

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS  
ON REFERRAL BY THE COMMISSIONER OF THE DEPARTMENT OF  
ADMINISTRATION**

QUALITY SALES FOODSERVICE, )

v. )

DEPARTMENT OF CORRECTIONS. )

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OAH No. 06-0400-PRO

ITB No. 2006-2000-6020

**DECISION AND ORDER**

**I. Introduction**

Quality Sales Foodservice appeals from the Department of Corrections' ("Corrections") denial of its protest regarding Invitation to Bid ("ITB") No. 2006-2000-6020, relating to food purchases for the prison system. As presented at hearing, the essence of Quality Sales' appeal is that the winning bid from Country Foods, Inc. was nonresponsive because the bid did not meet the ITB's requirement that it specify, in some instances, what brands of products were to be supplied.<sup>1</sup> Quality Sales requests that Country Foods' contract be voided or cancelled and that the contracts for the contested food purchase lots (Lot 1, South-central region; Lot 3, Fairbanks region) be awarded to the next lowest responsive and responsible bidders for those lots.<sup>2</sup> Alternatively, Quality Sales requests that it be awarded bid preparation costs.<sup>3</sup>

A hearing on the matter was held on July 25 and 26, 2006. The hearing showed that Quality Sales lacks standing to contest the Lot 1 award. With respect to the Lot 3 award, this case presents a close issue. Quality Sales successfully showed that the winning bid varied from the bid specifications, but, on balance, the evidence supports a determination that the variance did not give Country Foods a substantial advantage over other bidders and did not

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<sup>1</sup> Quality Sales raised other concerns in its protest and appeal documents, but did not pursue them in the hearing.

<sup>2</sup> Hearing Recording, Quality Sales closing argument (July 26, 2006).

<sup>3</sup> *Id.*

restrict or stifle competition, and hence was not material. Accordingly, the award to Country Foods should be upheld.

## II. Facts

On February 24, 2006, Corrections issued ITB No. 2006-2000-6020 for the purchase of miscellaneous grocery, meat, and produce items for correctional facilities located statewide.<sup>4</sup> The ITB was divided into three lots representing three regions of the state: Lot 1 for South Central, Lot 2 for Southeast, and Lot 3 for Fairbanks.<sup>5</sup> There was only one bidder for Lot 2, Food Service of America, whose conduct is not relevant to this appeal.<sup>6</sup> Quality Sales placed a bid on Lot 3 only. Peterkin Distributors Inc. placed a bid on Lot 1 only. Two other bidders, not relevant to this appeal, bid on both Lots 1 and 3. Country Foods won the contract for Lot 1 and Lot 3.<sup>7</sup>

Each of the three lots included 480 line items, with each line item corresponding to a different variety of grocery, meat, or produce. For each line item there was an estimated usage. In overall concept, vendors were to bid their unit cost and multiply it by the estimated usage to yield an extended price; the 480 extended prices would be added together to generate a “Grand Total Bid Price.”<sup>8</sup> Among responsible and responsive bidders, the one with the lowest “Grand Total Bid Price” would receive the award.<sup>9</sup>

An important feature of this bidding system was the handling of estimated usage. The ITB provided:

**USAGE:** The State does not guarantee any maximum or minimum purchase of any item in any location. A quantity of 1 in the Estimated Usage for Region column (Bid Schedule) means that the State currently does not expect to use the item, but reserves the right to purchase larger quantities should future needs change. Pricing information must be provided on the Bid Schedule for all items regardless of the estimated usage.<sup>10</sup>

An example of this system in operation can be seen at line items 4125 through 4165 of the bid schedule, where prices were solicited for fish products. The only kind of fish the

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<sup>4</sup> Protest Report at 1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Notice of Intent to Award a Contract.

<sup>8</sup> ITB at 19.

<sup>9</sup> *Id.*

<sup>10</sup> ITB at 15.

Northern Region expected to purchase was pollock fillets, for which the anticipated purchase was 1575 pounds. This large purchase estimate led to extended prices approaching \$4000 from both Quality Sales and Country Foods for that single line of the bid schedule. The bid schedule also called for prices for eight other fish products, however, with an estimated quantity of “1” for each. Thus, each Northern Region bidder quoted a price for precooked whitefish portions (item 4165), but with a quantity of only one pound, the extended price was less than three dollars for each bidder. Because the selection method for this ITB was simply to add all of the extended prices together into one grand total, the price given for pollock fillets was more than a thousand times more significant to the final selection than the price given for precooked whitefish portions. Indeed, it is fair to say that the price given on each of the “quantity of 1” lines of the bid schedule was mathematically trivial to the outcome of the selection.<sup>11</sup> There were 284 of these trivial line items in the ITB, compared to 196 potentially non-trivial lines. The distinction between trivial and potentially nontrivial elements of the bid (a distinction the parties did not address in their arguments) will become significant in Part III of this decision.

