

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

NATE GEARY and GEORGE CAMPBELL))
v.))
DEPARTMENT OF TRANSPORTATION))
AND PUBLIC FACILITIES) OAH No. 11-0367-PRO
_____) RFP No. 2511038

DECISION

I. Introduction

Nate Geary protested the award by the Department of Transportation and Public Facilities (Department) of a contract for airport inspections. The protest was denied and Mr. Geary filed an appeal with the Commissioner of Administration. On appeal Mr. Geary and his business partner, George Campbell, contend that the Department erred by not providing notice to either of them of the issuance of the request for proposals.

Under Alaska law the contracting agency is required to provide notice to a prospective contractor upon request. Notice was not provided as required by law. The protest is therefore sustained. As a remedy, the Department shall not renew the contract, and shall issue a new solicitation for services beginning in 2012.

II. Facts

The Department of Transportation and Public Facilities is responsible for periodic safety inspections of 381 rural public airports in Alaska in accordance with Federal Aviation Administration (FAA) requirements as stated in FAA Order No. 5010 (5010 inspections).¹ In recent years, the Department has conducted these inspections through independent contractors. Starting around three or four years ago, Rich Sewell, a transportation planner in the Department's statewide aviation section in Anchorage, was responsible for managing the 5010 inspection process statewide.

¹ RFP pp. 1, 24.

In 2005, a solicitation for the 5010 inspections was posted on the Department's webpage for construction-related procurements, where employees of Morris Engineering noticed it. Morris Engineering submitted an offer and was awarded a one-year contract. Nate Geary, an employee of the firm who was a pilot, conducted the inspections. In 2006, another firm was awarded a one-year contract for the inspections. In 2007, a solicitation for the 5010 inspections was once again posted on the Department's webpage for construction-related procurements, and once again the contract was awarded to Morris Engineering, this time for two years (2007-2008). Mr. Geary performed the inspections as an employee of Morris Engineering in 2007. Later in 2007, Mr. Geary left Morris Engineering and went to work for the Department. After the expiration of the Morris Engineering contract in 2008, the Department issued another solicitation, which was again posted on the Department's webpage for construction-related procurements, and awarded a three year contract (2008-2010) for the inspections to the sole respondent,² Northern Lights Renewables, LLC, (Northern Lights) whose managing director and primary pilot-inspector was William Bullock.

In April, 2010, in a conversation with a member of the Department's aviation contracting staff, Mr. Geary learned that the amount of money being charged by the new contractor was about twice what his former firm, Morris Engineering, had charged.³ Concerned at the cost, Mr. Geary let Mr. Sewell know that he could perform some of the inspections in his capacity as a Department employee, which could result in some cost savings for the state.⁴ Mr. Geary also suggested that Mr. Sewell issue the solicitation for the next contract in the fall of 2010, in order to ensure that contractors would have sufficient lead time to plan and conduct inspections during the spring and summer of 2011, when weather conditions are optimal for Alaska flying (prior solicitations had been issued later in the year).⁵ Mr. Sewell informed Mr. Geary that he anticipated issuing a solicitation in October, 2010, with the contract being issued in February, 2011.⁶ In mid-June, 2010, following up on Mr. Sewell's suggestion that he contact the incumbent

² Testimony of N. Geary, 0:46-47.

³ R. 206 (Protest Appeal, p. 2).

⁴ Testimony of N. Geary, 0:24; R. 202-203 (Protest at 1-2); R. 305 (Protest Appeal p. 3); Email, N. Geary to R. Sewell, 4/1/2010 @ 4:24 p.m.

⁵ R. 205 (Protest Appeal, p. 1).

⁶ Testimony of N. Geary; R. 203 (Protest, p. 2).

contractor about working on the project in his private capacity, Mr. Geary submitted an ethics disclosure and request for permission to pursue the work.⁷ Mr. Geary's request was approved,⁸ and on June 24, 2010, Mr. Geary contacted Mr. Bullock to let him know that he was available as a potential subcontractor to perform the Southeast Region inspections planned for the summer of 2010.⁹ Nothing came of that contact, however.

