



Ombudsman Complaint A2000-0324
(Finding of Record and Closure)

*(Identifying information has been removed as per AS 24.55.160(b)
to protect the confidentiality of the individuals involved)*

November 15, 2002

SUMMARY

A Homer businessman and landowner contacted the Office of the Ombudsman in September 2000 to allege that leasing staff of the Department of Administration, Division of General Services (DGS) handled a solicitation for leased space in Homer unfairly and inappropriately. He stated that DGS had allowed a competitor in the lease offering unfair latitude in meeting DGS's lease needs. He also alleged that DGS staff had promised they would notify him of future lease solicitations but did not keep that promise. He further alleged that DGS Leasing Officer Elayne Janiak had not provided information he requested, in violation of the Alaska Public Records law.

BACKGROUND

In March 2000 DGS initiated an emergency procurement to find new space for the group of state offices known as the Homer "One Stop." The One Stop housed offices for the Department of Labor, the Department of Health and Social Services, the Division of Public Assistance, and the Alaska Housing Finance Corporation, Public Housing Division.

Leasing Officer Elayne Janiak handled the lease for DGS and sought official permission from the chief procurement officer to use an emergency procurement process. In a request for alternate procurement dated February 25, 2000, Ms. Janiak wrote:

These leases have been plagued with maintenance and safety problems. Because of this the final option on each was not exercised. The leases were placed in month-to-month status, through September 30, 2000, with the intent of rebidding and leaving the space as soon as possible. I notified the Lessor, through his attorney, on February 8, 2000, that we did not exercise the final option because we intended to rebid the leases. I stated that we would continue to pay rent, abide by the terms of the leases and give at least 30 days notice before vacating the current space. The Lessor's attorney responded by letter dated February 16, 2000, which was received by Fax February 22, 2000. He gave us notice that the leases would terminate as of March 31, 2000.

The written request for alternate procurement was sent to Chief Procurement Officer Vern Jones; it was approved by Acting Chief Procurement Officer Walt Harvey on February 25, 2000. DGS then proceeded with the emergency procurement.

DGS received two responses to its emergency RFP, one from our complainant, the Homer businessman, and one from another landowner.

The other landowner offered a building that had served as a barbecue restaurant and proposed to convert it to office space for the One Stop. The complainant did not have actual office space available at the time in Homer. He owned a piece of undeveloped property in Homer that he said could accommodate a building. He proposed to move a modular building formerly used as a health clinic from Palmer to Homer to house the One Stop. The modular building would have required a foundation and reconstruction on site. The complainant's property had utilities up to the street that would have had to be connected to the building.

DGS declared the Homer businessman's proposal non-responsive on March 10. He did not protest the decision but did discuss it with Leasing Officer Janiak. He said that she told him DGS would be issuing other lease RFP's in Homer and she would notify him so he could apply again. Six months later, in September, he learned that the successful bidder was still doing major interior and exterior renovation on the One Stop building. The businessman at that point became angry that his proposal had been declared non-responsive when his competition had not—in his view—met the RFP deadline requirements. He questioned where the One Stop agencies were working while the renovation was being done.

On September 6, 2000, the businessman filed a written complaint with the Office of the Ombudsman. The businessman said he believed the contracting officer had indicated prior to his submitting a proposal that the agency would work with him, including helping obtain fire marshal plan reviews, to get the work on his building done by the deadline. The businessman also believed DGS unfairly ignored information that he provided stating that the then-lessor of the One Stop offices had agreed to a short extension of the lease to allow him to meet the RFP requirements. He said his proposal was not evaluated fairly and he was not given the same benefit and assistance that his competition was given in the overall evaluation and selection process. The businessman complained that DGS appeared unfairly to have assisted the successful bidder. He wrote, "Although I do not know any of the details it appears the state has bent over backwards to assist the lessor get his property in shape to meet the state requirements."

The businessman said he did not protest the lease when it was awarded because Leasing Officer Janiak had indicated to him that more leased space would be forthcoming in the summer and he would be informed of any new solicitation. He initially believed the contracting officer had been dealing with him in good faith but later felt differently because it appeared to him that DGS had issued an RFP for state office space without notifying him.

Finally, the businessman complained that he sent a March 28, 2000, fax to DGS requesting information about the winning proposal but the agency did not respond to it. He said he made other requests of the agency that went unanswered but he did not keep a record of when those requests were made.

Assistant Ombudsman Mark Kissel was assigned to this businessman's case. Mr. Kissel asked Leasing Officer Elayne Janiak if she had received any communications from the businessman that she failed to answer and whether she had notified the businessman of

procurements as she had promised. Ms. Janiak said she was not aware that she had failed to provide the businessman any information. She remembered only that the businessman wanted some scoring sheets from the March bid, which she provided. She recalled no other request. She did not think she had any unanswered calls, and her recollection of her last contact with the businessman was that the conversation was “pleasant and he had no issues.”

Ms. Janiak also said in September she had not made any lease offerings in Homer since March. She assured Mr. Kissel she would notify the businessman and others in the Homer area who had requested information on area lease RFP's.

Mr. Kissel's preliminary review of the businessman's complaint revealed that on March 10, 2000, DGS issued written notice that it had awarded the Homer One Stop lease contract to the other landowner. On March 15 DGS issued written notice to the businessman that his proposal had been deemed non-responsive. The businessman did not protest either the contract award or the notice that his own proposal was non-responsive despite the availability of the protest process set out in AS 36.30.550 – 36.30.615. Under AS 36.30.565(a), the businessman had 10 days after notice of intent to award was issued by DGS to protest the award of the contract; similarly, he had 10 days after notice that his proposal was non-responsive to protest that determination. Under paragraph (b) of the same section, the businessman could have filed a protest after these deadlines on a showing of good cause. Presumably, important information about the readiness of the winning bidder's building for occupancy that came to the businessman's attention after the protest deadline had passed would have qualified as good cause for filing a late protest. The businessman did not pursue this available protest option.

In accordance with 21 AAC 20.010(a)(6), Mr. Kissel declined to evaluate this portion of the businessman's complaint because the businessman did not utilize the protest process that would have resulted in administrative review of his concerns about the manner in which the award was made as well as the manner in which his own proposal was evaluated. Mr. Kissel relayed this information to the businessman and closed the case.

On October 18, 2000, the businessman recontacted the Ombudsman's Office to ask that his case be reconsidered for further review. Assistant Ombudsman Linda Lord-Jenkins was assigned the case and conducted the review that resulted in this investigation.

ALLEGATIONS

The remaining issues presented in the businessman's written complaint against DGS were accepted for investigation and are restated to conform with statutory requirements for investigation by the ombudsman (AS 24.55.150) as follows:

Allegation 1. DGS unfairly assisted another bidder to meet RFP specifications while withholding such assistance from the complainant.

Allegation 2. The DGS contracting officer unfairly reneged on a commitment to notify the complainant when the state issued a subsequent Request for Proposals for lease space in Homer.

Allegation 3. Contrary to law, DGS did not respond to the complainant's requests for public information.

During the course of the investigation, the ombudsman added the following allegation:

Allegation 4. DGS, unreasonably and contrary to law, by its own inaction created a situation that led to a lease procurement being handled as an emergency where no emergency originally existed.

In accordance with AS 24.55.140, Ms. Lord-Jenkins provided notice of investigation to Mr. Jones in a March 19, 2001, e-mail.

INVESTIGATION

DGS Procurement Officer Elayne Janiak

The March 2000 One Stop Procurement

Ms. Lord-Jenkins interviewed Ms. Janiak in November 2000. Ms. Janiak stated that DGS had had only 38 days to issue the March 2000 RFP, find new space, install telecommunications systems, and move the One Stop offices. Failure to provide office space for these agencies by that deadline would have meant the loss of important services to Homer area residents. She said she did not have time to issue a Competitive Sealed Bid or Competitive Sealed Proposal because of the notice requirements.