This bid protest focuses on the furnishing or failure to furnish brand names for the items offered in a bid. Brand names appeared in some of the product descriptions in the ITB, and the bid form contained a blank in each line for bidders to enter the brands they proposed to supply.

The ITB contained two key instructions regarding brand names. At page 19, it instructed:

**BRAND NAME:** When a specific brand is named, it shall be construed to be solely for the purpose of indicating the standard of quality, performance, and use described. Brands of equal quality, performance and use, may be considered a State approved equivalent provided the Contractor does not take exception to pack size indicated

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<sup>11</sup> No individual item, purchased in a quantity of only one, was so expensive that it could materially affect the total bids of the vendors, which in Region 3 all exceeded \$400,000.00. Indeed, in a number of cases the extended prices for the “quantity of 1” line items amounted to only pennies.

The price quotations for the “quantity of 1” items do have some importance in the long run, because in some circumstances they would govern what the state would pay if, contrary to expectation, it decided to purchase one of the quoted items in quantity. See ITB at 12-13. The observation that they are mathematically trivial relates only to the procurement context. This procurement, wisely or unwisely, was so constructed that the prices quoted on these items would not significantly affect the selection of a vendor.

in the Bid Schedule. Bidders must identify the brand name and product(s) they are offering in the space(s) provided.<sup>12</sup>

The ITB also required:

**BRAND AND PACK SIZE OFFERED:** Bidders must clearly identify the brand names and pack size they intend to provide. The bidder's failure to identify the brand and pack size offered may cause the State to consider the offer non-responsive and reject the bid.<sup>13</sup>

Read in isolation, the second quoted provision might suggest that bidders must supply a brand for every one of the 480 line items, even where no brand name appeared in the ITB's product description. All parties agree, however, that this is not the correct reading in the context of a food purchase such as this one, where many of the items sought are not universally sold by brand (*e.g.*, item 5290, 50 lb. sacks of Alaska potatoes); instead, the brand specification instructions are relevant to the subset of line items where the ITB's product description contained a brand name.

Most line items in the bid schedule were not brand-specific; that is, they described a type of product without reference to a particular brand. For 70 of the 480 line items, however (or, more significantly, for 23 of the 196 line items where the quantity sought was greater than "1"), a brand name was provided in the ITB's "description" of the item.<sup>14</sup>

Quality Sales submitted a bid for Lot 3 that, in every case, identified the brand to be supplied for any processed food item, including for all 70 line items where the ITB had specified a brand. As permitted by the ITB, Quality Sales often substituted a different brand for the brand mentioned in the ITB's "description" column.<sup>15</sup> The Quality Sales bid apparently departed from the bid specifications in an unrelated respect, by omitting to bid any price for three of the 480 line items, lines 1170, 1900, and 2255. The procurement officer appears to have accommodated this defect by deciding that, in the competitive

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<sup>12</sup> ITB at 19. The paragraph continues with additional language not relevant to this appeal.

<sup>13</sup> ITB at 6.

<sup>14</sup> Quality Sales and this office count slightly different numbers of line items which specify a brand, with this office counting 70 items and Quality Sales counting 78. This difference may be explained by ambiguity on the ITB and differences of opinion regarding whether descriptions such as "Raisin Bran" (line 1200) and "Puffed Wheat" (line 1195) identify specific brands or only classes of products. Corrections, in contrast, maintained at the hearing that only 43 items were brand-specific. Direct exam of Gregson; Vandor closing. This figure is simply inaccurate. Corrections may have under-counted because some brand names are difficult to spot in the product descriptions, and because its procurement officer is unfamiliar with food brands. See cross exam of Gregson ("I wouldn't know the difference between Duncan Hines or Pillsbury or Krusteaz").

<sup>15</sup> *E.g.*, lines 1070-1100 (substitution of Hospitality for Krusteaz).

selection process, these three items would be “deleted for evaluation purposes from the Fairbanks Lot.”<sup>16</sup>

Country Foods submitted a bid for Lot 3 that gave prices for all 480 items, but contained an irregularity of a different sort. For fifteen of the 70 line items<sup>17</sup> where the ITB specified a brand name, Country Foods did not indicate the brand it would supply. Instead, Country Foods entered the term “packer” in the space for “brand offered” for those line items.