With the 2008-2010 contract largely completed, in September, 2010, the Department initiated planning for a replacement contract, with Rich Sewell continuing as the project manager.¹⁰ By then, Mr. Geary had decided to pursue award of the contract as an independent contractor. He partnered with George Campbell, a pilot of his acquaintance with 30 years' experience in Alaska, to prepare for submission of a proposal.¹¹ In September, 2010, Mr. Campbell obtained the necessary training to perform the inspections.¹² On September 30, 2010, Mr. Geary for the second time requested, and on November 19 received, permission from his ethics supervisor to do the work in a private capacity, this time by submitting a proposal when the solicitation was issued.¹³

On December 3, 2010, at Mr. Sewell's request, Deputy Commissioner Marc Luiken issued an authorization to solicit professional services for the airport inspections beginning in April, 2011, for the 2011-2013 inspections.¹⁴ At the time, procurement staff notified Mr. Sewell that there was some doubt as to whether the contract should be treated as construction-related, as it had in prior years.¹⁵ In January, 2011, Mr. Campbell

⁷ A copy of Mr. Geary's letter, dated June 11, requesting permission to perform the work as a subcontractor was submitted with the appeal. *See also* R. 207 (Protest Appeal, p. 3); R. 201 (Protest, p. 1) ("I asked for and received permission from the S.E. Region Design Group Chief, Pat Carroll, and the Southeast Regional Director, Gary Davis, to submit a proposal on the project as a private contractor.")

⁸ Email, R. Sewell to N. Geary, 5/21/2010 @ 2:14 p.m. A copy of the Ethics Disclosure Form was submitted with the appeal. Mr. Geary's supervisor approved the ethics disclosure on June 24, and the ethics supervisor approved it on June 25.

⁹ Email, N. Geary to W. Bullock, 6/24/2010 @ 8:58 a.m. *See* R. 207 (Protest Appeal, p. 3).

¹⁰ R. 10-11. These documents pertain to a contract between the Department and Southern Illinois University under which the university would process the inspection contract(s), assist in the collection of data, and assist in the disbursement of funds by GCR & Associates, which was the recipient of the federal grant funds through which the project was to be funded.

¹¹ R. 205, 207 (Protest Appeal, pp. 1, 3).

¹² Testimony of G. Campbell, 0:53; R. 205 (Protest Appeal, p. 1).

¹³ A copy of Mr. Geary's second request and the ethics disclosure form was submitted with the appeal. *See* R. 207 (Protest Appeal, p. 3).

¹⁴ R. 4.

¹⁵ Bates 1413 (Email, J. Mitchell to R. Sewell, 12/3/2010 @ 4:01 p.m.).

contacted Mr. Luiken, now the newly-appointed Commissioner, asking for an update on the status of the solicitation.¹⁶ Commissioner Luiken referred Mr. Campbell to Mr. Sewell.¹⁷ Mr. Sewell referred Mr. Geary to Sharon Frascati.¹⁸ On January 13, 2011, Mr. Geary contacted Ms. Frascati, who was the supervisor of the Department's Central Region professional services procurement unit, and left a voice message inquiring about the project status.¹⁹ Subsequently, Ms. Frascati spoke with Mr. Geary, referred him back to Mr. Sewell, and told him that when the request for proposals was issued it would be posted on the Department's website.²⁰

On February 25, 2011, Mr. Sewell provided Ms. Frascati with documents relating to the project and requested formal initiation of the procurement process.²¹ Mr. Campbell sent an email to Mr. Sewell in the morning on March 1, pointedly noting that the prime spring flying time was rapidly approaching.²² Mr. Sewell responded that afternoon, stating that "[t]he RFP is down in procurement contracts right now, and so should be out on the street soon."²³ At around the same time, Mr. Geary contacted Mr. Sewell by telephone, informed him of his intent to submit a proposal, and was told that the request for proposals should be issued within a few weeks.²⁴ On March 3, 2011, Ms. Frascati determined that, although the aircraft inspection services had previously been conducted as construction-related, in fact the services were not construction-related and should therefore be procured through the Department's Statewide Procurement Office, in Juneau.²⁵ She copied Mr. Sewell with an email to that effect, noting that she had forwarded the documents that Mr. Sewell had provided to her to the Department's

¹⁶ Email, G. Campbell to M. Luiken, 1/13/2011 @ 2:30 a.m.

¹⁷ Email, M. Luiken to G. Campbell, 1/13/2011 @ 3:09 p.m.

¹⁸ N. Geary testimony, 0:40.

¹⁹ Testimony of S. Frascati; Bates 1575 (telephone diary, 1/13/2011).

²⁰ N. Geary testimony, 0:28. Mr. Geary testified that he had a conversation with Ms. Frascati in mid-February, after Mr. Sewell had told him that the solicitation was being prepared by procurement personnel, and that Ms. Frascati was upset because at the time of the call Mr. Sewell had not yet submitted the solicitation for preparation of a request for proposals. Ms. Frascati did not recall the details or the date of her call to Mr. Geary in response to his January 13 voice message.

