BEFORE THE ALASKA DEPARTMENT OF ADMINISTRATION

In the Matter of:	)	
	)	
WASTE MANAGEMENT OF ALASKA, INC.,	)	
	)	
	)	
Appellant	)	DOTPF ITB No. 25107
	)	Dept. of Administration Case No. 01.08

PROPOSED DECISION

Introduction

This is a bid protest appeal. It concerns a protracted effort by the Department of Transportation and Public Facilities [DOT] to obtain, for the first time by competitive solicitation, a long term contract for refuse collection services at Ted Stevens Anchorage International Airport [TSAIA]. There have been two solicitations. The first, an RFP issued in 2000, was protested, appealed and subsequently cancelled by DOT. The second, an ITB issued in 2001, is the subject of this appeal. The ITB engendered two protests and three notices of intent to award, in addition to proceedings before the Regulatory Commission of Alaska and the superior court. The resulting imbroglio is now before the commissioner for final action following an evidentiary hearing.

I. Procedural History

A. 2000: RFP 25003.

Prior to July 1, 2000, refuse services at TSAIA were provided by Anchorage Refuse, Inc., the predecessor of appellant Waste Management of Alaska, Inc. [WMAI] During that time, Anchorage Refuse was the sole entity authorized to provide those services at TSAIA, where it operated as a regulated monopoly under sole source contracts with DOT. After the Alaska Public Utilities Commission, predecessor of the Regulatory Commissioner of Alaska [RCA], opened the market for refuse disposal services in Anchorage to competition, it became necessary for DOT to issue, for the first time, a competitive solicitation for those services at TSAIA.

DOT issued an RFP for services beginning July 1, 2000, under a one-year contract with three one-year renewal options. Anchorage Refuse and Alaska Waste

Transfer [AWT] submitted proposals, and DOT issued a notice of intent to award the contract to Anchorage Refuse. AWT filed a protest, asserting that the price evaluation had been conducted improperly. The protest was denied, and AWT appealed. While the appeal was pending, DOT cancelled the solicitation and Anchorage Refuse continued to provide refuse services on a month-to-month basis. In response to the cancellation, AWT maintained its appeal, arguing that it was entitled to an award of the contract under the original RFP. Subsequently, DOT and AWT reached a settlement agreement, under which AWT agreed to dismiss its appeal and DOT agreed to issue a new solicitation.

B. 2001: ITB 25107.

DOT issued the new solicitation as an Invitation to Bid, rather than as a Request for Proposals. ITB No. 25107 was issued on June 18, 2001. The ITB solicited bids to provide refuse collection services at TSAIA, beginning from the date of award through June 30, 2002, again with three one-year renewal options. Bids were due July 10, 2001.

DOT received two bids in response to the solicitation, from WMAI and AWT. DOT issued a notice of intent to award the contract to WMAI. On July 18, 2001, AWT filed a protest asserting that WMAI's bid was in violation of AS 42.05, because it offered rates below WMAI's tariff. In addition, AWT called DOT and asked whether WMAI's monthly container rental fee was included in its hypothetical monthly invoice. On July 19, in response AWT's verbal inquiry, DOT cancelled the notice of intent and declared WMAI a non-responsive bidder on the ground that WMAI had not included a monthly container rental fee in its hypothetical monthly invoice. DOT notified the parties that it would award the contract to AWT and that AWT's protest of July 18 was moot because the award to WMAI had been cancelled on other grounds.

On July 24, WMAI filed a protest of DOT's decision of July 19, asserting that it did not intend to charge DOT a monthly container rental fee. In response, on July 27 DOT in effect sustained WMAI's protest. DOT rescinded its July 19 notice of intent to award the contract to AWT and informed the interested parties that it would now take up the AWT protest raising the issue of whether WMAI's bid was non-responsive on the ground that it was not in conformity with WMAI's tariff.

On August 3, WMAI submitted a letter to DOT responding to AWT's protest. WMAI acknowledged that its bid was not in compliance with its tariff. However, WMAI

argued that the bid was not contrary to state law, because WMAI can enter into a "special contract" that varies from its tariff. WMAI noted that a special contract must be approved by RCA before it goes into effect and is at all times subject to revision by RCA. WMAI asserted that it would submit the special contract it had bid to RCA for approval, and argued that under applicable law RCA would approve the special contract.

Upon review of WMAI's letter, DOT internally raised the question whether the requirement of prior RCA approval made WMAI's bid conditional – an issue that had not been raised by AWT and that DOT had not identified from review of the bid. DOT asked AWT to respond to WMAI's letter; AWT responded on September 12. AWT did not claim that WMAI's bid was non-responsive because it required prior RCA approval, or because a special contract is subject to revision by RCA. Rather, AWT reiterated that WMAI's failure to include a charge for container rental in its hypothetical monthly invoice was improper, and challenged WMAI's contention that RCA would approve a special contract on WMAI's terms.

On September 24, DOT declared the WMAI bid non-responsive. DOT determined that a bid proposing a contract that is subject to prior approval and subsequent revision by RCA is a contingent bid and is therefore impermissible under standard procurement law principles, which require that all bids be definite, firm, unqualified and unconditional. In addition, DOT determined that WMAI's bid was not lower than AWT's. DOT issued a third notice of intent, awarding the contract to AWT.