“Packer” is not a brand.<sup>18</sup> Instead, it is a term of art in the food distribution business meaning “packer’s discretion.”<sup>19</sup> There was general agreement among the witnesses that a bidder who enters “packer” in the space for specifying a brand will have the freedom to supply any brand that meets the contract specifications. In this case, any brand ultimately supplied would have to be “of equal quality, performance and use” to the brand listed in the ITB, because page 19 of the ITB so requires. However, whether the brand met those requirements is something that would have to be assessed upon delivery, rather than at the time of vendor selection.<sup>20</sup> The effect of entering “packer” in the space for “brand offered” was, for all practical purposes, the same as leaving the space blank.<sup>21</sup>

The practical effect of failing to identify a substituted brand in a procurement such as this one is that, for that line item, the state cannot not police at the vendor selection stage the ITB’s requirement that substituted brands be “of equal quality, performance and use” to the brand the state named in the ITB. Instead, that requirement must be enforced under the ITB’s “rejection” procedure, permitting the state to return products not in conformity with the specifications at the contractor’s risk and expense.<sup>22</sup> In the view of the Corrections procurement personnel, having to assess quality of a substituted brand after the fact, rather than in advance, is not unsatisfactory.<sup>23</sup> The ITB’s admonition that “failure to identify the

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<sup>16</sup> Notice of Intent to Award a Contract. No other Lot 3 bidder had these omissions.

<sup>17</sup> The proportion is sixteen of 71 if the reference to “Silver Bow” in line 4160 is a reference to a brand, a question the ALJ is unable to answer from the record or from general knowledge. This uncertainty need not be resolved since line 4160 is a “quantity of 1” line, insignificant to the “Grand Total Bid Price.”

<sup>18</sup> *E.g.*, Redirect examination of Thomas Sapp, Exec. Vice Pres., Gold Bond buying group, Boise, Idaho.

<sup>19</sup> *E.g.*, Direct exam of Sapp.

<sup>20</sup> *E.g.*, Direct exam of Gregson.

<sup>21</sup> The Corrections procurement personnel at the hearing contended that “packer” is not equivalent to leaving the space blank, but they could not articulate a meaningful difference. *E.g.*, ALJ exam of Alan Szepanski, Corrections Procurement Manager.

<sup>22</sup> ITB at 15.

<sup>23</sup> Cross exam of Gregson; cross exam of Szepanski.

brand and pack size offered **may** cause the State to consider the offer non-responsive”<sup>24</sup> reflects the degree of importance that the state placed on the brand-identification requirement: Bidders were thereby placed on notice that failure to list substituted brands might, in appropriate circumstances, be a serious enough omission to support rejection of a bid, but were simultaneously put on notice that some departures from the bid specifications on this point might be waived.

Most bidders, including Quality Sales, routinely used the term “packer” in bidding on items, such as produce, that are essentially “primals,” or unprocessed foods for which brand identification is not considered important in the industry.<sup>25</sup> Country Foods, however, was the only bidder using “packer” in instances where the ITB had specifically named a brand, and hence was the only bidder clearly departing from the bid specifications regarding brand identification.

Country Foods’ fifteen “packer” entries for items where a brand name had been specified are listed in the table below. The table also shows the price Country Foods bid for each item, and the price Quality Sales bid for the same item. Quality Sales, as noted previously, specified a brand with its price quote on these items.

**Comparison of the 15 Line Items in Lot 3 with a Brand Name Specified in the "Description" and "Packer" bid by Country Foods in the "Brand Offered" Column**

		Country Foods Bid (in dollars)	Quality Sales Bid (in dollars)
1395	Drink, Coffee	51.66	42.39
1580	Frozen Burrito	31.25	30.60
2170	Rice, Long Grain	581.50	358.00
2265	Shortening	18.53	19.67
4020	Beef Franks	4557.02	4574.70
4025	Hot Links	22.49	21.83
4030	Beef Pastrami	1.93	4.54
4065	Chicken Breast, Smoked, Sliced	3.31	3.63
4080	Chicken Nugget	3997.35	4167.45
4140	Fish, Salmon Burger	4.60	3.88
4145	Fish, Salmon Nuggets	4.60	8.38
4150	Fish, Salmon Patties	4.60	7.96
4155	Fish, Salmon Sausage	4.60	13.96

<sup>24</sup> ITB at 6 (emphasis added).

<sup>25</sup> See Direct exam of Nance.

