

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

WESTERN CONSTRUCTION &)	
EQUIPMENT, LLC,)	
v.)	
)	
DEPARTMENT OF MILITARY AND)	
VETERANS AFFAIRS)	OAH No. 09-0659-PRO
_____)	ITB No. 2010-0900-8933

DECISION

I. Introduction

This is a protest appeal. The Department of Military and Veterans Affairs issued a solicitation to obtain snow clearing services. Six bidders responded. The department issued notice of intent to award the contract to Snowball Express, Inc. (Snowball), and Western Construction & Equipment, LLC, (Western) filed a protest. The department cancelled the solicitation, and Western filed an appeal. Following briefing, the parties submitted the matter for decision on the record.

Because Western has not shown that the department cancelled the solicitation on improper grounds or that it abused its discretion, the appeal is denied.

II. Facts

The Department of Military and Veterans Affairs issued Invitation to Bid No. 2010-0900-8933 (ITB) on September 24, 2009.¹ The ITB requested bids to provide snow removal and ice control services at the Alaska National Guard facilities on Fort Richardson and other locations in Anchorage.²

The ITB specifications included a list of five types of minimum required equipment, without specifying the number or capacity of the listed types of equipment, as well as identifying a requirement for sanding capability and manual laborers.³ The evaluated bid price was the lowest bid for the total cost of one cleaning (plowing plus

¹ ITB, p. 1.
² ITB, pp. 1, 7.
³ ITB p. 12.

sanding) of a two to five inch snowfall.⁴ Bidders were required to list available equipment with an hourly wet rate (equipment plus operator) for any additional services (e.g., snowfalls over eight inches, or cleaning at additional locations), but the cost of these services was not included in the evaluated bid price.⁵ All listed equipment was subject to inspection and rejection if it did not meet basic safety and performance requirements (which were unspecified).⁶

Snowball submitted a bid of \$6,974.10 per cleaning. It listed equipment with hourly rates, including graders for \$275 and \$345 per hour, Ford F350's with plow for \$98 and \$105 per hour, and a Volvo L90 loader for \$235 per hour.⁷ Western's bid was \$7,691.05 per cleaning, and its equipment included graders for \$145 and \$155 per hour, Ford F250's with plow for \$75 per hour, and a Volvo L90 loader for \$125 per hour.⁸ Snowball's hourly rates were generally 50%-100% more than prevailing rates for the listed equipment.⁹

After reviewing the bids, representatives of the department inspected the equipment of some bidders. Snowball provided seven pieces of equipment for inspection, and Western provided all of its equipment for inspection. On October 14, the department issued notice of intent to award the contract to Snowball.

Western filed a protest asserting that Snowball's bid was non-responsive and that Snowball was not a responsible bidder. The protest alleged that the bid was not responsive because (1) Snowball had not included a dump truck (a required piece of equipment) in its list of equipment, and (2) the bid was unbalanced because the rental rates were excessive; and that Snowball was not a responsible bidder because (1) it did not provide proof that the listed equipment was available for its use, and (2) it did not provide proof of insurance. Western also asserted that the bid should be rejected because Snowball did not submit a list of subcontractors within five days of the notice of intent.

The procurement officer consulted with the Division of General Services. The division responded on October 26, noting that the ITB did not provide a mechanism for

⁴ ITB. pp. 15-17.

⁵ ITB p. 18-19.

⁶ ITB p. 19.

⁷ Snowball bid.

⁸ Western bid.

evaluating the cost of services for removal of snow in excess of five inches, and that therefore the total cost of the contract to the purchasing agency was unclear. In addition, the division noted that ITB did not clearly specify whether bidders would be required to own or control specific equipment, and that the inspection provision should specify the requirements to be met (*i.e.*, identify applicable published standards, or generally require performance capability). With respect to the subcontractor list, the division suggested that the solicitation should specify that the list is not due until five days after it is requested. In light of these problems in the initial solicitation, the division recommended that the solicitation be cancelled.

Consistent with the division's recommendation, on October 26 the department cancelled the solicitation, citing as grounds 2 AAC 12.860(2) and (3). Under these provisions, a purchasing agency may reject all bids on the grounds that the specifications were "ambiguous or otherwise inadequate", or that "the solicitation did not provide for consideration of all factors of significance to the state." A request for quotations was issued for a temporary contract, which was awarded to Snowball. Western filed an appeal. While the appeal was pending, the department issued a new solicitation. Bids on that solicitation are due on December 30.

