

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS  
ON REFERRAL BY THE COMMISSIONER OF ADMINISTRATION**

In the Matter of: )  
 )  
KYLLONON ENTERPRISES, )  
 )  
Appellant. ) OAH No. 08-0399-PRO  
 ) RFP No. 2008-1000-7399  
\_\_\_\_\_ )

**AMENDED DECISION**

**I. Introduction**

This is a protest appeal. It concerns Request for Proposals [RFP] No. 2008-1000-7399, issued by the Department of Administration, Division of General Services to acquire leased space in Homer for the Department of Natural Resources, Division of Forestry’s fire-fighting operations on the Kenai Peninsula.

Two proposals were submitted, both by Kyllonen Enterprises. However, Kyllonen’s offered prices were greater than the available funding. Rather than soliciting a best and final offer, the Division of General Services elected to reject Kyllonen’s offers. Kyllonen filed a protest asserting that the Division of Forestry had engaged in “price shopping” and requesting that it be awarded its bid preparation costs. The protest was denied and Kyllonen filed this appeal.

Because Kyllonen has shown that the solicitation failed to disclose material information, the protest appeal is granted. Kyllonen is awarded the costs of bid preparation, payable by the Division of Forestry. The Chief Procurement Officer is directed to review applicable policies and procedures.

**II. Facts**

The State of Alaska occupies a large building at the Homer airport that is managed by the Department of Transportation and Public Facilities as the Homer Airport Rescue and Fire Facility. Since 1999, the Department of Transportation has allowed the Division of Forestry to utilize otherwise-unneeded space in that building for the

division's seasonal fire-fighting operations.<sup>1</sup> The division uses the space to store vehicles and equipment used in its seasonal fire-fighting activities on the Kenai Peninsula and as a staging area during ongoing fire-fighting operations. In 2005, the Department of Transportation and the Division of Forestry memorialized their agreement: the division agreed to pay the monthly water and sewer bills at the building in exchange for use of the space.<sup>2</sup> Those bills average \$200-\$300 per month.<sup>3</sup>

For some time, the Department of Transportation had planned to build a replacement airport fire and rescue facility and, after completion, to tear down and replace the old building.<sup>4</sup> Ric Plate, the Division's Area Forester, had a number of discussions with department personnel over the years about including the division's operations in the new building in order to provide the division with a permanent location.<sup>5</sup> Any such transition was dependent on the Department of Transportation's ability to obtain funding for a new facility.<sup>6</sup> Sometime in 2005, the Department of Transportation informed the Division of Forestry that it anticipated receiving funding to replace the facility, and provided a move out date at the end of the 2006 fire season.<sup>7</sup> In response to the move out date provided by the Department of Transportation, during the 2006 legislative session the division obtained an increment of \$50,000 in its budget, specifically for the purpose of leasing new space to replace the Department of Transportation site.<sup>8</sup> In July, 2006, after the end of the 2006 legislative session, the department extended the move out date to August, 2007.<sup>9</sup>

In May, 2007, the Division of Forestry began discussions with the Division of General Services regarding a solicitation for the new space.<sup>10</sup> By mid-August, 2007, the Division of Forestry had been informed by the Department of Transportation that the department had not received funding for the proposed new facility, and the division and

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<sup>1</sup> DGS 378.

<sup>2</sup> February 8, 2005 memorandum (DGS 524).

<sup>3</sup> DGS 520.

<sup>4</sup> DGS 365.

<sup>5</sup> DGS 365.

<sup>6</sup> DGS 365.

<sup>7</sup> DGS 378; R. Plate testimony (06:20, 10:20).

<sup>8</sup> DGS 366; R. Plate testimony (14:00). *See* DGS 058 ("This facility is being procured by a special appropriation for the leased facility."); DGS 053 ("This is a project that received special funding and scrutiny through Representative Seaton in an effort to upgrade the fire fighting capability in that area.").

<sup>9</sup> DGS 378.