4240	Turkey Breast, Honey Roasted	3.28	3.65
4245	Turkey Breast, Oven Roasted	7182.00	6783.00
	<b>Total</b>	<b>16468.72</b>	<b>16043.64</b>

Eleven of the fifteen items in the table above were “quantity of 1” items in the ITB, which as discussed previously are mathematically insignificant to final selection. The items from the table above for which the quantity exceeded one were these:

**Comparison of the 4 potentially significant Line Items in Lot 3  
with a Brand Name Specified in the "Description" and "Packer"  
bid by Country Foods in the "Brand Offered" Column**

		Country Foods Bid (in dollars)	Quality Sales Bid (in dollars)
2170	Rice, Long Grain	581.50	358.00
4020	Beef Franks	4557.02	4574.70
4080	Chicken Nugget	3997.35	4167.45
4245	Turkey Breast, Oven Roasted	7182.00	6783.00
	<b>Total</b>	<b>16317.87</b>	<b>15883.15</b>

The bids for ITB 2006-2000-6020 were evaluated by a single procurement officer, John W. “Jack” Gregson.<sup>26</sup> Gregson is a highly experienced procurement officer, but is “fairly new to the procurement of food.”<sup>27</sup> He is not conversant with food brands.<sup>28</sup> Gregson apparently did not notice the “packer” entries listed above while he was evaluating the bids.<sup>29</sup>

Gregson created a spreadsheet to compare the various bids for the three lots.<sup>30</sup> The spreadsheet does not show any brand names. Gregson also created new spreadsheets for each Lot 3 bidder, likewise omitting brand references, in which he recalculated the extended

<sup>26</sup> Direct exam of Gregson.

<sup>27</sup> Direct exam of Szepanski (Gregson’s supervisor).

<sup>28</sup> Cross exam of Gregson (“I wouldn’t know the difference between Duncan Hines or Pillsbury or Krusteaz”).

<sup>29</sup> Direct exam of Nance (when told of the issue after the award, Gregson said “I wasn’t aware of that”); cross-exam of Szepanski (Gregson did not discuss packer issue with him until after the protest was filed).

<sup>30</sup> The spreadsheet is an oversized document with the following label at the bottom right: “ITB # 2006-2000-6020 LOT 3 SIDE-BY-SIDE COMPARISON OF BID PRICE ELEMENTS AND TOTALS.”

Reference to documents in this decision is made more cumbersome by the Department of Law’s election not to submit a numbered record, despite the request that it do so in item II-c of the Scheduling Order.

prices and the “Grand Total Bid Price” for that bidder.<sup>31</sup> This was necessary because some of the extended prices needed to be adjusted for differences in pack size, computation errors, and a transposition error in the Country Foods bid, and to account for the decision to delete items 1170, 1900, and 2255 that was discussed above.<sup>32</sup> For Country Foods and Quality Sales, he calculated “Grand Total Bid Prices” of \$405,386.90 and \$410,607.91, respectively, as to Lot 3.<sup>33</sup> This made Country Foods the low bidder by a margin of \$5221.01.

Mr. Nance of Quality Sales testified at the hearing that Gregson’s recalculated “Grand Total Bid Prices” contained some mathematical errors. He recalculated the final prices as \$404,413 for Country Foods and \$405,276 for Quality Sales.<sup>34</sup> This would still leave Country Foods as the low bidder, but by a margin of only \$863. Nance’s recalculations are themselves erroneous in significant respects, however.<sup>35</sup> The correct margin between the two bids is at least several thousand dollars.

On April 25, 2006, Gregson issued notice of intent to award the contract on Lot 3 to Country Foods. His notice showed his calculation of the relative “Grand Total Bid Prices” with items 1170, 1900, and 2255 removed from the calculation. It showed a determination that Country Foods submitted a responsive bid. As to the responsiveness of the other three

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<sup>31</sup> In the record, these spreadsheets are mixed in with the bid materials for each bidder, but are recognizable by their different format. The one for Country Foods is 47 pages and ends with the handwritten figure “405,386.90.” The one for Quality Sales is likewise 47 pages and ends with the printed figure “410,607.91.”

<sup>32</sup> Direct exam of Gregson. The transposition error is explained in the e-mail from Gregson to Tracy of April 7, 2006, attached to the back of the Country Foods bid packet; handwritten changes to account for this error can be seen on the 32-page spreadsheet that was part of the Country Foods bid.

<sup>33</sup> Notice of Intent to Award a Contract.

<sup>34</sup> These recalculations can be viewed at Quality Sales Exhibit 3, last 4 pages. Exhibit 3 was not admitted as evidence, but was allowed into the record as argument.