III. Discussion

In its appeal, Western points out that the department cancelled the solicitation due to perceived ambiguities, but that none of the bidders had objected to any of the provisions of the invitation to bid and that all of the bidders understood it to mean just what the department intended. Western argues that because none of the bidders objected, and the bidders all understood the invitation as the department intended, the solicitation should not be cancelled. Rather, the cancellation should be rescinded and the protest should be addressed on its merits. Western argues that the decision to cancel the solicitation rather than to address the issues raised in the protest creates an appearance of impropriety. Western asserts that because bid prices have been exposed, cancellation creates a reverse auction in which the purchasing agency effectively forces bidders to compete against the lowest prior bidder.

⁹ See Western Protest at 4.

A. The Purchasing Agency Had Valid Grounds for Cancellation

As Western points out, to the extent that ambiguous bid specifications are understood by all bidders in accordance with the purchasing agency's intent, any ambiguity is harmless. But 2 AAC 12.860(2) provides for rejection of all bids not only when the specifications are ambiguous, but also when they are "inadequate." More particularly, 2 AAC 12.860(3) provides for rejection of all bids when "the solicitation did not provide for consideration of all factors of significance to the state." In this case, as the Division of General Services pointed out, the invitation to bid was obviously deficient with respect to a key factor of significance: price.

The evaluated bid price in the solicitation was the cost for clearing a single snowfall of two to five inches. As issued, the evaluated price did not include any additional work beyond a single snowfall of two to five inches, and it thus completely ignores the cost impact of equipment rental for additional work. Western asserts that this deficiency created excessive costs on the prior contract, such that what should have been a \$250,000 contract resulted in billings of \$1,300,000. Plainly, this deficiency rendered the original solicitation inadequate, and resulted in the omission of a factor of primary significance to the purchasing agency. Cancellation was in the best interest of the state for this reason alone, without regard to any other concerns.

B. There is No Appearance of Impropriety

In its appeal, Western suggested that there is an appearance of impropriety because rather than sustaining the protest and awarding the contract to Western, the department cancelled the solicitation without providing a clear explanation for doing so, and because it awarded the temporary contract to the same contractor that Western had identified as non-responsive, in a solicitation that contained substantially the same language as was contained in the solicitation that the department had cancelled on the ground that it contained ambiguous or inadequate specifications.

The department's protest report provided additional detail regarding the reasons for cancellation. Most importantly, the protest report identified a patent deficiency in the price evaluation component of the initial solicitation, in that it failed to provide for evaluation of the actual cost of services to the state. The department has provided the Division of General Service's email from October 26 pointing out that particular concern,

and recommending cancellation. There is no evidence of bias or favoritism, and there is no appearance of impropriety.

C. Bidders Are Not Unfairly Prejudiced

Western objects that cancelling the solicitation, rather than reverting to the original solicitation and deciding its protest on the merits, gives the purchasing agency an unfair advantage because it forces all bidders to compete against the prior low bid. But that objection assumes a bidding structure that is identical to the first solicitation. In fact, the revised solicitation, issued on December 9, significantly altered the prior bid format by providing a definition of a “snow event” and eliminating any bid schedule for individual equipment. Under the new solicitation, the patent defect in the prior bid has been addressed, because the estimated total actual cost to the purchasing agency is captured by the bid price. In the prior solicitation, each bidder could artificially reduce their bid price in anticipation that income from the called-out equipment would make up for it. The new solicitation does not include any per hour payments, and provides only for payment on the basis of a “snow event”. Under the new solicitation, all bidders will compete on an equal playing field. While the prior bids provide a basis for estimating the competitive range under the new solicitation, the overall effect is better for both bidders and the purchasing agency, because it prevents gaming the evaluated bid.

IV. Conclusion

The department had grounds for cancellation under 2 AAC 12.860, and Western has not shown that cancellation was an abuse of discretion or in bad faith. Because the solicitation was properly cancelled, the protest is moot. The appeal is denied.

DATED December 29, 2009.

Signed _____
Andrew M. Hemenway
Administrative Law Judge

Adoption

Western Construction filed a proposal for action asking for an award of bid preparation costs on the grounds that cancellation occurred as a result of issues raised in its protest. Because of the Department of Military and Veterans' Affairs had grounds for cancellation independent of the specific issues raised in the protest, an award of bid preparation costs is inappropriate.¹⁰

On behalf of the Commissioner of the Department of Administration, the undersigned adopts the proposed decision as final under the authority of AS 44.64.060(e)(1). 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.

February 18, 2010

By: Signed _____
Andrew M. Hemenway
Administrative Law Judge

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

¹⁰ See In Re Dick Fisher Development No. 2, Inc. v Department of Administration, 838 P. 2d 263 (Alaska 1992)