Ms. Janiak's request for emergency procurement stated that she would contact building owners with advertised properties and obtain from the One Stop tenants contact names and telephone numbers for all suitable advertised properties. She said she also would contact at least three real estate offices in Homer to research available space.

Ms. Janiak said that when DGS began its search she hoped to find rental space that would require minimal renovation. However, she said, only the businessman and the other landowner had responded.

Ms. Janiak's file included notes from a March 10, 2000, telephone conversation with the businessman prior to the evaluation committee meeting for the solicitation. The notes indicate she inquired into the timeline for completion of the work on his proposed offering. At that time they had 21 days to do all work on moving the building, plus move the agencies into the building. The file notes read as follows:

- 7-10 days clear foundation
- 1 wk prep modules: clean up, take out 3 walls, take out cabling
- 1 day bring modules down from Palmer
- reconnect (mechanical)/plumbing & elect
- finish site, interior painting

- (utilities) in roadway, not to site
- permits: go to City Hall
- Now 2 public bathrooms
- carpet there now but not acceptable
- entry – concrete

Comments to file:

- 3/13/ permits 2 days
- 10 days clear foundation
- permits, run (utilities) to site
- handicapped ramp
- 7-8 days prep, cleanup, take out walls & cabling
- 1-2 days bring modules down to Homer
- set on foundation 3 days

reconnect mech/plumbing/elec
carpeting, painting

Schedule too tight and I think optimistic
Unlikely to be able to absolutely insure a roof over our head on 3/31
“unresponsive”

The file also indicates that Ms. Janiak contacted the Alaska Fire Marshal regarding both offerers on the solicitation. The fire marshal had no file on the other landowner but was familiar with the businessman.¹

Ms. Janiak sent the businessman a letter on March 10 notifying him that the evaluation committee had awarded the contract to the other landowner. This first letter did not state that the businessman's proposal had been deemed non-responsive. On March 15 she sent him another letter stating, “There were just two offers received for Solicitation #2000-0200-1839, yours and [the other landowner's]. Yours was found non-responsive due to the March 31, 2000, timing requirement for occupancy. Therefore [the other landowner's] was the only one evaluated.” She included the evaluation forms for the other landowner's offer. Neither letter contained information about the businessman's appeal rights, although that information was included on the RFP form.

The businessman said he faxed Ms. Janiak a note on March 28 asking for the total price, price per square foot, and usable square footage numbers for the other landowner's proposal. He asked her to fax the requested information to him. He said he never received an answer and did not contact her again about the request. Ms. Janiak did not recall this request and did not have it in her file. The businessman provided a copy of the fax to Ms. Lord-Jenkins.

Ms. Janiak told Ms. Lord-Jenkins that the successful lease offering had to be converted from a restaurant to an office and thus required a lot of work. She said the other landowner had gotten as much demolition done as possible before the One Stop moved in on March 31. She said that the other landowner's building's interior was gutted to the bare walls and work progressed thereafter. However, she said, the One Stop agencies were able to conduct their business during the construction time by relocating inside the building around the work.

She said she and the businessman had discussed his suggestion that the prior lessor would extend his lease, and she acknowledged she was “not receptive” to his suggestion. She said that the One Stop agencies had experienced continual problems in the space and the state wanted to leave. She also said the landlord had not directly offered DGS an extension.

Ms. Janiak confirmed that she told the businessman she would notify him of future lease procurements in Homer.

Requirements of the One Stop lease RFP

The RFP stated on page 30 that the successful bidder would have 21 days to make “basic improvements” to the space to allow the state tenants to move in on March 31 and

¹ Ms. Lord-Jenkins contacted Deputy State Fire Marshal Kelly Nicollelo, who said his office reviews permits in date-received order and gives no special treatment to state-lease buildings. He estimated that Fire Marshal review of a building could take from 60-90 days, depending on the nature of the review.

conduct essential state business. The RFP on page 30 defined the basic improvements as “at a minimum, providing light, heat, water, handicapped accessible (1) entrance from outside into the space, (2) toilet and (3) parking; and cabling described in Section III.E.” The definition of basic improvements was amended on March 2 to exclude the requirement for cabling.

The RFP stated on page 31, “The space will be conditionally accepted on March 31, 2000, and the lease signed, on the condition that all requirements of this solicitation are completed by May 31, 2000. If all requirements of this solicitation are not met by May 31, 2000, the state has the right to cancel the lease awarded as a result of this solicitation.”

Ms. Janiak said that the State Fire Marshal completed review of the renovation plans May 19 and she issued a proceed-to-work order on June 6. Work was completed on the north part of the building by the end of August. The tenants were moved to the north end and all work completed by the week of November 7. She acknowledged that work continued well beyond the deadline in the original RFP but said that the state has the option of extending deadlines depending on the state’s need. In this procurement, she said, the primary need was “to get a roof over” the One Stop by March 31.

She said that if the RFP requirements are not met by the lessor, the state has the right to cancel. However, it is the state’s prerogative, and the state is not held to that date. “It was our right to enforce the date if we want,” she said. She continued,

The key there was the March 31 date. That was the date by which we had to be out of our former space, and we needed a roof over people’s heads. So the other date was an estimate, assuming we got the space required.

Ms. Janiak said she extended the work completion deadline to the end of August 2000, which is permissible at the state’s discretion. She said that during that construction time, she received frequent reports from the lessor and the One Stop agency staff. She also inspected the site on two occasions.

Ms. Janiak provided to the ombudsman investigator the information that the businessman sought about the March lease. The state rented approximately 2653 square feet of net usable office space at a rate of \$1 per square foot until the state accepted the property, at which time the square foot rate would increase to \$2.42 per square foot. The monthly rate for the five-year lease is \$6,420.26.

The businessman’s proposal offered 4046 square feet at \$1.35 per square foot per month for a total monthly offer of \$5,462.10.

The October 2000 DFYS procurement

In October 2000 DGS initiated a lease procurement to find new space for the Division of Family and Youth Services (DFYS) office in Homer.

Ms. Janiak said the DFYS procurement also was an emergency procurement but did not start out that way. Ms. Janiak said that she originally had intended to issue a normal RFP October 20. She said she spoke to the lessor on October 17, and he said he planned to continue DFYS’s month-to-month lease until January. She said the owner then sold the building and notified DGS on October 20 that DFYS was being evicted as of October 31. She said she issued the procurement document October 24 and set the deadline for response as the next afternoon because the new owner wanted the state out no later than

October 31. She said the new owner later extended the deadline to November 7. She further stated:

The lessor didn't say 'boo,' then he called back and said 'out.' My intention was to notify [the businessman] and 20 other people who routinely call me with space. This wasn't the case. This is a different kind of procurement, and I was backed into a corner here.

She said she called four potential property owners: Bay Realty, a private owner; another lessor in Homer; and an office building owner.

She said the lessor did not have or know of any available space. Bay Realty also said they did not know of any property. The private owner had a building with space occupied by a day care center. DFYS inspected the space but found it to be inappropriate. The office building owner had office space that met the RFP criteria.

The office space met the agency's functionality needs, and it required only minor post-move renovation, she said. The owner "cleaned the carpet and gave them the keys." She said the owner would be doing minor modifications such as installing bulletproof glass at the front counter in accordance with statewide DFYS policy. He also planned to replace carpet in the core space, do some routine painting, and remove a wall between two offices in a back room to make a conference room.

Ms. Janiak also said she did not notify the businessman of the DFYS procurement because, to her knowledge, he still did not have actual office space on-site in Homer. She said she notified people who she knew had available office space or were likely to know of such space. DFYS moved into the new office building on November 7, 2000.

