

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

In the Matter of:)	
)	
DITTMAN RESEARCH AND)	
COMMUNICATIONS)	
)	
v.)	
)	
DEPARTMENT OF PUBLIC SAFETY)	OAH No. 13-0148-PRO
<hr/>)	Agency No. RFQ 12-99784

DECISION ON MOTION TO DISMISS

I. Introduction

The Department of Public Safety (DPS) issued a Request for Quotation (RFQ) for conducting two telephone surveys. Dittman Research and Communications (Dittman) was one of three companies that submitted a quote. Another company was awarded the contract, and Dittman protested that award. A notice was issued stating that Dittman’s protest was denied, but also stating that Dittman could appeal that denial to the Commissioner of Administration. Dittman did file an administrative appeal. Subsequently, DPS reconsidered the content of its notice and concluded that, under the rules applicable to small procurements, Dittman had no right to an appeal to the Commissioner of Administration. DPS has now moved to dismiss this administrative appeal. Dittman has opposed that motion.

Based on the pleadings and on the agency record, this appeal is dismissed.

II. Facts¹

On November 21, 2012, DPS issued an RFQ seeking a contractor who would perform two telephone surveys, one in January, and one in July of 2013.² The contract was awarded to the low bidder, Hays Research Group, LLC.³ Dittman filed a protest.⁴ On January 11, 2013, Deputy Commissioner Terry Vrabec denied the protest. The denial letter included the following statement:

¹ Documents within the agency record are referred to in this decision. To the extent this could be viewed as relying on evidence outside the pleadings, there is no genuine factual dispute as to the evidence relied on to support this decision.

² Agency Record, Exhibit 2.

³ Agency Record, Exhibit 3.

⁴ Agency Record, Exhibit 5.

Appeal Procedures:

You may appeal this protest decision to the Commissioner of the Alaska Department of Administration within ten (10) days of receipt of this decision in accordance with Alaska Statute 36.30.590, which reads:

- a) An appeal from a decision of a procurement officer on a protest may be filed by the protestor with the Commissioner of Administration An appeal shall be filed within ten (10) days after the decision is received by the protestor. The protestor shall file a copy of the appeal with the procurement officer.
- b) An appeal must contain the information required under AS 36.30.560. In addition, the appeal must include
 - 1) a copy of the decision being appealed; and
 - 2) identification of the factual or legal errors in the decision that form the basis for the appeal.^[5]

On January 22, 2013, Dittman filed a timely appeal with the Commissioner of Administration.⁶ On January 29, 2013, this matter was referred to the Office of Administrative Hearings for a hearing.⁷ On February 8, 2013, Deputy Commissioner Vrabec wrote to the Commissioner of Administration, asking that the appeal information be returned to DPS based on DPS's belief that there was no right to appeal a small procurement decision.⁸

III. Discussion

A. Process for Small Procurement Disputes

The State Procurement Code provides for protesting procurement decisions, and for appealing decisions concerning a protest.⁹ Small procurements, however, are exempted from these procedures.¹⁰ A small procurement is one that contracts for services not exceeding a total dollar amount of \$50,000.¹¹ The protest procedure for small procurements is set out in 2 AAC 12.695. Under this regulation, the first step is to attempt to resolve the dispute informally.¹² If this is unsuccessful, the interested party may file a protest with the commissioner of the

⁵ Agency Record, Exhibit 6, pages 3 – 4. The omitted language consists of the name and address of the current Commissioner of Administration; language which is not part of AS 36.30.590.

⁶ Agency Record, Exhibit 7.

⁷ Notice of Referral in OAH file.

⁸ Agency Record, Exhibit 8.

⁹ AS 36.30.550 – 699.

¹⁰ AS 36.30.550(a).

¹¹ AS 36.30.320(a). A small procurement also includes the purchase of supplies in an amount less than \$50,000, construction less than \$100,000, or the lease of less than 3,000 square feet of space. AS 36.30.320(a).

¹² 2 AAC 12.695(a).

purchasing agency, or with the commissioner’s designee.¹³ The “appropriate commissioner or commissioner’s designee”¹⁴ then has four options. The options relevant to this dispute are

(2) issue a decision denying the protest and stating the reasons for denial; [or]

* * *

(4) conduct a hearing on the protest consistent with the procedures contained in AS 36.30.670(b).^{15]}

B. *DPS’s Motion Should Be Granted*

DPS argues that Deputy Commissioner Vrabeck was wrong to reference the appeal procedures in AS 36.30.590, and that any appeal of the protest decision must be to the Superior Court. DPS goes on to argue that because the Commissioner of Administration and the Office of Administrative Hearings have no authority to hear this appeal, the matter must be dismissed.

