

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

TSURU MARITIME, INC.,	)	
v.	)	
DEPARTMENT OF ENVIRONMENTAL	)	
CONSERVATION	)	OAH No. 10-0620-PRO
<hr/>	)	RFP 2011-1800-09338
TSURU MARITIME, INC.,	)	
v.	)	
DEPARTMENT OF ENVIRONMENTAL	)	
CONSERVATION	)	OAH No. 10-0633-PRO
<hr/>	)	RFP 2011-1800-09338

**DECISION ON MOTION TO DISMISS**

**I. Introduction**

This procurement appeal consists of two consolidated cases, arising from a solicitation that has been cancelled. The first appeal raises the issue whether Tsuru Maritime, Inc. (Tsuru) was entitled to the Alaska bidder preference in the now-cancelled solicitation, and the second requests an award of the costs of preparing a proposal in response that solicitation.

The Department of Environmental Conservation filed a motion to dismiss both appeals, the first on the ground that the issue raised is moot (because the solicitation has been cancelled), and the second on the ground that it fails to state a basis for the relief requested (because it is undisputed that the cancellation was proper).

Because the solicitation has been cancelled and Tsuru has consented to dismissal of its appeal regarding eligibility for the Alaska bidder preference, the first appeal is dismissed. Because under the undisputed facts Tsuru is not entitled to an award of the costs, the procurement officer's decision to deny those costs is sustained.

**II. Facts**

The Department of Environmental Conservation (Department) issued Request for Proposals No. 2011-1800-9338 on July 16, 2010 (initial RFP). Following two amendments and a pre-proposal conference on August 10, an amended RFP was issued on August 13 (RFP). As amended on August 13, the RFP sought proposals to manage the Ocean Ranger program beginning with the 2011 cruise ship season, following the expiration of the initial contract covering the 2008-2010 seasons. The Ocean Ranger program requires that licensed marine engineers or other appropriately trained individuals be placed on board large commercial passenger vessels (cruise ships) to monitor and report on engineering, sanitation and health

related vessel operations, including marine discharges and other pollution control requirements. The selected contractor was to recruit, hire, train and manage individuals to act as Ocean Rangers, refine the existing reporting document, and generally administer the program and manage the logistics of placing Ocean Rangers on board.

Six responsive proposals were submitted on the August 31 due date, from Maersk, Crowley (the incumbent contractor), Saltwater, Tsuru, Totem Ocean, and Alaris. The evaluated costs shown on the proposals varied widely. In view of the wide variation in the evaluated costs the procurement officer, after consulting with the project director and Department of Administration procurement staff, determined to issue a revised cost spreadsheet and require resubmission of the cost proposals.

Amendment No. 6 was issued on September 10, with responses due on September 21. Amendment No. 6 substantially revised the cost proposal spreadsheet. All six offerors resubmitted their cost proposals, and Crowley (as permitted by Amendment 6) submitted a revised technical proposal as well. All proposals were deemed responsive. Once again, the cost spreadsheets included a wide variation in evaluated costs. However, the Department elected to make an award based on the revised cost proposals.

The Department issued a notice of intent to award the contract to Maersk, the highest ranked offeror considering cost (up to 40 points in the evaluation) and technical factors (up to 60 points). Thereafter, Crowley, Saltwater and Tsuru filed protests. Tsuru's protest raised four issues: (1) the RFP did not inform offerors of the basis for the evaluated cost of the proposals; (2) the evaluated cost understated the actual cost to the purchasing agency; (3) Maersk had not included in its evaluated costs all of the expenses that it should have; and (4) Tsuru was entitled to the Alaska bidder preference (10 points in the evaluation).

The procurement officer consulted with the division of general services and it was determined that the solicitation should be cancelled, based primarily on the ground that, as Tsuru's protest asserted, the evaluated cost would not accurately reflect the actual costs incurred by the Department. On October 28, notice of cancellation was provided by the procurement officer. Tsuru then filed an appeal seeking a decision on appeal regarding its claim to be eligible for the Alaska bidder preference (OAH No. 10-0620-PRO).

