

Earnest Greek, Contracts Officer
Division of Administration
Department of Fish and Game

June 14, 1988

663-93-0037

465-3600

Cannery Creek Hatchery
agreement; application of
State Procurement Code

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As requested in your memorandum of June 7, 1988, we have reviewed the hatchery management agreement between the Alaska Department of Fish and Game (ADF&G) and the Prince William Sound Aquaculture Corporation (PWSAC) for the operation and maintenance of the state's Cannery Creek hatchery. You have specifically requested our opinion as to whether the State Procurement Code, AS 36.30, applies to cost of repairs and purchases of inventory/equipment made at the expense of PWSAC as required under the agreement. In short, the answer is no. Given that the funds used to purchase the inventory/equipment and to make necessary repairs will not be state funds and, further, that PWSAC is not a state agency, the purchasing activities of PWSAC are not governed by the provisions of AS 36.30.¹

I. Application of the State Procurement Code, AS 36.30

AS 36.30.850(b) states that the procurement code "applies to every expenditure of state funds, irrespective of their sources . . . by the state, acting through an agency, under a contract (Emphasis added.)

Except for capital improvements, the state will not be providing the funding for inventory, equipment, or repairs to the hatchery under this agreement. According to AS 36.30.805(b), the code applies to an expenditure of "state funds" by the state. The funds provided by PWSAC do not fall under the definition of "state funds" merely because the expenditures will be made on a state-owned facility. Furthermore, the state will not be paying PWSAC state money to perform this contract. Instead, the consideration being provided is similar to a lease agreement. In consideration of a 20-year contract to operate and maintain the

¹ This exemption from the State Procurement Code is limited to cost of repairs and inventory/equipment purchased at the expense of PWSAC in accordance with the agreement. The state procurement code must be adhered to for any capital projects that involve state general operating or capital improvement funds. See Appendix C, sec. IX(G) of the agreement.

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Cannery Creek Hatchery, PWSAC may harvest and sell eggs, conduct cost recovery harvests, and retain any other revenue generating procedures at the hatchery in keeping with the Annual Management Plan and statutes. This will allow PWSAC to recover all or part of its costs of operating the hatchery. See ch. 14, SLA 1988; Appendix C. sec. IX(M). The state will not be receiving any of the revenue from the hatchery during the term of the agreement. Instead, the contract provides that PWSAC must ensure that upon completion of the contract the hatchery is returned to ADF&G in a fully operational mode similar to when the contract was initially let. See Appendix C, sec. VI.

II. Reimbursement to PWSAC

As to the provisions of the agreement governing reimbursement to PWSAC for equipment purchased as state replacement equipment, this expenditure of state money will not occur unless (1) the agreement is prematurely terminated at no fault to PWSAC; and (2) the legislature appropriates the funding to reimburse PWSAC. See Appendix C, sec. VII. If the contract is terminated due to the default of PWSAC or if the full contract life is completed, the state will not reimburse PWSAC for replacement equipment. We do not believe that the "potential" for the expenditure of state money for reimbursement under this section of the contract causes the procurement code to apply to PWSAC'S purchases of replacement equipment. Not only must the contract be prematurely terminated at no fault to PWSAC, but any reimbursement under this section is subject to a depreciated rate and legislative appropriation.

III. Conclusion

Under the facts and laws applicable to this agreement, we conclude that the purchasing activities of the PWSAC (for repairs, inventory/equipment) would not fall under AS 36.30. In reaching this conclusion, we stress that this agreement (and potential similar agreements) made in accordance with CCSSB 410 (ch. 14, SLA 1988) is unique in the arena of government contracting and our opinion as to the nonapplicability of the procurement code is limited to this case.

We find no legal problems with this contract.

MLO/pjg