On October 4, WMAI filed a protest of the September 24 decision by DOT. The protest asserted that a bid for a special contract is responsive, and, furthermore, that AWT's bid was also for special contract, and that if WMAI's bid was non-responsive then so was AWT's. WMAI also asserted that it was the lowest bidder.

After obtaining additional pricing information from the parties, on November 2, 2001 DOT denied WMAI's protest. The protest decision reiterated DOT's position that a bid proposing a special contract is conditional. It added that DOT had determined that AWT's bid did not propose a special contract, and that AWT's bid was lower than WMAI's. DOT declined to stay award of the contract. On November 6, DOT executed a contract with AWT with a startup date of December 7, 2001, and gave WMAI the required 30 days' notice of contract termination.

C. Protest Appeal.

On November 9, WMAI filed a protest appeal. On the same day, it filed an action in superior court, seeking an injunction to preserve the status quo pending resolution of the protest appeal. On November 21 the court denied injunctive relief.

On November 27, the commissioner assigned the matter to a hearing officer. A hearing was tentatively scheduled for December 5, pending submission and resolution of any prehearing motions. DOT filed a motion *in limine* to establish the burden of proof and the presumption of good faith. It also filed motions for summary judgment asserting that (1) in the absence of a showing that the procurement officer's decision was arbitrary and capricious, applying the Keco[1] factors as set forth in Fairbanks North Star Borough School District v. Bowers Office Products, Inc., 851 P.2d 56, 59 (Alaska 1992), the protest appeal must be denied; and (2) WMAI's bid was non-responsive.

On December 5, the hearing officer issued a Decision on Pending Motions recognizing a presumption of honesty and impartiality on the part of state officials[2] and placing the burden of proof by a preponderance of the evidence as to all factual issues on the protestor. The hearing officer also ruled that the commissioner's decision following an hearing in a protest appeal is *de novo*, and that the arbitrary and capricious standard applied by the courts on review of an administrative decision does not apply.[3] Finally, the hearing officer ruled that the bid submitted by WMAI was responsive.

At a teleconference on December 5, the hearing officer indicated that in light of his decision on the prehearing motions, rather than conducting a hearing he would recommend to the commissioner that the matter be referred back to DOT for a determination as to whether WMAI was a responsible bidder.

On December 6, DOT filed a motion for reconsideration. In light of the motion for reconsideration, commissioner elected not to refer the matter back to DOT, but to

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1 Keco Industries, Inc. v. United States, 492 F.2d 1200-1203 (Ct. Cl. 1974).

2 *See*, Bruner v. Petersen, 944 P.2d 43, 49 (Alaska 1997); Earth Resources v. State, Department of Revenue, 665 P.2d 960, 962 n. 1 (Alaska 1983); Navistar International Transportation Corp. v. United States Environmental Protection Agency, 941 F.2d 1339, 1360 (6th Cir. 1989).

3 Decision on Pending Motions at 2-3. *See generally,* Make it Alaskan, Inc., No. 00.11 (Department of Administration, April 30, 2001); In re Service Oil & Gas and Delta Fuel Company, Nos. 98.02-03 (Department of Administration, May 28, 1998); Certification of the 1989 and 1990 NPDES Placer Mining Permits for Alaska (Department of Environmental Conservation, May 17, 1991); AS 36.30.585, -.675(b); Model Procurement Code §9-505(b), §9-506(3).

continue the hearing process. A hearing was conducted on December 14. Subsequently, with the parties' assent, the hearing officer reviewed settlement possibilities with the parties. The parties were unable to reach a settlement agreement, and accordingly the hearing officer now issues this Proposed Decision for consideration by the commissioner.

II. Relevant Legal Principles.

The provision of refuse disposal services is subject to the regulatory authority of the RCA. AS 42.05.990(4)(F). The RCA requires providers, other than those with annual revenues below $300,000,[4] to file tariffs with the commission for its approval. Providers may not deviate from the tariff without prior commission approval. 3 AAC 48.320. A deviation from the tariff may be approved by the commission as a special contract, which is treated as a tariff filing. 3 AAC 48.220(c). A "special contract" includes one that:

> contains rates, …charges, or terms and conditions that deviate substantially from those contained in the…tariff for like service offered to the general public under comparable conditions, but excludes contracts that deviate from the…tariff only in respect to incidental matters…and do not have the effect of granting the contracting customer an unreasonable preference or advantage…or of subjecting the customer to an unreasonable prejudice or disadvantage as to rates, services or facilities.

3 AAC 48.820(36). A special contract must contain a provision notifying the parties that the contract does not take effect without prior commission approval, and that it is at all times subject to revision by the commission. 3 AAC 38.390(a). Under standard RCA procedures, approval for a special contract takes no more than 45 days. [RCA 11/30/01 at 7] *See*, AS 42.05.411(a). Any requirement of 3 AAC 48, including advance approval and subsequent revision of special contracts, may be waived by the RCA. 3 AAC 48.805(a).

