

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

BWC ENTERPRISES, INC.)	
)	
v.)	OAH No. 16-1249-PRO
)	Agency No. 170000003
DEPARTMENT OF MILITARY AND)	
<u>VETERANS AFFAIRS</u>)	

DECISION ON SUMMARY ADJUDICATION

I. Introduction

BWC Enterprises, Inc., submitted a bid for, and was awarded a contract by the Department of Military and Veterans Affairs for janitorial services. When the parties discovered that they did not agree on a key term in the contract, the Department cancelled the original bid, and issued a second invitation to bid. BWC again submitted a bid for the contract, but this time it was not the low bidder. It then filed a protest to the second procurement, arguing that the procurement was invalid because it already had a valid contract for the same services. Because BWC did not submit its protest within 10 days of the solicitation, BWC’s protest was not timely. Therefore, BWC’s protest is dismissed.

II. Facts

In past years, BWC Enterprises, Inc., has held the janitorial contract issued by the Department of Military and Veterans Affairs for cleaning the Alaska National Guard readiness center and airplane hangar in Bethel. BWC’s employees had keys to the facilities, and would clean them one night per week.¹

When the expiration of the 2015-16 contract was approaching in July 2016, no renewal options remained, so a new contract had to be put out for bid. The Department followed standard procurement practice and issued an invitation to bid on June 15, 2016 (the “June ITB”).² BWC was the successful bidder.³ On July 28, 2016, Dustin Silva, the Department’s procurement officer for this contract, sent a contract to BWC (the “July contract”).⁴ Brian Cook, the Vice President of

¹ BWC Exhibit N at 4; BWC Exhibit A at Amendment 2. Because this decision is addressing the Department’s Motion for Summary Adjudication, all facts supported by reasonably reliable documents in the record are interpreted in the manner most favorable to BWC. Should this matter ever go to hearing, facts found as established in this decision might be contested, and the ultimate factual determination might be different.

² Dep’t Exhibit B.

³ BWC Exhibit B.

⁴ Dep’t Exhibit C.

BWC, signed the contract, and returned it to Mr. Silva.⁵ Although no representatives of the Department other than Mr. Silva ever signed the contract, Mr. Silva informed Mr. Cook that the contract began on August 1 and work could begin after Mr. Cook had signed the contract and returned it to Mr. Silva.⁶ During the week of August 1, Mr. Cook's employees did clean the hangar and readiness center under this contract, using their keys to let themselves in after hours.⁷

A problem, however, immediately arose. The June ITB had specified that the janitorial services were to be performed "during business hours."⁸ Mr. Cook did not believe that this requirement prevented BWC from cleaning at night. He reasoned that business hours for cleaning were at night. The Department did not agree. On August 8, the building manager, James Rheault, sent an email to Mr. Cook, requiring that BWC employees turn in their keys and that Mr. Cook provide a schedule for cleaning compliant with the requirement that the contract be performed during business hours.⁹

Mr. Cook replied the same day. He explained that he did not agree with the Department's interpretation and gave reasons for BWC's inability to clean in the daytime. He said that if daytime cleaning was the Department's intent, then "I will have to decline this contract."¹⁰ In an email later that day, Mr. Cook clarified that he was "open to options and open to trying to have the buildings cleaned when the occupants are there."¹¹ He just could not "guarantee that all of the time."¹² Mr. Rheault forwarded both emails to the Department's procurement specialist, explaining that, in his view, "Mr. Cook is demonstrating that he is unable to comply with the contract."¹³

On August 11, 2016, the Department issued a "NOTICE OF CANCELLATION," cancelling the June ITB.¹⁴ The notice explained that the cancellation was because the ITB was either ambiguous or inadequate with regard to the hours for performance of the work.¹⁵ It advised

⁵ BWC Exhibit E.
⁶ BWC Exhibits D, E.
⁷ Dep't Exhibit H at 2; BWC Exhibit L.
⁸ Dep't Exhibit B at 8.
⁹ Dep't Exhibit D at 2-3.
¹⁰ *Id.* at 2.
¹¹ *Id.* at 1.
¹² *Id.*
¹³ *Id.*
¹⁴ Dep't Exhibit E; F.
¹⁵ *Id.* at 1.

bidders that they could protest the cancellation by filing a protest within 10 days of the cancellation.¹⁶ BWC did not protest the cancellation.