²¹ See Email, S. Frascati to L. Lawrence, 3/2/2011 @ 5:09 p.m.

²² Email, G. Campbell to R. Sewell, 3/1/2011 @ 11:00 a.m.

²³ Email, R. Sewell to G. Campbell, 3/1/2011 @ 3:11 p.m..

²⁴ See R. 207 (Protest Appeal, p. 3) (referencing phone call in February).

²⁵ Email, S. Frascati to L. Lawrence, 3/2/2011 @ 5:09 p.m. See Protest Report, p. 1.

statewide aviation unit.²⁶ Mr. Sewell questioned the change, but was informed that Ms. Frascati's determination was correct.²⁷

Charles Deininger manages the Department's unit for non-construction related procurements Statewide and in the Southeast Region. On March 3, 2011, he assigned John Wynne to be the procurement officer for the airport inspection project.²⁸ Mr. Wynne is an experienced procurement officer. He immediately started to prepare a request for proposals for the project, with the intent of posting the solicitation the following week, sending an email to Mr. Sewell with a draft request for proposals and a list of questions.²⁹ In response to the Department's expressed desire to have the work begin in the spring, the draft request for proposals included an issue date of April 1 and a contract start date of May 6, 2011; in response to Mr. Sewell's comment that the Department might choose to do some of the work using its own (unidentified) employees, the draft included language allowing it to do so.³⁰ Mr. Sewell was out of the office for a couple of weeks and did not provide an alternative contact, as Mr. Wynne had requested, and in the absence of timely answers to his questions Mr. Wynne was unable to complete work on the draft request for proposals until April 1, and even then he had a number of unanswered questions.³¹ To accommodate the short time remaining before the desired start date, Mr. Wynne shortened the time for posting the solicitation prior to award to 14 days.³² In the meantime, in Mr. Sewell's absence, Mr. Campbell was referred by Department staff to Linda Bustamante, a project assistant in the Department's Statewide Aviation section who worked closely with Mr. Sewell, for information on the status of the project.³³ Ms. Bustamante informed him that the project was "being processed by DOT&PF purchasing" (*i.e.* by procurement staff), adding "As soon as we hear something

²⁶ Email, S. Frascati to L. Lawrence, 3/2/2011 @ 5:09 p.m.

²⁷ Bates 1396 (Emails, K. Kristy to R. Sewell, 3/7/2011 @ 11:41 a.m.; R. Sewell to S. Frascati, 3/2/2011 @ 10:39 p.m.).

²⁸ See Email, C. Deininger to R. Sewell (cc S. Frascati, J. Wynne), 3/3/2010 @ 8:49 a.m.

²⁹ Email, J. Wynne to R. Sewell, 3/7/2011 @ 4:01 p.m.

³⁰ J. Wynne testimony, 2:49; R. 20, 23. See Protest Report, p. 1.

³¹ See Email, J. Wynne to R. Sewell, 4/1/2011 @ 2:01 p.m.

³² R. 42.

³³ G. Campbell testimony, 1:10-1:12.

we'll let you know.”³⁴ Ms. Bustamante passed on Mr. Campbell's request for information to the Department's Juneau office.³⁵

Upon his return to the office, on March 30, 2011, Mr. Sewell extended the existing contract with Northern Lights.³⁶ Still, he did not send Mr. Wynne responses to the questions Mr. Wynne had posed to him earlier that month, and on April 18 Mr. Wynne again emailed Mr. Sewell, noting that he had not received answers to his questions, and asking if Mr. Sewell still wanted the request for proposals to be issued.³⁷ By then, because of the delay in preparing the request for proposals, the earliest that a contract could be placed in effect was about May 12,³⁸ well into the favorable spring flying season. But by May 12, Mr. Sewell had still not contacted Mr. Wynne. Mr. Wynne then contacted Linda Bustamante to provide the necessary information,³⁹ but she was unable to do so.⁴⁰ Finally, in early June, Mr. Sewell contacted Mr. Wynne and provided additional information.⁴¹ Mr. Wynne provided a final version of the request for proposals for Mr. Sewell's review on June 9, and with Mr. Sewell's approval Mr. Wynne issued the request for proposals and posted it online on June 10, 2011. Ironically, on that same day, Mr. Geary, who was unaware that the solicitation had been issued, requested and received, for the third time, permission from his ethics supervisor to submit a proposal.⁴²

