BEFORE THE ALASKA DEPARTMENT OF ADMINISTRATION

In the Matter of:	)	
	)	
ASRC COMMUNICATIONS, Ltd.	)	ETS Contract Claim
	)	Contract No. 25-055-A
	)	OAH No. 04-0007-CON

DECISION
on
MOTION TO DISMISS

Introduction

The Enterprise Technology Services [ETS] section of the Department of Administration filed a contract claim concerning Contract No. 25-055-A, pursuant to AS 36.30.620(f). ASRC Communications, Ltd. [ACL] responded.[1] The commissioner appointed a hearing officer and subsequently transferred the case to the Office of Administrative Hearings.

Pursuant to the prehearing order, the parties filed three prehearing motions. ACL filed a motion to dismiss and a motion to limit damages to no more than the contract price (less $10,000); ETS filed a motion for partial summary judgment. For the reasons that follow, ACL's motion to dismiss will be granted, rendering the remaining motions moot.

Material Facts[2]

By late 1998, Ted Stevens Anchorage International Airport had decided to migrate its mobile telecommunications system to the Municipality of Anchorage's Smartnet II (Motorola) 800 MHz trunked radio system. [R 303-304, 409] The project required enhancements to the municipal system as well as the installation of base stations at the

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[1] The response to the solicitation was submitted by PMC Telecommunications, Inc., [PMC] which is also the signatory to the contract. At a prehearing teleconference, ASRC Communications, Limited identified itself as the successor in interest to PMC and accepted responsibility for PMC's obligations and liability, if any, under the contract.

[2] Except as otherwise specifically stated, the facts as set forth in the text and accompanying footnotes view the evidence in the light most favorable to the non-moving party, ETS, and make all reasonable inferences in favor of ETS. *Cf.* Goliver v. McAllister, 34 P.3rd 324 (Alaska 2001).

Record citations provide support for the facts as stated, but do not necessarily indicate that the cited portions of the record contain the only support for the stated facts. Citations are to the agency record

airport. [R 366] In addition, the project called for the purchase of portable and mobile radios for use by airport personnel in the field.[3] ETS staff advised the airport that only two manufacturers, Motorola and EF Johnson,[4] made equipment compatible with the municipality's system. [R 365-6]

On September 3, 1999, ETS issued solicitation No. 77-J-012-00, [R 325-354] a limited competition procurement restricted to Motorola and EF Johnson's Alaska sales representative, ACL. [R 237-239] ACL was the low bidder. ACL offered to provide EF Johnson's Stealth 25 portable radio and Auris mobile radio. Both products had been on the market for some time, but were in the process of being modified by EF Johnson to provide compatibility with the Motorola Smartnet system. [R 177, 321-322, 453] ETS obtained assurances from both ACL and EF Johnson that the offered equipment, notwithstanding possible reconfiguration issues at the time of installation, would meet the bid specifications and be fully compatible with the municipality's trunked system. [*Id.*, R 316]

ETS and ACL executed Contract No. 25-055-A for the purchase and sale of the radios at the airport. [R 278-94] The initial order, issued on October 7, 1999, simultaneously with the award of the control, was for 116 mobile radios and 121 portable radios. The contract called for delivery within 45 days of the date of award. [R 281] It contained a clause allowing rejection of non-conforming goods. [R 289] After acceptance, the contract warranty provided for replacement of radios that suffered a specified number of failures within 150 days after being placed in service. [R 292]

In the first quarter of 2000, the other components of the new airport communications system were being installed, including base stations, a backup 3-channel system, and the upgrades to the municipal system. [R 724] By early June, 2000, airport personnel had begun phasing in use of the new radios, [R 720] anticipating a fully functional system by about the end of July. [R 571] A number of problems surfaced,

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[R], ACL's initial disclosures [ACL], affidavits in the record [initials of affiant], or exhibits to the motion to dismiss [Ex.].

[3] Portable radios are carried by individuals in the field. Mobile radios are installed in vehicles.