<sup>10</sup> DGS 294.

the department had agreed to an indefinite extension of the existing arrangement for space at the airport facility.<sup>11</sup> Department personnel informed division personnel that the department still planned to replace the old building eventually, contingent on funding.<sup>12</sup>

On August 20, 2007, the Division of Forestry submitted a purchase requisition to the Division of General Services, asking the division to procure leased space for its fire services facility.<sup>13</sup> The requisition identified the estimated cost of space as \$50,000 per year. Ben Milam handled the solicitation for the Division of General Services, coordinating primarily with Marlys Hagen, who was in charge of Department of Natural Resources procurement activities. During October of 2007, Mr. Milam obtained information from the Division of Forestry outlining its needs and used that information to begin preparing a request for proposals.<sup>14</sup> The division stressed that it had “limited funds for this lease.”<sup>15</sup>

On December 7, 2007, the Division of General Services authorized deviating from the state’s standard space allocation standards in connection with the procurement; the Division of Forestry’s request for the authorization noted that a new lease was necessary because the facility was “currently in DOT bldg being demolished.”<sup>16</sup> At that time, the Division of Forestry occupied the Department of Transportation site under an indefinite, open-ended agreement, and there was no timetable or specific plan for demolition of that building. Based on the information provided by the Division of Forestry, senior Division of General Services staff granted the space allocation request. With the authorizations in hand, Mr. Milam, working with Division of Forestry staff, tailored the specifications of the request for proposals to meet forestry’s specific needs.<sup>17</sup> Preparation of a draft request for proposals was substantially complete by January 9, 2008.<sup>18</sup> After various changes, the request for proposals was issued on March 13, 2008, with proposals due by April 22.

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<sup>11</sup> DGS 378; R. Pate testimony (10:50-11:20; 12:45; 19:30-20:00).

<sup>12</sup> DGS 378; R. Plate testimony (39:00).

<sup>13</sup> DGS 381.

<sup>14</sup> DGS 001-012.

<sup>15</sup> DGS 008, 463.

<sup>16</sup> DGS 018-022.

<sup>17</sup> DGS 023-027.

<sup>18</sup> DGS 043, 054.

The Division of General Services conducted a pre-proposal conference on April 8, 2008. At the conference, potential offerors were told that the Division of Forestry's current space was scheduled for demolition in preparation for construction of a new facility for the Department of Transportation.<sup>19</sup> Information obtained by the Division of General Services at the pre-proposal conference resulted in the extension of the time for submitting proposals, an amendment to the request for proposals and another request for departure from standard state space allocation policies. With the latter request, Mr. Milam noted, based on the representations of the Division of Forestry, that the "DOT building [is] scheduled for demo."<sup>20</sup> The amended proposal was issued on April 23, 2008, with proposals due on May 14.

Kyllonen was the lone offeror. Kyllonen's lower-priced, higher-ranked proposal was for a total price of \$62,400 in years 1-3 (base lease cost of \$42,600 per year, plus leasehold improvements cost of \$19,800 per year) and \$42,600 per year in years 4-8.<sup>21</sup> On May 28, Mr. Milam notified the Division of Forestry that the highest ranked proposal's price of \$62,400 for years 1-3 was more than the amount shown on the purchase requisition (\$50,000 per year), and he asked that the division "certify that funds are available to cover this additional cost."<sup>22</sup> At the same time, he contacted Kyllonen and asked "what we could do that would reduce cost and hopefully bring his offer within [the Division of Forestry's] budget."<sup>23</sup> After discussions, Kyllonen offered to make changes in the layout that appeared likely to eliminate most or all of the leasehold improvement costs and reduced the project price to the available funding, and which met with approval from Area Forester Ric Plate.<sup>24</sup> On June 3, the Department of Natural Resources told Mr. Milam that it was exploring alternative funding sources.<sup>25</sup> On June 5, however, Regional Forester Mike Curran informed Marlys Hagen that he did not want to

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<sup>19</sup> DGS 338. Evidence in the record suggests that, to the extent plans for demolition existed, they were for construction of a new building before the old one was demolished. *See* note 4, *supra*.

<sup>20</sup> DGS 172.

<sup>21</sup> DGS 382.

<sup>22</sup> DGS 230.

<sup>23</sup> DGS 231.

<sup>24</sup> DGS 231-235.

<sup>25</sup> DGS 243.

proceed and did “not wish to negotiate for lesser specifications in order to drive down the cost.”<sup>26</sup>

On June 10, 2008, Marlys Hagen discussed the situation with Division of Forestry officials.<sup>27</sup> On June 11, the Division of Forestry, through Area Forester Ric Plate, executed an agreement with the Department of Transportation to continue the existing arrangement for use of space at the Homer airport for an indefinite period at an annual cost to the Division of Forestry of about \$3,000.<sup>28</sup> That same day, Marlys Hagen notified Mr. Milam that the division had elected not to proceed “due to the fact that the offeror’s price is higher than our budget” pending review by the commissioner’s office “to ensure that all pertinent factors were considered.”<sup>29</sup> Mr. Milam responded, pointing out that the contractor had offered changes, some of which Division of Forestry staff had identified as desirable, that appeared likely to reduce the cost of the proposal to within the division’s budget, and urging the Department of Natural Resources to authorize the Division of General Services to obtain a best and final offer. He stated:

This contractor has expended a considerable amount of money in bid preparation cost based on a good faith assumption that an award would be made. We have an obligation to make that award if it is within the budget amount unless there are severe overriding circumstances that have arisen after the solicitation was opened.<sup>[30]</sup>

The next day, June 12, Marlys Hagen notified Division of General Services leasing and facilities manager Tanci Mintz that the decision to forego further discussions was final, based on her discussion with the department’s deputy commissioner and the director of the Division of Forestry, and that the division would no longer pursue the solicitation “due to the fact that we now know that the facility we are currently in will be available to us for a much longer period than we thought.”<sup>31</sup> Ms. Mintz asked the department to provide specific grounds for rejection of all proposals under 2 AAC

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<sup>26</sup> DGS 377. Contrary to Mr. Curran’s apparent understanding, the changes that Kyllonen had proposed would not have lowered the quality of the space. Before the department broke off discussions, Mr. Plate had stated, “The more I looked at Tom’s [revised] proposal the better I like it. I like the open environment.” DGS 234. Mr. Milam later observed, “Many of the changes...were items identified by the evaluation committee as desirable changes.” DGS 265.

<sup>27</sup> DGS 268.

<sup>28</sup> DGS 276. *See* note 3, *supra*.

<sup>29</sup> DGS 262.

<sup>30</sup> DGS 264.

<sup>31</sup> DGS 267.

12.860.<sup>32</sup> Division of Forestry director Chris Maisch identified two grounds: the space was no longer needed, and the price exceeded available funds.<sup>33</sup> At Ms. Mintz's request, Mr. Milam reiterated to Ms. Hagen that the contractor had offered to reduce price while also making layout changes that had been approved by the division.<sup>34</sup> On June 19, Deputy Commissioner Richard Lefebvre responded, stating that because the Department of Transportation had agreed to continue the existing use of its building, the Department of Natural Resources no longer needed or desired to obtain alternative space.<sup>35</sup> After reviewing the matter, Ms. Mintz directed Mr. Milam to prepare a notice of rejection of all proposals, specifying the lack of need for the space as the basis of the rejection.<sup>36</sup> The Division of General Services notified Kyllonen of the rejection of all proposals on June 23, 2008, citing a lack of need and the state's best interest.<sup>37</sup>

### III. Discussion

#### A. Kyllonen Did Not Establish Bad Faith

Kyllonen asserts that the Division of Forestry acted in bad faith and that it never intended to enter into a lease.

Procurement and other state officials are presumed to act in good faith and to exercise honest and impartial judgment.<sup>38</sup> To overcome the presumption, a protestor must provide direct evidence of bad faith, rather than speculation and inference.<sup>39</sup>

In the context of this case, bad faith would be shown if, prior to the date proposals were due, the division did not intend to enter into a lease for new space regardless of its ability to obtain a price within the available funding limits. The preponderance of the evidence, however, is that the division decided to forego a lease for new space after proposals had been submitted and prices were revealed. There is extensive documentation of internal Division of Forestry communications over the lengthy period of time that the request for proposals was under development; none of it suggests that the

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<sup>32</sup> DGS 269.

<sup>33</sup> DGS 271. *See* 2 AAC 12.860(1), (4).

<sup>34</sup> DGS 271, 277.

<sup>35</sup> DGS 284.

<sup>36</sup> DGS 297.

<sup>37</sup> DGS 302, 304.

<sup>38</sup> 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).

<sup>39</sup> Navistar International Transportation Corp. v. United States Environmental Protection Agency, 941 F.2d 1339, 1360 (6<sup>th</sup> Cir. 1989).

division was not planning on executing a lease if it could obtain adequate premises at a price within its budget,<sup>40</sup> although the division quite clearly did not intend to spend more than \$50,000 per year for the new facility.<sup>41</sup> It is true that long before the solicitation was issued, the division knew that the Department of Transportation had no fixed or firm date for tearing down its airport facility.<sup>42</sup> But that the division went ahead with the solicitation even though it had no fixed or firm date for moving does not necessarily mean that it did not intend to enter into a lease for new premises. In the absence of any direct evidence of bad faith, Kyllonen's assertion that the division never intended to enter into a lease is rejected.