The request for proposals was posted on the State's online public notice webpage, as is required by law for all solicitations, and not on the Department's webpage, where the Department routinely posts its construction-related solicitations as a courtesy for construction contractors. Mr. Geary and Mr. Campbell, both of whom were experienced

³⁴ Email, L. Bustamante to G. Campbell, 3/29/2011 @ 1:21 p.m.. *See also*, Emails, G. Campbell to R. Sewell (cc L. Bustamante), 3/15/2011 @ 7:11 p.m.; L. Bustamante to G. Campbell, 3/16/2011 @ 11:58 a.m.; G. Campbell to L. Bustamante, 3/21/2011 (cc R. Sewell), 3/21/2011 @ 10:10 a.m.; L. Bustamante to G. Campbell, 3/25/2011 @ 11:56 a.m. (“Hi George, Just confirming that you've heard from Rich?”); G. Campbell to L. Bustamante, 3/25/2011 @ 7:05 p.m. (“uh, nope. Not since an email weeks ago saying it would be out that week or early the next, and that he was on his way to vacation.”).

³⁵ L. Bustamante testimony, 2:26.

³⁶ Email, R. Sewell to W. Bullock, 3/30/2011 @ 12:49 p.m.

³⁷ Email, J. Wynne to R. Sewell (cc L. Bustamante), 4/18/2011 @ 11:12 a.m.

³⁸ *Id.*

³⁹ Email, J. Wynne to L. Bustamante, 5/12/2011 @ 8:35 a.m.

⁴⁰ L. Bustamante testimony, 2:27.

⁴¹ Emails, R. Sewell to J. Wynne, 6/3/2011 @ 12:45 p.m., 1:12 p.m.; 6/6/2011 @ 12:58 p.m.

⁴² A copy of Mr. Geary's third letter requesting permission, dated June 10, and of the ethics supervisor's approval, dated June 16, was included with the protest appeal. *See* R. 207 (Protest Appeal, p. 3); Protest Report at 6 (noting confirmation of ethics supervisor's approval).

in the construction contract solicitation process, were familiar with the Department's webpage for posting solicitations online. Neither of them was aware of the existence of the State's online public notice webpage, and neither had any idea that the Department might issue a solicitation that it did not post on its own webpage. Throughout the time that the request for proposals was under development, from early March through the mid-June, Mr. Geary and Mr. Campbell monitored the Department's webpage for notice of the request for proposals. That is the webpage on which the prior solicitation had been posted and it is the webpage to which they had been directed by various Department personnel, including procurement personnel.⁴³ In addition, during that time, they left telephone messages with Mr. Sewell expressing interest in the solicitation; Mr. Sewell did not respond and did not inform Mr. Wynne of the receipt of those messages.⁴⁴ Also, as previously described, they had contacted Ms. Bustamante by email on multiple occasions to express interest in the solicitation and requesting information.⁴⁵ At no time was either Mr. Geary or Mr. Campbell referred by anyone to Mr. Wynne, who, as the procurement officer for the solicitation, should have been the primary point of contact for all inquiries regarding the solicitation.

Under the terms of the request for proposals, proposals were due no later than June 24, with an anticipated start-up date of July 11. The request for proposals included a requirement for a \$1,000,000 per seat aviation liability insurance policy.⁴⁶ The contract was to run through April 15, 2012, for the initial term, and the Department had the right, in its sole discretion, to renew the contract for up to two additional one-year periods. The minimum requirements were that offerors must have, within the last ten years: (1) at least five years' experience in flying light aircraft in Alaska; (2) at least two years' experience in performing 5010 inspections; and (3) completion of the 5010 training course offered by GCR & Associates. Changes from the insurance requirements were permissible only upon approval by the Department of Administration, Division of Risk Management. Offerors were not guaranteed a specific number of airports, and the state retained the right to perform some of the 5010 inspections itself.

⁴³ N. Geary testimony, 0:18-19, 0:43

⁴⁴ Testimony of N. Geary, 0:17, 0:42-0:43; R. 206-207 (Protest Appeal, pp. 2-3).

⁴⁵ See notes 34-36, *supra*.

⁴⁶ This requirement was inserted by language provided by the Division of Risk Management at Mr. Wynne's request, even though Mr. Wynne believed it was unnecessary. See J. Wynne testimony, 3:48.