Ms. Janiak said that she maintains her own list of potential lessors in the area. It is not the same as the official state list maintained in Juneau. She said she cannot recall if she told the businessman how to get his name on the official vendor list in Juneau. Ms. Lord-Jenkins provided that information to the businessman during her review of his complaint.

DGS file on the DFYS lease RFP

The ombudsman investigator reviewed the DGS file on the DFYS lease and interviewed DFYS Administrative Officer Cynthia Alexander, who was responsible for preparing the procurement documents. The review showed that the DFYS lease expired August 31, 2000, but DGS did not issue a Request for Proposals to obtain new lease space.

According to the October 24, 2000, Request for Alternate Procurement (RAP) document, the DFYS Homer office had been located at the Lakeside Mall since March 1993. In February 2000, six months before the expiration of the final lease option period, DGS intended to sign a lease extension as allowed under AS 36.30.083. However, the building had been plagued for some time with noxious odors, the source of which could not be documented. Shortly before the extension was to be signed the odor became particularly bad and DFYS staff called the fire department. Firefighters could not determine the nature of the substance and called the Occupational Safety and Health Administration. Subsequent tests indicated the presence of harmful and carcinogenic airborne chemicals from the neighboring print shop. However, while the tests were being conducted progress stopped on the lease extension and the deadline to extend the lease beyond August 31, 2000, passed.

Instead of extending the lease, DGS was forced to go out to bid to find new space for DFYS. Ms. Janiak's Request for Alternative Procurement document stated:

Because of other work priorities the term was administratively extended until 10/31/00. The lessor was verbally informed on 10/17/00 that we would be further extending on a month-to-month basis and he did not object. Then on Friday 10/20/00 at 2 pm the lessor called and informed me that he had sold the property and we had to leave by 10/31/00. He would only extend through 11/30/00 at double the rent. However, in talking with the buyer, I found that the lessor had also firmly promised the buyer our space on 11/1/00. I feel it is in the State's best interest to avoid conflict in the community of Homer and avoid possible legislative inquiries by pressing ahead to vacate the space by 10/31/00.

Ms. Janiak wrote a memorandum to the file elaborating on the problems she faced:

I phoned the buyer on October 20, 2000 to discuss our status with him. He explained that he wanted our space to expand his shop. [The landlord] had promised it to him as of 9/1/00 but then extended with us. [The landlord] then told him he could have the space without fail on November 1, 2000. [The buyer] stated that he had \$50,000 of new inventory in storage for the expanded store. He needed to have the expanded store operational for the Christmas sales period or he would end up with a terrible financial loss. He said he could live with us staying until the first week in November but after that it was a serious problem for him.

I decided the prudent thing to do was to concentrate on finding new space by October 31, 2000. I wanted to avoid a confrontation with [the landlord] and I did not want [the buyer] saying we somehow economically harmed him.

Ms. Janiak's memorandum outlined the property she had considered and discussed the ultimately successful site in the building already housing the State Court. She described the space as being "good size and built out very close to our needs." She spoke with State Courts Procurement Officer Kit Duke, who termed the owner a responsible landlord. Ms. Janiak's memo states that the building met Americans with Disabilities Act accessibility requirements and had a good heating system. Most important, the space was available on short notice.

Neither the Request for Alternate Procurement nor the memorandum to the file elaborated on what conflicting priorities had kept Ms. Janiak from issuing the Homer DFYS lease RFP in the months between February and August or what had further delayed issuing the RFP in September or October 2000.

DGS Chief Procurement Officer Vern Jones

DGS Chief Procurement Officer Vern Jones told the ombudsman investigator that Alaska law requires state agencies to use the vendor list except in the cases of alternative procurements such as emergency, single source, or limited competition procurements. Agencies must obtain permission to use such non-traditional procurements. In such procurements the agencies requesting permission to use an alternative procurement must give DGS information on how to practically conduct the competition. He said the vendor list provides cheaper notice than newspaper advertising and "our vendors know that's how we do business, how we get better coverage using the list."

Mr. Jones said that some contracting officers keep their own vendor list, but such a list “would have to be supplementary” to the official statewide vendor list, in addition to whatever competition is prescribed in the normal invitation to bid. He continued,

If [the contracting officer] has her [own] list, maybe that means these are people who responded to her [other offerings]. Oftentimes everybody and anybody is on the vendor list, but some contracting officers for their own purposes may keep a running list of who is active in the community. Generally speaking, [when] doing an emergency procurement they will run a bid list and pull names where they know names are available in the community.

Mr. Jones said that contracting officers are directed to tell potential vendors to get on the statewide list when contacted about contracts.

He said that Ms. Janiak did not issue an RFP for the DFYS lease space before the lease expired because she was occupied with other higher priority leases. He said that during 2000 Ms. Janiak was responsible for administering 56 leases, 45 of which required processing contractual documents. He said she supervised 11 other leases that required only occasional monitoring. He said she also solicited, evaluated, and awarded nine lease procurements during 2000.

Those procurements included lease space for the following:

RFQ 2000-600-1466/10-4-99, Department of Health and Social Services-DFYS, 2,000 square feet Temporary in Anchorage;
RFQ 2000-1800-1760/3-17-00, Department of Environmental Conservation (DEC), 1,200 square feet in Anchorage;
RFQ 2000-1200-1396/10-12-99, Department of Public Safety & Department of Administration, 3000 square feet in Delta Junction;
RFQ 2000-1000-1595/1-28-00, Department of Natural Resources (DNR), 1,500 square feet in Anchorage;
ITB 2000-1800-1584/1-11-00, DEC, 5,000 square feet in Anchorage;
SP 2000-1000-1895/3-31-00, DNR, 1,500 square feet in Anchorage;
RFQ 2000-1800-1554, DEC, 1,600 square feet Anchorage;
RFP 2000-9900-1699/2-25-00, Alaska Oil and Gas Commission, 8700 square feet in Anchorage;
SP 2000-0200-1839/3-1-00, Department of Labor, DHSS, Department of Revenue (AHFC), 2,960 square feet (Homer One-Stop).

Mr. Jones said that the DGS lease inventory fluctuates, but as of April 2001 the unit was handling an inventory of 353 leases statewide. Four leasing officers work in the lease unit.

The ombudsman investigator asked Mr. Jones how much lead-time before a lease expires is incorporated into the lease procurement process. He responded,

There is no general answer to this question. The amount of lead-time required varies widely depending on the size and complexity of the lease space requested. Much of the time necessary in the leasing procurement cycle is used to work with the agency to develop adequate specifications for the procurement documents.

Mr. Jones was asked to provide information about the total number of lease procurements compared to the number of alternative procurements. He defined alternative

procurements as single source, limited competition, emergency, and contract amendment exception procurements.

In 1998, he said, DGS handled 78 lease procurements, 32 of which were alternative procurements.

In 1999, he said, DGS handled 85 lease procurements, 52 of which were alternative procurements.

In 2000, he said, DGS handled 91 lease procurements, 35 of which were alternative procurements.

Mr. Jones said that the leasing section is plagued by problems caused by inadequate staffing, the result of inadequate funding.

Lease procurement practices in other state agencies

The ombudsman investigator contacted other state employees who handle lease procurements to determine their standards for starting lease procurements. The standard for beginning work to issue lease procurements among the group was six months prior to the end of the lease.