III. Factual Findings.

A. Preparation of ITB No. 25107.

Amy Deininger is the supply chief for DOT. She took that position in April, 2001. She received a request to issue a solicitation for refuse services at TSAIA and assigned the matter to Mary Ann Henriques, who acted as the procurement officer for the

[4] AS 42.05.711(i).

solicitation. Neither Ms. Deininger nor Ms. Henriques had any involvement in the prior RFP or the protest, appeal and settlement that followed. Neither was aware, prior to issuing the ITB, that the provision of refuse disposal services at TSAIA was subject to the jurisdiction of the Regulatory Commission of Alaska [RCA], and that the regulated service providers would be required to comply with their tariffs filed with the commission. Neither Ms. Deininger nor Ms. Henriques had any experience in obtaining services from an RCA-regulated entity.

B. Other Relevant Facts.

At the time of its bid, WMAI had a good faith, reasonable belief that its proposed terms would be approved by RCA within 45 days of the date bids were due and that RCA would either waive its right to revise those terms, or, if not, that RCA would not make any revision to the price or any other material term of the contract while it was in effect. Accordingly, WMAI had a good faith, reasonable belief that it was bound to execute a contract and perform it in accordance with the terms it had bid.

The ITB bid price was the total price indicated on each bid's hypothetical monthly invoice. The invoice listed 10 refuse container locations at TSAIA, specified dates of service, and instructed bidders to "Provide a unit and grand total price for refuse collection for one month (four full weeks)" under that scenario, including all miscellaneous charges.

WMAI's listed monthly total price was $5,833.80; AWT's was $6,621.38.

There is no clear and convincing evidence that the omission of a container rental fee on WMAI's hypothetical monthly invoice is erroneous. Accordingly, I find that WMAI's bid price included no rental fee for any of the containers listed on the hypothetical monthly invoice, and that the rental fee listed on WMAI's bid schedule applies only to containers not included in the hypothetical monthly invoice.

There is clear and convincing evidence that AWT erroneously calculated its hypothetical monthly invoice based on 4.3 weeks per month, rather than on the basis of 4 weeks per month as expressly stated in the ITB.[5]

[5] The general rule in federal procurement cases is that upon a showing by clear and convincing evidence that the bid price was in error, the bidder may withdraw the bid; in general, neither the purchasing agency not the bidder may correct the bid to reflect the intended price. In Alaska, by contrast, caselaw

The ITB did not specify a class of service to be provided at any of the locations identified in the hypothetical monthly invoice. Each bidder independently determined which class of service rate it would charge for each of the locations and calculated a hypothetical monthly invoice at that class of service. Both bidders used the same class of services at all but one of the locations listed on the hypothetical monthly invoice. At that location, AWT's invoice reflects a lower class (higher cost) service.

In addition, the bid schedule did not specify container weights per cubic yard. Bidders independently determined the weights to be used in calculating the unit prices listed on their bid schedules. Both bidders used identical weights in calculating their unit prices for the bid schedule.

After obtaining additional pricing information from both parties, DOT adjusted the price of AWT's hypothetical monthly invoice to correct for its mistaken 4.3-week calculation. In addition, DOT applied WMAI's unit price for container rental to the containers listed in the hypothetical bid schedule. DOT made no adjustment for, and was unaware of, the different classes of services offered at one location.

Analysis

A. The Protest Should Be Accepted.

DOT suggests that because WMAI knew that special contracts had been the subject of protests in other public procurements, it should have filed a protest prior to the due date for bids, and that its protest should accordingly be rejected as untimely. I find that argument unpersuasive.

In this case, both bidders filed protests after bids were due, raising substantially the same underlying issue. Both bidders were aware that there was an issue as to the acceptability of bids requiring a special contract, because that issue had been raised in at least two prior public solicitations in which they had participated and it was the subject of

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suggests that a procurement officer has substantial discretion to either accept, reject or correct an erroneous bid. The subject has been a matter of spirited debate in the Alaska Supreme Court. *See generally*, *Jensen & Reynolds Construction Co. v. State, Department of Transportation and Public Facilities*, 717 P.2d 844 (Alaska 1986); *Vintage Construction, Inc. v. State, Department of Transportation and Public Facilities*, 713 P.2d 1213 (Alaska 1986); *Alaska International Construction, Inc. v. Earth Movers of Fairbanks, Inc.*, 697 P.2d 626 (Alaska 1985*); Chris Berg, Inc. v. State, Department of Transportation and Public Facilities*, 680 P.2d 93 (Alaska 1984). The concurring opinion in *Jensen & Reynolds* observes that, regardless of the stated rationale and legal principles applied, "in practice, achieving the lowest bid price has been paramount in all cases." 717 P.2d at 849.

proceedings before the RCA when the DOT solicitation was pending.[6] In addition, both bidders were cognizant that the bid schedule in the ITB was incompatible with tariff rates, and that in order to conform to the ITB's bid schedule, bidders would have to make assumptions that the ITB did not provide for.

Both WMAI and AWT had an opportunity to seek clarification on these matters. Neither chose to do so. Each instead submitted a bid based on its own interpretation of the ITB and its own assumptions about how to determine prices. Each filed a protest after bids were due, based on issues that could have been raised prior to the due date.