Only one proposal was submitted, by the incumbent contractor, Northern Lights, at a total cost of \$210,000 in the first year of the contract (Tasks 1-5), including \$202,000 for the core tasks of airport inspections (Tasks 1-3).⁴⁷ Mr. Wynne determined that the proposal was responsive, and on June 28 he notified Mr. Sewell that he was prepared to issue the contract upon Mr. Sewell's approval of the amount.⁴⁸ Mr. Sewell did not contact Mr. Wynne, and on July 7 Mr. Wynne sent a follow up email again requesting direction.⁴⁹ Mr. Sewell responded that afternoon, directing Mr. Wynne to enter into price negotiations, since the offered price was in excess of the available funding.⁵⁰ Mr. Wynne contacted Mr. Bullock and requested a price of \$186,300 (Tasks 1-5), including \$178,300 for the airport inspections (Tasks 1-3).⁵¹ With some minor adjustments to the work schedule and a commitment to timely payments, Northern Lights agreed to that price.⁵² On July 18, Mr. Wynne issued notice of intent to award the contract to Northern Lights.⁵³ A written contract in the amount of \$182,300 (Tasks 1-4), including \$178,300 for the inspections (Tasks 1-3) was executed on July 25.⁵⁴

After the execution of the written contract, on July 25, Mr. Wynne asked Northern Lights to submit proof of the required insurance, notifying him that contract performance could not begin until the insurance had been verified.⁵⁵ Mr. Bullock then realized, for the first time, that the request for proposals had required a \$1,000,000 per seat liability policy, which Northern Lights lacked, and he requested a waiver of that requirement. He also requested waiver of the requirement for workers' compensation insurance, on the ground that Northern Lights had no employees.⁵⁶ Mr. Wynne, by that time, was himself on leave, which led to further delays in determining what to do about the insurance issue.⁵⁷ Eventually, the Department waived those requirements, and on August 2, 2011,

⁴⁷ R. 146. These were Tasks 1, 2 and 3 of the scope of work. The offered price for Tasks 4 and 5 was \$8,000.

⁴⁸ R. 148 (Email, J. Wynne to R. Sewell, 6/28/2011 @ 11:16 a.m.).

⁴⁹ R. 148 (Email, J. Wynne to R. Sewell, 7/7/2011 @ 8:50 a.m.).

⁵⁰ R. 147-148 (Email, R. Sewell to J. Wynne, 7/7/2011 @ 4:51 p.m.).

⁵¹ R. 150 (Email, J. Wynne to W. Bullock, 7/11/2011 @ 11:29 a.m.).

⁵² R. 149 (Email, W. Bullock to J. Wynne, 7/12/2011 @ 4:28 p.m.).

⁵³ R. 159.

⁵⁴ R. 160-161. The price for Task 4 was reduced to \$4,000 (and the work cut in half), and Task 5 was eliminated. R. 178.

⁵⁵ R. 180 (Email, J. Wynne to W. Bullock, 7/25/2011 @ 11:45 a.m.).

⁵⁶ Bates 292-293.

⁵⁷ R. 207 (Email, R. Gattung to W. Bullock, 7/27/2011 @ 12:20 p.m.).

issued a notice to proceed, which was countersigned by Mr. Bullock on September 9,⁵⁸ about one year after the initial planning for the procurement.

Several weeks later, as a result of a conversation with one of the Department's aviation staff, Mr. Geary learned for the first time that the request for proposals had been issued, that the contract had been awarded, and that Mr. Wynne had been the procurement officer. In response, he filed this protest.

III. Discussion

Mr. Geary's protest objected to the manner in which this solicitation had been conducted, primarily asserting that: (1) the project manager had failed to take appropriate action in response to Mr. Geary's expressed interest in submitting a proposal; (2) Department personnel had provided incorrect information regarding the location in which the solicitation would be posted online; and (3) because only one offer was submitted, award of the contract was not in the state's best interests. The Department filed a motion for summary adjudication, asserting that Mr. Geary's objections concerned the actions of the project manager and other employees who were not responsible for the conduct of the solicitation, and that the issues he raised were not within the scope of a protest. Because the Procurement Code governs the conduct of a solicitation, and not solely the actions of procurement personnel, the motion was denied.⁵⁹ Mr. Geary's sole argument on appeal is that he is entitled to relief under the Procurement Code based on the manner in which the purchasing agency notified prospective offerors of the issuance of the request for proposals.