[4] The radios in question were marketed by Transcrypt, Inc. EF Johnson is a related corporate entity that subsequently replaced Transcrypt as the marketer. [R 450-453] For convenience and consistency, I refer to EF Johnson throughout this decision.

some of which were "user or location dependent", *i.e.*, not the result of equipment defects or system incompatibility. [R 570-71, 720, 747] By the end of July, ETS technicians had determined that the portable radios required reconfiguration,[5] and had made arrangements for all of them to be returned to the factory for modification. [R 709] Work on the mobile radios had been delayed by problems with the portable radios and other system components, and the completion date had slipped to late August. [R 708-9]

As installation of the mobile radios proceeded, their performance was unsatisfactory. [R 567] A system-wide test of the new system was scheduled for August 15, 2000. [R 711] By the end of August, 31 of 115 portable radios had not yet been modified, and 43 of 126 mobile radios had not yet been installed. [R 705] The completion date for the project had been set back to the end of September. [R 706] Performance problems had not been fully resolved. [R 163-164] By comparison with the EF Johnson radios, airport personnel found the Motorola radios to provide better coverage. [R 162]

In mid-October, 2000, EF Johnson personnel conducted field evaluations, and identified both system deficiencies[6] and hardware and software issues in the radios. [MN ¶7] EF Johnson attempted to resolve the hardware and software issues identified in their evaluation [*id.*], but airport personnel continued to complain about the performance of the EF Johnson radios. [R 467]

On December 4, 2000 representatives of ETS, the airport and EF Johnson met at the airport.[7] The airport advised EF Johnson that the radios were having at least two

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[5] "Reconfiguration" in this decision means routine adjustments to the hardware and software after initial installation or delivery, in order to achieve full system compatibility. Reconfiguration was reasonably foreseeable by both ACL and ETS.

[6] "System deficiency" in this decision means a condition in the trunked system that was not reasonably foreseeable by ACL, and that requires more than normal reconfiguration in order to achieve system compatibility, or that renders system compatibility impracticable. Whether a system deficiency is a substantial cause of particular instance of unsatisfactory performance by a radio using the system is a question of fact that cannot be resolved on the current record. The record indicates that not all of the problems encountered were the result of system defects or lack of coverage and that at least some of the problems were attributable to ACL. [MH1 at ¶4, 5; LN at ¶3; MM at ¶2]

[7] In attendance were: Doug Lohr, of the airport [Ex. 4, p. 1]; Marlys Hagen, ETS' procurement officer for the contract [MH1 ¶5]; Gary Peters and Melissa Marshall, employees of Pro Comm Alaska [Ex. 4, p. 1] (and formerly employees of PMC Communications, Ltd.); and Dave Helfrich and Phil Bruha, of EF Johnson [*id.*].

The parties disagree about what commitments were made at this meeting. According to airport personnel and Gary Peters, EF Johnson agreed that if all of the problems in the EF Johnson radios were not resolved by January 15, it would take back the radios. Mr. Helfrich, however, avers that EF Johnson merely

significant operational problems: (1) the portable and mobile radios intermittently went into a "receive audio mute" mode on powerup; and (2) the mobile radios' LCD screens "locked up", with loss of functionality.[8] Although both problems could be resolved by "recycling" (presumably, repowering the unit), in light of the public safety and security issues at the airport, both conditions were unacceptable. [Ex. 4, p. 1] Airport personnel continued to report unsatisfactory performance by the EF Johnson radios in early January. [Ex. 3, page 1]

The week of January 8, 2001, three EF Johnson technicians returned to the airport to perform additional reconfiguration of the portable and mobile radios. [R 759; Ex. 2 p. 1] In initial testing after those modifications, on about January 15, the radios appeared to work properly. [R 759] After the January reconfigurations, however, airport personnel continued to report problems. [DH ¶6]

On February 5, airport personnel reached a decision to scrap the radios. [R 160] On February 20, the airport formally asked the contracting officer, Marlys Hagen, to return the radios. [R 558] ETS and the airport decided to obtain a limited number of Motorola radios and compare their performance with the prior performance of the EF Johnson radios. [R 145, 762]

By around March 1, 2001, the contractual replacement warranty had expired for all of the radios.[9] On March 19, 2001, ETS formally notified ProComm[10] of a contract controversy under AS 36.30.620(f). [R 149] The notice expressed the position that the radios did not meet the ITB specifications and requested that they be replaced. In

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committed to try its best to resolve issues by January 15, and after that time, "to continue to work toward a solution per a definite schedule." [MN ¶4]

[8] Other problems had been identified, as well. [R 145]

[9] The contractual provision for evaluation and replacement under warranty specifies replacement of individual units based on individual failures; the evaluation period, accordingly, ran for 150 days after installation of each individual unit. On the current record, it is impossible to determine when individual units were installed. It appears that initial installation of the portable radios was complete no later than July 31, and that initial installation of the mobile radios was complete no later than September 30. Thus, it appears that the evaluation period for replacement under warranty provision had expired for all of the portable units 150 days after July 31 (around January 1, 2001), and for all mobile units, 150 days after September 30 (around March 1, 2001).