STANDARDS

Alaska statutes and regulations

AS 36.30.050, "Lists of contractors," requires the Commissioner of Administration to establish a vendor list for businesses wishing to do business with the state:

- (a) Except for persons debarred or suspended under AS 36.30.635 - 36.30.655, the commissioner *shall establish* and maintain current lists of persons who desire to provide supplies, services, professional services, or construction services to the state.
- (b) A person who desires to be on a list shall submit to the commissioner evidence of a valid Alaska business license. A biennial fee may be established by regulation in an amount reasonably calculated to pay the costs of administering this section. A construction contractor shall also submit a valid certificate of registration issued under AS 08.18. The commissioner, by regulation, may require submission of additional information.
- (c) The lists *may* be used by the chief procurement officer or an agency when issuing invitations to bid or requests for proposals under this chapter. . . . [Emphasis added.]

Two regulations refer to the above-cited statute or the existence of the vendor list.

2 AAC 12.020, "Exclusion of Prospective Contractor from Competition," speaks to barring vendors from the list if the contracting officer determines that the vendor gained substantial information about a bid that was not otherwise available to the public.

2 AAC 12.060, "Contractors Lists," describes the information that a potential vendor must submit to be on the list and authorizes the charge of a biennial fee to vendors.

Other than to say that the list “may be used” when issuing invitations to bid (2 AAC 12.060), no regulation specifically outlines the role of the vendor list in state procurement.

The DGS Internet Web page contains a publication, **How To Do Business With The State Of Alaska**.² On page 11 the booklet offers information about “Common Errors In Selling To The State,” including:

- Failure to get on the State bidders mailing list.

On pages 5-6 under the heading, “To Get On State Contractors Lists,” is the following information:

The first step necessary to become a bidder is to get on the appropriate mailing list. . . .

When General Services receives your completed application and evidence of a valid Alaska business license, your name will be placed on computerized lists for each supply or service code listed on your application. When the need arises for a supply or service estimated to cost more than \$50,000, an Invitation To Bid or Request for Proposals *will usually* be sent to vendors on the bid list. [Emphasis added.]

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AS 36.30.083, “Lease extensions,” authorizes agencies to extend leases for up to 10 years with some caveats. There must be at least six months remaining on the lease term, and the state must be able to negotiate a minimum cost savings of 15 percent or a 10 percent saving if the lessor agrees to make modifications on the property to bring the property into compliance with the requirements of the Americans with Disabilities Act of 1990.

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AS 36.30.310, “Emergency procurements,” describes the circumstances under which a contracting officer can resort to an emergency procurement:

Procurements may be made under emergency conditions as defined in regulations adopted by the commissioner when there exists a threat to public health, welfare, or safety, *when a situation exists that makes a procurement through competitive sealed bidding or competitive sealed proposals impracticable or contrary to the public interest*, or to protect public or private property. An emergency procurement need not be made through competitive sealed bidding or competitive sealed proposals but *shall be made with competition that is practicable under the circumstances*. A written determination by the chief procurement officer of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The written determination must include findings of fact that support the determination. Except when there is insufficient time for the chief procurement officer to make the written determination required by this section, the chief procurement

² <http://www.state.ak.us/local/akpages/ADMIN/dgs/pdf/htdbws.pdf>. The booklet was revised in July 2000, after the March procurement, but the information remains essentially unchanged.

officer may not delegate the authority to make the determination.
[Emphasis added.]

2 AAC 12.440, “Determination of emergency conditions,” details the circumstances that constitute an emergency for the purposes of AS 36.30.310:

- (a) For the purposes of AS 36.30.310, emergency conditions include
 - (1) fire, flood, epidemic, riot, environmental accident, or a similarly compelling reason;
 - (2) equipment failure, if the need for timely repair is essential;
 - (3) a situation in which procurement through competitive sealed bidding or competitive sealed proposals is impracticable or contrary to the public interest; or
 - (4) a need to protect public or private property.
- (b) Unless a determination of emergency is made as provided in (c) of this section before a procurement may be made under this section, a written determination of emergency is required from the chief procurement officer, or from the commissioner of transportation and public facilities for a construction contract or a procurement for the state equipment fleet. An agency requesting a determination of emergency shall provide a written explanation as to why emergency conditions exist. The agency shall include with its explanation the evidence necessary for the independent examination and determination of the material facts of the procurement, subject to AS 36.30.315.
- (c) A determination of emergency under this section
 - (1) may be made by a responsible agency official if
 - (A) immediate action is necessary to protect public health, welfare, or safety, or to protect public or private property; and
 - (B) insufficient time exists for
 - (i) the agency to provide the explanation and evidence required under (b) of this section; and
 - (ii) the chief procurement officer or the commissioner of transportation and public facilities to make the written determination of emergency required under AS 36.30.310 and (b) of this section; and
 - (2) is subject to AS 36.30.315.

2 AAC 12.450. Procurement methods for emergency conditions

- (a) When emergency procurement is authorized by AS 36.30.310 and 2 AAC 12.400, and emergency procurement is limited to the supplies, services, professional services, or construction necessary to meet the emergency, and shall be made with competition that is practicable under the circumstances.
- (b) An agency may make an emergency procurement by any reasonable means. If practical, approval by the head of the agency must be obtained before an emergency procurement of \$25,000 or more is made. . . .

AS 36.30.315, “False statements in determinations; criminal penalty,” underscores the strict requirements for declaring emergency conditions.

- (a) In a determination made by a state official under AS 36.30.300 - 36.30.310, the state official making the determination shall independently examine the material facts of the procurement and independently determine whether the procurement is eligible for the procurement method requested.

(b) If a state official knowingly makes a false statement in a determination made under AS 36.30.300 - 36.30.310, the state official is guilty of a class A misdemeanor.

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6 AAC 96.325, “Response to Request, Time Limits,” sets a 10-day timeframe for responding to a request for public information. The agency may extend the deadline by another 10 days if notice is sent to the requestor and there is good cause as outlined in the regulation. Section (f) states in part, “If a response is not received by a requestor by the expiration of the time limit, the requestor may consider the request denied.”

6 AAC 96.340, “Appeal from Denial, Manner of Making,” states that someone whose request has been denied “may ask for reconsideration of the denial by submitting a written appeal to the agency head” within 60 working days of the denial. The appeal

must include the date of the denial and the name and address of the person issuing the denial. . . . If an appeal is from the failure of the agency to respond to the records request within the appropriate time limit under 6 AAC 96.325, the appeal must so state, must identify the records sought, and must identify the public agency to which the request was directed and the date of the request.

Ombudsman standards

AS24.55.110, “Investigation of Ombudsman complaints,” states in part:

The ombudsman shall investigate any complaint that is an appropriate subject for investigation under AS 24.55.150, unless the ombudsman reasonably believes that
(1) there is presently available an adequate remedy for the grievance stated in the complaint; . . .

21 AAC 20.010, “Subjects excluded from investigation,” states in part:

(a) In addition to subjects that are specifically excluded from the jurisdiction of the ombudsman by AS 24.55, the ombudsman may not investigate . . .
(6) a complaint for which it appears that applicable law or administrative procedures provided a remedy adequate in the circumstances for the complainant and the complainant did not avail himself of the remedy with no reasonable justification for the complainant’s failure to do so. . . .

ANALYSIS AND FINDINGS

For reasons set out above, this investigation did not focus on the businessman’s complaints that DGS unreasonably leased substandard property that had to undergo major renovations after the lease was in effect, and that DGS unfairly determined that the businessman’s own proposal was non-responsive. Nonetheless, it appears that neither of these complaints is supported by the evidence, as the following discussion of the allegations investigated will make clear.

Allegation 1. DGS unfairly assisted another bidder to meet RFP specifications while withholding such assistance from the complainant.

According to the Office of the Ombudsman Policies and Procedures manual at 4040(3), an administrative act is *unfair* when it violates some principle of justice:

Investigation of a complaint that an administrative act was “unfair” should consider both the process by which the action was taken or the decision was made and the equitableness of that decision, that is, the balance between the agency and a complainant in the decision-making process.

