
Kenai Peninsula Borough

Special Assembly Meeting Summary

May 8, 2002 - 2:00 p.m.

Special Meeting - Soldotna, Alaska

CALL TO ORDER

A Special Meeting of the Kenai Peninsula Borough Assembly was held on May 8, 2002, in the Assembly Chambers, Borough Administration Building, Soldotna, Alaska. President Navarre called the meeting to order at 2:00 p.m.

PLEDGE OF ALLEGIANCE

The Pledge of Allegiance was recited.

There were present:

Tim Navarre, Presiding
Paul Fischer
Ron Long
Milli Martin

Grace Merkes
Chris Moss
Pete Sprague
Gary Superman

comprising a quorum of the assembly.

Absent:

Bill Popp (excused)

Also in attendance were:

Dale Bagley, Borough Mayor
Kevin Koch, Attorney for the Assembly
Linda Murphy, Borough Clerk
Sherry Biggs, Deputy Borough Clerk

APPROVAL OF AGENDA

(Tape 1, 40)

MOTION TO APPROVE AGENDA:

Sprague moved for the approval of the agenda.

President Navarre called for additions or corrections to the agenda.

AGENDA APPROVED AS PRESENTED:

Unanimous without objection.

PUBLIC COMMENTS *(Interested Parties)*

(Tape 1, 50)

Kathryn Thomas, Box 3005, Kenai, AK, provided an overview of the events that occurred during the bid submittal by ArcTech Services.

APPEAL HEARING

(Tape 1, 185)

Appeal of Mayor's Award of a Contract for Stariski Timber Sale as filed by Gates Construction, Inc.

PRESENTATION BY APPELLANT

(Tape 1, 190)

William Choquette, attorney at law, represented Gates Construction, Inc. Mr. Choquette stated Gates Construction was prejudiced by the borough in accepting a competing bid at other than the advertized location. Mr. Choquette stated this was not merely a minor irregularity, but posed an unfair situation to Gates Construction, Inc. Mr. Choquette asked that all bids be rejected and suggested that the timber sale be rebid.

Mr. Choquette called Fred W. Thompson, timber buyer for Gates Construction, Inc., as a witness. Mr. Thompson explained the circumstances in submitting his bid at the Spruce Bark Beetle Office.

PRESENTATION BY APPELLEE

(Tape 1, 1140)

John Simmons, Assistant Borough Attorney, called Duane Wise, Program Manager of the Spruce Bark Beetle Office, as a witness. Mr. Wise discussed the driving time from the Spruce Bark Beetle Office to the Borough Administration Building.

Mr. Simmons explained the statement of facts and the confusion of accepting bids at different locations.

REBUTTAL TO WITNESSES

(Tape 1, 1995)

Mr. Choquette discussed minor irregularities as ruled by the Alaska Supreme Court. Mr. Choquette contacted Roger Covey, who participated via teleconference as a witness. Mr. Covey stated that Mr. Thompson had two bids in his possession at the Spruce Bark Beetle Office.

Mr. Choquette called Tammy Westover, Information Technician at the Spruce Bark Beetle Office, as a witness. Ms. Westover did not recall speaking to Mr. Thompson.

Mr. Choquette stated there was only one factual item under dispute and that was the borough did not follow its advertized procedures.

(Tape 1, 2810)

Mr. Simmons said this was a location issue not a timeliness issue. Mr. Simmons called Michael Fastabend as a witness. Mr. Fastabend said that Gates Construction had tried to submit bid documents at the Borough Administration Building on March 15th. In reviewing the bid documents on the computer, he noticed that old forms still listed the Borough Administration Building as the

specified location. Mr. Fastabend did not believe that any of the incorrect forms had ever been distributed to potential bidders, but chose to accept bids at both locations.

Mr. Wise was asked about the relationship between Covey and Sons and Gates Construction. Mr. Wise stated that Covey and Sons did chipping work and sold through Gates Construction, Inc.

QUESTIONS BY ASSEMBLY

(Tape 1, 3450)

Assembly Member Moss asked what was considered a legal notice. Attorney Koch said a published ad in the newspaper constituted a legal notice to all.

Assembly Member Merkes asked if it was allowable to tell bidders that other bids had been received by the borough. Ms. Merkes asked if that was private information. Mr. Simmons stated there was no written borough policy, but doing so would be frowned upon.