A. The Department Must Notify A Prospective Contractor On Request

Notice of the issuance of a request for proposals is governed by AS 36.30.210(d):

Notice of a request for proposals shall be given in accordance with procedures under AS 36.30.120. The procurement officer may use additional means considered appropriate to notify prospective offerors of the intent to enter into a contract through competitive sealed proposals.

⁵⁸ Bates 942. The requirement for workers' compensation insurance was waived with the concurrence of the Division of Risk Management because Northern Lights had no employees. With respect to the \$1,000,000 per seat requirement, Mr. Sewell asked the Division of Risk Management for authorization to "amend the RFP", and the division declined to do so. Bates 1469. Mr. Sewell's inquiry, and the division's response, mischaracterized the issue: the Department did not want to amend the request for proposals, it wanted to waive the insurance requirement on the ground that it was unnecessary for the protection of the state's financial interests.

⁵⁹ Memorandum and Order Denying Summary Adjudication (November 17, 2011).

The methods of notice under AS 36.30.130 are these:

- (a) ...Notice shall be posted on the Alaska Online Public Notice System (AS 44.62.175). The time and manner of notice must be in accordance with regulations adopted by the commissioner of administration. When practicable, notice may include
 - (1) publication in a newspaper...;
 - (2) notices posted in public places...;
 - (3) notices mailed to all active prospective contractors on the appropriate list maintained under AS 36.30.050.^[60]

As provided in AS 36.30.130(a) and 2 AAC 12.220,⁶¹ notice of a request for proposals must also be provided in accordance with 2 AAC 12.130, which, in addition to the notice requirements described in AS 36.30.130(a), states:

- (d) The procurement officer shall provide notice of [a request for proposals] to a prospective contractor upon request, regardless of the location of the prospective contractor.

It is this last requirement, for notice to a “prospective contractor upon request,” that governs this appeal.

B. Nate Geary and George Campbell Requested Notice

It is undisputed that Mr. Geary and Mr. Campbell were prospective contractors who repeatedly and directly informed various persons in the Department of Transportation and Public Facilities that they wished to be notified of the issuance of the request for proposals. Their documented, written (email) requests were made over a period of several months, from January 13, 2011, and continuing at least through March 25, 2011, directly to procurement officials in the Department, to the project manager, to Department employees with operational responsibilities related to the project, and to Department supervisory officials. Most of these requests, if they were not made by Mr. Geary or Mr. Campbell directly to Mr. Sewell, the project manager, were, at one time or another, communicated by the recipient to him. In addition, Mr. Geary and Mr. Campbell made a number of direct telephone calls to Mr. Sewell requesting information about the solicitation.

⁶⁰ AS 36.30.050(a) states “the commissioner shall establish and maintain current lists of persons who desire to provide supplies, services, professional services, or construction services to the state.” AS 26.30.050(c) states: “The lists may be used by the chief procurement officer or an agency when issuing invitations to bid or requests for proposals under this chapter.”

⁶¹ This regulation states: “Public notice shall be given by distributing the request for proposals or notice of requests for proposals in the manner provided in 2 AAC 12.130.”

For much of the time that Mr. Geary and Mr. Campbell were repeatedly asking a variety of Department employees for information about the status of the solicitation, the project manager had not yet formally initiated the procurement process, and as a result no procurement officer had been assigned to that particular solicitation. However, for several weeks after March 3, 2011, when Mr. Wynne was assigned as the procurement officer, Mr. Geary and Mr. Campbell repeated their requests, which were forwarded to Mr. Sewell, the project manager. At that time, Mr. Geary and Mr. Campbell were told by Department personnel that “[a]s soon as we hear something we’ll let you know.”⁶² In addition, after Mr. Wynne had been assigned, they left telephone messages with Mr. Sewell asking for information on the status of the solicitation.

In the face of these repeated and unmistakable requests for information, to suggest that the Department substantially complied with 2 AAC 12.130(d) is simply untenable. That it is the procurement officer who is responsible under 2 AAC 12.130(d) for providing notice “upon request” does not necessarily mean that the request must have been directed by the prospective contractor to the procurement officer. To construe 2 AAC 12.130(d) in that fashion would effectively impose on prospective offerors the obligation to intuit the identity of the procurement officer, which is information in the sole possession of the purchasing agency until the solicitation has been issued. Rather, the only practicable construction of the regulation is that the procurement officer must, at the least, provide notice to a prospective contractor upon a request made after assignment to the solicitation, whether the request is made directly to procurement officer or to the project manager.⁶³ In this particular case, the record establishes that at least some of Mr. Geary’s and Mr. Campbell’s requests for information were made directly to the project manager, and others were provided to him, on multiple occasions after Mr. Wynne was assigned to the procurement. Under these circumstances, the failure to provide notice to either of them was contrary to 2 AAC 12.130(d).