Procedurally, a complaint that an administrative act was “unfair” usually will involve an examination of one or more of the following elements:

...
(F) the agency applied standards or principles inconsistently in making a decision.

In September 2000 the businessman learned that the successful bidder was doing major interior and exterior renovation on the One Stop building in apparent violation of the RFP deadline requirements. He complained to the ombudsman that the winning proposal must have been non-responsive and that state employees unfairly assisted the other landowner in meeting RFP requirements after the award was made.

These allegations suggest that the state ignored the businessman’s property, which allegedly better fit the state’s needs, in favor of substandard property that required extensive alterations following the bid award and move-in date.

The RFP required that the One Stop be moved into its new “basic” space within 21 days of the bid openings. Although the Alaska State Fire Marshal did not approve the permits for the One Stop renovation until May 19, long past the moving date, the RFP required that the winning bidder, by the March 31 deadline, provide only “basic improvements” as defined on page 30 as “at a minimum, providing light, heat, water, handicapped accessible (1) entrance from outside into the space, (2) toilet and (3) parking.” The winning bidder provided those basic services. The building was not substandard but provided the bare minimum required by the RFP.

The businessman has not specified what assistance the other landowner was given that the businessman did not receive. When questioned, he speaks of the extensive post-contract renovation at the One Stop. The other landowner’s property met the primary and most critical requirement of the RFP—the space was available by the March 31 deadline—and he was the only vendor to do so. The RFP allowed for extensive interior build-out after the One Stop was moved. Ms. Janiak supervised the construction on site and through contact with the One Stop employees.

DGS reviewed the businessman’s proposal in light of the One Stop’s need to be in a new space by March 31. He needed to get city construction permits and a permit to transport the modular building from Palmer to Homer. He also had to clear the site and lay a foundation for the building, dismantle the building in Palmer, move it to Homer, reassemble it, and make it habitable for the One Stop to move in, all in 21 days. DGS staff, based on their professional experience, found it highly unlikely that work would be done in time. They determined the proposal was non-responsive because of the timeframes.

Because it could not be determined that DGS applied standards inconsistently or that the other landowner was given improper assistance to the businessman’s detriment, the ombudsman finds Allegation 1 **not supported** by the evidence.

Allegation 2. The DGS contracting officer unfairly reneged on a commitment to notify the complainant when the state issued a subsequent Request for Proposals for lease space in Homer.

According to the Office of the Ombudsman Policies and Procedures manual at 4040(3), an administrative act is *unfair* when it violates at least one of six principles of justice, including the following:

- (A) adequate and reasonable notice of the matter was not provided to the complainant;
- (B) adequate opportunity has not been given for a person having an interest in a decision to be heard or, if applicable, to conduct an examination or cross-examination to secure full disclosure of the facts;
- ...
- (D) the decision is not made on the record: the action or decision has been made without consideration of pertinent facts and circumstances, or the testimony, evidence, or point of view of those having a legitimate interest in the decision has been disregarded. . . .

Ms. Janiak confirmed that she told the businessman she would notify him when the state sought new lease space in the Homer area. At the time of the businessman's September 2000 complaint to the ombudsman, no new lease procurements had come up in Homer. Therefore, Ms. Janiak could not have reneged on any commitment to notify the businessman *up to that time*.

The next issue is whether failure to notify the businessman of the emergency DFYS procurement in October breached her twice-stated commitment to him directly and to him via Assistant Ombudsman Kissel. Clearly it did. She acknowledged her promise to the businessman and then committed, in a September 28 e-mail to Mr. Kissel, to notify the businessman and 20 other potential vendors when a lease was being let. She said:

Because of other solicitation priorities I extended the [DFYS] lease temporarily and will not be issuing a solicitation until later this year. No other Homer solicitations have been issued but when one is, [the businessman], as well as all other interested parties, will certainly be notified.

In his letter closing the businessman's complaint, Assistant Ombudsman Kissel quoted from Ms. Janiak's e-mail message her commitment that "[the businessman], as well as all other interested parties, will certainly be notified."

Under state emergency procurement statutes and 2 AAC 12.450, Ms. Janiak was required only to use a "competition that is practicable under the circumstances." She did that. She notified four potential vendors but did not notify the businessman. She said that she did not think the status of the businessman's property had changed: she thought that the modular building remained in Palmer, that the property in Homer remained undeveloped with no utility hookups on-site, and that he had not obtained the necessary permits. Moreover, the timeframe for this RFP process was even shorter than for the previous one—if it had earlier seemed unlikely that the businessman could prepare his building within a three-week timeframe, it must have seemed even more unlikely that he could prepare the building within just seven days between the issuance of an October 24, 2000, RFP to house DFYS and the agency's eviction date of October 31.

However, Ms. Janiak did not verify with the businessman the current status of his property. For all she knew, he might have already moved the building or made arrangements that would have accelerated the process of making it available for occupancy. He might have purchased another building in the area. Her commitment to the businessman, repeated to the ombudsman, was clear and did not differentiate between emergency and non-emergency procurements. It also was not contingent on his providing her with information about his ability to provide space before he was asked. Ms. Janiak breached her commitment to at least notify the businessman of the upcoming DFYS emergency procurement, no matter what her understanding was of his ability to provide useable space.

Although not a violation of existing statutes and regulations, it is clear that the contracting officer unfairly renegeed on a commitment to notify the businessman when the state was issuing RFPs for lease space in Homer. There is no evidence to suggest that Ms. Janiak retaliated against the businessman for complaining to the ombudsman about what appeared to him to be a flawed RFP process. However, her failure to contact him regarding the later search for new accommodations for DFYS may well have confirmed his fears of retaliation.

Because DGS did not give the businessman notice, did not give him an opportunity to respond to Ms. Janiak's assumptions about the status of the businessman's property, and did not attempt to make its decision on the basis of a careful consideration of all available pertinent information, the ombudsman finds this allegation justified.

Allegation 3. Contrary to law, DGS did not respond to the complainant's requests for public information.

According to the Office of the Ombudsman Policies and Procedures manual at 4040(1), an administrative act is *contrary to law* when it involves:

- (A) failure to comply with statutory or regulatory requirements;
- (B) misinterpretation or misapplication of a statute, regulation, or comparable requirement. . . .

The businessman presented as evidence the March 28, 2000, fax that he said he sent to Ms. Janiak without receiving a response. Ms. Janiak did not remember and had no written record of this communication. The businessman did not follow-up the fax with another request and did not raise the issue again until his September complaint to the ombudsman.

Ms. Janiak said that the DGS procedure for receiving correspondence is that the mail is machine date-stamped. Faxes received have dates added by the fax machine. Correspondence is given to the contracting officer, but the agency doesn't maintain a log of public information requests.

6 AAC 96.325 sets a 10-day timeframe for responding to a request for public information. The agency may extend the deadline by another 10 days if notice is sent to the requestor and there is good cause as outlined in the regulation. Section (f) states in part, "If a response is not received by a requestor by the expiration of the time limit, the requestor may consider the request denied."

6 AAC 96.340 provides that someone whose request has been denied or ignored "may ask for reconsideration of the denial by submitting a written appeal to the agency head within 60 working days of the denial."

This complaint involves a “he-said, she-said” issue. While there is no reason to doubt that the businessman requested information, there is nothing to establish that the request reached Ms. Janiak. She did not have it in her file, she did not have a recollection of it, and the office did not maintain a public information request log.

Under regulation the failure to respond may be interpreted as a denial which is appealable in accordance with the process set out in regulation. The businessman apparently did not follow up his initial request with a reminder or an appeal.

Because there is no evidence that the businessman’s request was received and ignored, and because the complainant did not follow up on his request in accordance with the regulatory process, the evidence does not support the allegation that DGS failed to comply with the Public Records law by not responding to his requests for public information. Therefore, the ombudsman finds this allegation ***not supported***.