B. The Request for Proposals Omitted Material Information

The Division of General Services argues that it did not abuse its discretion in cancelling the solicitation, because 2 AAC 12.860(1) expressly and specifically allows cancellation when "the supplies services or construction being procured are no longer required."

This argument misconceives the thrust of Kyllonen's protest. Kyllonen does not dispute that the Division of General Services had grounds for cancelling the solicitation. The real thrust of its protest is not that the solicitation was cancelled: it is that the division cancelled the solicitation for a reason that would have served equally well as a reason not to issue it in the first place. Kyllonen's fundamental objection is that the request for proposals failed to disclose that the Division of Forestry had an alternative source for the desired space, namely its existing landlord, the Department of Transportation.<sup>43</sup> 2 AAC 12.860(1) allows cancellation when services are no longer required. Implicit in Kyllonen's protest is the claim that a new lease never was required,

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<sup>40</sup> See generally, DGS 448-514.

<sup>41</sup> DGS 450 ("I would like to reiterate that we have limited funds for this lease so before a lease is signed [we] want to review the options."); DGS 463 ("I expressed concern regarding funding issues").

<sup>42</sup> R. Plate testimony (15:15). See also, DGS 494 (February 7, 2008, letter, Deputy Director Brown to Rep. Seaton: "The initial move date...was extended by DOT&PF to August 2007 and has subsequently been extended without a specific date due to delays in their plans.").

<sup>43</sup> Kyllonen specifically made this argument at the hearing. See also, Post Hearing Brief at 2 ("Private enterprise incurs a large cost in preparing offers working under the notion that competition will be among other bidders. When the State competes with a bid and fails to disclose that fact it endangers the future of fair practice bids.").

and thus the solicitation did not reflect the agency's actual needs. On appeal, Kyllonen specifically argued that the solicitation lacked material information.<sup>44</sup>

"A request for proposals must provide sufficient information 'to enable offerors to compete intelligently and on a relatively equal basis.'"<sup>45</sup> In addition, "[m]inimum requirements should reflect the agency's actual needs, not all possible needs."<sup>46</sup> Both these general principles are relevant in this case. By issuing a solicitation for a new lease without either (a) considering and rejecting the option of extending an existing below-market arrangement for space in state-controlled premises, or (b) informing prospective offerors that it would consider that option after proposals were submitted, the Division of Forestry placed prospective private sector offerors in the position of competing against an undisclosed third party: the Department of Transportation. That the division had the option of continuing in its existing space at a price far below the market price is plainly material information that should have been disclosed to prospective offerors, for two reasons. First, knowing that it could not compete on cost, a prospective offeror might choose not to incur the costs of preparing a response. Second, assuming it chose to submit a response, a prospective offeror might propose a substantially lower price than it otherwise would have.

In this case, the failure to disclose material information was compounded at the pre-proposal conference, when, according to the protest report, prospective offerors were informed that the existing premises were scheduled for demolition, which was not in fact the case. Because the request for proposals omitted material information in the absence of which a prospective offeror could not intelligently compete, the protest should be sustained.

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<sup>44</sup> Ordinarily, objections to the contents of a solicitation must be raised prior to the due date for responses. AS 36.30.565(a). However, where the prospective bidder or offeror is unable to discern the defect until after submission, a protest need not be filed prior to the due date in order to be considered timely. AS 36.30.565(b) (untimely protest may be accepted for good cause); *see, e.g., In Re Bachner Company, Inc. and Bowers Investment Company*, No. 02.06/.07 at 11 (Department of Administration, February 19, 2001), *affirmed*, *State, Department of Administration v. Bachner Company, Inc.*, 167 P.3d 58 (Alaska 2007).

<sup>45</sup> *In Re Empyra.com. Inc.*, OAH No. 06-0520-PRO at 16 (December 19, 2006), *quoting Meridian Management Corporation*, No. B-285127 (Comptroller General, July 19, 2000).

<sup>46</sup> *In Re Sanders*, OAH No. 05-0240-PRO at 14 (December 20, 2005), *citing* AAM 81.150 (Specifications "should list all the essential characteristics that are necessary for the...service to meet your mission-related needs." [emphasis in original])



### C. Remedy

Kyllonen asks for an award of the costs of preparing its proposal. The Division of General Services argues that (1) the terms of the solicitation preclude an award of bid preparation costs and (2) the evidence does not support the amount claimed.

#### 1. *The Solicitation Does Not Preclude An Award of Costs*

Section 2.15 of the request for proposals states:

In the event this Request for Proposals or lease is canceled or terminated, the State shall not be responsible for any preparation costs incurred by the Offeror.

