

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

BRENNTAG PACIFIC, INC.	)	
	)	
v.	)	
	)	
DEPARTMENT OF TRANSPORTATION	)	
AND PUBLIC FACILITIES	)	OAH No. 09-0347-PRO
_____	)	ITB No. 2590444

**DECISION**

**I. Introduction**

This is a protest appeal. The Department of Transportation and Public Facilities issued Invitation to Bid (ITB) No. 259044 to supply airport runway deicer at 12 airports. Three bidders responded. The apparent low bidder was Brenntag Pacific, Inc. The department rejected Brenntag's bid because it inadvertently stated an unacceptable delivery time at one airport.

Brenntag filed a protest, which was denied, and it has appealed. The parties agreed to submit the matter for decision on the written record. Because the error in the bid may not be corrected, the bid as submitted was not responsive to the express terms of the solicitation, and the delivery date is a material term of the ITB, the denial of the protest is sustained.

**II. Facts**

The Department of Transportation and Public Facilities issued ITB No. 259044 on April 23, 2009. The ITB requested bids to supply airport runway deicer at twelve statewide airports on an as-needed basis. The ITB estimated a total quantity of 2,125,904 pounds of product, with no minimum guaranteed. 1,343,160 pounds, about 63% of the anticipated quantity, was estimated for the Anchorage airport, 213,600 at the Bethel airport, and 160,200 pounds at Fairbanks airport. The remaining nine airports ranged from a high of 96,120 pounds to a low of 21,360 pounds (about 1% of the total) at the Deadhorse airport.

The ITB required delivery of the product to each of the airports within a specified number of days after receipt of an order, ranging from 3 days at the Palmer airport to 45 days at the Nome airport. The required time for delivery at the Deadhorse airport was 30 days after receipt of an order. ITB states:

DELIVERY: The “Bid Schedule” will indicate specific delivery requirements by F.O.B. point. All cost of delivery shall be included in the bid price. For locations served by barge transportation, (Nome, Kotzebue & Dutch Harbor) orders will be placed by the State in a timely manner so that the Contractor can meet barge schedules. Indicate in the space(s) provided in the “Bid Schedule”, the time required to make delivery after receipt of an order. Failure to make an entry in the space(s) provided will be construed as an offer to deliver within the days after the receipt of an order as outlined in the specifications for each Item. Bids which specify deliveries in excess of these requirements will be considered nonresponsive and the bids will be rejected. [emphasis added]

Each item on the bid schedule includes a space for the bidder’s date of “Guaranteed Availability.” After that space, the Deadhorse airport item in the Bid Schedule states: “(Bidders who offer availability in excess of 30 days after receipt of order will be declared nonresponsive.)”

Haley Ragsdale, an account manager at Brenntag Pacific, Inc., prepared the firm’s bid for the contract. He intended to meet the delivery requirement for each airport, including the 30 day delivery requirement at the Deadhorse airport. For eleven of the twelve airports, Mr. Ragsdale entered, as the “Guaranteed Availability” date, the number of days specified in the bid schedule as the maximum time allowed. However, for the Deadhorse airport Mr. Ragsdale inadvertently entered 45 days after receipt of an order, which is well in excess of the stated maximum time of 30 days at that location. Whether delivery to the Deadhorse airport is provided within 30 days or within 45 days after receipt of an order would make no difference in Brenntag’s bid price.

The procurement officer found that Brenntag’s bid was nonresponsive because it specified a delivery date at the Deadhorse airport of 45 days after a receipt of an order, rather than the required maximum of 30 days. Brenntag’s protest argued that the delivery date stated in its bid was an inadvertent error that could be corrected under 2 AAC 12.170(a). The procurement officer concluded that the error was not a “minor

informality” within the meaning of 2 AAC 12.990(8), and that it therefore could not be corrected. Brenntag appeals.

### **III. Discussion**

On appeal, Brenntag asserts that its specification of a 45 day delivery time at the Deadhorse airport was an inadvertent error. It contends that the error constitutes a minor informality that may be corrected under 2 AAC 12.270(a), which Brenntag argues should be construed in a manner that provides the purchasing agency flexibility to allow corrections to a bid that are in the state’s best interest. Brenntag also argues that the bid should be considered responsive even if not corrected.

