

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

TOP FUEL CO. LLC	)	
	)	
v.	)	
	)	
DIVISION OF GENERAL SERVICES	)	OAH No. 09-0047-PRO
_____	)	ITB No. 2009-9900-8238

**DECISION ON SUMMARY ADJUDICATION**

**I. Introduction**

The Division of General Services issued a solicitation for bids on a contract to provide petroleum products at a variety of locations. Top Fuel, Inc., submitted a bid in response, including a bid on Lot 13, in Bethel, that claimed eligibility for the Alaska Product Preference. The division did not provide the preference, and Top Fuel filed a protest. The protest was denied, and Top Fuel appealed.

On appeal, Top Fuel argues that its bid adequately identified a product eligible for the preference. The division argues that the commissioner should defer to the procurement officer's decision. Because Top Fuel's bid did not expressly specify a qualified product, the division properly denied the preference. However, because undisputed facts do not establish that Crowley properly identified a qualified product, or that it will be able to provide products eligible for the preference, the matter is remanded to the procurement officer.

**II. Facts<sup>1</sup>**

The Division of General Services issued Invitation to Bid (ITB) 2009-990-8238 on October 16, 2008. The ITB solicited bids to provide diesel fuel, heating oil, aviation gasoline, Jet A fuel, and unleaded gasoline on an as-needed basis for all state agencies and other qualified entities in various locations throughout the state.<sup>2</sup> The ITB included the standard Alaska product preference term:

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<sup>1</sup> The facts as set forth are undisputed in the current record. All reasonable inferences from those facts have been drawn in favor of the division.

<sup>2</sup> Invitation to Bid 2009-9900-8238 at 1 (hereinafter, "ITB").

A bidder that designates the use of an Alaska Product which meets the requirements of the ITB specification and is designated as a Class I, Class II, or Class III Alaska Product by the Department of Community & Economic Development shall receive a preference in the bid evaluation in accordance with AS 36.30.332 and 3 AAC 92.010.<sup>[3]</sup>

The ITB also states:

**Brand or Model Offered.** If offering a fuel that qualifies for the Alaska Product Preference, the Bidder must indicate the brand of fuel they intend to provide. If a bidder is not offering a fuel that qualifies for the Alaska Product Preference, the bidder does not need to indicate a brand of fuel.<sup>[4]</sup>

...

**Alaska Product Preference.** Bidders who offer products which have received certification by the Department of Commerce [*sic*] and Economic Development and that are listed in the current published edition of the “Alaska Products Preference List” will receive this preference. In order to qualify for the Alaska Product Preference, a bidder must provide the qualified product on a 100% basis. There are no provisions under Alaska Statutes or regulations that allow for product exchanges/substitutions, or permit the product to be commingled with other products. Rather, AS 36.30.330 provides for a penalty for failing to use the designated Alaska products.... Bidders must check the correct preference box beneath each line item. When bids are evaluated, the preference percentage will be deducted from the bid price of the product only. If a bidder fails to check one of the product preference boxes, no preference will be given, and no corrections will be allowed after bid opening. The State will allow for the application of the Alaska Product Preference on a percentage basis depending on the amount of 100% Alaska product being supplied to the State. However, the product that qualifies for the Alaska Product Preference shall not be co-mingled or exchanged with other products that do not qualify. Fuel that qualifies for the Alaska Product Preference may only be co-mingled or exchanged with other products that also qualify for the same category of preference.<sup>[5]</sup>

The Remote Delivery Bid Schedule Instructions state:

Fuel Brand: The brand of fuel offered must be inserted in this column **if offering** a fuel that qualifies for the Alaska Product Preference. ...<sup>[6]</sup>

The Remote Bid Schedule itself states:

**If offering** a fuel that qualifies for the Alaska Product Preference, you must enter “Yes” from the drop down menu in the Alaska Product

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<sup>3</sup> ITB at 5.

<sup>4</sup> ITB at 10.

<sup>5</sup> ITB at 11 (bold in original).

<sup>6</sup> ITB at 23 (bold in original). Bethel is a Remote Delivery site. *Id.*, at 26.