Neither WMAI nor AWT should profit from the other's failure to act sooner: it is DOT, not either of them, that has been unduly prejudiced by their mutual failure to bring these fundamental issues to the attention of DOT at an appropriate time. In addition, WMAI had a reasonable, good faith belief that its bid was acceptable, and DOT did not reject WMAI's protest as untimely when it was filed. Under these circumstances, there was good cause to accept WMAI's protest even if it is untimely. *See*, AS 36.30.565(b).

B. WMAI's Bid is Responsive.

1. Standard and Scope of Review.

DOT's motion for summary judgment argued that the commissioner must deny a protest appeal unless the procurement officer's protest decision was an abuse of discretion under the Keco standards.[7] The motion was denied, and DOT requested reconsideration. On reconsideration, DOT argued that to the extent the commissioner may conduct *de novo* review, only the protest decision, not the initial determination of non-responsiveness, may be addressed. [Mo. Reconsid. at 7]

DOT's argument raises issues regarding both the scope and standard of review. Clearly, because the commissioner may conduct evidentiary hearings, the facts relevant to the protest are within the scope of review. DOT's argument appears to be that the

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[6] At the time bids were due on ITB No. 25107, three separate formal complaints (including one by AWT) were pending before RCA asserting that WMAI had violated its tariff by submitting below a below tariff bid to the Municipality of Anchorage on a solicitation issued earlier in 2001. In addition, AWT had been a party to a dispute before the RCA raising a similar issue in regard to a 1998 solicitation by the Anchorage School District. [RCA 11/20/01 at 2, 5]

[7] Under Keco, the availability and nature of relief depends on: (1) whether the agency acted in bad faith; (2) whether the decision had a reasonable basis: (3) the degree of discretion involved; and (4) whether there was a violation of law. *See, e.g.*, Fairbanks North Star School District v. Bowers Office Products, Inc., 851 P.2d 56, 58-59 (Alaska 1992).

procurement officer's initial exercise of discretion is outside the scope of review, and that on review of the protest decision the scope of review is restricted to determining whether the facts (applying a *de novo* standard of review or otherwise) establish a Keco violation.

A. FACTUAL MATTERS.

The idea that the procurement officer's factual findings should be reviewed on a deferential basis is fundamentally inconsistent with the commissioner's authority to conduct an evidentiary hearing. The evidence at a hearing is materially different from the evidence before the procurement officer. To suggest that the commissioner should parse out which of the facts were not contested, which were not addressed at the hearing, or which were not material, and defer to the procurement officer's findings in any of those areas would be to unnecessarily complicate the commissioner's task, artificially segregate the evidentiary and factual matrix, and unduly restrict the commissioner's ability to make factual determinations based on the evidence as a whole. I conclude that the commissioner may determine the facts *de novo* following an evidentiary hearing.

B. QUESTIONS OF LAW.

While DOT disagrees with the prehearing rulings regarding the scope and standard of review, it does not dispute that the commissioner, in the context of a protest appeal, has authority to interpret and apply the Procurement Code and to exercise his independent judgment with respect to the legal questions presented. Of course, the commissioner's rulings must be made in good faith and be consistent with applicable statutes, regulations, and court decisions. DOT does not suggest that the prior rulings are outside the pale of reasonable disagreement.

C. ADMINISTRATIVE DISCRETION.

DOT suggests that the exercise of administrative discretion is vested in the purchasing agency, not in the commissioner, and the commissioner either must (as a matter of law) or should (as a matter of sound policy) defer to the exercise of discretion by the procurement officer absent a violation of the Keco factors.

I. LEGAL AUTHORITY.

The Procurement Code authorizes the commissioner to issue a final agency decision, and after a hearing to take "appropriate action". The Procurement Code does not, except (arguably) insofar as it requires the protestor to state the basis for a protest,

expressly limit the commissioner's scope of review in a protest appeal, prescribe a standard of review, or afford the procurement officer's decision any deference.

On reconsideration, DOT points out [Mo. Reconsid. at 6-7] that the Procurement Code does not expressly authorize *de novo* review, as does the Model Procurement Code [MPC]. DOT implies that the lack of similar language in the Alaska code indicates that the legislature did not intend to adopt the MPC standard of review.

The Procurement Code was derived from the MPC,[8] and accordingly it is appropriate to look to the MPC for interpretive assistance. Where the two codes use different language to address the same issue, there may be a basis for interpreting them differently. However, when the Procurement Code is silent on an issue the MPC addresses, the MPC provisions are persuasive authority. I conclude that the Procurement Code does not preclude adoption of the MPC standard of review.

II. POLICY CONSIDERATIONS.

(a) Scope of Review.

DOT argues on reconsideration [Mo. to Reconsid. at 7] that the commissioner's scope of review does not include the procurement officer's initial discretionary act, but is limited to determining whether in the protest decision, under whatever standard of review is applicable, a violation of the Keco factors was shown.