[10] Gary Peters, as an ACL employee, had provided technical services in connection with the installation of the EF Johnson radios. [GE1 ¶1] In October, 2000, ACL divested itself of its telecommunications business; Mr. Peters formed ProComm, which purchased the ACL telecommunications

response, ProComm wrote to ETS advising ETS to notify ACL of its concerns because ACL was the responsible party for Contract No. 25-055-A. [R 147]. ProComm sent ACL a copy of its letter to ETS, but neither ProComm nor ETS provided ACL with a copy of the March 19 letter formally declaring a contract controversy. [R 548]

On April 27, the airport formally requested that ETS purchase replacement radios for the entire EF Johnson inventory. [R 248-49] By that time, ACL was preparing its own contract claim against EF Johnson. [R 236] In mid-June, counsel for ACL learned that ETS had filed a formal notice of controversy in March. [R 548] Thereafter, having reviewed the matter, counsel for ACL wrote to counsel for ETS, asking for a meeting to resolve the formal contract controversy, [R 548] and formally notified EF Johnson of its own claim. [ACL 479] Discussions between ETS and ACL resulted in an agreement that ACL would provide $10,000 to assist with the replacement of the EF Johnson radios. [R. 536, 542-43] Pursuant to a written agreement, both ETS and ACL retained all their rights, remedies and defenses under the contract. [R 536]

Purchase of the replacement radios and their installation at the airport occupied several months. On December 17, 2001 counsel for ACL wrote to counsel for ETS, indicating that ACL was engaged in settlement discussions with EF Johnson and asking for tender of the replaced radios, confirmation of the satisfactory performance of the Motorola replacements, and a statement of the costs incurred "to replace the EF Johnson units."[11] [R 533-34]. Counsel for ACL continued to seek a settlement with ETS [R 497] and suggested that ETS participate in mediation. [R 692]

On March 18, 2002, counsel for ACL sent an email to counsel for ETS as an update "on the status of [ACL's] negotiations with EF Johnson..." [R 687] EF Johnson's position was that the radio problems airport personnel had observed were not attributable to defects in the radios or to system incompatibility. ACL noted that it had not yet received an accounting of the damages claimed, but that it understood that ETS sought to recover the cost of the replacement radios plus the cost of changing out the mobile units.

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business, except for the ETS-ACL contract. [GE1 ¶2, R 147] Mr. Peters, as an employee of ProComm, continued to work on the project with ETS and the airport. [GE2 ¶3; MM ¶1],

[11] Consistently with Evidence Rule 408, I have considered the statements made in the letter for purposes of the claim of undue delay.

ACL again asked if ETS would participate in mediation, which ACL anticipated asking EF Johnson to agree to. [R 687]

On May 1, 2002, ACL accepted the airport's tender of the EF Johnson radios under the agreement between ACL and ETS. [ACL 416, 492-93; R 526-28] On June 21, ETS advised ACL that it would not participate in mediation, stating that ETS "will be proceeding...to file a contract controversy claim under AS 36.30.620." [R 46] In November, 2002, ETS asked ACL about the status of the ACL/EF Johnson negotiations; ACL replied that the negotiations were continuing [R 702] and again asked for information on damages and settlement prospects. [ACL 489] On January 31, 2003, ETS provided a written statement of damages, "in an effort to resolve this issue before pursuing a formal contract controversy in accordance with AS 36.30.620(f)." [R 517] On March 10, ACL responded, asking for additional information and supporting documentation. [R 685] On June 11, ETS provided the requested information and documentation. [R 492-493] ACL advised ETS that the information would be provided to ETS, hopefully leading to a settlement. [R 684]

On July 25, 2003, ACL wrote to ETS, explaining that it was no longer trying to get EF Johnson to settle and that EF Johnson had agreed to take over the defense of ETS's claim against ACL. [ACL 482-83] Upon receipt of the letter, ETS concluded that settlement of its controversy with ACL was no longer possible. ETS referred the matter to the commissioner on March 17, 2004.