The Department has argued that even if the Department was required to provide notice, the failure to do so should be excused because Mr. Geary and Mr. Campbell failed

⁶² Email, L. Bustamante to G. Campbell, 3/29/2011 @ 1:21 p.m.

⁶³ Whether 2 AAC 12.130(d) requires the procurement officer to provide notice to a prospective contractor in other circumstances need not be addressed. This decision addresses the circumstances of this case (a request provided to the project manager after appointment of a procurement officer), not different circumstances that may arise in other cases.

“to take every opportunity to obtain the solicitation,” citing a federal Comptroller General decision, Wind Gap Knitwear, to that effect.⁶⁴ That case involved a federal procurement regulation (since repealed) that required the purchasing agency to place all firms “that have submitted solicitation mailing list applications” to be placed on that mailing list, that is, the list of firms to whom copies of the solicitation would be sent when it was issued. Wind Gap Knitwear, Inc. (Wind Gap) learned of an anticipated solicitation when advance notice was published in the Commerce Business Daily on April 12, 1996. The notice “indicated an anticipated May 25 closing date and invited interested firms to request a copy of the solicitation.” On April 22, Wind Gap sent a written request to the specified address. The purchasing agency failed to add Wind Gap to the mailing list, but after the May 25 date had passed, Wind Gap failed to contact the agency or renew its request. The solicitation was eventually issued on August 14, and five proposals were received by the September 13 closing date. Eventually, on March 27, 1997, Wind Gap contacted the purchasing agency and was told of the award, after which it filed a protest.

Leaving aside the degree to which this particular federal precedent is persuasive in the context of Alaska’s notice requirements, it is clear that the factual situation in this case is quite different than in Wind Gap Knitwear. In that case, the prospective contractor was provided formal notice of a specific anticipated solicitation date, whereas Mr. Geary and Mr. Campbell were never given any date other than “soon” or “in a couple of weeks.” During the time frame they had been lead to believe that the solicitation would be issued, and for a lengthy period of time thereafter, Mr. Geary and Mr. Campbell repeatedly and diligently attempted to obtain information from multiple sources within the Department as to the status of the solicitation. This is exactly what the Wind Gap Knitwear decision points out the prospective contractor in that case had failed to do. Finally, and with due respect for the Comptroller General’s decision, 2 AAC 12.130(d) does not say that the failure to provide notice as required by law may be excused based on a prospective contractor’s lack of diligence after making a request for notice. To the extent that a prospective contractor’s alleged lack of diligence is relevant to a protest

⁶⁴ Reply to Opposition to Motion for Summary Adjudication at 1, *citing In Re Wind Gap Knitwear*, No. B-276669 (Comp. Gen. 1997), 1997 WL 382976.

based on violation of the express requirement of 2 AAC 12.130(d), it may be considered in the context of determining the appropriate remedy.

C. Appropriate Remedy

When a protest is sustained, the procurement officer must implement an appropriate remedy after considering all of the circumstances, including (1) the seriousness of the procurement deficiency, (2) the degree of prejudice to the parties and the procurement system, (3) whether any defect in the procurement was in good faith, (4) the extent to which the procurement has been accomplished, and (5) costs and other impacts to the purchasing agency.⁶⁵ Failure to comply with AS 36.30.130 does not invalidate an award of a contract, but if the purchasing agency fails to substantially comply with AS 36.30.130, the protestor may be awarded damages.⁶⁶

(1) Seriousness of Procurement Deficiency

The failure to comply with 2 AAC 12.130(d) is a serious procurement deficiency. The general purposes of the Procurement Code were set out in legislation adopted when the code was enacted in 1986.⁶⁷ They include, among other things, fair and equitable treatment of offerors, maximization of the purchasing value of state funds, and facilitating broad-based competition.⁶⁸ Notice required by law includes not only general public notice through the state's online public notice system, but notice to prospective contractors upon request. Providing notice to prospective contractors who have expressed interest in a particular solicitation serves the purposes for which the Procurement Code was enacted and is in the state's best interests.