Preference column for each lot and line you are offering a qualified product. By entering “Yes” on the Alaska Product Preference column, you are certifying that 100% of the total product you will provide under the contract is entitled to a...Alaska Product Preference in accordance with 3 AAC 92. Qualifying products may not be co-mingled or exchanged with non-qualifying products.<sup>7]</sup>

Lot 13 of the ITB was for fuel delivered to Bethel; it included four separate lines, each for a specific type of fuel: diesel fuel/heating oil, unleaded gasoline, Jet A, and aviation gas.<sup>8</sup> The division received two bids for Lot 13, one from Top Fuel and the other from Crowley Petroleum (Crowley). Top Fuel claimed the Alaska Product Preference for all of the four types of fuel in Lot 13.<sup>9</sup> Top Fuel’s bid identified “Crowley” as the eligible product on each line.<sup>10</sup> Crowley’s bid claimed the Alaska Product Preference and identified “Tesoro” as the eligible product for diesel fuel/heating oil, unleaded gasoline, Jet A, and aviation gas.<sup>11</sup> Crowley identified “Chevron” as the aviation gas product.<sup>12</sup>

Two suppliers deliver Jet A and unleaded gasoline to Bethel: Crowley and Delta Western.<sup>13</sup> In Bethel, diesel fuel/heating oil is “the same as Jet A.”<sup>14</sup> Jet A and unleaded gasoline are offloaded to the Crowley Bulk Fuel Terminal, which is the only bulk fuel storage facility in Bethel.<sup>15</sup> All of the Jet A and unleaded gasoline delivered to the bulk fuel facility is co-mingled.<sup>16</sup> At the time Top Fuel submitted its bid, Crowley Petroleum was getting its Jet A fuel “from Kenai,” as was Delta Western.<sup>17</sup> The Jet A fuel obtained from Kenai is Tesoro fuel.<sup>18</sup> Tesoro and Petro Star are the only two Jet A products listed as eligible for the Alaska Product Preference; Tesoro is the only unleaded gasoline product listed as eligible for the Alaska Product Preference; and Petro Star is the

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<sup>7</sup> Remote Bid Schedule at 1 (bold in original).

<sup>8</sup> Remote Bid Schedule at 1.

<sup>9</sup> Exhibit A, page 5.

<sup>10</sup> Exhibit A, page 5.

<sup>11</sup> Exhibit B, page 1.

<sup>12</sup> Exhibit B, page 1.

<sup>13</sup> Walsh Aff., ¶3.

<sup>14</sup> Walsh Aff., ¶3.

<sup>15</sup> Walsh Aff., ¶3.

<sup>16</sup> Walsh Aff., ¶3.

<sup>17</sup> Faulkner Aff., ¶2.

<sup>18</sup> Top Fuel’s affidavits do not expressly make this connection. However, it is a reasonable inference from the undisputed evidence, viewed favorably to the division.

only diesel fuel (other than low sulphur) or heating oil listed as eligible for the Alaska Product Preference.<sup>19</sup> The division did not apply the Alaska Product Preference to any of Top Fuel’s bid for Lot 13 (“Crowley”). It applied the Alaska Product Preference to Crowley’s bid for diesel fuel/heating oil, Jet A, and unleaded gasoline (“Tesoro”), but not for aviation gas (“Chevron”).

### **III. Discussion**

#### **A. The ITB Requires Express Identification of a Qualifying Product**

Top Fuel argues that the ITB should not be read as requiring the express identification of a specific qualifying product, pointing to language in the standard terms and conditions and in the Remote Bid Schedule that does not contain such a requirement.<sup>20</sup> It argues that that because the bidder who seeks the preference must certify that it will provide qualified products, identification of a specific product is unnecessary.<sup>21</sup> The division responds that such a construction of the ITB would be contrary to the general principle that the Alaska preference should be narrowly construed,<sup>22</sup> and would burden the procurement officer with making determinations based on matters outside the four corners of the bid document.<sup>23</sup>

As Top Fuel observes, some of the language in the ITB addressing the Alaska Product Preference does not include a requirement to identify the qualifying brand. But the general term stating that the preference will be applied to a bidder who “designates the use of [a qualified product]” can easily be read as calling for the designation of a particular product. Furthermore, other portions of the ITB referenced above, and in particular the Remote Bid Schedule instructions, specifically state that the brand name must be provided. Specifying a brand name enables the division to confirm eligibility for the preference based on review of the qualifying product list. To apply the preference in the absence of an express brand name would invite disputes over the applicability of the preference. Furthermore, requiring express identification of a specific brand as a condition of application of the preference is consistent with the general principle that

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<sup>19</sup> Exhibit H, page 1.