ANALYSIS

ACL argues that the claim should be dismissed because: (1) ETS failed to refer the matter "immediately" to the commissioner, as required by AS 36.30.620(f); [Mot. at 4-8] (2) the claim is barred by the equitable doctrine of laches; [Mot. at 8-11] and (3) in the absence of subpoena power, an administrative hearing would not provide due process of law. [Mot. at 11-2]

A. Statutory Requirements.

AS 36.30.620(f) states that "[i]f a claim asserted by the state concerning a contract...cannot be resolved by agreement, the matter shall be immediately referred to the commissioner."

ACL argues that the term "immediately," as used in section 620(f), means as soon as possible [Mot. at 4] after the party asserting the controversy (a) fails to actively pursue resolution, or (b) ceases to pursue resolution. [Mot. at 6] It argues that after ETS received a $10,000 payment in the fall of 2001, it "basically abandoned its efforts to resolve the controversy." [Mot. at 7] ACL argues that ETS failed to refer the matter within the time allowed by section 620(f).

Notwithstanding ETS' suggestion that the term "immediately" means "directly," ETS agrees with ACL that the filing of a claim cannot be indefinitely delayed. ETS argues that a claim must be referred to the commissioner "within a 'reasonable time' in light of the circumstances." [Opp. at 5] ETS argues that it referred the matter to the commissioner within a reasonable time, given the circumstances. [Opp. at 6-8]

The parties' memoranda conflate two distinct issues: whether ETS timely asserted a claim, and whether it thereafter timely referred the matter to the commissioner. In this case, ETS asserted a claim on March 19, 2001, but did not provide notice of the claim to ACL. ACL learned that the claim had been asserted in mid-June, 2001. I interpret section 620(f) as requiring a state agency to provide notice of a claim within a reasonable time after the agency becomes aware of the basis of the claim or should have known the basis of the claim.[12] I interpret the term "immediately" in section 620(f) to mean that the matter must be referred to the commissioner within a reasonable time from the earliest of the dates on which an agency, having asserted a claim, (a) fails to pursue resolution by agreement, (b) ceases to pursue resolution by agreement, or (c) reaches impasse.

B. ETS Timely Asserted a Claim.

The essential function of a notice of claim is to put the non-performing party on notice that performance is not only unsatisfactory, but is in fact deemed a breach of

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12 Section 620(f) does not expressly provide a time limit within which an agency must assert a claim against a contractor. However, the Procurement Code may be supplemented by relevant provisions of the Uniform Commercial Code (UCC). AS 36.30.860. The UCC specifically requires that a party must provide a timely notice of breach, "or be barred from any remedy...." AS 45.02.607(c)(1). The Alaska Supreme Court has specifically held that AS 45.02.607(c)(1) should be strictly applied to bar a remedy in the event timely notice is not provided. Armco Steel Corporation v. Isaacson Structural Steel Co., 611 P.2d 507, 512 (Alaska 1980). The requirement of timely notice should similarly be strictly applied to bar the administrative remedy, in order to advance the purpose of that remedy, which is to encourage and facilitate the prompt, informal, and inexpensive resolution of claims involving the state. Undue delay in asserting a claim is inconsistent with those goals.

contract and that in the absence of cure the claimant intends to pursue its remedies.[13] Whether notice of breach is provided in a reasonable time depends upon the nature of the notice, its purpose, and the attendant circumstances.[14]

In this case, the parties to the contract, ACL and ETS, were working together in an attempt to obtain satisfactory performance through at least January 15, 2001, and, viewing the evidence favorably to ETS, through March 19, 2001. The March 19, 2001, letter would have been timely if it had been directed to ACL, rather than to ProComm.[15] But ETS did not notify ACL of its claim at that time. Instead, despite a specific notice from ProComm that its claim had been misdirected, ETS took no action to notify ACL directly and it appears that ACL did not have actual notice of the filing of the claim until mid-June, approximately 90 days after the March 19 letter.