#### **A. The Bid Contained an Inadvertent Error**

The evidence that Brenntag’s bid contained an inadvertent error is, on the current record, undisputed. The person who prepared the bid has submitted a sworn affidavit stating that his intent was to designate a delivery date in compliance with the ITB requirement. The surrounding circumstances support the affidavit: (1) the particular item was listed with several other remote locations calling for a 45 day delivery; and (2) a bidder acting in good faith would not knowingly have submitted a bid that on its face obviously did not meet the ITB’s clear and express requirement for responsiveness.<sup>1</sup>

#### **B. The Error is Not a Minor Informality.**

##### *1. The Department Did Not Misinterpret the Regulations*

Brenntag argues that 2 AAC 12.170(a) and 2 AAC 12.990(8) “were not intended to tie the State’s hands and prevent it from acting for its own benefit.”<sup>2</sup> In this particular case, a “strict formalistic application of [applicable regulations]” will cost the state \$384,000, Brenntag asserts, due to the higher cost of the winning bid.<sup>3</sup> Brenntag argues that the regulations were not intended to prevent the state from allowing a bidder to correct an obvious error in a bid, to the detriment of the state’s financial interest.

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<sup>1</sup> See Flagship Development, LLC v. Division of General Services, OAH No. 06-0249-PRO at 7 (August 8, 2006) (“A good faith offeror warrants that the goods and services offered will, at the time required by the [solicitation], comply with the minimum requirements of the [solicitation].”).

<sup>2</sup> Appeal at 8.

<sup>3</sup> Appeal at 9. In point of fact, this stated cost differential includes the 10% Alaska bidder’s preference provided to the winning bidder, who was not the next lowest bidder. The actual difference in bid price between Brenntag’s bid and the next lowest bidder was \$195,109.

Contrary to Brenntag’s argument, however, it appears that the relevant regulations were intended to do precisely that. Prior to the promulgation of 2 AAC 12.170(a) in 1988 Alaska law might reasonably have been construed as Brenntag suggests: to provide purchasing agencies with discretion to allow corrections favorable to the state, using whatever rationale might support that outcome.<sup>4</sup> 2 AAC 12.270(a), however, limits a procurement officer’s discretion to allow a bidder to correct its bid, even when the error is inadvertent and is apparent on the face of the bid document.<sup>5</sup> It states:

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.

The regulation may not always lead to a result that is favorable to the state, but it provides clarity and it treats all bidders equally. Under 2 AAC 12.170(a), whether a bid may be corrected is not determined based on whether correcting the bid will save the state money. It is determined based on whether the error is a minor informality as defined in 2 AAC 12.990(8), which states:

“minor informalities” means 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[.]

## 2. *The Error is Not a Matter of Form*

Brenntag argues that the error was a matter of form. Brenntag references the description of “matters of form” provided in a legal dictionary as “all that relates to the mode, form, or style of expressing facts.”<sup>6</sup> It “submits that a mistake in writing a number can and should be considered a matter of form.”<sup>7</sup>

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<sup>4</sup> See generally, Jensen & Reynolds Construction Co. v. State, 717 P.2d 844 (Alaska 1986); 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); Chris Berg, Inc. v. State, Department of Transportation, 680 P.2d 93 (Alaska 1984). The concurring opinion in Jensen & Reynolds 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.

<sup>5</sup> See, Top Fuel Co. LLC v. Division of General Services, OAH No. 09-0047-PRO at 5-6 (Department of Administration, May 13, 2009).

<sup>6</sup> Appeal at 6, note 2, citing BLACK’S LAW DICTIONARY at 652.

<sup>7</sup> *Id.*

This argument is without merit. If the ITB had called for expression of the delivery date in terms of weeks and the bid had expressed it in terms of days, that would have been a matter of form. To specify an incorrect delivery date, in whatever form, is a matter of substance.

3. *The Error Is Not Insignificant and of Negligible Effect*

Brenntag argues that the error regarding the delivery date at the Deadhorse airport is insignificant and of negligible effect for two reasons. First, the Deadhorse airport deicer is only a small part of the whole contract, constituting less than 1.1% of the total bid price and quantity. Second, because Brenntag actually intended to meet the required delivery time, and all the bidders plan on pre-shipping deicer to the Deadhorse airport before any order is placed, the designated delivery date is unimportant.

