



SUBJECT: AN ORDINANCE OF THE MATANUSKA-SUSITNA BOROUGH ASSEMBLY AMENDING THE BID PROTEST AND APPEAL PROCEDURE BY ADOPTING AMENDMENTS TO MSB 3.08.342BID PROTEST AND APPEAL PROCEDURES.






AGENDA OF: SEPTEMBER 07, 2021

ASSEMBLY ACTION:

Adopted Without Objection 9-21-21


MANAGER RECOMMENDATION: Introduce and set for public hearing.

APPROVED BY MIKE BROWN, BOROUGH MANAGER: 

Route To:	Department/Individual	Initials	Remarks
	Originator	SB SB	for Manager
	Purchasing Officer		
	Finance Director		
	Borough Attorney		
	Borough Clerk		

ATTACHMENT (S): Fiscal Note: YES NO
 Ordinance Serial No. 21-090 (7 pp)

SUMMARY STATEMENT: This ordinance is brought forth by the Borough Manager in consultation with the Attorney's office for consideration of the MSB Assembly.

Throughout the last decade, the Purchasing Officer and then the Office of Administrative Hearings has handled a number of bid protests and appeals.

The recent appeal of a significant capital project highlighted some code procedures in the midst of Alaska's short building season and concerns relating to the potential fluctuations of material prices due to the pandemic. As a result, these changes were identified to help facilitate Borough business to ensure an award can go forward despite a bid protest or a bid appeal. The proposed changes here are consistent with the way state law approaches contract awards upon the filing of bid protests.

More specifically, instead of the current process of waiting on the results of the bid protest and appeal proceedings - which can take weeks and delay the award by weeks - State law allows awards to proceed unless a determination is made that there is a "reasonable probability" that the protest will be sustained (i.e. some error occurred and the protestor will could prevail), or unless a determination is made that the a stay of the award is not contrary to the best interests of the state. For instance, if a protest involves a contract that is not time sensitive, then that could be a basis to stay the award.

The proposed revisions in this ordinance address the Borough's procedures by largely mirroring Alaska State statutes AS 36.30.575 (Stay of award) and AS 36.30.585 (Protest remedies). More specifically, AS 36.30.575 states:

If a protest is filed the award may be made unless the procurement officer of the contracting agency determines in writing that a

- (1) reasonable probability exists that the protest will be sustained; or
- (2) stay of the award is not contrary to the best interests of the state.

AS 36.30.585 states:

- (a) If the procurement officer sustains a protest in whole or in part, the procurement officer shall implement an appropriate remedy.
- (b) In determining an appropriate remedy, the procurement officer shall consider the circumstances surrounding the solicitation or procurement including the seriousness of the procurement deficiencies, the degree of prejudice to other interested parties or to the integrity of the procurement system, the good faith of the parties, the extent the procurement has been accomplished, costs to the agency and other impacts on the agency of a proposed remedy, and the urgency of the procurement to the welfare of the state.
- (c) Notwithstanding (a) and (b) of this section, if a protest is sustained in whole or part, the protester's damages are limited to reasonable bid or proposal preparation costs.

The proposed revisions for MSB 3.08.342(C) address how the Borough should handle the award of a contract if a protest is filed, and whether or not that award should go forward during the protest or appeal.

The proposed code language makes the initial decision to go forward

with the award solely within the discretion of the Purchasing Officer (during the protest period), and then the Purchasing Officer or the Assembly (if it is subject to Assembly approval); the decision to award the contract or stay it is solely within their discretion and is not appealable.

The proposed revisions clarify the hearing officer's authority under sub-section (J) to reject or uphold the decision, rather than rejecting the award of the contract.

Section (J) also provides guidance on how any relief would be determined if remanded for the provision of relief. While it allows for damages, damages are not automatically warranted under the proposed language.

One proposed clause expressly provides, "A protestor's damages are limited to reasonable bid or proposal preparations costs." That clause simply states the current Alaska state law and does not broaden the relief available. Specifically, Laidlaw Transit, Inc. v. Anchorage School District, 118 P.3d 1018, 1026 (Alaska 2005) citing King V. Alaska State Housing Authority, 633 P.2d 256, 260 (Alaska 1981) held that a bidder is limited by public policy from claiming anything more than the reasonable costs incurred in preparing and unsuccessful bid. See also King V. Alaska State Housing Authority, 633 P.2d 256, 260 (Alaska 1981) (for an arbitrary and capricious rejection of a bid a bidder is entitled to recover the expenses incurred in preparing its bid), and Dick Fischer Development No. 2, Inc. V. Department of Admin., 838 P.2d 263, 266 (Alaska 1992) (the cancellation of the solicitation was not arbitrary and capricious and the bidder was not entitled to bid costs). Again, these changes bring the Borough code procedures in line with those that currently exist in state law.

Under current code and something that is not affected by these proposed changes, it is important to understand that a bidder that protests or appeals may not be awarded the contract if they are successful. If they prevail at the OAH, they are at the most entitled to reasonable bid preparation costs.

The City of Palmer has adopted similar procedures at PMC 3.21.290 (E) and (F) to those reflected in state law and proposed here.

There is also a proposed change to MSB 3.08.342(C) that clarifies who can file a protest. In the past, a protest was filed by a bidder that would not have received the contract even if the Purchasing Officer's decision on the contract award was rejected by the hearing officer. The bidder was not determined to be the second low, but the third or fourth bidder in line for the award. It can be a waste of resources to allow protests and appeals by bidders, such as third or fourth for "low bid" that will not be

affected by the outcome of an appeal. The phrase "direct economic interest" inserted is a term used in the definition of "interested party" in 31 USCA § 3551, and is added here in an effort to narrow the ability of bidders to appeal to those bidders that have a sufficient interest or are sufficiently harmed or aggrieved by the purchasing officer's decision.

Also, sub-section MSB 3.08.342(H) has caused some confusion in application. Those changes simply make the process more clear.

RECOMMENDATION OF ADMINISTRATION: Adoption of legislation.