Ms. Merkes asked about the address mentioned on the unofficial Spruce Bark Beetle Office website. Mr. Simmons said the internet site indicated that bids were to be delivered to the Borough Administration Building.

Assembly Member Long asked which location was shown on the bid documents submitted by ArcTech Services. Mr. Simmons did not have the actual ArcTech bid and could not say.

Assembly Member Sprague asked Mr. Choquette if all the bids were thrown out, would it be a level playing field for all the parties. Mr. Choquette responded in the affirmative and suggested that all bids should be delivered to just one location.

Mr. Sprague asked Mr. Choquette if there was a fair and legal way to proceed. Mr. Choquette felt that legally the ArcTech bid was delivered to the wrong location and should be deemed invalid. Then the Gates Construction bid would become the only valid bid for consideration, but that did not seem fair to ArcTech. Mr. Choquette stressed the best solution, both fair and legal, was to republish and rebid the sale.

Assembly Member Martin asked if a pre-bid conference, as per KPB 5.28.210 (c), was ever held in light of the confusion of the dual addresses. Mr. Simmons said that was not an issue.

Assembly Member Fischer asked Mr. Choquette how his client would ever know how many companies had bid on a sale, since Mr. Simmons said the Spruce Bark Beetle Office did not release the names of bidders. Mr. Choquette stated that bidders often have sources through other contractors and subcontractors. It was lawful and done all the time. Most companies that conduct sealed bids have a bidders sign in sheet. It was not a secret that other people were bidding. The secret was the dollar amount of the bid. The integrity of the ArcTech bid was not damaged because it was not opened between the Borough Building and the Spruce Bark Beetle Office. However, the integrity of the process was damaged.

Assembly Member Long inquired if both parties had the opportunity to strike language from the Stipulated Statement of Facts. Mr. Simmons responded in the affirmative.

Mr. Long asked who was authorized to point out irregularities or make any changes in the location where bids were to be received. It appeared that both the Planning Department and the Finance Department asked that timber sale bids be handled by the Spruce Bark Beetle Office. Then sometime between March 15 and March 20, Mr. Fastabend asked that bids also be received by the Finance Department. Mr. Simmons said the party that prepared the bid package and sent it out would indicate the location where the bids were to be received.

Mr. Long said both bid parties expressed confusion about the locations. It appeared that Mr. Thompson tried to submit a bid at the Finance Department for a different timber sale on March 15. Mr. Thompson was sent to the Spruce Bark Beetle Office to deliver that bid. Mr. Long asked if there were other instances of bid location confusion.

Assembly Member Superman said the affidavits and the new testimony supplied at the hearing appeared to present conflicting information. Mr. Superman asked Mr. Thompson if he tried to submit his higher bid before the 2:00 p.m. deadline. Mr. Superman also wanted to know what time the representative from ArcTech Services arrived at the Spruce Bark Beetle Office. Mr. Thompson said Andrea Hodgins arrived five or ten minutes after 2:00 p.m. It was just after 2:00 p.m. when Mr. Thompson asked to replace his first bid with the higher bid.

President Navarre asked Mr. Simmons to clarify the argument about Mr. Thompson lying in wait.

Assembly Member Moss asked Mr. Simmons if it was illegal to wait in a parking lot across from an office. Mr. Simmons said it was not illegal but it smelled bad. Mr. Simmons felt that Mr. Thompson was trying to gain information about a confidential process, and the names of the bidders or the number of bidders should not be public information.

Assembly Member Long asked if any attempts were made to notify Mr. Thompson or any other bidding parties that bids would now be received at two locations. Mr. Simmons said there was no amendment to the regular bid package. There was a publication on the Internet, relied upon by ArcTech Services, and also other bid packages that may have been sent out with the old location address and this was an attempt to make the process fair by not penalizing the parties that acted in the same way that Gates Construction did on March 15th.

Mr. Long inquired again if the present bidders or those historical bidders were ever contacted that bids would now be accepted at two different locations. Mr. Simmons was not aware of that.

Assembly Member Superman asked if a bid holders list was maintained by the Spruce Bark Beetle Office and was available for potential bidders to view. Mr. Wise said there was a bid sign out sheet maintained at both the Homer and Soldotna Spruce Bark Beetle Offices.