Brenntag's first argument is not persuasive. It is true that from a cost perspective, the error is insignificant; indeed, the error has no effect on price. But from a delivery perspective, the error is significant, even though only one airport is affected. Plainly, compliance with the required delivery times at all locations is essential to ensure safe wintertime operations, and the department treated the solicitation as a single lot. Brenntag did not object to the requirement for a response to all items, and it has not argued that the department could have treated the Deadhorse item as severable when it awarded a contract.<sup>8</sup> Although the Deadhorse airport is of relatively minor importance in terms of the contract as a whole, this does not mean that a late delivery of deicer to the Deadhorse airport would be insignificant.

Brenntag's second argument is fallacious. The premise of Brenntag's second argument is that the procurement officer's decision was "based on circular reasoning."<sup>9</sup> According to Brenntag, whether an error's effect is negligible should be determined based on a corrected bid, not on the original bid: "A corrected bid will...have no effect on actual delivery.... The error was thus negligible and qualifies as a minor

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<sup>8</sup> Although the ITB expressly required bidders to bid on all items, it did not expressly state that the contract would be awarded as a single lot. Thus, although the department treated the solicitation as a single lot, and it appears all the bidders did as well, the ITB did not expressly preclude separate awards by location. *Compare, JJG Cleaning Services v. Department of Health and Social Services*, OAH No. 09-0049-PRO at 12 (Department of Administration, July 2, 2009) ("The ITB states: 'Award will be made as one lot to the lowest responsive and responsible bidder. In order to be considered responsive, bidders must bid on all items.'").

informality.”<sup>10</sup> Upon reflection, it is apparent that Brenntag, not the procurement officer, has engaged in circular reasoning: to say that correcting a bid makes an error immaterial is to say that all errors are correctible. Brenntag’s argument would render 2 AAC 12.170(a) a nullity.<sup>11</sup>

C. The Bid Was Not Responsive

A bid is nonresponsive when it “does not conform in all material respects to the solicitation.”<sup>12</sup> Whether a particular requirement in an ITB is material, and thus a matter of responsiveness, is generally a determination within the discretion of the purchasing agency.<sup>13</sup> Brenntag’s final argument is that its bid, even if uncorrected, was responsive and that it was therefore mistaken to reject the bid even though the ITB expressly and unequivocally stated that a bid offering availability at a time in excess of the required delivery date would be rejected as nonresponsive.

Brenntag’s argument is based on its assertion, which for purposes of this decision is taken as established, that at the Deadhorse airport all of the bidders would deliver the full amount of the anticipated needed quantity of deicer in advance of the winter season. But this is no guarantee that, should the pre-positioned supply run low, any subsequent orders will be filled within the desired time frame. Regardless of whether the bidder provides the full amount of the anticipated needed quantity in advance, the purchasing agency still needs to be assured that in the event of a shortfall additional product will be supplied in a timely manner. Thus, the requirement for a specified delivery date was not superfluous or otherwise immaterial. It is therefore not necessary to decide whether a purchasing agency may, in an appropriate case, disregard a specific and express

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<sup>9</sup> Appeal at 7.

<sup>10</sup> *Id.*

<sup>11</sup> Brenntag’s interpretation is also belied by the language of 2 AAC 12.990(8), which provides that an error is insignificant if the error is has a negligible effect and can be waived or corrected without prejudice to the other bidders. The use of the conjunction “and” suggests that these are distinct requirements.

<sup>12</sup> 2 AAC 12.990(9).

<sup>13</sup> *See generally, Quality Foods v. Department of Corrections*, OAH No. 06-0400-PRO at 12-13 (Department of Administration, September 21, 2006).

requirement for responsiveness that is stated in the solicitation, on the ground that meeting the requirement is not actually necessary.<sup>14</sup>

#### **IV. Conclusion**

The bid submitted by Brenntag was nonresponsive under the express terms of the solicitation. Brenntag has not shown that the required delivery date was immaterial. The procurement officer's denial of the protest is sustained.

DATED August 7, 2009.

*Signed* \_\_\_\_\_  
Andrew M. Hemenway  
Administrative Law Judge

#### **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 9th day of September, 2009.

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

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

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<sup>14</sup> “An agency may expressly establish minimum requirements that must be satisfied for a proposal to be considered responsive, but in the absence of specific language linking particular requirements with the determination of responsiveness, the materiality of a requirement is determined in light of the RFP as a whole.” In Re Spectrum Printing, Inc., No. 98-14 at 4 (Department of Administration, April 29, 1999).