For at least three reasons, this is an untenable position. First, the procurement officer's protest decision is just as much an exercise of administrative discretion as the initial act that is the subject of the protest. Indeed, in many cases the procurement officer's only exercise of administrative discretion occurs after the protest, in response to a problem pointed out by the protestor that the procurement officer had previously been unaware of. Accordingly, if the basis for DOT's objection is that the exercise of administrative discretion by the procurement officer is outside the scope of review, then the protest decision itself could not be reviewed. Second, if the commissioner, under whose delegated authority the original action was taken, may not review the procurement officer's initial exercise of administrative discretion, surely the courts may not do so,

[8] The Alaska Procurement Code, as initially submitted to the legislature, was "based on the Model Procurement Code." 1986 Senate Journal at 1550 (Report of the Senate Select Interim Committee on Procurement Practices and Procedures).

either. But it is clear from both state and federal procurement decisions that the courts' review in a protest appeal is not restricted to determining whether the Keco standards were violated.[9] To grant the commissioner a narrower scope of review than the courts would render the protest appeal process meaningless. Third, the Keco factors express common law principles applicable in the absence of the Procurement Code. Those factors do not limit the scope of review available under the Procurement Code.[10]

(b) Standard of Review.

DOT points out on reconsideration [Mo. Rec. at 7, note 4] that the Comptroller General uses the arbitrary and capricious standard of review, suggesting that standard should be applied under the Procurement Code. But the role of the Comptroller General is fundamentally different from the role of the commissioner. The Comptroller General is a legislative branch employee in the General Accounting Office. The separation of powers doctrine bars the Comptroller General from reversing the decision of an executive branch procurement officer no matter what standard of review is applied.[11] For this reason, the standard of review used by the Comptroller General is not persuasive authority for proceedings under the Procurement Code.

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[9] *See, e.g.*, Aloha Lumber Corporation v. University of Alaska, 994 P.2d 991 (Alaska 1999); Peninsula Correctional Health Care v. Department of Corrections, 924 P.2d 425 (Alaska 1996); Gunderson v. University of Alaska, Fairbanks, 922 P.2d 229, 237 (Alaska 1996); Lower Kuskokwim School District v. Foundation Services, Inc., 909 P.2d 1383 (Alaska 1996); Jensen & Reynolds Construction Co. v. State, Department of Transportation and Public Facilities, 717 P.2d 844 (Alaska 1986); Alaska International Construction, Inc. v. Earth Movers of Fairbanks, Inc., 697 P.2d 626, 628-29 (Alaska 1985); Chris Berg, Inc., v. State, Department of Transportation, 680 P.2d 93, 94 (Alaska 1984).

[10] The Keco factors were recognized in 1981 as governing the implied contract of good faith and fair dealing. King v. Alaska State Housing Authority, 633 P.2d 256, 263 at n. 7 (Alaska 1981). The Procurement Code was adopted in 1986. In two post-1986 common law actions for damages, neither of which was a protest appeal, the Alaska Supreme Court applied the Keco factors. *See*, Fairbanks North Star Borough School District v. Bowers, 851 P.2d 56 (Alaska 1992); Dick Fischer Development No. 2, Inc. v. Department of Administration, 838 P.2d 263 (Alaska 1992). In protest appeals, both before and after the adoption of the Procurement Code, the court has consistently applied an abuse of discretion standard to the agency's decision on the merits, without regard to the Keco factors. *See*, note 9, *supra*.

The Keco factors remain relevant to protests when there are allegations of bad faith, because bad faith may provide a basis for relief in a protest even in the absence of a violation of the Procurement Code. *See*, Paul Wholesale, B.V./Hols Trading, GMBH, J.V., 908 P.2d 994, 1001 (Alaska 1995) (holding that reasonable agency action may be reversed for appearance of impropriety); KILA, Inc., v. State, Department of Administration, 876 P.2d 1102 (Alaska 1994) (bias alleged).

[11] *See, e.g.*, Ameron, Inc. v. United States Army Corps of Engineers, 809 F.2d 979 (3rd Cir. 1989); *cert granted*, 485 U.S. 958, *cert. dismissed*, 488 U.S. 918. By statute, the Comptroller General's scope of review is limited to determining whether the agency's action complies with applicable law; in the event it does not, the Comptroller General issues a non-binding recommendation. 31 U.S.C. §3554(b)(1).

The commissioner, by contrast to the Comptroller General, is in the executive branch, and, with the Chief Procurement Officer, has direct statutory responsibility for all state procurement. AS 36.30.005(a). Procurement officers act as delegates of the commissioner, even though they may be employees of another executive branch agency. AS 36.30.015(b). Indeed, precisely because procurement officers are employed by multiple agencies (which separately supervise their own employees without direct administrative control by either the commissioner or the Chief Procurement Officer), it is appropriate to lodge in the commissioner a substantial degree of procurement oversight responsibility through the protest appeal process. The Procurement Code authorizes the commissioner to "audit and monitor the implementation of the [procurement] regulations and the requirements of this chapter with respect to using agencies." AS 36.30.040(a). The commissioner's decision in a protest appeal, consistently with that authority, fosters the uniform interpretation and application of the Procurement Code, provides for direct administrative supervision by the commissioner over procurement officers acting under delegated procurement authority, and contributes to the development and implementation of sound, consistent procurement policies. For these reasons, the commissioner's decision in a protest appeal should not be restricted to correcting abuses of discretion that warrant reversal in the courts.