On August 17, the Department issued a new Invitation to Bid on the Bethel janitorial contract (the “August ITB”).¹⁷ The August ITB advised that bids would close in two weeks, on August 31, and that no pre-bid conference would be held. BWC and two other firms submitted bids to the Department in response to the August ITB.

Early in the day on August 31, Mr. Cook alerted the Department’s procurement office to his sudden realization that, in fact, he already had a valid contract for the services being solicited by the August ITB.¹⁸ He explained that initially he had accepted the Department’s representation that the contract had never been finalized because it was not signed by the Department. But that day he happened to review his documents, and discovered that Mr. Silva had signed the contract. He was alerting them that his contract was valid and if they went forward with the August ITB, they might end up with two valid contracts.¹⁹

The Department responded that, in its view, the contract was not valid because it was never fully signed and executed. The bids were opened on August 31. BWC’s bid was not the low bid. A notice of intent to award the contract to Bethel Cleaning Services was issued on September 1.²⁰ A contract was awarded to Bethel Cleaning Services on September 9, 2016 (the “September contract”).²¹

On September 12, BWC filed a protest of the award of the contract.²² The protest made clear that it was a protest under the State Procurement Code of the award of contract # CTO9 17000046-2 (the official number of the September contract), which was from ITB 170000003 (the official number of the August ITB).²³ BWC asserted that the flaw in the August ITB process was that BWC already had a valid contract for the services sought under the August ITB. As damages, BWC requested payment of two months’ worth of service. Later in the protest process, BWC amended its damage claim to 12 months’ worth of service.

On September 20, 2016, the Department denied the protest. The Department found that the protest was not timely because a solicitation protest had to be filed 10 days before the due date

¹⁶

Id.

¹⁷

Dep’t Exhibit A.

¹⁸

Dep’t Exhibit H at 1-2; BWC Exhibit L.

¹⁹

Id.

²⁰

Attachment 2 to Protest Report for ITB 170000003 (Oct. 17, 2016).

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Dep’t Exhibit G.

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Attachment 8 to Protest Report.

²³

Id. at 1.

for the bids. It also found that BWC did not have a valid contract and that BWC had never protested the cancellation of the June ITB.²⁴

On September 30, BWC appealed the denial of its protest to the Commissioner of Administration. The Commissioner referred the appeal to the Office of Administrative Hearings. The Department filed a motion for summary adjudication, arguing that BWC's procurement protest was not timely.

At a status conference held on November 29, 2016, Administrative Law Judge Christopher Kennedy explained to Mr. Cook that contract claims were different from procurement protests.²⁵ He further explained that contract damages—such as those sought by Mr. Cook in this action—could only be awarded in a contract claim. In order for Mr. Cook to pursue a contract claim, however, he would have to file a new administrative action, separate from this procurement protest. Mr. Cook stated that he understood, but he still wished to go forward with his procurement protest.

BWC filed its brief in opposition to the Department's motion on December 16, 2016. The motion and the opposition are discussed below.

III. Discussion

The Department's primary argument for summary adjudication is that BWC's protest was late.²⁶ Under AS 36.30.565(a), a protest related to a solicitation for a procurement must be filed 10 days before the due date of the bids.

BWC argues in opposition to the Department's timeliness argument that it was not protesting the solicitation. It was protesting the *award* of the contract. When a protest concerns the award of the contract, the protest is timely if it is filed within 10 days of issuing the notice of intent to award.²⁷

BWC's opposition spends considerable time discussing the issue of contract validity, arguing that the August contract was valid and never rescinded. BWC also argues that the cancellation of the June ITB in August was a pointless and ineffective act. In BWC's view, given

²⁴ Attachment 9 to Protest Report.

²⁵ On January 9, 2017, this case was transferred to Administrative Law Judge Stephen C. Slotnick. ALJ Slotnick listened to the recording of the November 29, 2016 status conference.

²⁶ Summary adjudication in an administrative proceeding is appropriate when no material facts are in dispute and a decision is based solely on a question of law. In evaluating whether a party is entitled to summary adjudication, all facts are viewed, and inferences drawn, in the light most favorable to the party against whom adjudication may be granted. See, e.g., *In re Skaflestad*, OAH No. 13-0661-GUI at 8 n.68 (Board of Big Game Commer. Servs. 2014); *Samaniego v. City of Kodiak*, 2 P.3d 78, 82-83 (Alaska 2000).