In addition, Maersk and Tsuru filed separate protests of the procurement officer's decision to cancel the solicitation. Maersk sought to overturn the protest and reinstate the original notice of intent to award, while Tsuru sought an award of its costs incurred in preparing

a response to the cancelled solicitation. Both protests were denied, and Maersk (OAH No. 11-001-PRO) and Tsuru filed separate appeals (OAH No. 10-0633-PRO). A proposed decision was issued in Maersk's appeal sustaining the decision to cancel the solicitation, but prior to entry of a final decision Maersk and the Department entered into an agreement settling their dispute, and that appeal was dismissed. Tsuru maintains its appeal regarding an award of its costs.

### **III. Discussion**

#### **A. The Appeal In No. 10-0620-PRO Is Dismissed**

Tsuru's protest to the solicitation, filed after a notice of intent to award the contract but prior to cancellation, raised four issues, three of which were implicitly resolved in its favor in the proposed decision issued in the Maersk appeal.<sup>1</sup> Only one issue from that protest was maintained by Tsuru in its appeal after cancellation of the solicitation, namely, the question of Tsuru's eligibility for the Alaska bidder preference.<sup>2</sup>

Whether Tsuru was eligible for the Alaska bidder preference is a moot question: resolving that question will make no difference in the outcome of the solicitation, because the solicitation has been cancelled and Tsuru does not seek to overturn the cancellation. Because the issue is moot, the Division filed a motion to dismiss the appeal. In its response to the motion, Tsuru consented to dismissal of the appeal.<sup>3</sup> Accordingly, the appeal in No. 10-0620-PRO is dismissed.

#### **B. Undisputed Evidence Establishes That An Award Of Costs Is Unwarranted**

##### *1. The Motion Is Treated As A Motion For Summary Adjudication*

Tsuru's second appeal, No. 10-0633-PRO, is from the denial of its protest (filed after cancellation) requesting an award of the costs of preparing a proposal. In its appeal, Tsuru contends that the Department should be held accountable, through the payment of reasonable costs, for the defects in the original RFP that led to cancellation.<sup>4</sup>

The Department's motion to dismiss asserts that costs are not an available remedy where a solicitation has been properly cancelled. The Department argues:

An award of proposal preparation costs to a prevailing protestor is appropriate in cases where there has been a finding that the underlying decision of the procurement officer was without reasonable basis. There is no legal or factual

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<sup>1</sup> The proposed decision in Maersk's appeal was attached as an exhibit to the Department's motion.

<sup>2</sup> Tsuru Appeal, November 4, 2010, at p. 1.

<sup>3</sup> Tsuru Response at 3 ("OAH No. 10-0620 is Tsuru's protest appeal of DEC's failure to apply the Alaska bidder and offeror preferences to Tsuru's proposal. Tsuru consents to dismissal of this protest appeal.").

<sup>4</sup> Tsuru Response at 2, 3.

basis for making an award to a party whose protest is not sustained in whole or in part, or where the ALJ has made an express finding that the underlying agency decision had a reasonable basis. Here, in order for Tsuru to be the prevailing party, it must show that the underlying decision being protested was without reasonable basis.<sup>[5]</sup>

The Department characterizes Tsuru's request for costs as dependent on its protest of the cancellation. Because the cancellation was proper, the Department argues, Tsuru's post-cancellation protest was properly denied and costs are therefore not an available remedy. But although it was only in its post-cancellation protest that Tsuru specifically requested costs as a remedy, Tsuru's request for costs is not dependent on that protest. Rather, Tsuru's request is an outgrowth of the action that the Department took in response to its initial protest objecting to the terms of the RFP.

The procurement officer's response to Tsuru's initial protest was a letter dated October 28, 2010, stating:

After reviewing and evaluating your protest letter...the department has determined that certain points raised on protest arise from ambiguous and/or inadequate RFP specifications with respect to the cost proposals. Therefore, the department is rescinding the Notice of Intent to Award a Contract..., rejecting all proposals, and cancelling [the] RFP....