This is not to say that the commissioner should exercise *de novo* review in all respects. Rather, the appropriate standard of review in a protest appeal varies with the nature of the issue presented. As noted above, on questions of law the independent judgment standard applies, and the commissioner determines facts *de novo* following an evidentiary hearing.

The commissioner will give the procurement officer's discretionary decisions due deference, but the degree of deference owed to such decisions varies. For example, when the facts are undisputed, the procurement officer's determination that a particular bid requirement is material is generally persuasive, since the purchasing agency is in the best position to make judgments about its own needs. However, the facts may be subject to dispute, in which case the abuse of discretion standard may not be appropriate.

But it is not necessary to decide in this case what standard of review applies to a particular exercise of discretion, because the procurement officer did not make a

discretionary decision about the responsiveness of WMAI's bid. Rather, the officer reached a legal conclusion that WMAI's bid was conditional, based on undisputed facts. A conditional bid is non-responsive as a matter of law. But whether an unstated requirement of regulatory approval makes a bid conditional is a question that primarily concerns the interpretation and application of the Procurement Code. As such, it is within the scope of the commissioner's general procurement oversight, and not within a purchasing agency's discretion. Accordingly, the independent judgment standard of review is appropriate.

2. WMAI's Bid is Unconditional.

A. REQUIREMENT OF PRIOR APPROVAL.

DOT argues that because a special contract is subject to prior approval by RCA, a bid offering to enter into a special contract is conditional. DOT's prehearing motion for summary judgment raising that argument was denied, on the ground that WMAI's bid on its face was unconditional. DOT's motion for reconsideration argues that it cannot be "forced" to enter into a special contract, and that therefore it has the right to find a bid for a special contract non-responsive.

The latter argument misses the point. Certainly, DOT could have exercised its discretion to preclude a special contract. In that sense, of course, DOT cannot be "forced" to enter into a special contract. But the issue in this case is not whether DOT could preclude such contracts, but whether it did so <u>in the ITB</u>.[12] Clearly, the ITB did not address the issue directly. Indeed, DOT did not even consider the possibility of such contracts prior to AWT's protest. In the absence of any language in the ITB addressing special contracts, DOT in effect asserts that the ITB precludes special contracts by implication, because a special contract is by definition conditional.

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[12] In this case, DOT did not decide, prior to issuing the ITB, not to accept a special contract. Indeed, although it has taken that position during the course of the hearing, [Mo. re Arbitrary… at 8, lines 14-15; Mo. to Reconsid. at 4, ll. 1-2, 16-17; Reply on Reconsid. at 2], I understand this to have been a litigation position, applicable to the bids received in response to this particular ITB, rather than a policy decision that DOT will not accept a special contract under any circumstances.

Whether or not a decision by DOT not to accept a special contract under any circumstances (including, for example, under an ITB allowing 60 days for RCA approval and requiring a waiver of the "subject to revision" clause) would unduly restrict competition is therefore an issue that need not be considered at this time.

DOT's argument that a special contract is by definition conditional reflects a misunderstanding of WMAI's bid, and of the requirement of unconditionality. A bid may be subject to any number of post-acceptance contingencies, but it is not "conditional" for purposes of responsiveness unless: (1) the ITB precludes those contingencies;[13] or (2) the bid on its face makes its bid conditional on those contingencies.[14] A bid that is on its face unconditional is not rendered conditional simply because the bidder will be unable to perform unless it obtains approvals, authorization, licenses, or financing.

DOT argues that even though WMAI made a facially unconditional promise, a condition must be implied, because WMAI cannot legally contract to perform the services until RCA approves the special contract. [Mo. Reconsid. at 5] But there is always the risk that a bidder who submits a bid in good faith, fully expecting to perform, will be under a functional or legal disability to sign or to perform a contract if it fails to obtain financing, licensing, or other necessary approvals. Nonetheless, it is the facially unconditional nature of a bid, not the nature of any unstated contingencies, that determines its responsiveness.

B. RCA'S AUTHORITY TO REVISE THE TERMS.

DOT also argues that WMAI has not made a firm offer, because even if RCA approves a special contract, the contract will be subject to revision by RCA. On the surface, this argument appears different from the objection that a special contract is subject to approval by RCA, because if the "subject to revision" clause is not waived, then a "firm contract price" is a legal impossibility, since the price could be unilaterally changed by RCA. But a waiver is possible, and therefore a firm contract price is a legal possibility.[15]

Furthermore, this argument conflates WMAI's bid price with the contract price. WMAI's bid price was firm: the bid specified a price to be maintained throughout the

[13] The failure to expressly preclude special contracts in the ITB distinguishes this case from Mid-East Contractors, Inc., 70 Comp. Gen. 383 (March 29, 1991).