²⁷ AS 36.30.565.

that it had a valid contract, the Department had to take action to cancel the contract. Cancelling the ITB was too late.

Although the parties disagree about the issue of contract validity, for purposes of summary adjudication, this decision accepts BWC's position that it had a valid and enforceable contract at the time that the Department issued the August ITB.²⁸ Accepting this proposition as true enables me to set aside much of the dispute between the parties, and focus strictly on the issue of whether BWC's protest was timely.

A. Was the protest of the solicitation or of the award?

As BWC correctly points out, the timeliness issue turns on whether BWC's protest was a protest of the *solicitation* or a protest of the *award*. Although BWC designated its protest as a protest of the award, I cannot simply accept that designation at face value. I must inquire into whether the protest is *actually* a protest of the solicitation, even though stated as a protest of the award.

To determine the actual target of the protest requires an inquiry into what BWC is alleging was a violation of the procurement process. In that regard, BWC's theory for a violation of the procurement process is that the new contract being awarded to Bethel Cleaning Services duplicated an existing valid contract already held by BWC. Because BWC believes that having duplicate contracts for the same service is inherently wrongful, the award of the duplicate contract was necessarily wrongful.

In BWC's view, however, the *solicitation* in the August ITB was not necessarily wrongful. The state is allowed to *solicit* for a contract even at the time that a contract for the same service is already in place. For example, in this procurement, the June ITB was issued before the old 2015-16 contract had expired. Thus, having an ITB out on the streets that solicits for a service for which the state already has a valid contract is not wrongful. Therefore, BWC argues, it could not have protested the solicitation. It had to protest the award.

BWC's distinction is not persuasive. Assuming BWC is correct that awarding a duplicative contract violates the laws governing the procurement process, then soliciting for a contract that would necessarily be a duplicative contract would also violate the procurement process. Under BWC's theory, what makes solicitation for a new contract during the term of an existing contract an acceptable practice is that once the new contract is in place, the old will have

²⁸ Nothing in this decision decides or implies that BWC had a valid contract. BWC will have to establish validity in a contract action. All this decision does is accept BWC's representation that the July contract was valid, so that I can address the issue of timeliness of the procurement protest without having to discuss the issue of validity.

expired. The new contract being solicited will not be duplicative. That circumstance, however, does not apply to the situation here. Here, at the time when the Department released the August ITB, if BWC's theory of error is correct (and, for purposes of this analysis, I accept that it is), then a valid contract was in existence and would remain in existence. The contract being solicited would necessarily be duplicative and therefore (in BWC's view) wrongful. That means that the solicitation would be just as wrongful as the award.

Moreover, as the Department correctly argues, one way to identify the type of defect that must be raised at the solicitation stage is to ask whether the defect could be cured at the solicitation stage.²⁹ If yes, then the defect is a defect in the solicitation, not a defect in the award.

Here, the alleged defect clearly could have been cured if it had been raised at the time of the August solicitation. The solicitation could have been cancelled, or postponed to allow the Department to cancel the July contract. These actions could have cured the potential duplication that BWC sees as the defective condition giving rise to its protest. It does no good to argue that, at the time of the solicitation, BWC did not know whether the Department might have later properly canceled the July contract in time for the award to be proper. Under that argument, an offeror could always delay a protest to the award stage because a defect in a solicitation might be cured or obviated by subsequent events. In short, if the defect is present in the solicitation, a protest must be filed no later than 10 days before the bids are due.³⁰ BWC did not do that, so its protest was not timely.

B. Did BWC's protest allege an impropriety or ambiguity?

BWC also makes an argument based on a strict interpretation of the words in the statute. It points out that the statute on timeliness, AS 36.30.565(a), instructs that "[a] protest based on alleged improprieties or ambiguities in a solicitation must be filed at least 10 days before the due date of the bid or proposal." It argues that this timeline does not apply here because its protest did not assert either an ambiguity or impropriety. BWC asserts that "impropriety" means "misconduct or a serious procurement deficiency."³¹ Because its protest was based on

²⁹ Cf., e.g., *J&S Servs., Inc. v. Dep't of Nat. Res.*, OAH No. 14-0472-PRO at 9 (Dep't of Admin. 2014) (holding that protest regarding failure of request for proposals to state how two different scenarios would be evaluated was untimely protest of solicitation because issue was knowable and cureable at solicitation stage); available at: <http://aws.state.ak.us/officeofadminhearings/Documents/PRO/PRO140472.pdf>; *aff'd*, *J&S Servs., Inc., v. Dep't of Nat. Res.*, Case No. 4FA-14-02651CI (Alaska Super. Ct. 2016); available at <http://aws.state.ak.us/officeofadminhearings/Documents/PRO/PRO140472%20Superior%20Court%20decision.pdf>.

