

INVESTIGATIVE REPORT

Finding of Record

Public Report

Ombudsman Complaint A098-0143

May 28, 1998

SUMMARY OF THE COMPLAINT

The Office of the Ombudsman received a complaint on February 4, 1998, alleging irregularities in contracting procedures between the Alaska Department of Commerce, Division of Trade and Development and the American Business Center (ABC) of Seattle, Washington. The specific allegation was that the contract between the division and the ABC to represent Alaskan interests on Sakhalin Island in Russia was entered into without competitive solicitation and had cost overruns in excess of \$50,000. The complainant also complained that the ABC was under contract with the federal government to provide states the same services for which Alaska pays.

Oral notice of investigation was given to the division on February 17, 1998. Assistant Ombudsman Joan F. Connors investigated the complaint.

INVESTIGATION AND ANALYSIS

Fee for service

The 1992 Freedom Support Act, P.L. 102-511 approved two billion dollars in United States aid to support democratic reforms in Russia. The Act established the American Business Centers in Russia and the Newly Independent States (NIS) with the goal of creating commercial partnerships between the people of the U.S. and the NIS. Congress envisioned the ABCs as centers geared toward facilitating the entry of

small and medium-sized U.S. businesses into the commercial markets of the NIS. Section 301(c)(2) of the Act specifically requires the ABCs to collect user fees from state economic development offices and other eligible clients.

According to Doug Barry, program specialist at the United States Department of Commerce, International Trade Administration Russia/NIS Program, Congressional intent was never to provide U.S. entities with free services through the ABCs. Rather, the intent behind the fee-for-service requirement was to help the ABCs evolve quickly into private entities not dependent upon taxpayer support.

Mr. Barry said federal funding subsidizes ABC operating costs and allows the centers to keep user fees low. The U.S. Department of Commerce's ABC program guidelines direct applicants to operate the centers on a fee-for-service basis with the admonition that fees be set at a reasonable rate to ensure the participation of small and medium-sized businesses. At present, the U.S. Department of Commerce's International Trade Administration matches up to fifty percent in ABC operating funds. These funds are available through a competitive process.

Procurement rules

Contract exempt from procurement rules

AS 36.30.850(b)(31) expressly exempts from the procurement rules contracts to be performed outside the country and that require knowledge of the customs, procedures, rules or laws of the area. The division's position is that its contract with the ABC in Yuzhno-Sakhalinsk fits within this exemption. The contract states that the location of work is Yuzhno-Sakhalinsk, Sakhalin Island, Russia. The ABC's responsibilities under the contract require it to promote and facilitate business opportunities between Alaska and Sakhalin Island businesses. It is reasonable to assume that the ABC must be knowledgeable about local Sakhalin Island and Russian national Russian customs, procedures, rules or laws to carry out the contract. Thus, it appears that the exemption applies to the contract in question.

"Rational, reasonable" selection method

Because the contract is exempt from the procurement rules, the division was not obligated to solicit proposals competitively or otherwise. However, the division was required under Addendum 1 to the Alaska Administrative Manual to "have a rational, reasonable method of selecting the recipients" of funds.

Priscilla Wohl, manager of the division's trade program, said that the

ABC contract was entered into before her tenure at the division. Documents in the ABC file show that the division had an informal "dialogue" with the only two organizations then offering the needed services on Sakhalin Island, ABC and TROIKA Alaska. The Alaska World Trade Center submitted a proposal on behalf of TROIKA Alaska to provide representational services in Yuzhno-Sakhalinsk. A January 23, 1997, letter to World Trade Center Director Robin Zerbel from Commerce Commissioner Deborah Sedwick says the ABC was selected because of:

- 1) [The ABC's] formal working relationship with the Sakhalin Regional Administration;
- 2) Governor Farkhutdinov's chairing of the ABC Advisory Board, which consists of key individuals in Russian government and business, as well as heads of all the major international oil producers;
- 3) the official protocols with key offices in the Administration, such as the Department for Development of Mineral Resources Offshore Sakhalin; and
- 4) the ABC's documented history of work with more than 50 Alaskan firms.

This suggests that the division made a "rational, reasonable" selection of one proposal over the other consistent with Addendum 1 to the Alaska Administrative Manual. I should caution, however, that the ombudsman has not investigated the merits of the selection in the absence of an allegation that the selection was unreasonable. This would require fuller examination of the record to determine whether the reasons cited in the commissioner's letter are accurate and plausible. A copy of the commissioner's January 23 letter is appended to the investigative report as Attachment 1.

Contract amount

If this had been a contract subject to the procurement rules in effect at the time (Alaska Administrative Manual section 82.370), the division could have amended it to increase the overall contract amount by the lesser of 10 percent of the original contract value or \$25,000 without rebidding it. If the proposed amendment exceeded that limit, the division could have requested approval for an alternate procurement from the state's chief procurement officer. The chief procurement officer would have examined the request to determine whether it was a reasonable, justifiable change within the scope of the original contract, did the

contract envision change of this type to this extent, and if not, should it be a new procurement?

In this instance, the original contract amount was \$5,000 for the period February 13 to June 30, 1997. Subsequent amendments on March 6 and June 16, 1997, raised the contract amounts by \$15,000 and \$32,000, respectively, for the same period. Appendixes to the amendments indicate that the additional amounts were to pay for non-routine direct expenses associated with a trade mission. The final total contract amount was \$52,000. Copies of the original contract and the amendments are appended as Attachment 2.

Because the contract was exempt from the procurement rules, the division was under no constraint to limit the amount of its amendments or to seek the chief procurement officer's approval for an alternate procurement. All amendments appear to have been for the purpose of paying trade mission expenses contemplated by the original contract.

FINDING OF RECORD AND CLOSURE

In summary, there appears to be a clear legal basis for the ABC to charge the division for both routine and non-routine expenses associated with performance of the contract. Because the place of contract performance is outside the country in Yuzhno-Sakhalinsk and requires knowledge of the customs, procedures, rules or laws of that area, the contract is exempt from state procurement rules on competitive solicitation and contract amendment. Accordingly, I find the allegation not supported.