This letter was the functional equivalent of a decision in Tsuru's favor on its protest, and implementing cancellation of the solicitation as the appropriate remedy. Tsuru's post-cancellation request for costs is the functional equivalent of an appeal from the procurement officer's implicit determination, embodied in the October 28 letter, that cancellation (rather than cancellation plus an award of costs) was the appropriate remedy for the defects in the terms of the RFP that were identified by Tsuru in its first protest. Tsuru's request warrants a direct response. To hold otherwise could present the appearance (to an offeror) that the Department has attempted to evade liability for costs for issuing a defective RFP by cancelling the solicitation.<sup>6</sup> That, in itself, could be deemed a bad faith action warranting an award of costs, even if cancellation was an appropriate remedy.<sup>7</sup> To avoid any such appearance of impropriety,

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<sup>5</sup> Department Motion at 2 (footnotes omitted).

<sup>6</sup> See Western Construction & Equipment, LLC v. Department of Military and Veterans Affairs, OAH No. 09-0659-PRO at 4 (Commissioner of Administration 2010) (protestor claims "there is an appearance of impropriety because rather than sustaining the protest and awarding the contract to [protestor], the department cancelled the solicitation without providing a clear explanation for doing so...").

<sup>7</sup> See Western Construction & Equipment, LLC v. Department of Military and Veterans Affairs, OAH No. 09-0659-PRO at 6 (Commissioner of Administration 2010) ("Because...the [agency] had grounds for cancellation

Tsuru's request for costs should be considered on its merits.<sup>8</sup> Accordingly, the Department's motion to dismiss is denied. Because the facts, as set forth above, are undisputed, the motion is treated as a motion for summary adjudication.<sup>9</sup>

## 2. *An Award Of Costs Is Not An Appropriate Remedy*

The issue raised in OAH No. 10-0633-PRO is whether, on the undisputed facts as set forth above, an award of costs was an appropriate remedy (in addition to cancellation) for Tsuru's initial protest. The appropriate remedy when a protest is sustained is determined in light of all of the circumstances, including the following specific statutory factors: (a) the seriousness of the procurement deficiency; (b) the degree of prejudice to the parties and to the integrity of the procurement system; (c) whether the agency and the parties acted in good faith; (d) the extent to which the procurement has been accomplished; (e) costs and other impacts to the purchasing agency; and (f) any other relevant considerations.<sup>10</sup>

### a. *Seriousness of procurement deficiency*

In this case, the Department of Environmental Conservation issued a solicitation that failed to provide it with an adequate basis for evaluating the relative actual costs of the proposals submitted. While this error was serious with respect to its effect on the Department's ability to obtain the most beneficial contract, it was not serious with respect to the Department's legal obligation to conduct a procurement in good faith and in conformity in law.

Because of its impact on the Department's ability to conduct a successful procurement and obtain the best value, the deficiency warranted cancellation of the solicitation.<sup>11</sup> If cancellation had not been a feasible remedy, then an award of costs might have been appropriate.<sup>12</sup>

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independent of the specific issues raised in the protest, an award of bid preparation costs is inappropriate." [emphasis added; citation omitted]).

<sup>8</sup> Cf. In Re Kyllonen, OAH No. 08-0399-PRO (Commissioner of Administration 2009) (good faith cancellation of solicitation did not preclude an award of costs on appeal).

<sup>9</sup> The commissioner may render a decision without an evidentiary hearing when the material facts are not in dispute. AS 36.30.610(b). Tsuru has not asserted that there are any material facts in dispute. If Tsuru wishes to contest any of the material facts, as stated in the text, or to introduce additional evidence in support of its appeal, it may, in a proposal for action, request request a remand for that purpose.

<sup>10</sup> AS 36.30.585; *see, e.g., State, Department of Administration v. Bachner Company, Inc.*, 167 P.3d 58 (Alaska 2007).

<sup>11</sup> *See, e.g., In Re Waste Management of Alaska, Inc.*, No. 01.08 at 18 (Department of Administration 2002).