[14] It is a well established principle of procurement law that, in general, the responsiveness of a bid is determined on its face. *See, e.g.*, Balantine's South Bay Caterer's, Inc., No. B-250223 (Comp. Gen., Jan. 13, 1993); Mechanical Resources, Inc., No. B-241403 (Comp. Gen., Jan. 30, 1991).

term of the contract. As DOT recognizes, the contract price, assuming no waiver, would have been subject to revision. However, RCA might not actually impose any change in price. Accordingly, WMAI's bid offering a fixed price for the term of the contract does not offer a legal impossibility even in the absence of a waiver: the contract price might have remained fixed over the life of the contract, just as the bid promised.

C. RCA APPROVAL AND REVISION ARE ISSUES OF RESPONSIVENESS.

Responsibility concerns matters pertaining to the offeror's ability or capacity to perform; responsiveness concerns whether the offeror has made an unequivocal promise to comply with the material terms of the solicitation. *See, e.g.*, Aviation Specialists, Inc., Aviation Enterprises, Inc., Nos. B-218597, B-218597.2 (Comp. Gen., August 15, 1985).

DOT's concerns regarding WMAI's capacity or ability to perform on the terms stated in its bid raise questions of responsibility, not responsiveness. As DOT observes, it cannot be "forced" to sign a contract with WMAI if RCA does not approve the terms offered by WMAI, or if RCA does not waive the "subject to revision" clause. But in the absence of an ITB that precludes a special contract, DOT must either find WMAI non-responsible, based on an assessment of whether WMAI will obtain the approval and waiver it seeks, or accept the bid and decline to execute a contract if WMAI will not agree in the contract to the terms it offered in the bid.

These are substantially the same options that confront any purchasing agency when a facially unconditional bid is subject to unstated contingencies: lack of a license, certification, zoning, or other approval is not a matter of responsiveness unless a term in the ITB expressly makes it so, although of course the purchasing agency may consider the likelihood that the license, certification, zoning, or other approval may not be timely obtained, under the rubric of responsibility. *See, e.g.,* Carolina Waste Systems, Inc., B-215689.3 (Comp. Gen., Jan. 7, 1985); TRS Design & Consulting Services, B-218668 (Comp. Gen., Aug. 14, 1985); William S. Stiles, Jr., Piazza Construction, Inc., No. B-215922, B-215922.2 (Comp. Gen., Dec. 12, 1984).

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[15] WMAI filed a motion with RCA asking it to waive application of 3 AAC 48.320 to all public procurements. RCA declined to do so. However, RCA's action does not mean that it will decline to waive the "subject to revision" clause in particular cases, following review of the special contract terms.

There are also practical reasons why, in the absence of a specification on point, it is better to consider the issues presented in this case from the standpoint of responsibility, rather than as a matter of responsiveness. First, neither the procurement officer nor the commissioner has any expertise in identifying "special contracts". That is an issue within the expertise and discretion of RCA. Accordingly, whether a bid is for a "special contract" is a criterion upon which neither the procurement officer nor the commissioner can make an authoritative judgment. Second, in the context of responsibility DOT could consider the likelihood of RCA approval and subsequent price increases, and seek further assurances to avoid any perceived risks. This would enable DOT to consider a broader range of bids in the context of a realistic review of the actual risks.

IV. Remedy.

Under the circumstances of this case, the potential remedies for DOT's erroneous decision that WMAI's bid was non-responsive appear to be: (1) do not issue a new solicitation, and either (a) confirm the contract award to AWT and award WMAI its bid preparation costs, or (b) remand to DOT to determine WMAI's responsibility, and if WMAI is the low responsible bidder cancel the contract with AWT and award the contract to WMAI; or (2) issue a new solicitation and pending the outcome of the new solicitation either (a) cancel the existing contract and reinstate WMAI as the contractor on a month-to-month basis; or (b) let the existing contract run to the end of the initial term and continue AWT as the contractor.

AS 36.30.585(b) provides that in determining an appropriate remedy, the procurement officer must consider: (1) the seriousness of the procurement deficiencies; (2) the degree of prejudice to other interested parties or to the integrity of the procurement system; (3) the good faith of the parties; (4) the extent to which the procurement has been accomplished; (5) costs to the agency and other impacts on the agency of a proposed remedy; and (6) the urgency of the procurement to the welfare of the state.

(1) Seriousness of the Procurement Deficiency.

In this case, the procurement officer rejected as non-responsive a proposal that should have been accepted. In addition, the ITB was materially deficient in two key

respects: it did not address special contracts, and the bid schedule format required by the ITB was not compatible with tariff pricing.

The acceptability of special contracts clearly should have been addressed in the ITB. As noted by the RCA:

> Soliciting bids in a way that excludes regulated utilities from complying unless they violate RCA regulations will exclude some potential bidders or at least prevent them form making attractive offers when they can offer competitive rates below their tariffed rates. By doing so, the state agency may defeat its purpose of obtaining services at the most competitive price. We hope that public procurement officers dealing with utility services will recognize this commission's role in protecting the public interest and will include a requirement to comply with state law, including RCA regulations, as a condition required for a responsive bid rather than considering such compliance as a non-responsive contingency. To do so would have the desirable effect of enhancing the field of potential bidders and removing the risks of having attractive bids declared non-responsive. Our review of 'special contract' terms will also help to assure that the bidder is realistically able to provide service at the offered rates if those rates are below the utility's tariffed rate.