(2) Degree of Prejudice to the Parties and the Procurement System

Mr. Geary and Mr. Campbell were prejudiced because they reasonably relied on the information provided to them by the Department as to the manner in which the solicitation would be posted. The procurement system was prejudiced because absent

⁶⁵ AS 36.30.585; *see, e.g., State, Department of Administration v. Bachner Company, Inc.*, 167 P.3d 58 (Alaska 2007).

⁶⁶ AS 36.30.130(b) states: "Failure to comply with the notice requirements of this section does not invalidate a bid or the award of a contract. If the state fails to substantially comply with the requirements of (a) of this section, the state is liable for damages caused by that failure." Because the protestors in this case did not submit a proposal and have not requested an award of damages as an administrative remedy, it is not necessary to decide whether damages (at the administrative level) for failure to comply with AS 36.30.130(a) are limited to the costs of preparing a proposal. *See* AS 36.30.585(b).

⁶⁷ Section 1, Chapter 106, SLA 1986.

⁶⁸ *Id.*, subsections 4, 5, 6.

their participation only a single response was received, at a price substantially in excess of what Mr. Geary and Mr. Campbell state they were prepared to offer, and the request for proposals contained terms that, according to them, they would have protested as unduly restrictive.⁶⁹

(3) Good Faith

There is no evidence of bad faith. However, the failure to provide notice after repeated requests to the Department could create an appearance that the incumbent contractor was the beneficiary of favoritism, particularly in light of the fact that only one proposal was submitted.

(4) Extent to Which Procurement Accomplished

The procurement has been completed, the contract has been awarded, and the first year term has been substantially completed.

(5) Costs and Other Impacts to the Purchasing Agency

There is ample time to conduct a solicitation for services beginning after the end of the initial year, assuming that the new solicitation (unlike the prior one) is conducted without undue and unreasonable delay.

(6) Other Circumstances

The record in this case reflects that the solicitation was unduly and unreasonably delayed, with the result that services were not begun when the prior contract was set to expire, much less during the spring of 2011 when flying conditions were optimal. In addition, the request for proposals as issued included insurance requirements that were ultimately waived as unnecessary. Finally, the record amply indicates that the manner in which the Department responded to Mr. Geary's and Mr. Campbell's requests for information about the solicitation was inadequate. Under these circumstances, in addition to resolicitation, the matter should be reviewed by the chief procurement officer

⁶⁹ The request for proposals included several provisions that Mr. Geary and Mr. Campbell asserted were unduly restrictive. In addition to the \$1,000,000 per-seat insurance requirement, which the department waived, the incumbent contractor lacked, and which Mr. Geary testified is essentially not available in the market, these were (1) the requirement for two years' experience in conducting 5010 inspections; (2) the prohibition on passengers; and (3) the requirement for five years' experience in Alaska flying. Mr. Geary asserted that only Mr. Bullock, Mr. Bullock's partner, and himself met these three requirements, thus essentially restricting the field of potential competitors (assuming the insurance requirements were waived, as occurred) to two: NLR and Mr. Geary.

for consideration of additional training, changes in policies and procedures, and any other appropriate action.

IV. Conclusion

The protest is sustained. The award of the contract is confirmed, but the Department of Transportation and Public Facilities shall not exercise its option of renewal.

This matter is referred to the chief procurement officer to determine whether specific changes should be made to existing regulations, the administrative manual, whether additional training or information should be provided to procurement officers on the relevant issues, and whether any other corrective actions should be taken.

DATED February 2, 2012.

Signed _____
Andrew M. Hemenway
Administrative Law Judge

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

NATE GEARY and GEORGE CAMPBELL))
))
v.))
))
DEPARTMENT OF TRANSPORTATION))
AND PUBLIC FACILITIES)) OAH No. 11-0367-PRO
) RFP No. 2511038
_____)

Adoption

The undersigned, in accordance with AS 44.64.060(e)(3), revises the remedy in this case and accordingly amends the first paragraph of the Conclusion of the proposed decision, at page 15, to read as follows:

The protest is sustained. The award of the contract is confirmed. The Department of Transportation and Public Facilities shall extend the period of performance for airport inspections scheduled to be completed in the first year of the contract through September 30, 2012, but shall not exercise its option of renewal. A solicitation for all of the airport inspections, to be conducted over a three-year period beginning in 2012, or, if that is not feasible, for the remaining airport inspections, to be conducted over a two-year period beginning in 2012, shall be issued expeditiously.

As amended, the proposed decision dated February 2, 2012, is adopted.

This is the final administrative decision. 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 15th day of March, 2012.

By: Signed
Signature
Becky Hultberg
Name
Commissioner
Title

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