To the extent that the March 19, 2001, letter invokes the statutory right to revoke acceptance, the "claim" (*i.e.*, the right to revoke acceptance) did not arise until after the airport had decided to no longer seek to obtain performance, which was on February 5, 2001.[16] In light of the anticipated reconfiguration and the presence of system deficiencies in addition to software issues, ETS arguably did not "know" of the basis for a claim for breach until after alternative explanations had been ruled out, which, viewing the evidence favorably to ETS, might be said to have been as late as the January 15, 2001 date fixed at the December 4, 2000 meeting. Furthermore, while ACL did not have actual

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13 "The notice 'of the breach' required is not of the facts, which the seller presumably knows as well as, if not better than, the buyer, but of buyer's claim that they constitute a breach. The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning."
Armco Steel Corp., *supra n. 12*, at 515, *quoting* American Manufacturing Co. v. United States Shipping Board Emergency Fleet Corp., 7 F.2d 565, 566 (2d Cir. 1925) (Learned Hand, J.).

14 *See* AS 45.01.204(b).

15 Under the UCC, a notice of breach or revocation of acceptance must be provided within a reasonable time after the buyer discovers or should have discovered the breach or ground for revocation. AS 45.02.607(c)(1); AS 45.02.608(b). Mutual efforts to resolve problems are grounds for extending the time for asserting the breach or revoking acceptance, although not for an indefinite or unduly lengthy period. *See, e.g.,* Hospital Computer Systems, Inc. v. Staten Island Hospital, 788 F. Supp. 1351, 1360 (D.N.J. 1992) (breach of contract); Sumner v. Fel-Air, 680 P.2d 1109, 1117 (Alaska 1984) (revocation of acceptance).

16 It is unclear whether ETS's letter should be viewed as notice of breach under AS 45.02.607 or as a revocation of acceptance under AS 45.02.608. Because ETS had, by this time, decided to obtain replacement radios, and since ACL did eventually agree to accept a tender of the goods, it appears that the letter should be viewed as a revocation of acceptance, with ETS having elected to "cover" and seek damages. *See* AS 45.02.712; -.715.

notice of the formal notice of a contract claim until June, it was aware of the existence of a dispute over the radios' performance long before March 19, 2001: indeed, by mid-April it was preparing its own claim against EF Johnson based on the same facts.

In view of all of the circumstances, I find that ETS timely asserted an administrative contract claim against ACL.

B. ETS Pursued Resolution by Agreement until July, 2003.

In this case, ETS formally notified ProComm of the existence of a contract controversy in March, 2001.[17] ACL was aware of the facts constituting the basis of the claim, if not of the formal notice, in mid-April at the latest and had actual notice of the formal notice in June, 2001. From April, 2001, until June, 2003, ACL and ETS were in sporadic contact regarding the controversy while ACL and EF Johnson attempted to negotiate a settlement. In January and June, 2003, ETS provided specific information regarding the damages being sought, for use by ACL in its separate negotiations with EF Johnson.

That ETS may have been dilatory in its contacts with ACL in aid of ACL's direct negotiations with EF Johnson, that it declined to pursue a direct settlement with ACL, and that it chose not to participate in direct negotiations or mediation with EF Johnson does not mean that ETS had abandoned settlement with ACL as a possible or preferred

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[17] The March 19, 2001 letter states, "this letter constitutes notice of a contract controversy under AS 36.30.620(f)." It adds, "if we cannot come to terms on an acceptable solution for both parties, the matter will be referred to the Commissioner of the Department of Administration for resolution."

This letter was sent pursuant to the provisions of AS 36.30 in effect prior to October 14, 2003. Former section 620 established procedures for asserting a "controversy" and filing a contract "claim." Subsection (f) provided that if a "controversy" asserted by the state could not be resolved, "the matter" must be referred to the commissioner. ETS interpreted these provisions to call for a formal notice of controversy to the contractor, prior to a claim being filed with the commissioner.

Ch. 144 SLA 2003 applies to contracts entered after October 14, 2003. Among other things, the new legislation substituted the term "claim" for the term "controversy" throughout section 620 and related sections. This change, because largely delegated to the revisor, was plainly not intended to be substantive. *See* §18 ch. 144 SLA 2003. Taking the change to be a clarification of previously existing law, I deem the change in terminology not to have altered the procedure. Under both the former and current versions of section 620, the state commences a contract claim by providing notice of the claim to the contractor. Under the former version, that notice came in the form of a notice of a contract controversy; under the current version it comes in the form of a contract claim. Under both versions of section 620(f), in order to invoke the administrative remedy, the dispute must first be "asserted" and if not resolved by agreement, immediately referred to the commissioner for hearing.