Allegation 4. DGS, unreasonably and contrary to law, by its own inaction created a situation that led to a lease procurement being handled as an emergency where no emergency originally existed.

According to the Office of the Ombudsman Policies and Procedures manual at 4040(2), an administrative act is *unreasonable* when:

- (A) a procedure adopted and followed by an agency in managing a program is inconsistent with, or fails to achieve, the purposes of the program;
- (B) a procedure 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 relative to all others.

According to the Office of the Ombudsman’s Policies and Procedures Manual at 4040(1), an administrative act is contrary to law if it involved:

- (A) failure to comply with statutory or regulatory requirements;
- (B) misinterpretation or misapplication of a statute, regulation or comparable requirement;

On the surface, DGS faced a legitimate emergency when a Homer landlord gave DFYS 10 days to move out of its lease space. AS 36.30.310 describes emergency as a threat to public health, welfare, or safety, or when a situation exists that makes a procurement through competitive sealed bidding or competitive sealed proposals impracticable or contrary to the public interest.

2 AAC 12.440 defines emergency conditions as fire, flood, epidemic, riot, environmental accident, or a similarly compelling reason; equipment failure, if the need for timely repair is essential; a need to protect public or private property or a situation in which procurement through competitive sealed bidding or competitive sealed proposals is impracticable or contrary to the public interest.

There was no flood, epidemic or threat to public health, welfare or safety, but it clearly was not in the public interest to allow the Homer DFYS office to close while leasing officers followed the cumbersome procurement process of finding new space.

If that were the only criterion this allegation could easily be found not supported. However, the facts in this case indicate that the situation faced by Ms. Janiak was not as unavoidable as DGS suggests. DGS knew from the date the lease was signed, five years before, when the lease would expire and have to be renegotiated. This deadline was not a surprise.

DGS first planned to extend the lease in February 2000, but the problems with carcinogenic, noxious fumes made that option unacceptable and required that a new location be found. Despite that apparent health risk and the impending lease termination, DGS did not expedite the process to obtain lease proposals. Instead, on August 31, 2000, the lease's final expiration date, DGS administratively extended the lease to October 31, 2000, still taking no steps to issue an RFP.

It appears that DGS would not have met that extension deadline either. Ms. Janiak set October 20 as the date that she would *issue* an RFP for the DFYS space, but on that date the landlord exercised his right to evict DFYS by the end of the lease extension period on October 31. Even if DGS had issued the RFP on October 20, the required response time, evaluation period, appeal period, and necessary moving time would have pushed the deadline well beyond the extended lease termination date of October 31.

Declaring this situation an emergency seems disingenuous. The emergency was created by the state contracting officer; it was not forced upon the state by unavoidable circumstances.

The intent language for the 1986 legislation that implemented much of the State Procurement Code declared that the Act was intended to "provide for increased public confidence" in state procurement procedures; to "ensure the fair and equitable treatment of all persons who deal with" the state procurement system; to "provide increased economy in state procurement activities and maximize to the fullest extent practicable the purchasing value of state funds"; and to "foster effective broad-based competition within the free enterprise system."

The Procurement Code calls for competition, but in this lease procurement true competition did not occur. It does not appear that the "emergency" DFYS lease procurement was a true emergency nor does it appear that the declared emergency met the intent of AS 36.30.310.

DGS's defense for failing to solicit bids in a timely manner is that the leasing section is overworked. The numbers provided by Mr. Jones do seem to suggest that the agency is short-staffed for the workload. However, the State Procurement Code does not appear to contain a provision that the rules can be altered to meet the manpower needs of the agency.

Additionally, it is troubling that the only agreement Ms. Janiak obtained from the landlord when discussing the lease extension was that "he did not object" when she suggested it. That can hardly be termed a "verbal agreement."

Finally, by DGS's own account, the state employees in the building were being subjected to some level of carcinogenic, noxious substances in the air. Surely this created a situation that called for faster, not slower action for the protection of the state employees.

In summary, there was no reasonable cause to delay issuing the RFP; on the contrary, the carcinogenic fumes created legitimate cause to expedite the lease issue long before August 2000. Further, this delay resulted in the declaration of an artificial emergency that

denied other potential vendors the opportunity to compete for the contract and that failed to secure for the state the advantages of competition in awarding contracts that the Procurement Act was written to effect. By declaring an artificial emergency, DGS misinterpreted and misapplied the Procurement Act. The ombudsman therefore finds this allegation justified.

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When an investigation has several components, and one or more allegations are found to be *justified* while others are found *not supported*, the allegations as a whole are found to be *partially justified*. The ombudsman finds this complaint as a whole partially justified.

AGENCY RESPONSE TO FINDINGS

DGS agreed with the proposed finding of *not supported* on Allegations 1 and 3, but disagreed with the proposed finding of *justified* on Allegations 2 and 4.

Regarding Allegation 2, DGS argued that because the Homer DFYS lease was an emergency procurement, Ms. Janiak had no obligation to check with the businessman to see if he had suitable office space available for lease:

... because the Homer DYFS was an Emergency Procurement versus a Request for Proposal the mailing list was not utilized and [the businessman] was not included.

It is also assumed that Ms. Janiak was familiar with the recent proposal submitted by [the businessman] for the Homer One Stop, where he was found non-responsive because of his timing completion problems. DGS believes, with the recent knowledge of his facility and availability, Ms. Janiak did not consider [the businessman] a viable responsive Offeror for the Homer DFYS Emergency Procurement.

The ombudsman finds this reasoning unpersuasive. As noted in the preliminary investigative report to DGS, Ms. Janiak in her capacity as a state contracting officer, expressly promised verbally and in writing to notify the businessman of the next lease procurement in Homer. Further, working in Anchorage she could not be sure without contacting the businessman whether he had gone forward with development of his modular building or had acquired existing office space in Homer in the six months since she had last talked to him. For these reasons, the finding on this allegation remains justified.

Regarding Allegation 4, DGS argued that the ombudsman misrepresented the nature of the procurement process followed for the Homer One Stop and the Homer DFYS office:

Regarding the Homer DFYS, DGS believes this allegation is not completely justified. It is apparent a mistake was made, but there are no indications DGS committed an act that was “contrary to law.”

The Contracting Officer for this lease is no longer employed with the State of Alaska. DGS Management has reviewed the files and concurs that the CO could have provided a more timely standard Request for Proposal (RFP). Upon review of the files it is not clear what aside from other priority work precipitated the delay in a solicitation after receipt of the Agency’s Purchase Requisition (dated 03/00), requesting DGS to replace the expiring lease.

DGS would like to add, upon the appointment of a new Leasing & Facilities Manager in September 2000 and a new Divisional Director — the current practices were evaluated and new procedures, structure and practices were implemented to minimize the need for Emergency Procurements and allow sufficient time to solicit bids utilizing the standard Request for Proposal process.

DGS also called attention to erroneous information provided by Chief Procurement Officer Vern Jones to the ombudsman investigator:

We would also like to clarify some information that was provided to your office while conducting this investigation and listed in your report. As discussed with Ms. Lord-Jenkins, the number of lease procurement and alternate procurements previously provided included all lease actions, even amendments to existing leases. Upon review of our files to determine the actual numbers of new leases or [lease] replacements that were established via alternate procurement, and the types of alternate procurements used, please note the following:

- * 1998 – 78 lease procurements, 5 single source, 0 limited competition, 0 emergency
- * 1999 – 85 leases [sic] procurements, 0 single source, 0 limited competition, 0 emergency
- * 2000 – 91 leases procurements, 7 single source, 1 limited competition, 2 emergency
- * 2001 – 136 lease procurements, 6 single source, 1 limited competition, 1 emergency

Ombudsman Response

The discrepancy between the two sets of numbers provided by Mr. Jones is significant. While the new numbers dispel the appearance that DGS contracting officers in general have overused the emergency procurement procedure in recent years, the numbers nonetheless underscore the anomaly of Ms. Janiak using emergency procurements twice in the same small town in the same year. The Homer One Stop and Homer DYFS procurements accounted for two of just three emergency lease procurements statewide in the four years reported on by Mr. Jones. This strengthens the ombudsman's preliminary conclusion that the procurements the businessman complained about were indeed irregular.