<sup>35</sup> With respect to line 2120, Nance adjusted the Quality Sales quote down by \$1216.60 because, he believed, both bidders changed the pack size but only Quality Sales adjusted its quantity supplied to give the state the amount of food requested in the ITB. Nance appears to have reasoned that if Country Foods was permitted to supply a lesser amount of food, Quality Sales should be allowed to adjust its bid to correspond to a lesser amount of food as well. Nance’s error, however, is that Country Foods had offered a pack size *greater* than the state had requested (243 versus 240 ounces), and had still offered the full requested quantity of 200. Only Quality Sales offered a smaller pack size (204 ounces). Thus it was appropriate for the Quality Sales quantity to be adjusted upward, but for the Country Foods quantity to remain the same; indeed, Country Foods would have been justified to offer a quantity of only 198 and thereby shave about \$70 from its bid.

At line 2530, Nance used the error correction spreadsheet to adjust a Quality Sales bid from \$2233.00 to zero. He also reduced the Country Foods bid from \$963.75 to zero. The net effect would be to narrow the gap between the bidders by nearly \$1300. He did this because Quality Sales mistakenly overbid the item in question, entering the case weight as the cost. The fact that Quality Sales bid too high on a line item is not a mathematical error by Gregson, however, nor is it a basis for an adjustment after the bids have been opened.



Lot 3 bidders, it made no determination, stating that responsiveness was not evaluated “because there was a lower responsive bid.”<sup>36</sup>

Quality Sales immediately asked for details of the bids, and upon obtaining and evaluating the information it submitted a timely protest to Gregson, requesting that Country Foods’ bid be declared non-responsive for its use of “packer” where a brand name was called for. The protest encompassed all three lots.

Gregson denied the protest on May 17, 2006. He first ruled that Quality Sales lacked standing to protest the award for Lots 1 and 2, having submitted no bid for those lots. As to the substance of the protest, Gregson noted that although the ITB said that bidders “must clearly indicate the brand names,” it also provided that “failure to identify the brand and pack size offered may cause the State to consider the offer non-responsive.”<sup>37</sup> He went on to reason:

“Packer” items may come from many different suppliers, some of them brand name suppliers, and cannot automatically be determined to be inferior products. . . . Your protest does not provide legal and factual evidence that “packer” products are inferior.<sup>38</sup>

This appeal followed.

At the appeal hearing, Gregson elaborated somewhat on his reasoning. Notably, he observed that if a bidder had entered “packer” on every line in the “brand offered” column, “I may have done something differently” (meaning that he might have deemed such a bid nonresponsive).<sup>39</sup> Thus his disposition of the protest seems to have turned partly on the relatively small number of times “packer” was used in place of a brand name.

### III. Discussion

#### A. Standing

Quality Sales initially protested the award for all three lots. The procurement officer rejected the protest as to Lots 1 and 2 for lack of standing. In its June 1, 2006 appeal to Commissioner Nordstrand, Quality Sales acquiesced in this ruling as to Lot 2, but pressed its appeal as to Lots 1 and 3. The scope of the challenge is still too broad.

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<sup>36</sup> Notice of Intent to Award a Contract.

<sup>37</sup> Letter from Gregson to Nance, May 17, 2006 (emphasis Gregson’s).

<sup>38</sup> *Id.*

<sup>39</sup> Cross-exam of Gregson.

Alaska Statute 36.30.560 – 590 allow protest and subsequent appeal by an “interested party.” The procurement code defines an “interested party” as “an actual or prospective bidder or offeror whose economic interest may be affected substantially and directly” by the matter protested.<sup>40</sup> To have standing, a protester must therefore meet two criteria: to have been an actual or prospective competitor for the award, and to have a substantial and direct economic interest that may be affected by the decision under protest. The use of the phrase “may be” establishes that the economic interest must be a prospective one, not an economic interest that existed solely at some time in history, prior to the decision under protest.

Quality Sales was an actual bidder on Lot 3, and its economic interest may be substantially and directly affected by the award of Lot 3 to Country Foods because, but for the award, Quality Sales might be awarded the same contract. Quality Sales therefore has standing to protest the award of Lot 3, and to appeal the denial of its protest.

With respect to Lot 1, Quality Sales was not a bidder. It also was not a prospective bidder; it has made no claim that, absent some irregularity, it would have bid on Lot 1. Thus, it fails to meet the first prong of the statutory test for standing to protest Lot 1.