³⁰ *Id.*

³¹ BWC Opposition at 5.

circumstances, rather than on ambiguous or improper language in an ITB, BWC concludes that it could raise its protest at the award phase rather than at the solicitation stage.

In support of its argument, BWC cites to the 2007 Alaska Supreme Court decision in *State, Dep't of Administration v. Bachner Co.*³² *Bachner*, however, does not help BWC. Although *Bachner* did involve an issue of misconduct by a person participating in the evaluation of a bid, *Bachner* does not define the term “impropriety” as used in AS 36.30.565, or limit its reach in AS 36.30.565 to misconduct by a government official. *Bachner* uses the term “impropriety” to describe both the individual’s misconduct and all irregularities that could be remedied following a successful procurement protest.³³ Therefore, nothing in *Bachner* could be interpreted to mean that the 10-day limit applies only to errors of misconduct or ambiguity in a solicitation.

Moreover, AS 36.30.565 uses the term “impropriety” again when describing the time limit for filing a protest to an award: “[a] protest based upon alleged improprieties in an award of a contract or a proposed award of a contract must be filed within 10 days after a notice of intent to award the contract is issued by the procurement officer.”³⁴ If BWC were correct, and the term “impropriety” meant only “misconduct,” then the time limits in AS 36.30.565 would apply only to errors of misconduct or ambiguity, without regard to whether the protest was lodged at the solicitation stage or the award stage. This narrow, formalistic interpretation of the term “impropriety” has never been found to be a limit on the scope of a procurement protest.

Indeed, a common online dictionary includes the following as definitions of impropriety: “the quality or condition of being improper; incorrectness” and “an erroneous or unsuitable expression, act, etc.”³⁵ The error alleged here by BWC is that the award of a duplicative contract is improper and an abuse of discretion because it is inherently wrongful. As this decision makes clear, that means that solicitation of an inevitably duplicative contract would also be improper. The allegation of procuring an improper contract is an allegation of impropriety that could be raised in a procurement protest. Therefore, the 10-day limit in AS 36.30.565(a) does apply to BWC’s protest. Because BWC’s protest was based on an alleged impropriety in the solicitation, it was not timely.

³² 167 P.3d 58, 60 (Alaska 2007).

³³ *Id.* at 61 (“Alaska Statute 36.30.585(b) grants the hearing officer a substantial amount of discretion to determine how to remedy a documented impropriety in the procurement process”).

³⁴ AS 36.30.565(a).

³⁵ <http://www.dictionary.com/browse/impropriety>.

C. Did BWC have good cause for not filing a timely protest to the solicitation?

A protestor may be excused from the 10-day requirement if the protestor shows good cause for the delay.³⁶ In this case, however, BWC did not argue that it had good cause for its delay. It argued only that awarding a duplicative contract is inherently wrongful, but that issuing a duplicative ITB is not inherently wrongful. That argument is a matter of legal interpretation, not good cause for delay.

In addition, determining whether a circumstance constitutes good cause for failing to timely protest requires analysis of “(1) the timing of the protest, (2) the nature of the objections raised, and (3) the strength of the evidence presented.”³⁷ BWC’s failure to protest as soon as it became aware that the ITB was (in its view) flawed, and instead waiting until after the bids had been evaluated and the intent to award was given to a different bidder, cuts strongly against finding that BWC had good cause for its failure to timely protest.³⁸ With regard to the nature of BWC’s objections and the strength of BWC’s evidence, this decision does *not* adopt BWC’s underlying assumption that awarding a duplicative contract is necessarily wrongful and a violation of the procurement process. BWC has not cited to any provision in the Procurement Code that makes it illegal for an agency to solicit for, or enter into, a duplicative contract. Entering into a duplicative contract may mean that the agency will inevitably be in breach of one of the two contracts. In turn, that may mean that the agency will owe contract damages to one of the parties. This might or might not be bad policy for the state. It might be bad policy if it costs the state unnecessary damages. It might not be bad policy, for example, if the second contract is so much more efficient than the first that it saves the state money to pay damages for one contract while procuring the goods or services under the other.