This language limits the State's liability for a cancellation of the solicitation that is within the discretion of the purchasing agency: a cancellation that is both in good faith and is not an abuse of discretion. However, in this case the protest is sustained on the ground that the solicitation was defective, not on the ground that the cancellation was an abuse of discretion. Section 2.15 does not abrogate AS 36.30.585, which provides that if a protest is sustained, the procurement officer shall implement an appropriate remedy, although the protestor's damages are limited to reasonable bid or proposal preparation costs.

#### 2. *Kyllonen Submitted Evidence of Costs in the Amount of \$6,775.04*

At the hearing, Kyllonen offered testimony that its costs had totaled about \$10,000. The Division of General Services' post-hearing brief objected to the lack of documentary support for the claimed costs, but with its (simultaneous) post-hearing brief, Kyllonen provided documentary evidence for \$6,775.04 in costs, consisting of fees paid to Mr. Davis (\$5,285), a surveyor (\$288.40) and an architect (\$870), and printing costs (\$331.64). If the division maintains its objection, it may request supplemental proceedings by filing a proposal for action.

#### 3. *Costs and Administrative Review are Appropriate*

The available remedies in a protest appeal include an award of proposal preparation costs, termination of an existing contract, declining to exercise options under an existing contract, cancellation of the solicitation with or without resolicitation, re-evaluation, and corrective administrative action (*e.g.*, referral to the Attorney General for investigation under the Ethics Act, referral to departmental personnel for disciplinary

proceedings, or referral to the Chief Procurement Officer for consideration of changes to applicable law or policies).<sup>47</sup>

In implementing a remedy, all of the circumstances must be considered, including the following specific statutory factors:<sup>48</sup>

(1) Seriousness of Procurement Deficiency

In this case, the Division of Forestry failed to provide material information to be included in the request for proposals. This resulted in the issuance of a solicitation to which prospective offerors could not intelligently respond. This was a substantial defect in the procurement process.

(2) Degree of Prejudice

There is no prejudice to any parties other than Kyllonen, since no other parties participated in the procurement and the omitted information would not have encouraged any prospective offeror to actually submit a proposal. However, there is some prejudice to the integrity of procurement system, because in the absence of all the material information, Kyllonen's offers may have been higher than they would otherwise have been.

Because the defect in the solicitation induced Kyllonen to submit a proposal that it might otherwise not have, at a price that it might otherwise have reduced, an award of proposal preparation costs is appropriate. However, because the Division of General Services was not responsible for the defect, the purchasing agency should pay the award (which is substantially less than the increment to its budget for the purpose of obtaining lease space).

(3) Good Faith

There is no direct evidence of bad faith. Kyllonen's unsubstantiated allegations are not persuasive and do not create a substantial appearance of impropriety.

(4) Extent Accomplished

The solicitation has been cancelled, and there is no risk of upsetting existing contracts.

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<sup>47</sup> See Appeal of J & S Services, Inc., No. 02.01 at 7-8 (Department of Administration, September 17, 2002).

<sup>48</sup> AS 36.30.685(b); see, e.g., State, Department of Administration v. Bachner Company, Inc., 167 P.3d 58 (Alaska 2007).

(5) Costs and Other Impacts to the Agency

This is the most significant factor to be considered. The Division of Forestry's failure to investigate extension of its existing arrangement before committing to the procurement process led to the investment of substantial unnecessary time and effort on the part of the Division of General Services (and, to a lesser extent, personnel of the Division of Forestry) to conduct a procurement that, in the end, the Division of Forestry essentially decided that it need not have undertaken in the first place. This matter should be reviewed by the Chief Procurement Officer to determine whether specific changes in leasing procedures should be implemented in order to avoid similar situations in the future.

**IV. Conclusion.**

The protest appeal is granted. The Division of Forestry is directed to compensate Kyllonen in the amount of \$6,775.04 for the costs of proposal preparation. This matter is referred to the Chief Procurement Officer for review of applicable policies and procedures.

DATED March 10, 2009.

*Signed* \_\_\_\_\_  
Andrew M. Hemenway  
Administrative Law Judge

## Adoption

On behalf of the Commissioner of Administration, and in accordance with AS 44.64.060(e)(4), the undersigned has amended the findings at pages 4, 5 and 6 of the proposed decision in accordance with the division's proposal for action based on a review of the specific evidence cited in the proposal for action, and hereby issues the amended decision as final.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 10th day of March, 2009.

By: *Signed* \_\_\_\_\_  
Andrew M. Hemenway  
Administrative Law Judge

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