The defects in the ITB clearly affected DOT's ability to obtain the best value for the state's purchasing dollar, as well as the bidders' ability to submit bids on an equal basis. The erroneous determination of non-responsiveness was a serious deficiency in a procurement, as were the defects in the ITB. Accordingly, this factor weighs in favor of a resolicitation.

(2) Degree of Prejudice to AWT and Integrity of the Procurement System.

In this case, it is uncertain whether AWT was entitled to an award under the original ITB.[16] Furthermore, AWT expressly elected to proceed to contract award rather than stay the award until resolution of the appeal. Finally, AWT has no right to continuation of the contract beyond the initial one-year term. For these reasons, neither a resolicitation nor a remand of the existing solicitation would unfairly prejudice AWT.

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[16] It is entirely conjectural whether DOT would find WMAI a responsible bidder. It does appear, however, that WMAI was the low bidder. DOT's determination that AWT was the low bidder was based on two adjustments to the bid prices. One, the application of the container rental fee to the hypothetical monthly invoice, was erroneous. The other, reduction of AWT's monthly invoice to reflect a 4 week month, was reasonable. WMAI's protest regarding price is therefore sustained as to the first issue and denied as to the second. *See generally*, note 6, *supra*.

It is unknown whether the erroneous decision altered the outcome of the procurement, and there is no appearance of impropriety. Accordingly, there is no risk of prejudice to the integrity of the procurement system regardless of the remedy selected.

(3) Good Faith.

There is no evidence suggesting bad faith by any public official or by any bidder in this matter. In the absence of bad faith, the state is under no legal obligation to reimburse bid preparation costs. In light of this factor and WMAI's failure to raise the issue of special contracts at an earlier time, an award of bid preparation costs is not an appropriate remedy.

(4) The Extent the Procurement has been Accomplished.

Because contract award was not stayed, the procurement was completed before the protest appeal was filed. With respect to performance, the initial one-year term of the contract has been substantially performed. Because the contract with AWT includes a cancellation clause, cancellation of the existing contract would not be unreasonable. However, given the time left in the initial term, cancellation is unlikely to bring final resolution any closer. Furthermore, there is no compelling reason why WMAI should replace AWT pending a new solicitation, since it is unclear whether WMAI would have won the contract if the procurement had been conducted without error, and WMAI's contract at the time of the solicitation was month-to-month, while AWT's present contract is for a one year term and it had a reasonable expectation of renewal.

This factor supports allowing the initial term to run out, and leaving AWT in place pending resolicitation, rather than canceling the existing contract and reinstating WMAI.

(5) Costs to the Agency and Other Agency Impacts of the Proposed Remedy.

DOT declined to stay award of the contract pending the outcome of the protest appeal. Accordingly, DOT may be deemed to have accepted the reasonably foreseeable costs of an adverse outcome on appeal. The only identifiable cost to DOT of resolicitation is the relatively limited administrative costs associated with any solicitation. Those costs may be outweighed by savings in the cost of the contract, if DOT elects to accept special contracts. Furthermore, DOT agreed to cancellation and

resolicitation in the prior protest appeal. For these reasons, from the perspective of agency costs and impacts, resolicitation appears to be the appropriate remedy.

(6) Urgency of the Procurement.

DOT has expressed no urgency, but has indicated that it desires to establish a long term contract rather than continuing on a month to month basis. Given the time remaining to the termination of the initial term of the contract, it is not unreasonable to believe that a new solicitation can be accomplished in a timely manner.

Conclusion

The determination that WMAI's bid was non-responsive was in error. The appropriate remedy appears to be to conduct a new solicitation and to maintain the incumbent contractor pending the outcome of the new solicitation. WMAI is not entitled to an award of bid preparation costs. I recommend that the commissioner sustain the appeal and remand this matter to the Department of Transportation to implement the appropriate remedy.

DATED April 24, 2002.

Signed
Andrew M. Hemenway
Hearing Officer

[DEPARTMENT OF ADMINISTRATION LETTERHEAD]

April 25, 2002

Steven E. Mulder
Dorsey & Whitney LLP
1031 West Fourth Avenue, Suite 600
Anchorage, AK 99501

CERTIFIED MAIL No. 70000520001808564457
Re: Protest Appeal, ITB No. 25107

Dear Mr. Mulder:

I have reviewed the record and the proposed decision of the hearing officer in this matter and I have determined to adopt the hearing officer's proposed decision as my own. A copy of the decision is enclosed.

In accordance with this decision, the Department of Transportation and Public Facilities may maintain its contract with Alaska Waste Transfer through June 30, 2002 and thereafter on a month-to-month basis, pending the outcome of a new solicitation.

This is the final administrative action regarding your protest and appeal. 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,

Signed
Jim Duncan
Commissioner

cc: Peter Putzier, Department of Law
Amy Deininger, DOTPF
Daniel Zipay, Alaska Waste Transfer

[This document has been modified to conform to technical standards for publication.]