Thus, I deem the letter of March 19, 2001 as substantially equivalent to a contract claim under current section 620(f) and the filing with the commissioner dated March 17, 2004 as substantially equivalent to the referral of a contract claim under current section 620(f).

outcome. To the contrary, viewed favorably to ETS, the record clearly indicates that during the period that ACL and EF Johnson were in negotiations, ETS had not abandoned resolution by agreement and was not at impasse: it was awaiting the outcome of the ACL-EF Johnson negotiations.[18]

For these reasons, I reject ACL's various suggestions [Mot. at 7-8] that the time for referring the matter to the commissioner began to run in the fall of 2001, in June, 2002, or in January, 2003; I conclude, instead, that the time began to run after ETS learned that ACL and EF Johnson had concluded their independent negotiations.

ACL's letter of July 25, 2003 indicates that ACL and EF Johnson ended their negotiations in late July, 2003. ETS acknowledges that upon receipt of ACL's letter dated July 25, 2003, it realized that ACL was no longer aligned with ETS in relation to the manufacturer, EF Johnson, and that from that time forward ETS was no longer anticipating a settlement with ACL. Viewing the evidence favorably to ETS, the time for referring the matter to the commissioner began to run on July 25, 2003.

C. ETS Did Not Refer the Matter in a Reasonable Time.

Pursuant to section 620(f), ETS was required to file its administrative claim with the commissioner within a reasonable time after July 25, 2003. ETS referred the matter to the commissioner on March 17, 2004, nearly eight months later.

Neither ETS nor ACL addresses whether the period of time from July, 2003, until March 17, 2004, was "reasonable", within the meaning of section 620(f). Both ACL [Mot. at 7-8; Reply at 9-11] and ETS [Opp. at 4-8] focus on the period of delay prior to

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[18] Ms. Hagen's affidavit is sufficient to support that view. ACL argues that Ms. Hagen's affidavit may be ignored because she does not have personal knowledge of counsel's conversations or of the actual status of negotiations. [Reply at 10] But Ms. Hagen's affidavit is sufficient to establish her own reasons for not referring the matter to the commissioner. That Ms. Hagen withheld referral because she believed negotiations were proceeding is, on the current record, undisputed.

In addition, other documents in the record support an inference that ETS had not abandoned settlement. In June, 2002, counsel for ETS provided ACL information on its damages, and advised ACL that it did not wish to participate in mediation; counsel stated, "the state will be proceeding as normal to file a contract controversy claim under AS 36.30.620." But subsequently, in November, counsel for ETS emailed ACL and asked about the status of the ACL-EF Johnson negotiations, stating "We would prefer not to go the contract claim route if [ACL] is in a position to directly pay for damages or can work out payment schedule." [R 702] Taken together, these messages support the view that throughout this period, ETS was looking to the ACL-EF Johnson negotiations for resolution of its claim. Moreover, counsel for ACL specifically stated, in an email in March, 2003, that "we continue efforts to negotiate a mutually acceptable

July, 2003. That period of delay may be controlling for purposes of a laches analysis, but it is of limited significance for purposes of section 620(f). ETS does point out, however, that after July, 2003, the procurement officer responsible for filing a contract claim was fully engaged in other activities, and in particular the disentanglement of the statewide telecommunications contract, that "consumed her time...from July 2003, until near her departure from ETS in March 2004." [Opp. at 3]

To the extent that ETS relies on the procurement officer's many substantial other obligations as grounds for delay in referring the matter to the commissioner, ETS misconceives the nature of a referral. The referral of a state contract controversy to the commissioner under section 620(f) is substantially equivalent to a contractor's request for a decision on the contractor's contract claim, under section 620(b). Both actions are triggered by the termination of attempts to resolve the controversy by agreement, and both result in a written determination of the matter. But under section 620(f), there is no need for the referring procurement officer to provide a complete record in conjunction with the referral. Rather, because a *de novo* hearing before the commissioner is necessary, the record may be created during the hearing process.[19] Accordingly, the referral to the commissioner may take the form of a simple notice of referral and brief factual summary, without any substantial accompanying documentation or analysis.