<sup>20</sup> Opposition to Motion for Summary Adjudication at 5-6.

<sup>21</sup> Opposition to Motion at 7-8.

<sup>22</sup> Reply to Opposition to Motion for Summary Adjudication at 2. *See, e.g., Computer Task Group, Inc. v. Division of General Services*, at 10-11 (OAH No. 07-0147-PRO; August 2, 2007).

preferences are strictly construed. The procurement officer did not err by requiring express identification of a qualifying brand as a condition to application of the Alaska Product Preference.

B. Top Fuel May Not Correct Its Bid

Relying on prior Alaska Supreme Court decisions in cases involving mistaken bids, Top Fuel argues that because Top Fuel submitted a lower bid than Crowley, the ITB's specifications did not mandate product identification, and Top Fuel's intent is clear, Top Fuel's bid should be construed as specifying Tesoro products.<sup>24</sup>

As previously observed, the ITB may reasonably be construed to require the express identification of a qualifying brand as a condition of application of the Alaska Product Preference. More fundamentally, the cases cited by Top Fuel, and others in the same vein,<sup>25</sup> have been superseded by the adoption of 2 AAC 12.170, which provides:

- (a) Inadvertent errors discovered after opening but before award, other than minor informalities, may not be corrected. If a bidder submits proof that clearly and convincingly demonstrates that an inadvertent error other than a minor informality was made, the bidder may withdraw the bid.
- (b) If, before award, a procurement officer knows of an error in a bid, the officer shall notify the bidder of the error.

This provision eliminates the procurement officer's discretion in the event of an inadvertent error, except for minor informalities, defined in 2 AAC 12.990(a)(8) as:

matters of form rather than substance which are evident from the bid document, or are insignificant matters that have a negligible effect on price, quantity, quality, delivery or contractual conditions and can be waived or corrected without prejudice to other bidders.

Use of the supplier's name, rather than the product's name, to identify the product qualifying for a preference was an inadvertent error. Even if the error was, as Top Fuel

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<sup>23</sup> Reply at 5-6.

<sup>24</sup> Opposition to Motion for Summary Adjudication at 4-10, *citing Jensen & Reynolds Construction Co. v. State*, 717 P.2d 844, 848 (Alaska 1986); *Chris Berg, Inc. v. State, Department of Transportation*, 680 P.2d 93, 94 (Alaska 1984).

<sup>25</sup> *See also, Vintage Construction, Inc. v. State, Department of Transportation and Public Facilities*, 713 P.2d 1213 (Alaska 1986); *Alaska International Construction, Inc. v. Earth Movers of Fairbanks, Inc.*, 697 P.2d 626 (Alaska 1985). The concurring opinion in *Jensen & Reynolds*, cited by Top Fuel, observes that, regardless of the stated rationale and legal principles applied, "in practice, achieving the lowest bid price has been paramount in all cases." 717 P.2d at 849.

suggests, a matter of form and not substance,<sup>26</sup> it was not evident on the face of the bid: it could only be discerned after review of the list of qualifying products. Furthermore, proper identification of the qualifying product is not an insignificant matter that can be waived or corrected without prejudice to other bidders. For these reasons, the procurement officer correctly declined to allow Top Fuel to correct its bid.