Even if the duplicative contract were bad policy, however, I do not see that BWC has raised an issue implicating the procurement process specified in the Procurement Code. Although an agency has discretion to cancel a procurement, if BWC were to argue that the issuance of, or failure to rescind, the August ITB was an abuse of discretion, this argument would lead us back to

³⁶ AS 36.30.565(b).

³⁷ *Right! Systems, Inc. v. Enterprise Tech. Servs.*, OAH No. 12-0008-PRO at 4 (Dep’t of Admin; 2012); available at: <http://aws.state.ak.us/officeofadminhearings/Documents/PRO/PRO120008.pdf>. See also *Davis Wright Tremaine LLP v. State, Dep’t of Admin.*, 324 P.3d 293, 300 (Alaska 2014) (affirming practice of “considering the timing of the protest, the nature of the objections raised, and the strength of the evidence presented” in evaluating good cause for late filing of protests).

³⁸ *Right! Systems*, OAH No. 12-0008-PRO at 5 (“By electing to submit a bid, rather than filing an untimely protest along with, or prior to, its bid, RSI not only deprived the procurement officer of the opportunity to take corrective action, but also created an opportunity to take two bites at the apple: if it had won the contract, it would not have filed a protest. For these reasons, the timing of RSI’s protest weighs against considering it now”).

BWC's real issue—its contract claim. If an abuse of discretion occurred here (and I am not suggesting that there was abuse of discretion), it occurred during the contract phase of the first contract (failure to cancel the contract) rather than the procurement phase of the second contract. In these circumstances, where the complaining party did not protest a cancellation of the earlier ITB, or file a timely protest to the new solicitation, finding an abuse of discretion by the Department at the award phase is extremely unlikely. Because the parties did not brief the merits of whether entering into duplicative contracts is an abuse of discretion in violation of the Procurement Code, this decision merely notes that if the case were to go forward past the summary adjudication stage, the probability that BWC could establish a violation of the procurement process is low.³⁹ To the extent that BWC has a cause of action (and, again, I am not addressing whether it does), that cause of action would appear to be through a contract claim rather than a procurement protest. In short, nothing in BWC's argument on the merits indicates that the strength of BWC's procurement protest warrants further examination of the issue of good cause.

Finally, BWC did allege that it relied on the Department's representations about the invalidity of the contract and therefore did not form its belief in the validity of the contract until August 31.⁴⁰ Even accepting BWC's factual representations about its reliance as true, however, and accepting that this reliance established good cause for waiting until August 31 or September 1 to protest the solicitation, it would not be good cause for waiting until September 12. As explained above, the facts presented and legal arguments made by BWC in response to the Department's motion do not establish good cause under the test for good cause that has been adopted by previous decisions.

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³⁹ Furthermore, the contract remedies requested by BWC would not be available to BWC in this action even if it could prove an abuse of discretion. Damages here are limited to bid preparation costs. AS 36.30.585(c). Moreover, if BWC were to prove an abuse of discretion, the remedy might be very limited, and could simply involve further training for the Department.

⁴⁰ BWC Opposition at 6-7. BWC did not assert, however, that its reliance was good cause for delaying its protest of the solicitation. BWC's actual argument is that the Department is liable in tort because the Department's representations were an act of bad faith that constitutes a violation of its duty to BWC. *Id.* at 15-18. Because tort damages are not available in this procurement protest, this decision does not discuss the merits of BWC's tort claim other than to note that this argument also does not affect the issue of good cause.

IV. Conclusion

BWC filed its procurement protest regarding contract # CTO9 17000046-2 after the procurement process had closed and an intent to award had been issued. Because the protest actually alleged a defect in ITB 170000003, the protest was not timely, and BWC did not have good cause for delay. Therefore, BWC’s protest is dismissed.

DATED this 24th of January, 2017.

By: Signed
Stephen C. Slotnick
Administrative Law Judge

Adoption

Under the authority of AS 44.64.060(e)(1), I adopt this decision 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 Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 10th day of March, 2017.

By: Signed
Signature
Sheldon Fisher
Name
Commissioner
Title

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