The term "immediately" connotes urgency, and section 620 otherwise provides that actions be taken within 90 days of the triggering event.[20] A delay of more than 90 days in referring a matter for hearing is unwarranted except under unusual circumstances.

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resolution of the State's claims." [R 685] Viewed favorably to ETS, a "mutually acceptable resolution" is one acceptable to ACL and ETS, not ACL and EF Johnson.

[19] Under AS 36.30.630, a hearing must be conducted unless under subsection (b) the commissioner adopts the decision of the procurement officer in an appeal of a contract claim. The procurement officer only issues a decision, and appeals only arise, on claims filed by contractors. Thus, for controversies asserted by the state, a hearing under section 670 is mandatory.

Similarly, it appears that under section 620(b) the contractor need not provide complete information with the initial claim, because under section 620(b), a decision need not be rendered until 90 days after all of the necessary information has been provided. As amended section 620(b) makes clear, the procurement officer may request additional information as may be necessary, after the request for a decision is filed.

[20] "[A] claim under [section 620] must be filed within 90 days after the contractor becomes aware of the basis of the claim or should have known the basis of the claim, whichever is earlier." AS 36.30.620(a). "The decision [on a contractor's claim] shall be made no more than 90 days after the receipt by the procurement officer of all necessary information from the contractor." AS 36.30.620(b).

In this case, ETS cites to nothing other than the procurement officer's other pressing obligations that could be considered as possible grounds for finding that the claim was referred to the commissioner within a reasonable time after July 25, 2003. However, given that the referral of a contract controversy to the commissioner involves little more than a notice of referral, the procurement officer's other obligations and responsibilities were not a reasonable basis upon which to forego referring a matter to the commissioner. Furthermore, while the period of delay prior to July, 2003, is not controlling, it is a factor that may be considered in determining the subsequent delay was reasonable.

In light of the nature of the action required (a simple referral form), the purpose of the action,[21] and the attendant circumstances (viewing the evidence favorably to ETS), I find that the matter was not referred to the commissioner within a reasonable time.

D. Timely Referral is Not Jurisdictional.

Neither party addresses the effect of an untimely referral. ACL, by implication, argues that that failure to refer a matter to the commissioner within the time allowed by section 620(f) is fatal to the administrative claim, but provides no legal authority to that effect. ETS casts the issue in terms of statutes of limitations, arguing that section 620(f) should not be read as a statute of limitations against the state. [Opp. at 6]

A statute of limitations precludes the assertion of a civil claim after a designated period of time. A statute establishing time limits for invoking an administrative remedy is not, strictly speaking, a statute of limitations.[22] A statute limiting the time frame for invoking an administrative remedy precludes the untimely assertion of that remedy as a matter of statutory right, but it does not necessarily preclude the administrative agency from waiving the limitation and providing the administrative remedy as a matter of administrative discretion. For purposes of discussion, I presume that requirement of immediate referral in section 620(f) is directory, not mandatory,[23] and that it may be waived in the commissioner's discretion.[24]

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[21] *See* note 12, *supra*.

[22] ACL points out that section 620(f) expressly does apply to the state, [Reply at 6, note 2], which answers ETS's point but does not mean that section 620(f) is a statute of limitations.

[23] In the absence of any express provision for a penalty or other consequence for untimely action, time limits on state agency action are generally considered directory, rather than mandatory. *See, e.g.*,

In determining whether to exercise discretion in favor of accepting this untimely claim for hearing, it is appropriate to consider ACL's objections to proceeding in the administrative arena, as well as any prejudice to ETS that would result from pursuing an alternative remedy. ACL argues that the administrative case should be dismissed under the equitable doctrine of laches and that the lack of subpoena authority will render it impossible to conduct adequate discovery or to obtain necessary witnesses at the hearing. Because the defense of laches may be asserted in the superior court, and because in a civil action discovery may be conducted and subpoenas can be issued, dismissing the administrative action in favor of a civil action would render moot ACL's objections to proceeding in this forum. With respect to ETS, no claim of prejudice was asserted in briefing or at oral argument. Although civil litigation is often more costly and less expeditious than an administrative hearing, it was ETS's own delay that resulted in the loss of the statutory right to hearing at the administrative level. In this particular case, because both parties claim they are entitled to summary judgment, proceedings in superior court may be as expeditious as in an administrative hearing. Furthermore, dismissal of this matter will not prejudice ETS on the merits, because the statute of limitations on a civil action has not expired, the administrative remedy is not exclusive,[25] no preclusive election of remedies has occurred,[26] and a dismissal on procedural grounds

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State, Division of Insurance v. Schnell, 8 P.3rd 351, 357 (Alaska 2000); City of Yakutat v. Ryman, 654 P.2d 785, 790 (Alaska 1982).