<sup>12</sup> *See, e.g., In Re Bachner Co., Inc., Department of Administration* No. 02.06/07 (Department of Administration 2002) (protest sustained and proposal preparation costs awarded where cancellation was not an appropriate remedy), *affirmed, State, Department of Administration v. Bachner Co., Inc.*, 167 P.3d 58 (Alaska 2007); In Re J&S Services, No. 02.01 (Department of Administration 2002) (protest sustained and bid preparation costs awarded where cancellation was not an appropriate remedy); In Re Human Resources Co., Inc., No. 97.09

b. Degree of prejudice to parties and procurement system

Tsuru incurred costs to prepare a solicitation that it cannot recoup in the course of contract performance, because the solicitation was cancelled. However, Tsuru would have incurred those same costs and would not have recouped them even if the solicitation had not been cancelled, unless Tsuru was selected as the contractor. Moreover, Tsuru's costs to prepare a response to a second solicitation will likely be reduced by virtue of the fact that it has already submitted a proposal. Thus, the degree of prejudice to Tsuru is in direct proportion to the likely outcome of the solicitation, had the Department revised the RFP rather than cancelling the solicitation. It is impossible to say with any certainty whether Tsuru would have been awarded the contract if the price terms of the RFP had been revised, because the cost proposals would have been different as well. It seems clear, however, that Tsuru would have submitted a proposal that was reasonably susceptible of award, given the scores on the technical evaluation and the prices previously submitted. Moreover, if, as an alternative to cancellation, the Department had elected to engage in further discussions and revisions, there is a substantial possibility that Tsuru would ultimately have been deemed the most favorable respondent. For these reasons, there is a substantial possibility that Tsuru would have been awarded the contract, and that the defects in the RFP were the reason it did not. Accordingly, this factor supports an award of some portion of Tsuru's costs.<sup>13</sup>

c. Good faith

There is no evidence of bad faith. Where there is bad faith or a violation of law, an award of costs typically is an appropriate protest remedy,<sup>14</sup> and may even be the only practicable remedy.<sup>15</sup> In the absence of bad faith, there is no legal obligation to reimburse an offeror for the costs of preparing a proposal.<sup>16</sup>

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(Department of Administration 1997) (protest sustained and bid preparation costs awarded where contract had been awarded).

<sup>13</sup> Prejudice to the procurement system is not a relevant consideration under the circumstances of this case.

<sup>14</sup> See In Re Bachner Co., Inc., Department of Administration No. 02.06/07 (Department of Administration 2002) (award of costs appropriate remedy for breach of implied covenant of fair and honest consideration, even absent bad faith on the part of the purchasing agency), *affirmed*, State, Department of Administration v. Bachner Co., Inc., 167 P.3d 58 (Alaska 2007); State, Department of Education v. Nickerson, 711 P.2d 1165, 1170 (Alaska 1985) (bid preparation costs may be awarded in absence of bad faith if procurement statutes violated); King v. Alaska State Housing Authority, 633 P.2d 256, 263 (Alaska 1981) ("Breach of this implied contract [to consider bids honestly and fairly] on the part of the agency entitles a disappointed bidder to recover the costs incurred in preparation of the bid.").

<sup>15</sup> See In Re Bachner Co., Inc., Department of Administration No. 02.06/07 (Department of Administration 2002) (otherwise appropriate cancellation was not feasible; costs awarded), *affirmed*, State, Department of Administration v. Bachner Co., Inc., 167 P.3d 58 (Alaska 2007); NANA Management Services, LLC v. Department

d. Extent accomplished

The solicitation has been cancelled, and there is no risk of upsetting an existing contract. This factor has no relevance to an award of the costs.

e. Costs and other impacts to the agency

By issuing a new solicitation that corrects the defects in the RFP that were the subject of Tsuru's initial protest, the Department will achieve a more accurate evaluation based on actual costs. This likely will result in cost savings over the period of performance, by providing for the selection of a contractor at a lower actual cost to the Department. An award of costs would compensate Tsuru for the costs it incurred while likely still providing the Department savings in the long term under the resulting contract. This factor supports an award of costs in addition to cancellation.

f. Other circumstances

Tsuru's central argument is that the Department should be held accountable for the defects in the RFP because by issuing a solicitation with ambiguous or otherwise inadequate terms, the purchasing agency failed to live up to its purported "complete duty...to issue an RFP free of defects."<sup>17</sup>

The short answer to Tsuru's argument is that there is no such duty. The legal obligation of a purchasing agency is to act in good faith and in compliance with the law. When the purchasing agency acts in good faith and complies with the law, it has fulfilled its legal duty. Good faith mistakes will sometimes occur, but do not necessarily (and did not in this case) result in a violation of any applicable legal requirement.