Quality Sales also fails to meet the second prong of the test for standing regarding Lot 1. Through the testimony of its CEO, Quality Sales contended at the hearing that the existence of Lot 1, and the economies of scale that lot potentially gave to competitors who could bid on both lots, affected the Quality Sales bid on Lot 3 (presumably by causing it to pare its prices to a minimum).<sup>41</sup> This does not equate to a *prospective* economic interest in the status of the Lot 1 award. Asked in closing argument to identify a prospective economic impact on Quality Sales of issuance or cancellation of the Lot 1 contract, counsel for Quality Sales could identify none.

Because it meets neither of the two prerequisites, Quality Sales cannot pursue a challenge to awards for lots other than the one on which it bid, Lot 3. The procurement officer’s decision to deny the protest with respect to the other lots will be affirmed on that basis.

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<sup>40</sup> AS 36.30.699.

<sup>41</sup> Direct exam of Nance.

*B. Standard of Review in Evaluating Substantive Challenge*

Alaska courts give deference to administrative decisions, applying a “reasonable basis” standard when reviewing decisions appealed to the judicial system by dissatisfied bidders.<sup>42</sup> Corrections argues that a procurement officer must have wide discretion in evaluating bids, and that the Commissioner of Administration must defer to his decisions if they have a reasonable basis, just as courts defer to final administrative decisions in the procurement context.<sup>43</sup>

The commissioner’s role is different from the role of a court hearing an appeal of a final administrative decision, however.<sup>44</sup> The Procurement Code’s appeal process envisions an evidentiary hearing.<sup>45</sup> Through the process of gathering and evaluating information, often beyond that available to the agency’s procurement official, the hearing yields new findings of fact. To require the commissioner to defer to the fact findings of the department’s procurement official could defeat the purpose of the hearing. Moreover, an executive agency procurement official’s ability to secure contracts for services is based on a delegation of power from the commissioner.<sup>46</sup> As an earlier commissioner observed, “The commissioner’s role is to make the final administrative decision: it is the final administrative decision, not the initial decision by a subordinate administrative official, that is entitled to deference in the courts.”<sup>47</sup> The commissioner may review an executive agency procurement official’s decisions de novo.

While there is no automatic deference to a department’s procurement official at this stage of the review process, the commissioner may, in appropriate circumstances, wish to extend some practical latitude to the judgments of agency staff. Where the procurement official’s decision on a protest was based on an essentially sound understanding of the facts and fell within the range of discretion allowed by law, the commissioner may choose to defer to that exercise of discretion, rather than wholly to substitute his own judgment, so as to avoid undue disruption of the day to day administration of procurement. In past decisions, the commissioner has referred to this traditional but voluntary and flexible degree of

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<sup>42</sup> *King v. Alaska State Housing Auth. [King III]*, 633 P.2d 256, 263 (Alaska 1981).

<sup>43</sup> Corrections final argument; Corrections’ Prehearing Brief at 1-2.

<sup>44</sup> *In re Make It Alaskan, Inc.*, Dep’t of Administration Case No. 00.11 (2001), at 2.

<sup>45</sup> AS 36.30.670(b).

<sup>46</sup> See AS 36.30.015(b).

<sup>47</sup> *Make it Alaskan, supra* (emphasis in original).

deference as “due deference.”<sup>48</sup> As will be discussed below, the instant case is one in which a measure of such limited, practical deference seems appropriate.

*C. Substantive Issue on Appeal*

In its appeal letter to the commissioner, Quality Sales raised three bases to overturn the procurement officer’s decision to reject its protest: (1) a contention that the Country Foods bid should have been rejected as nonresponsive on account of the use of “packer” where a brand should have been designated; (2) a contention that Country Foods manipulated its bid through improper handling of freight charges; and (3) a contention that Quality Sales’ due process rights were violated through delayed production of documents relating to the procurement. At the hearing, Quality Sales pursued only the first of these three contentions. Moreover, this contention was further refined at the hearing. While the appeal letter focused on the total percentage of the 480 line items on which “packer” appeared in the “brand offered” column of the Country Foods bid, at the hearing the Quality Sales presentation turned on the number of times “packer” appeared in the subset of line items for which the ITB had named a brand.<sup>49</sup> It was to those 70 line items that the paragraph entitled “BRAND NAME” on page 19 of the ITB applied, containing the instruction that alternative brands could be specified but bidders “must identify the brand name and product(s) they are offering in the space(s) provided.” The crux of the controversy in this case is therefore a simple one: was Country Foods’ bid rendered nonresponsive by its “packer” entries for some of those 70 line items?