Mr. Sprague asked if the bid sign out sheet was available for viewing. Mr. Wise said it was not available and sitting on the counter but a person could request that through the Freedom of Information Act.

Assembly President Navarre asked if that was restricted information per the Kenai Peninsula Borough Code of Ordinances or a procurement policy. Mr. Wise said the timber sales were

originally operating under the procurement policies. But then it was felt that “sales” did not fall under the procurement operations. That was the reason that bids were to be received at the Spruce Bark Beetle Office and not with the Finance Department.

Assembly Member Sprague asked about the driving time from the Spruce Bark Beetle Office to the Borough Administration Building. Mr. Wise responded he timed it going both directions and using Park Avenue and Marydale Street.

Assembly Member Martin said she understood that a list of bid holders was maintained and if there was a change, then the bid holders were all notified. Mr. Wise said if a timber sale was postponed or changed a bid date, then the bid holders were contacted. Mr. Wise said the circumstance with two submittal locations was not like postponing or making a major amendment to the sale. They did not contact all parties and tell bidders that bids could be delivered to the Binkley address.

Ms. Martin asked which location address was listed in the bid documents submitted by ArcTech Services. Mr. Wise did not recall.

Assembly President Navarre asked both parties to respond to KPB 5.28.210(d) and KPB 5.28.240, regarding timeliness and the purchasing agent’s authority. *[Clerk’s Note: Copies of these sections of the Kenai Peninsula Borough Code of Ordinances were made available to all parties.]*

Mr. Choquette spoke to these portions of the code and stated that delivering the sealed bid by the proper time at the proper place were the two issues of this appeal.

Mr. Simmons said the citations used by Mr. Choquette were from federal acquisition regulations and *Gunderson v. University of Alaska*. Mr. Simmons said there was no case in Alaska that was directly on point with this particular case. Mr. Simmons stated Gates Construction was not prejudiced by the borough in any way.

Assembly President Navarre inquired as to who waived the irregularity in the bid delivery point. Mr. Wise said after the bids were opened he talked with Tom Burgess, former KPB Purchasing Agent. When Fred Thompson came into Mr. Wise’s office with his second bid Mr. Thompson was told he had the option to file a protest.

Mr. Navarre asked Mr. Wise if he knew that Mr. Thompson had two bids. Mr. Wise said he did not know that until afterwards.

Assembly Member Merkes asked for clarification on who exactly waived the irregularities on the bid locations and was that after the bids were opened or before. Mr. Wise said it was after the bids were opened that he spoke with Mr. Burgess. Mr. Burgess was actually at the Spruce Bark Beetle Office at the time the bids were opened.

Ms. Merkes asked if there was a protest from Gates Construction that the ArcTech bid should not have been opened. Mr. Wise said nothing was mentioned.

ASSEMBLY DELIBERATIONS AND DECISION

(Tape 2, 2050)

MOTION: Merkes moved to affirm the mayor's bid award to ArcTech Services for the Stariski Timber Sale.

Assembly Members Superman, Long and Martin spoke in opposition to the motion to affirm the mayor's bid award.

(Tape 2, 2770)

The gavel was passed to Vice President Merkes. President Navarre spoke in opposition to the motion to affirm the mayor's bid award. The gavel was returned to President Navarre.

VOTE ON MOTION TO UPHOLD MAYOR'S AWARD:

Yes: Fischer, Merkes
No: Long, Superman, Sprague, Moss, Martin, Navarre
Absent: Popp

MOTION TO UPHOLD THE MAYOR'S AWARD FAILED:

2 Yes, 6 No, 1 Absent

MOTION: Superman moved to remand the bid award to the mayor with the recommendation to rebid the Stariski Timber Sale.

Assembly Member Superman stated the borough was party to conflicting bid delivery locations and proper notification was not afforded to all bidders of the various delivery sites.

VOTE ON MOTION TO REMAND:

Yes: Superman, Moss, Fischer, Martin, Long, Sprague, Navarre
No: Merkes
Absent: Popp

MOTION TO REMAND PASSED:

7 Yes, 1 No, 1 Absent

ADJOURNMENT

(Tape 2, 3095)

With no further business to come before the assembly, President Navarre adjourned the special meeting at 5:09 p.m.

I certify the above represents an accurate summary of the special assembly meeting of May 8, 2002.

Linda S. Murphy, Borough Clerk