

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

AADLAND MARKETING GROUP, INC., )  
 )  
 v. ) OAH No. 07-0709-PRO  
 ) RFP No. 258010  
 DEPARTMENT OF TRANSPORTATION AND )  
 PUBLIC FACILITIES. )  
 )  
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**ORDER ON MOTION FOR ATTORNEY’S FEES**

Aadland Marketing Group (“Aadland”) has moved for an award all attorney’s fees and costs it has incurred in this matter, totaling approximately \$12,700. The single basis for the motion is AS 44.64.040, an authority to award sanctions that is vested in the Office of Administrative Hearings (OAH) and not in the final decisionmaker on the merits of this case. Accordingly, OAH will make a final ruling on the motion.

**I. Background**

This case grows out of a solicitation for competitive sealed proposals to perform a range of planning and marketing services for the Alaska Scenic Byways Program. Three vendors made submissions in response to the Request for Proposals, and DOT issued a notice of intent to award the contract to one of them, Information Insights, Inc. (“I-I”). The proposal of Aadland was deemed nonresponsive and was not considered.

Aadland, whose cost proposal was sixteen percent lower than I-I’s, protested on the basis that its proposal should not have been found nonresponsive. Aadland also contended that the award was improperly influenced by the fact that I-I’s Project Leader and main contact was Shannon McCarthy, who had just left employment at DOT and who had been involved to some degree in the scenic byways effort.

DOT procurement officer Jewelee Bell rejected the protest on December 5, 2007, and this appeal followed. To its credit, DOT voluntarily delayed the final award of the contract for several months pending a decision in this appeal, even though Aadland had not followed the statutory procedure to secure a formal stay. In the experience of this administrative law judge (ALJ), the voluntary delay in award was an accommodation many procurement officers would not have provided.

After a hearing, the ALJ indicated by e-mail that he expected to recommend that the Commissioner of Administration sustain the protest on one of the two grounds offered, but that a written proposed decision would be delayed by a family emergency. The procurement officer ascribed to this e-mail a somewhat more optimistic meaning than its author had intended; she concluded that the recommended decision would simply ask DOT to evaluate responsiveness “one last time” on the same basis it had before. Based on this expectation and her belief that the reevaluation would lead to the same result as before, she conveyed to Aadland that DOT now intended to proceed with the award unless instructed not to do so by Commissioner Kreitzer. This meant that counsel for Aadland had to move for a stay of the award.<sup>1</sup> Counsel did so, and—although the motion was never acted on—DOT elected not to proceed with the award while the motion was pending.

The ALJ then issued a written proposed decision. The ALJ found that the standard for responsiveness had been applied inconsistently. While he found the procurement deficiency to be “serious and substantive,” he found that it did not involve “dishonesty or corruption.” He found that “[t]here is no evidence in the case of bad faith on the part of any competitor or of the agency.”

After reviewing the proposed decision, which was a much more complete exposition than the ALJ’s prior e-mail, DOT acquiesced in the remedy the ALJ proposed. It declared the Aadland proposal to be responsive, and forwarded both the Aadland and I-I proposals to the evaluation committee. Aadland acknowledges in its motion for fees that it ultimately received “a fair chance to compete.”

## **II. Standard for Awarding Fees**

Alaska Statute 44.64.040(b)(2) authorizes an ALJ to “order a party, a party’s attorney, or another authorized representative of a party to pay reasonable expenses, including attorney fees, incurred by another party as a result of actions done in bad faith or as a result of tactics used frivolously or solely intended to cause unnecessary delay.” An OAH regulation, 2 AAC 64.360, provides in its subpart (a) that an ALJ “may not” assess fees as a sanction” except as provided in (b) of that regulation, which repeats the standard in AS 44.64.040(b)(2).

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<sup>1</sup> According to the billing records, the cost of the motion was about \$600.

### **III. Aadland's Motion**

Aadland's motion for attorney's fees contends that "the decision to disqualify [Aadland's] proposal was based on a desire to 'stack the deck' in favor of" I-I. It observes that "[i]f the contracting process had been conducted fairly in the beginning, then Aadland would have saved substantial time and money."

Aadland's second observation is certainly correct. The first, however, is contradicted by the ALJ's express finding after the hearing that there was no evidence of bad faith. To prevail on a motion under AS 44.64.040(b)(2) requires much more than just being right about the merits of the dispute. Aadland proved at the hearing that it was right on the merits in one important respect, but it did not prove a bad faith desire to "stack the deck."

Aadland also faults DOT for "attempting to award the contract to [I-I] after the ALJ had written that he intended to sustain the protest." Aadland contends DOT's action at that point was frivolous, done in bad faith, and was the cause of unnecessary delay.

At the outset, one should note that the amount at issue on this second allegation is much smaller—presumably only the \$600 cost Aadland had to incur to formally request a stay. Moreover, the ALJ could not sustain the protest on his own, as Aadland implies, because he was not the final decisionmaker in the case. All DOT could have known at that point was that the ALJ would probably make an unfavorable recommendation, one DOT could have contested before the commissioner as permitted in AS 44.64.060(e). Further, DOT's forbearance from making an award had been wholly voluntary up to that point. And finally, DOT's reading of the ALJ's e-mail, though mistaken, seems to have been no more than an honest misunderstanding of a hasty communication that did not fully describe the ALJ's reasoning. Once DOT received the full proposed decision, it reversed course and elected to follow the decision rather than contest it. This course of events does not support a finding of bad faith, frivolous tactics, or tactics used for delay.

### **IV. Ruling**

Aadland's Motion for Attorney's Fees and Costs is denied.

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 3<sup>rd</sup> day of July, 2008.

By: Signed  
Christopher Kennedy  
Administrative Law Judge

**Certificate of Service:** The Undersigned certifies that on the \_\_\_\_ day of July, 2008, a true and correct copy of this **document** was transmitted by pdf and mailed to the following: Lynn Allingham, counsel for Aadland Marketing Group, Inc; Jewelee Bell, DOT; and Rachel Witty, AAG.

By: \_\_\_\_\_  
Kimberly DeMoss

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