As stated above, the commissioner or commissioner’s designee has several options when a protest of a small procurement is received. 2 AAC 12.695 allows the procuring agency to either make the final agency decision or hold a hearing that would result in the final agency decision. Any hearing held to resolve the protest would be before the commissioner of the procuring agency, who would refer the matter to the Office of Administrative Hearings to actually conduct the hearing.¹⁶

In this case, Deputy Vrabeck’s letter could be read as exercising two options under 2 AAC 12.695. He denied the protest and he offered a hearing. The record does not disclose whether Deputy Commissioner Vrabeck is the designee of the Commissioner of DPS for purposes of 2 AAC 12.695. If he has been formally designated to act on the Commissioner’s behalf, then he should clarify whether he is denying the protest pursuant to 2 AAC 12.695(g)(2) or is granting a hearing pursuant to 2 AAC 12.695(g)(4). If Deputy Commissioner Vrabeck is not the Commissioner’s designee, then the Commissioner of DPS will have to make that determination. In either event, this is not a decision that can be made by the Commissioner of Administration.

Dittman argues that the legislature intended to provide a right to an administrative appeal for all small procurement protest decisions. The applicable statute says “The commissioner shall

¹³ *Id.*

¹⁴ 2 AAC 12.695(g). In this case, appropriate commissioner would be the Commissioner of DPS or his designee.

¹⁵ 2 AAC 12.695(g). The other options are to use an alternate dispute resolution process or to sustain the protest in whole or in part.

¹⁶ AS 36.30.670.

adopt regulations providing for protest and appeal procedures of small procurements made under AS 36.30.320.”¹⁷ Dittman argues that this statute requires the availability of an administrative appeal whenever a protest is denied. The regulation that was adopted, 2 AAC 12.695, does not explicitly provide for any appeal. The decision not to include in the regulation a process for appealing a protest decision means any appeal would be to the Superior Court pursuant to Rule of Appellate Procedure 602.¹⁸

This regulation does provide the option for an administrative hearing when the commissioner or commissioner’s designee deems it appropriate to hold a hearing.¹⁹ This would be a hearing to actually make the agency decision concerning the protest. Given the less formal nature of small procurements, this is not an unreasonable implementation of the legislature’s directive to adopt procedures for protesting a small procurement decision.

C. Agency Record

Dittman argues that regardless of the ruling on DPS’s motion, the agency record must be supplemented with additional documents. For purposes of this hearing, the agency record consists of “the record relied on” when DPS denied Dittman’s protest.²⁰ The record may be more than just those documents that support DPS’s decision, but it may also be less than all documents related to the performance of this and previous telephone survey contracts. Nevertheless, this appeal is dismissed on legal grounds and not on the merits of Dittman’s protest. There is no need to supplement the record to make this decision. The request to supplement the record is moot.

IV. Conclusion

To the extent Dittman has the right to a hearing on its protest, that hearing would be before the Commissioner of DPS. Accordingly, the appeal and request for a hearing before the Commissioner of Administration is dismissed without prejudice. In order to comply with 2 AAC
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¹⁷ AS 36.30.550(b).

¹⁸ Whether the decision not to provide an appeal process complies with the legislative directive is a question that cannot be resolved by the Commissioner of Administration. A validly adopted regulation must be followed unless a civil court rules otherwise.

¹⁹ Cf. AS 36.30.610(b) (allowing decision on protest appeal without a hearing when the dispute involves only questions of law); AS 36.30.360(b) (in contract claim, commissioner may adopt decision of the procurement officer without a hearing).

²⁰ AS 44.64.060(b).

12.695, the Commissioner of DPS, or his designee, shall properly inform Dittman whether a decision has been made to deny the protest or to grant a hearing on the protest.

DATED this 20th day of March, 2013.

Signed _____
Jeffrey A. Friedman
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 36.30.675. The undersigned, on behalf of the Commissioner of Administration and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Rule 602 of the Alaska Rules of Appellate Procedure within 30 days after the date of this decision.

DATED this 6th day of May, 2013.

By: *Signed* _____
Signature
Becky Hultberg
Name
Commissioner
Title

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