Tsuru argues that the RFP wording was so defective as to be "apparent to a reasonably careful and reasonably skilled person," and that to issue an RFP with such defective wording constitutes gross negligence on the part of the Department.<sup>18</sup> Tsuru argues that a potential offeror has no obligation to file a protest, and that, accordingly, the purchasing agency is entirely responsible, and should be fully accountable through the payment of costs, for any and all errors in the contents of the RFP.<sup>19</sup>

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of Transportation and Public Facilities, OAH No. 09-0068-PRO at 19, n. 77 (Commissioner of Transportation and Public Facilities 2010).

<sup>16</sup> In Re Waste Management of Alaska, Inc., No. 01.08 at 18 (Department of Administration 2002).

<sup>17</sup> Tsuru Response at 3.

<sup>18</sup> Tsuru Response at 2, note 1.

<sup>19</sup> Tsuru Response at 3.

It may be that, as Tsuru asserts, potential offerors are under no legal obligation to file protests in advance of the due date. However, it is not true that the failure to file a protest in advance of the due date has no consequences. The RFP stated:

Offers should carefully review this solicitation for defects and questionable or objectionable material. Comments concerning defects and objectionable material must be in writing and received by the procurement officer at least ten days before the proposal opening. This will allow issuance of any necessary amendments. It will also help prevent the opening of a defective solicitation and exposure of the offeror's proposals upon which award could not be made. Protests based on any omission or error, or on the content of the solicitation, will be disallowed if these faults have not been brought to the attention of the procurement officer, in writing, at least ten days before the time set for opening.<sup>[20]</sup>

This provision clearly and expressly informed offerors of the importance of careful review of the terms of the solicitation for defects, and that they should bring any defects to the attention of the Department in advance of the due date. One consequence of the failure to do so is that a protest based on those defects may be untimely, and thus subject to dismissal without consideration.<sup>21</sup> But, as this provision in the RFP suggests, even if a protest filed after the due date is timely (or is accepted despite being untimely), that a defect in the solicitation was not brought to the attention of the procurement officer in advance of the due date is an appropriate consideration in determining the remedy in the event the protest is sustained.<sup>22</sup>

Notifying the procurement officer of defects, either through written comments or by filing a protest, in advance of the due date provides the purchasing agency with the opportunity to correct errors, which is better for both the purchasing agency and for potential offerors. Moreover, filing a protest puts the purchasing agency on notice that continuing with the solicitation, and awarding a contract, are actions subject to review in the context of a protest and appeal. To award costs as a remedy when the defect in the solicitation was not brought to the attention of the procurement officer until after the due date would effectively encourage offerors to disregard defects, thus preventing timely corrective action, and would provide offerors who are aware of errors with a second opportunity to obtain an award in the event their first proposal

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<sup>20</sup> RFP §1.07.

<sup>21</sup> See AS 36.30.565.

<sup>22</sup> See, In Re Sanders, OAH No. 05-0240-PRO at 22 (Commissioner of Administration 2005) (denying costs because protest alleging terms of solicitation were unduly restrictive was untimely, even though the good cause existed to consider the untimely protest on appeal and it was sustained on appeal); In Re Waste Management of Alaska, Inc., No. 01.08 at 18 (Department of Administration 2002) (“In light of this factor [absence of bad faith] and WMAI’s failure to raise the issue...at an earlier time, an award of bid preparation costs is not an appropriate remedy.”).



is not selected. This would be detrimental to the purchasing agency's interests and unfair to other offerors. That Tsuru had no legal obligation to bring defects to the attention of the Department does not mean that its failure to do so may not be considered as a factor in determining an appropriate remedy.

**IV. Conclusion**

Tsuru consented to dismissal of its appeal regarding the Alaska bidder preference. Under the circumstances of this particular case, cancellation was an appropriate remedy. Because the Department did not act in bad faith or violate the law, and because Tsuru failed to file a protest prior to the due date, an award of the costs of preparing a proposal is not an appropriate additional remedy.

DATED July 25, 2011.

By: Signed  
Andrew M. Hemenway  
Administrative Law Judge

**Adoption**

The undersigned adopts this 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 Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 17<sup>th</sup> day of August, 2011.

By: Signed  
Signature  
Becky Hultberg  
Name  
Commissioner  
Title

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