*D. Legal Standard for Evaluating Responsiveness*

The Procurement Code requires that a bid be responsive to support a contract award.<sup>50</sup> A bid is nonresponsive if it “does not conform in all material respects to the solicitation.”<sup>51</sup> The Alaska Supreme Court has elaborated:

while a “material” variance from the invitation requires rejection of the proposal, a “minor” variance does not require rejection of the proposal. A variance is said to be material “if it gives the bidder a substantial

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<sup>48</sup> *In re Waste Management of Alaska, Inc.*, Dep’t of Administration Case No. 01.08 (2002), at 9-13.

<sup>49</sup> *E.g.*, Quality Sales closing argument. The narrower focus was appropriate, since most bidders, including Quality Sales itself, had used “packer” on lines that did not contain a brand-specific product description. As discussed on pages 3-4 above, the request for brand names related to the brand-specific line items.

<sup>50</sup> AS 36.30.170.

<sup>51</sup> 2 AAC 12.990(9).

advantage over other bidders, and thereby restricts or stifles competition.”<sup>52</sup>

The court has acknowledged that there is a range of discretion to be exercised in determining whether a variance is material or minor.<sup>53</sup> Further, in *Chris Berg, Inc. v. State, Department of Transportation and Public Facilities*,<sup>54</sup> the court established the lower boundary of that range of discretion, determining that a “minor technical defect or irregularity *which does not and could not affect the substance of a low bid in any way* does not justify the rejection of that bid on the ground that it is not responsive.”<sup>55</sup> There is no discretion to reject a bid in such a situation. The upper boundary of the range of discretion—the point at which a variance is sufficiently material that the bid *must* be rejected—was elucidated in another Alaska Supreme Court case generally known as *King I*: for a bid to be “automatically invalidated,” an appellant must “prove” that by virtue of the variance the winning bidder actually “gained a competitive advantage.”<sup>56</sup> Between these boundaries are cases where the substance of a low bid has been or could have been affected and a competitive advantage *may* have been obtained, though none has been proved by a preponderance of the evidence. *King I* indicates that in such cases rejection for nonresponsiveness is permissible but “not require[d].”<sup>57</sup>

The concept of responsiveness is one broadly recognized in government procurement and often applied in federal procurement cases. Federal tribunals decline to deem a variance material if it would have only a “trivial impact”<sup>58</sup> or “negligible effect”<sup>59</sup> on price, quality, delivery, or relative standing of the bidders. By way of example, a failure of a bidder to conform its bid to an amendment to the specifications was found “negligible” where the potential effect on price was \$1622 in a bid of \$269,500.<sup>60</sup>

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<sup>52</sup> *King v. Alaska State Hous. Auth. [King I]*, 512 P.2d 887, 892 (Alaska 1973) (quoting prior authority).

<sup>53</sup> *Chris Berg, Inc. v. State, Dep’t of Transp. & Pub. Facilities*, 680 P.2d 93, 94 (Alaska 1984) (“The determination by a public agency of the responsiveness of a bid is within the agency’s discretion”).

<sup>54</sup> 680 P.2d 93 (Alaska 1984).

<sup>55</sup> *Id.* at 94 (emphasis added).

<sup>56</sup> 512 P.2d at 892.

<sup>57</sup> *Id.* at 893 & n.23.

<sup>58</sup> *In re Singleton Enter.*, Case No. B-295562 (Comptroller General, February 25, 2005).

<sup>59</sup> *In re Lumus Constr., Inc.*, Case No. B287480 (Comptroller General, June 25, 2001).

<sup>60</sup> *Id.*

*E. Responsiveness of the Country Foods Bid*

There can be no doubt that the Country Foods bid varied from the bid specifications. Page 19 of the ITB was unequivocal in noting that a bidder could offer a brand different from one appearing in the ITB's product description, but that a bidder choosing this option "must identify the brand name" being offered as a substitute. An entry of "packer" does not identify a brand name.

The language of the ITB recognized this as a potentially serious flaw, warning bidders that "failure to identify the brand and pack size offered may cause the State to consider the offer non-responsive."<sup>61</sup> Procurement Officer Gregson implicitly acknowledged that an entry of "packer" does not satisfy the call for a brand name when he indicated that he might have rejected a bid on which "packer" was entered on every line.<sup>62</sup>

The more difficult question in this case is whether the variance was material. This case does not fall below the lower boundary set by *Chris Berg*, establishing that irregularities that "[do] not and could not affect the substance of a low bid in any way" are too minor to support rejection for nonresponsiveness. The variance could affect the substance of Country Foods' bid, because the ITB explicitly made brand identification part of the substance of the bid. Moreover, the use of the flexible term "packer" could affect pricing. A bidder offering a specific brand would, at least for a time, be locked into offering that brand at the price it bid. A bidder using "packer" would have added flexibility to fill state orders with whatever acceptable brand was cheapest at the time of the order; the prospect of this added flexibility might allow a lower bid for that line item in response to the ITB. Since price is part of the substance of the ITB, and the variance in Country Foods' bid could affect price, the variance, unlike the one addressed in *Chris Berg*, is not below the materiality threshold as a matter of law.

