

CODE ORDINANCE

Sponsored by: Borough Manager
Introduced: 09/07/21
Public Hearing: 09/21/21
Adopted: 09/21/21

**MATANUSKA-SUSITNA BOROUGH
ORDINANCE SERIAL NO. 21-090**

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

WHEREAS, the intent and rationale are outlined in the accompanying Informational Memorandum.

BE IT ENACTED:

Section 1. Classification. This ordinance is of a general and permanent nature and shall become a part of the Borough Code.

Section 2. Amendment of Subsection. MSB 3.08.342(C) is hereby amended to read as follows:

3.08.342 BID PROTEST AND APPEAL PROCEDURES

(C) Bid Protest. Within two days of service of the purchasing officer's determination of the apparent successful bid or proposal, a bidder whose direct economic interest would be affected by the award of the contract who wishes to protest the determination shall lodge a protest with the purchasing officer. The bid protest shall be in writing on a form provided by the purchasing officer. The bid protest shall describe with particularity the alleged errors in the award of the

bid. If a protest is filed, the award may be made unless the procurement officer determines in writing that a reasonable probability exists that the protest will be sustained or that stay of the award is not contrary to the best interests of the borough. The purchasing officer shall conduct a review in consultation with the borough attorney. Within three business days of receipt of the bid protest, the purchasing officer shall issue a determination. The time for the determination may be extended up to ten calendar days for good cause by the purchasing officer. The determination shall be in writing, supported by findings and conclusions addressing the issues raised in the bid protest. The determination shall be issued to all participants in the bidding process by facsimile, if available, and U.S. mail.

Section 3. Amendment of Subsection. MSB 3.08.342(D)(1) is hereby amended to read as follows:

3.08.342 BID PROTEST AND APPEAL PROCEDURES

(D) *Notice of appeal.* A bidder may appeal the purchasing officer's decision on a bid protest as follows:

(1) *Deadlines for filing.* An appeal shall be received by the clerk's office within three business days after the issuance of the purchasing officer's decision. Failure to file within three business days shall result in an appeal being denied as untimely without further process and shall constitute a bar on any further action. If an appeal is filed before a contract is awarded and the award was stayed under MSB 3.08.342(C), the filing of the appeal automatically continues the stay until the purchasing officer or, in the case of awards subject to Assembly approval, the Assembly, determines the award of the contract without further delay is necessary to protect the best interests of the borough.

Section 4. Amendment of section. MSB 3.08.342(H)(1) is hereby amended to read as follows:

3.08.342 BID PROTEST AND APPEAL PROCEDURES

(H) *Hearing date and briefing schedule.* The clerk shall set a hearing date at least 15 calendar days and no later than 20 calendar days from the date the record is mailed or personally served. The clerk shall issue a calendaring notice for briefing and exhibit filing. The

calendaring notice shall be served by U.S. Mail. The briefing schedule shall be set by the clerk as follows:

(1) *Briefs.* Briefs shall be drafted to conform with the Alaska Rules of Civil Procedure and shall be filed no later than five calendar days prior to the hearing. [BRIEFS MAY INCLUDE AN APPENDIX WITH EVIDENCE UPON WHICH THE BIDDER INTENDS TO RELY AT HEARING.]

Section 5. Amendment of Subsection. MSB 3.08.342(H)(2) is hereby amended to read as follows:

3.08.342 BID PROTEST AND APPEAL PROCEDURES

(2) *Exhibits.* All exhibits to be used at the hearing shall be filed with the clerk no later than five calendar days prior to hearing. Exhibits not a part of the record shall be subject to admission at the hearing or, upon motion, prior to the hearing.

Section 6. Amendment of Subsection. MSB 3.08.342(I)(2) is hereby amended to read as follows:

3.08.342 BID PROTEST AND APPEAL PROCEDURES

(I) Hearings.

(2) Conduct of hearing. The administrative hearing officer has the discretion to conduct the hearing in a manner which enables the issues and facts to be presented in a manner which conforms to due process and preserves

[JUDICIAL] economy. The administrative hearing officer shall conduct the hearing according to the Alaska Rules of Civil Procedure and the Alaska Rules of Evidence. However, the administrative hearing officer may in his or her discretion waive strict adherence to the evidence rules.

(a) A bidder shall be entitled to present witnesses and evidence on its behalf.

(b) A bidder has the right to cross-examine opposing witnesses and rebut evidence.

(c) All hearings shall be open to the public.

(d) All testimony shall be given under oath or affirmation.

(e) The hearing shall be tape-recorded.

Section 7. Amendment of Subsection. MSB 3.08.342(J) is hereby amended to add titles and section numbers (1) and (2) and amended language as follows:

3.08.342 BID PROTEST AND APPEAL PROCEDURES

(J) *Findings and decision.*

(1) Decision Making Process. The administrative hearing officer's findings are limited to [REJECTING OR UPHOLDING THE AWARD OF THE CONTRACT] **determining whether to sustain the protest in whole or in part.** **If the**

administrative hearing officer rejects the protest and upholds the purchasing officer's decision to award to a particular bidder, no further action is needed by the borough. If the administrative hearing officer [REJECTS THE AWARD OF THE CONTRACT] sustains the protest in whole or in part, the matter shall be remanded to the borough for determination of an appropriate remedy, if any [FURTHER ACTION]. In determining an appropriate remedy, if any, the borough 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 Borough. A protester's damages are limited to reasonable bid or proposal preparation costs.

(2) Decision Issuance Process. The administrative hearing officer has the discretion to make an oral finding [TO UPHOLD OR REJECT THE BOROUGH'S AWARD OF THE CONTRACT] at the conclusion of the hearing or to take

the matter under advisement. If the administrative hearing officer takes the matter under advisement, a written decision shall be issued within five business days of the hearing. If the administrative hearing officer makes an oral finding at the conclusion of the hearing, the oral finding shall be supplemented with written findings within five business days of the hearing. The administrative hearing officer shall support the decision through written findings of fact. The administrative hearing officer shall provide the written decision to the clerk. The clerk shall serve the written decision on the parties in person or by mail within two business days after receiving the decision. The clerk, in her or his discretion, may notify the parties by telephone prior to mailing the decision.

Section 8. Effective date. This ordinance shall take effect upon adoption.

ADOPTED by the Matanuska-Susitna Borough Assembly this 21 day
of September, 2021.



VERN HALTER, Borough Mayor

ATTEST:



LONNIE R. McKECHNIE, CMC, Borough Clerk

(SEAL)



PASSED UNANIMOUSLY: Hale, Nowers, McKee, Yundt, Tew, Sumner, and
Boeve