Furthermore, as the preliminary investigative report noted, the long lead time Ms. Janiak had to initiate a conventional competitive bidding process on the Homer DFYS office space, coupled with the state employee reports of noxious fumes in the old lease space, makes it difficult to understand why this became an "emergency" procurement nearly a year after those employees complained to the Homer Fire Department and OSHA about unhealthy working conditions in the building.

DGS points to workload issues and the contracting officer's decision not to extend the lease to show she was adequately dealing with these issues, but potential hazards to the health of state employees and the public ought to have been reason enough to get this procurement process going on time. Furthermore, the contracting officer twice renewed the lease on a month-to-month basis despite knowledge of the problems with the building. Yet in reviewing this case, the agency excused the contracting officer's decisions on the grounds that she had higher priorities than this lease. We are troubled by DGS's apparent inability to appreciate the seriousness of this matter.

The evidence further shows that Mr. Jones approved this “emergency” procurement, apparently on grounds of expediency, despite the contracting officer’s failure to justify it in accordance with statutory requirements for emergency procurements. Statistics provided by DGS show this to have been an extremely unusual method of procurement, yet DGS has defended the decision as if it were a routine matter. DGS’s justification of its failure to follow the requirements of the State Procurement Code in this case appears to run directly counter to its mission in state government.

The finding on Allegation 4, that DGS acted contrary to law in this case, will remain justified.

RECOMMENDATIONS

Ms. Janiak promised the businessman directly, and again indirectly through Assistant Ombudsman Kissel, that he would be notified of impending lease procurements in Homer. She did not qualify that promise. She said she made the same promise to 20 other vendors in the area.

Granted, Ms. Janiak had a serious time crunch on her hands in October 2000 and had to find new office space for DFYS immediately. But her unqualified commitment to the businessman and 20 others was to notify them of upcoming RFPs. Time was short, but the shallow lease candidate pool might have been deeper had all of the vendors been notified. This notification could have been as brief as a short phone call, a pre-programmed fax message or an email to all stating that an emergency lease procurement for office space in Homer was on the street and available at the old DFYS office.

Ms. Janiak also did not tell the businessman what he needed to do to get his name on the state vendor list to *perhaps* receive notice of other area procurements—“perhaps,” because although state law requires use of the vendor list and DGS web page information directs bidders to get on the vendor list, statute provides only that procurement officers *may* use the list when soliciting bids for contracts. In the case at hand, Ms. Janiak said she had her own list in her own files, which consisted of notes and “yellow stickies.”

The fact that Ms. Janiak maintained her own vendor list is at once understandable and disconcerting. The statewide vendor list contains many names of businesses that do not lease property or who do not lease property in all areas. Mr. Jones termed the individual contracting officer lists “supplemental.” These supplemental lists can be a valuable tool in alternative procurements, especially procurements with a short deadline. They help to quickly separate the wheat from the chaff.

However, there is a problem with the information provided potential vendors about vendor lists: who knew that Ms. Janiak had a separate, “supplemental” vendor list? It could be argued that the 20 Homer landlords whom Ms. Janiak promised to notify of lease procurements thought they were on the only vendor list that mattered.

How many potential landlords placed their names on the official state vendor list but took no steps to update contracting offices about the status of their property because they were unaware of the need to update an unadvertised supplemental vendor list? This is confusing to vendors at best and can lead to a serious breakdown of faith in the state’s procurement system.

The ombudsman therefore made the following recommendations:

Recommendation 1: DGS should take steps to ensure that the businessman and the other 20 vendors are notified of future procurements in the Homer area.

Recommendation 2: DGS should direct all contracting officers to use the state vendor list as a base list and the individual contracting officer vendor lists as supplemental lists only. Additionally, DGS should remind contracting officers to advise interested vendors about the easily obtainable vendor list application.

*

Because DGS is not bound to use the vendor list in alternative procurements, more accurate and complete information should be disseminated to the business community about DGS's use of the vendor list. DGS should explain that inclusion in that list does not guarantee that individuals will be notified of all lease offerings. Therefore, the ombudsman recommends the following:

Recommendation 3: DGS should give more accurate and complete information to the business community about DGS's use of the vendor list.

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On March 10, 2000, DGS issued written notice that it had awarded the lease contract to the other landowner. On March 15 DGS issued written notice to the businessman that his proposal had been deemed non-responsive. Neither letter contained information about the businessman's protest and appeal rights. Although that information was included in the RFP materials, it is good administrative practice to include information about options for protest or appeal in notice of administrative decisions. Therefore, the ombudsman recommends the following:

Recommendation 4: DGS should give notice of protest and appeal rights set out in AS 36.30.550 — 36.30.615 when notifying bidders of bid awards and determinations that proposals are non-responsive.

*

Although the ombudsman does not agree that the Homer DFYS lease procurement constituted a true emergency, DGS could better utilize Internet technology to notify more potential bidders in a short time when circumstances require quick action. The state has begun posting legal notices on the state's Internet home page. E-mail addresses could easily be obtained from those seeking to be added to the vendor list, and procurement staff could develop mail groups to use when emergency procurements arise. This would better fulfill the intent of Alaska's procurement legislation to promote consistency, fairness, competition, and public confidence in state procurement actions. Therefore, the ombudsman recommends the following:

Recommendation 5: DGS should use Internet technology in the case of true emergency procurements by sending notices to potential bidders via mass e-mails.

AGENCY RESPONSE TO RECOMMENDATIONS

DGS director Chris Parce responded to the ombudsman's preliminary investigative report and proposed findings and recommendations on February 4, 2002. The net effect of that response was to reject all five ombudsman recommendations aimed at preventing a recurrence of the problems uncovered in this investigation.

Then Acting Ombudsman Maria Moya directed the ombudsman investigator to confer with Ms. Parce and Chief Procurement Officer Vern Jones about the division's reply, and following that conference Ms. Parce agreed to review the files and submit a revised response. The revised response, dated February 22, 2002, contained new information from agency files but differed little from the first response in sentiment.

Ms. Moya directed the ombudsman investigator to try again to explain to Ms. Parce and Mr. Jones the case-specific and systemic problems uncovered by this investigation in the hope that systemic problems would not happen again. Director Parce agreed to submit a third response to the preliminary investigation, the principal contents of which are excerpted below.

DGS accepted and implemented Recommendation 1, argued that Recommendations 2, 3, and 4 were unnecessary, and stated that Recommendation 5 was based on inaccurate assumptions.

Recommendation 1: DGS should take steps to ensure that the businessman and the other 20 vendors are notified of future procurements in the Homer area.

DGS responded,

DGS has reviewed the names contained in Ms. Janiak's lease file and personally and individually contacted each of the potential Lessors who are not currently on the DGS vendor list (including [the complainant's] business) and mailed them a vendor application. Upon receipt of the application, each Lessor will automatically be supplied with a bid solicitation under standard conditions.

DGS will follow the public notice requirements of AS 36.30.130 and 2 AAC 12.130 when procuring office spaces via competitive sealed bids or proposals. Public notice procedures for alternate procurements are dictated by the individual circumstances surrounding each procurement, as determined by the Chief Procurement Officer.

This response substantially satisfies the ombudsman's first recommendation.