This case likewise does not fall above the threshold for automatic rejection set by *King I*. Country Foods was the low bidder by a margin of several thousand dollars. Plainly, effects on the bid price of the eleven "quantity of 1" items for which Country Foods neglected to list a brand name could not possibly have affected the outcome of the

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<sup>61</sup> ITB at 6.

solicitation. Even the most expensive of these items was in the neighborhood of fifty dollars in the Country Foods and Quality Sales bids, and most were just a few dollars. The focus must be on the four potentially significant line items listed in the second table in Part II above. On these items, Quality Sales has not *proven* that Country Foods “gained a competitive advantage” by means of its bidding irregularity. Country Foods did not significantly underbid Quality Sales on any of the four items, and in the aggregate it was Quality Sales that had the lower price for these four lines, by a margin of \$15,883.15 to \$16,317.87. One can speculate that, had Country Foods had to specify a brand, its already high bid on these four items might have been forced still higher, and that the gap in “Grand Total Bid Prices” would have narrowed or disappeared. This has hardly been proven by a preponderance of the evidence, however.<sup>63</sup> Indeed, it stretches credulity that changes in the prices of these four lines could have eliminated the whole gap of several thousand dollars between the overall bid prices.

Accordingly, this case falls into the intermediate range where procurement officials have discretion to treat, or not to treat, the variance from the bid specifications as a material one leading to rejection for nonresponsiveness. In this case, Procurement Officer Gregson first considered the matter when the use of “packer” was brought to his attention through the protest. While conceding that he may have handled the matter differently had the use of “packer” been pervasive, he decided that in the present circumstances the variance was not material. Several factors support his conclusion:

--the variance affected only four of the 196 potentially significant line items in the bid;

--the variance did not enable Country Foods to underbid Quality Sales significantly on any of the four line items;

--it is unlikely that, had there been no variance, the overall outcome of the selection would have been different;

--this was a complex ITB, with so many products and packaging variables that it was difficult to execute a bid perfectly;

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<sup>62</sup> Cross exam of Gregson (had he been faced with a bid using “packer” throughout, “I may have done something differently.”)

<sup>63</sup> Quality Sales offered no specific testimony about brands and pricing for the four line items significant to this decision.

--insisting on perfection could deprive the state of the benefits of broad competition.

It is also notable that the procurement officer approached this procurement in an evenhanded way. He could have rejected the Quality Sales bid for its failure to give any price at all for items 1170, 1900, and 2255. Instead, he went out of his way to eliminate these items from the three other Lot 3 bids so that the bids could be compared fairly with Quality Sales still in the competition.

In light of the procurement officer's fair and evenhanded approach to minor deficiencies in the bids, and in recognition of the need to give procurement staff some latitude to manage a complex procurement to reach the overall goal of securing the state the lowest total cost, this is a case where some deference to the procurement officer's judgment is appropriate. Here, his judgment in rejecting the protest has not been shown to be unreasonable.

#### **IV. Conclusion**

Quality Sales' protest of the award for Lot 1 of ITB 2006-2000-6020 fails for lack of standing. Quality Sales' protest of the award on Lot 3 of ITB 2006-2000-6020 should not be sustained.

DATED this 1<sup>st</sup> day of September, 2006.

By: \_\_\_\_\_

Christopher Kennedy  
Administrative Law Judge



## Adoption

This Order is issued under the authority of AS 36.30.675. The undersigned, on behalf of the Commissioner of the Department of Administration and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Rule 602 of the Alaska Rules of Appellate Procedure within 30 days after the date of this decision.

DATED this 21 day of Sept, 2006.

By: \_\_\_\_\_  
Name:  
Title:

Helaine Millhorn  
Deputy Commissioner for

Scott J. Nordstrand  
Commissioner  
Department of Administration

THE UNDERSIGNED CERTIFIES THAT ON  
THIS DATE AN EXACT COPY OF THE  
FOREGOING WAS PROVIDED TO THE  
FOLLOWING INDIVIDUALS:

Burns  
Jordan  
Gragson

SIGNATURE

DATE  
9-22-06