C. The Record Does Not Establish Crowley's Entitlement to the Preference

The division argues that it was reasonable for the procurement officer to deny the Alaska Product Preference to Top Fuel, because there is no guarantee that Crowley, the supplier identified by Top Fuel, will always provide Tesoro products.<sup>27</sup> Top Fuel turns this argument around, arguing that Crowley itself has committed to supply Tesoro to other locations using fuel from the same bulk facility, and that therefore Crowley could not stop supplying Tesoro products to Top Fuel without itself breaking its contractual commitments to the state.<sup>28</sup> Top Fuel also argues that the procurement officer did not treat both bidders equally, since Crowley identified Tesoro as the brand it was offering for diesel fuel/heating oil, and yet only Petro Star is a qualified product for diesel fuel/heating oil.<sup>29</sup>

Top Fuel's protest, as addressed in these arguments, raises serious questions about Crowley's commitment and ability to provide 100% qualified products throughout the contract term, particularly with respect to diesel fuel/heating oil. First, as previously stated, the procurement officer reasonably interpreted the ITB as requiring the bidder to expressly identify a qualifying product as a condition to application of the Alaska Product Preference. With respect to diesel fuel/heating oil, Line 1 of Lot 13, Crowley (and Top Fuel) did not identify the only qualified Alaska product, which is Petro Star. While there is undisputed evidence that in Bethel, Jet A and diesel fuel/heating oil are "the same", Line 1 of Lot 13 did not call for delivery of Jet A: it called for delivery of diesel fuel/heating oil, and only Petro Star diesel fuel/heating oil qualifies for the Alaska Product Preference. Second, just as Top Fuel cannot guarantee that Crowley will

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<sup>26</sup> "Top Fuel's mistake, if there was one, was semantic and immaterial, since Crowley fuel is Tesoro fuel." Opposition to Motion for Summary Adjudication at 6.

<sup>27</sup> Motion for Summary Adjudication at 2, 4.

<sup>28</sup> Opposition to Motion for Summary Adjudication at 6-8.

<sup>29</sup> Opposition to Motion for Summary Adjudication at 8.

continue to provide products from a particular source, neither can Crowley guarantee that Delta Western will. The undisputed evidence establishes that petroleum products are commingled in Crowley's bulk facility, which is the only bulk storage facility in Bethel. There is no evidence in the record that all of the diesel fuel/heating oil delivered to Bethel qualifies for the Alaska Product Preference: the affidavits state only that there are two (presumably, only two) suppliers of Jet A and unleaded gasoline, and that in Bethel (for unknown reasons, not apparent on the face of the ITB) Jet A is "the same as" diesel fuel/heating oil. Because, under the express terms of the ITB, absolutely no commingling of qualified and unqualified products is permitted,<sup>30</sup> the Alaska Product Preference does not apply to Line 1, Lot 13 unless all the diesel fuel/heating oil that enters the Bethel bulk fuel facility is Petro Star product.

Because Top Fuel's protest concerns its own bid, and not Crowley's, these questions are not directly at issue. However, the procurement officer has discretion to make such further inquiries as may be appropriate in order to determine whether Crowley has properly claimed the Alaska Product Preference as to diesel fuel/heating fuel, and whether it has demonstrated the ability to provide 100% qualified products for all fuel categories throughout the term of the contract.<sup>31</sup>

#### **IV. Conclusion**

Top Fuel's protest asserts that the Alaska Product Preference was wrongly denied to it. Therefore, the division's motion for summary adjudication is GRANTED. Because undisputed evidence does not establish that Crowley is entitled to the Alaska Product Preference for all categories in Lot 13, the matter is remanded to the procurement officer. The commissioner does not retain jurisdiction.

DATED April 14, 2009.

By: Signed  
Andrew M. Hemenway  
Administrative Law Judge

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<sup>30</sup> See note 5, *supra*. Product exchanges and commingling are common in the petroleum products industry. Absent specific language in the ITB, these practices have in the past been the source of contractual dispute regarding the Alaska Product Preference. See generally, In Re Petro Marine, No. 97-011 (Department of Administration, June 25, 1998).

<sup>31</sup> See 2 AAC 12.500. Application of a preference to a prospective contractor may be addressed as a matter of responsibility. See, In Re Service Oil & Delta Fuel Company, Nos. 98-002/003 (May 26, 1998).

**Adoption**

On behalf of the Commissioner of the Department of Administration, the undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 12th day of May, 2009.

By: Signed  
Signature  
Andrew M. Hemenway  
Name  
Administrative Law Judge  
Title

[This document has been modified to conform to technical standards for publication.]