Recommendation 2: DGS should direct all contracting officers to use the state vendor list as a base list and the individual contracting officer vendor lists as supplemental lists only. Additionally, DGS should remind contracting officers to advise interested vendors about the easily obtainable vendor list application.

DGS responded,

Contracting Officers have long been instructed to use the state vendor list per AS 36.30.130 and 2 AAC 12.130.

DGS expends considerable effort to educate vendors about how to be placed on vendor lists, as well as how to effectively compete for State business. We plan to continue these efforts. For example, on our web site alone, potential vendors can find the following:

*Main DGS page contains a button titled, "click here to download Bidder Application"

*Purchasing page contains a button titled, "Bidder Application Packet Request," the "How to do Business with the State" booklet, and "Frequently asked Questions," which all explain how to become listed on the vendor lists.

*Leasing page contains a button titled, "Bidding / Solicitation Application, (for potential & current landlords) — which is linked to an email so people can request a bidder application packet.

Ombudsman Response

This response sidesteps the principal point of the recommendation, namely, that according to Ms. Janiak and Mr. Jones, DGS contracting officers routinely use personal, "supplemental" lists of vendors. This recommendation and the following one were aimed at ensuring that state contracting officers adhere to the spirit as well as the letter of the State Procurement Code by attempting to include eligible vendors on their informal supplemental lists. DGS's unwillingness to concede this point virtually ensures that the unusual and unfair contracting procedures followed by Ms. Janiak will be repeated by others.

For this reason, the DGS response to this recommendation is *not satisfactory*.

Recommendation 3: DGS should give more accurate and complete information to the business community about DGS's use of the vendor list.

DGS responded,

DGS fully complies with all laws and policies concerning the use of vendor lists, and as mentioned above, expends considerable effort to educate the vendor community on its use of vendor lists. In addition to the information contained on our web pages and in our instructional materials, DGS employees meet with the vendor groups on a regular basis to educate [sic] them about how to market to the State, including how to be on the vendor list.

Ombudsman Response

The clear intent of the State Procurement Code is to ensure that Alaska businesses have fair access to the state procurement process. DGS's response asserts that it adequately publicizes the official vendors list, yet the division permits but does not publicize the use of unofficial, supplemental lists that do not contain the names of many vendors on the statewide vendors list. What good does it do a vendor to apply to be placed on the statewide list if state contracting officers can ignore that list and use a list of their own when it suits their needs? DGS appears not to recognize the problem this causes and the fundamental unfairness of this practice.

Again, Recommendations 2 and 3 were aimed at ensuring that state contracting officers adhere to the clear intent of the State Procurement Code by enabling eligible vendors to get on lists actually used in the procurement process. The use of personal supplemental vendors lists with the express permission of the chief procurement officer and the director sidesteps the intent of the law. What happened in this case will surely happen again so long as DGS adheres to a practice that, while it may be convenient for DGS contracting officers, nonetheless has the effect of rendering the state vendors list ineffectual for some procurements. The ombudsman believes this is contrary to the intent of the legislature as set out in the Procurement Code.

The DGS response to Recommendation 3 is *not satisfactory*.

Recommendation 4: DGS should give notice of protest and appeal rights set out in AS 36.30.550 — 36.30.615 when notifying bidders of bid awards and determinations that proposals are non-responsive.

DGS responded,

DGS has been providing protest and appeal rights to vendors with award notification for many years.

As an example, in Solicitation #2000-O200-1839, Homer One Stop, Section III, Item #7, Instruction to Offeror's [sic], Filing a Protest: "An offeror may protest the award of a contract or the proposed award of a Contract for supplies, services or professional services. The protest must be filed in writing and include the following information: (1) the name, address and telephone number of the protestor; (2) the signature of the protested [sic] or the protestor's representative; (3) identification of the contracting agency and the solicitation or contract at issue, (4) a detailed statement of the legal and factual grounds of the protests, including copies of relevant documents; and (5) the form of relief requested. Protest will be treated in accordance with Alaska Statutes (AS) 36.30.560 — 36.30.610."

Ombudsman's Response

The director's response to Recommendation 4 states that agency staff always give notice of protest and appeal rights. But it didn't do that in this case. In this case, Ms. Janiak failed to give notice of appeal in two successive determination letters to the complainant in March 2000. We are disappointed that DGS argued it has been giving adequate notice "for many years," instead of simply reminding state contracting officers of state law and DGS policy on this point. In this case the DGS contracting officer clearly failed to meet the requirements of Alaska law as set out in the State Procurement Code. To defend this failure by pretending it did not occur invites further abuses by division staff.

Because DGS's response does not indicate that the agency plans to take proactive steps to ensure that all state contracting officers understand their legal obligation to give notice of protest and appeal rights, the director's response is not satisfactory.

Recommendation 5: DGS should use Internet technology in the case of true emergency procurements by sending notices to potential bidders via mass e-mails.

DGS responded that this recommendation was based on inaccurate assumptions:

The immediate need of the emergency dictates the competition as approved by the chief Procurement Officer. This recommendation assumes that all potential vendors possess this technology, and that DGS has been notified of all vendors' email addresses. Both of those assumptions are inaccurate.

Ombudsman's Response

The DGS response to Recommendation 5 appears to argue that because not every vendor has an e-mail address, there is no point in attempting to reach a wider vendor pool by using e-mail in cases of true emergency procurements. This response is illogical and flies in the face of the division's legal obligation to obtain the best possible services and goods for the best possible prices by soliciting from the widest range of vendors possible under given circumstances.

Many vendors do have e-mail addresses, and many state agencies routinely make use of this means of contact with the public. DGS itself asks for email addresses on its vendor application forms which are posted on the Internet. The form also seeks location information that appears to allow complex data sorts for certain kinds of vendor needs. In an earlier response to this finding, DGS pointed to the steps it has taken *on the Internet* to inform the public of its services.

Indeed, for several years all three branches of state government have set a high priority on using computer-based communications to expand the delivery of state services to Alaskans. All public notices are posted on the Internet state web site. All state administrative hiring is done on the workplace Alaska site on the Internet. DGS should rethink its rejection of this now standard, widely used and effective form of communication.

It is simply illogical to imply that issuing public notices on the Internet is acceptable but then argue that issuing emergency RFP notices via the use of email technology is not fair because not all vendors have email.

The DGS response to Recommendation 5 is *not satisfactory*.

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Although the division failed to acknowledge there was a significant problem with the Homer emergency procurements of 2000, Ms. Parce assured the ombudsman that DGS has new procedures in place to better manage state leases.

Because of the ever-increasing workload, DGS current management acknowledges the need to be pro-active in tracking critical dates. We acknowledge the need to strive for full and open [competition] to ensure the State of Alaska is receiving the best value and that vendors have a fair opportunity to respond to our solicitations.

Within the last year and a half, procedures have been implemented to achieve these goals. Specifically, the appointment of an on-site Leasing & Facilities Manager. The Manager initiated a tracking system that identifies every lease expiring with and without options. Several status reports are reviewed and the current action by each individual Contracting Officer are [is] discussed on a weekly basis to track progress and ensure projects are on track. In addition to this, we have implemented peer review of all outgoing documents. All outgoing Contracting Officer emails communications are monitored by the Manager to monitor communications, status and progress.

I am confident these measures will result in a marked improvement in the way our leasing section is managed. . . .

This improvement in the tracking and management of the state's leases is a small step in the right direction. We regret there were not more.

FINDINGS OF RECORD

The ombudsman's findings of record in this case are that Allegations 1 and 3 are *not supported* by the evidence, and Allegations 2 and 4 are *justified*.

DGS's response to Recommendation 1 was satisfactory, but the agency rejected Recommendations 2, 3, 4, and 5.

The complaint taken as a whole is *partially justified* and *partially rectified*.

LLJ:jjj