[24] Actually exercising discretion to waive the requirement for "immediate" referral may in substance be no different than finding that under the circumstances, the delay in referral was not "unreasonable". The circumstances addressed in the context of waiver might equally well be considered in the context of reasonableness.

[25] There is no indication that by enacting section 620(f), the legislature intended to preclude an agency from pursuing alternative remedies. Indeed, to the contrary, because the legislature specifically provided that the administrative remedy is exclusive with respect to claims by contractors, and made no such provision regarding claims by an agency, it is reasonable to infer that the administrative remedy is not exclusive with respect to claims by an agency.

[26] No statutory election of remedies has occurred, since AS 36.30.690 does not apply to claims asserted by an agency. Nor is the common law doctrine of election of remedies applicable. That doctrine may be applied to prevent the assertion of inconsistent remedies. *Compare* Moening v. Alaska Mutual Bank, 751 P.2d 5, 8 (Alaska 1988) (foreclosure and suit on a note not inconsistent; doctrine does not apply); *with* B.B. & S. Construction Co., Inc. v. Stone, 535 P.2d 271, 274 n. 8 (Alaska 1975) (contract and quasi-contract are mutually exclusive); *see generally* Sauceda v. Kerlin, ___ S.W.3rd ___, 2005 WL 1361569 (Tex. App, June 9, 2005). While the breach of contract remedy may be inconsistent with recission, cancellation, or revocation of acceptance, the remedies available to ETS in this forum are not inconsistent with its potential remedies in a civil action. Thus, although the doctrine of election of remedies might be applied to preclude the simultaneous pursuit of relief under section 620(f) and in a civil action, or

has no preclusive effect on the merits. Finally, even if the administrative proceedings resulted in a decision in favor of ETS, enforcing a claim for damages would require obtaining a civil judgment, with attendant proceedings in the superior court. For these reasons, assuming the commissioner has discretion to waive the statutory requirement of immediate referral, I conclude the commissioner should not exercise his administrative discretion in favor of granting a hearing and that this case should be dismissed, without prejudice to renewal in the event the matter is not resolved on the merits in the superior court.[27]

DATED June 30, 2005.

Andrew M. Hemenway
Administrative Law Judge

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to preclude inconsistent remedies in either forum, the doctrine should not preclude a civil action after dismissal of this case.

[27] Dismissal in this case is predicated, in substantial part, on the legal conclusion that an alternative remedy is available. Dismissal without prejudice ensures that, in the event that ETS is precluded from obtaining relief in the superior court under principles of exhaustion, election of remedies, estoppel, or another doctrine unrelated to the merits of the case, the administrative claim could be reinstated.

STATE OF ALASKA

DEPARTMENT OF ADMINISTRATION

OFFICE OF THE COMMISSIONER

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July 27, 2005

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State of Alaska
Office of Administrative Hearings

Marjorie L. Vandor
Assistant Attorney General
PO Box 110300
Juneau, Alaska 99811-0300

Re: Contract Claim, Contract No. 25-055-A
CERTIFIED MAIL NO. 7001 1940 0001 9509

Dear Ms. Vandor:

I have reviewed the record and the proposed decision of the administrative law judge in this matter and I have determined to adopt the proposed decision as my own. A copy of the decision is enclosed.

This contract claim is dismissed without prejudice. This is the final administrative decision regarding the claim. If you are dissatisfied with my decision, you may appeal to the superior court. An appeal must be filed within 30 days of the date this letter was mailed to you, in accordance with the applicable rules of court and AS 36.30.685. For further information on the appeal process, please contact the clerk of court.

Sincerely,

Ray Matiashowski
Commissioner

cc: Robert C. Bundy, Attorney at Law (w/encl.)
Terry Thurbon, Chief Administrative Law Judge (w/encl.)

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