

INVESTIGATIVE REPORT

*Finding of Record -- Public Version
(The names of the complainant and her company have been
changed in this public report.)*

Alaska Ombudsman Complaint A2000-0168
May 8, 2001

SUMMARY OF THE COMPLAINT

XYZ Surveys (XYZ) was the apparent low bidder for a state contract to perform bathymetric surveys in Southeast Alaska waters during the summer of 2000. The project was to be funded jointly by the federal government and the Alaska Department of Fish & Game (ADF&G), which issued the invitation to bid. The solicitation was eventually cancelled because, according to ADF&G, federal funding had not been approved in time.

By the time the state cancelled the contract, XYZ had reserved equipment for the survey and begun mobilization. According to Lesley Roman, managing partner of XYZ, the company had committed itself to \$25,000 in costs before the state cancelled the contract. XYZ requested that ADF&G reimburse it for these costs, but the agency declined.

Ms. Roman brought her complaint to the Office of the Ombudsman for review. The ombudsman opened an investigation into the following complaint:

*The Department of Fish & Game unreasonably
cancelled a bathymetric survey after the complainant
had incurred expenses related to the project.*

Ms. Roman said she doubted ADF&G's explanation that the project was cancelled due to a delay in federal funding. She said she believed that ADF&G did not want her company to handle the survey, preferring a larger, more experienced firm.

Assistant Ombudsman Mark Kissel investigated the complaint. He

gave verbal notice of investigation to ADF&G Procurement Officer John White on April 4, 2001.

INVESTIGATION

Invitation to Bid

When the state chooses to contract for supplies or services, it generally issues either an invitation to bid (ITB) or a request for proposals (RFP). ITBs are used when cost will be the deciding factor; RFPs are used for professional services when factors other than cost are important. With an RFP, for instance, the state may give weight to the vendor's experience or the quality of similar work the vendor did in the past.

According to Tom Taylor, procurement specialist for ADF&G, solicitation for a bathymetric survey would normally be issued as an RFP because of the specialized nature of the work. Taylor said ADF&G chose to solicit the project as an ITB in 2000 because of the tight timeline for getting a surveyor and beginning work. Taylor said that ITBs are faster to process than RFPs and less likely to generate protests from vendors.

Bids for the 2000 solicitation were opened on June 15, with work scheduled to begin on August 5. According to Taylor, ADF&G expected to award the contract on July 1, but that was dependent on federal funding.

The ITB lists several conditions governing the proposed contract and its execution. Condition 9 reads as follows:

CONTRACT FUNDING: Bidders are advised that funds have not yet been received for this project. Award of a contract as a result of this ITB is subject to the availability and appropriation of funds.

The ITB also warned vendors not to incur expenses before receiving a written contract for the work:

Bidders identified as the apparent low responsive bidders, are instructed not to proceed until a Purchase Order, Contract Award, Lease, or some other form of written notice is given by the contracting officer. A company or person who proceeds prior to receiving a Purchase Order, Contract Award, Lease, or some other form of written notice from the contracting officer does so without a contract and at their own risk.

Ms. Roman said that Mr. Taylor had told her "on several occasions"

that state funds were available and he was waiting for federal funds before he would issue a contract. Mr. Taylor's phone log bears this out. He noted that he discussed the funding issue with XYZ on June 19, June 29, July 6, and July 7, 2000. Mr. Taylor said he cancelled the solicitation on July 10 because the federal government still had not authorized funding for its share of the project. He said no one involved in this project indicated to him that they did not want XYZ to get the contract.

Federal Funding

The bathymetric survey contract was not awarded because, according to ADF&G, the federal partner agency delayed signing the cooperative agreement that authorizes funding. Ms. Roman questioned whether this explanation was true or merely an excuse to divert the contract from her firm to a different surveyor.

The ombudsman investigator looked at the contract files and the communications between ADF&G and the federal agencies that accompanied the cooperative agreement.

On May 15, 2000, Tom Taylor of ADF&G sent an e-mail to Philip Hooze of the U.S. Geological Survey (USGS), Glacier Bay Field Station. The e-mail indicates that it was sent with two attachments, one of which was the cooperative agreement. The e-mail reads:

Here is the Cooperative Agreement... I have made some minor revisions. Please print off at least three copies, have them signed and sent to me. I will get the ADF&G signatures and return a fully executed copy to you.

Mr. Taylor said that in his experience, federal approval of cooperative agreements is usually accomplished in about 45 days. In this case, however, USGS did not return the agreement until September 11, 2000. The cooperative agreement was finally executed on September 19, 2000, with signatures from USGS contracting officer Militza Jennings and ADF&G Director of Administration Kevin Brooks. In the cooperative agreement, the federal government authorized up to \$150,000 for the bathymetric surveys.

ANALYSIS & FINDINGS

Standards

The allegation is that ADF&G performed unreasonably. The Office of the Ombudsman Policies and Procedures manual at 4040(2) defines

“unreasonable.”

Unreasonable means:

(A) a procedure adopted and followed by an agency in the management of a program is inconsistent with, or fails to achieve, the purposes of the program,

(B) a procedure that defeats the complainant’s valid application for a right or program benefit, or

(C) an act is inconsistent with agency policy and thereby places the complainant at a disadvantage to all others.

Analysis & Findings

A contract to perform a bathymetric survey is neither a right nor a program benefit of ADF&G, so paragraph (B) of the definition of “unreasonable” does not apply to this complaint. Ms. Roman raised two significant questions: was federal funding really the reason ADF&G cancelled the solicitation, and was ADF&G attempting to steer the award to another more experienced bidder?

The solicitation file and the communication between ADF&G and the USGS support Mr. Taylor’s assertion that the contract was cancelled because federal funding had not been authorized in time. State regulation 2 AAC 12.860 allows the state to reject all bids if “prices exceed available money and it would not be appropriate to adjust quantities to accommodate available money.” The file shows that Mr. Taylor was telling the truth about federal funding. The cooperative agreement, which authorized the federal portion of the project, was not executed until more than a month after the bathymetric survey was scheduled to begin. Nothing in the ADF&G files or in conversations with Mr. Taylor and Mr. White indicated that ADF&G took action to give another bidder an unfair advantage over XYZ or to steer the contract to the other bidder.

Ms. Roman feared that cancellation of the project put XYZ at a disadvantage when the project was re-solicited in 2001, because the bidder knew what XYZ had bid in 2000. XYZ, however, also knew what its competitor had bid. When the project was solicited in 2001, the opposing bidder offered a price still far above XYZ’s 2000 bid of \$250,000. XYZ did not respond to the 2001 solicitation or protest that the RFP was discriminatory or improper, which makes academic a discussion of the effect of the cancelled ITB on XYZ’s chances for the 2001 contract. Evidence in this investigation did not show that

ADF&G took action that placed XYZ at a disadvantage compared to other bidders.

Evidence in this investigation did not show that ADF&G took actions inconsistent with its stated desire of conducting a bathymetric survey in Southeast Alaska. Although the schedule for the ITB, project funding, and the survey itself was tight, the project could have been completed on schedule had USGS responded to the draft cooperative agreement within 45 days as ADF&G anticipated. The ombudsman finds the allegation that it was unreasonable for ADF&G to cancel the 2000 bathymetric survey *not supported*.