

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

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) )  
SELECT MEDICAL PRODUCTS, INC. )  
) )  
v. )  
) )  
DEPARTMENT OF MILITARY AND )  
VETERANS' AFFAIRS )

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OAH No. 14-0570-PRO  
RFP No. 2014-0900-2302

**DECISION**

**I. Introduction**

The Department of Military and Veterans' Affairs (DMVA) issued a Request for Proposals (RFP) for the purchase of emergency food supplies. After the proposals were evaluated and a Notice of Intent to Award was issued, Select Medical Products (SMP) filed a protest. The protest was denied, and SMP appealed that decision.

SMP raised three issues in its appeal. First, it claimed that V.F. Grace, the prevailing offeror, should not have received a veteran preference. Second, it claimed that because V.F. Grace had improperly sought that preference, its proposal should be rejected. Finally, SMP argued that if its proposal had been properly scored, it would have been selected as the most advantageous offeror once V.F. Grace's proposal was rejected.

Prior to the hearing, DMVA agreed that V.F. Grace was not entitled to a veteran preference. It rescored the proposals, but the relative ranking of each proposal remained the same. At the beginning of the hearing, SMP agreed that if V.F. Grace's proposal was not rejected, then SMP could not prevail in this hearing. That is because, even if it received full points in all of the non-cost evaluation factors, its proposal would still be scored lower than V.F. Grace's, primarily because V.F. Grace's price was lower.

As discussed below, DMVA was not required to reject V.F. Grace's proposal. Accordingly, the decision to deny SMP's protest is affirmed.

**II. Facts**

DMVA issued an RFP to purchase emergency food from a qualified supplier. The RFP stated

The initial food order will be for a sufficient quantity of food products to feed 40,000 people 3 meals a day for 7 days. Breakdown by area will be meals to feed

20,000 people 3 meals a day for 7 days in the Anchorage area (50%), and meals to feed 20,000 people 3 meals a day for 7 days in the Fairbanks area (50%).

Thereafter orders may be placed against the contract to replace items issued during an emergency or to support a developing or on-going emergency, or to purchase additional times for DMVA use.

The emergency food supply should consist of immediate-use meals that can be prepared for either individual use or mass feeding. The meals offered must have a minimum 5 year, desired 7 or more year, shelf life under all storage conditions.<sup>[1]</sup>

The RFP defined one day's worth of food as "breakfast, lunch, and supper for one adult for one day."<sup>2</sup>

V.F. Grace's proposal included an affidavit stating that it qualified for the Alaska Veteran Preference, and asserted "V.F. Grace Inc. is a corporation wholly owned by individuals, a majority of whom are Alaska veterans."<sup>3</sup> V.F. Grace also submitted a Report of Separation from the Armed Forces of the United States showing that Charles Rush, one of V.F. Grace's owners, is a veteran.<sup>4</sup>

Other information in the record, however, includes a printout from the Division of Corporations, Business and Professional Licensing web site. This information shows that V.F. Grace is not wholly owned by individuals. Instead, Charles Rush owns three percent, Evlyn [sic] Rush owns two percent, and the remaining ownership is divided equally between the Charles Rush Escrow Trust and the Evelyn Rush Escrow Trust, with each trust owning 47.5%.<sup>5</sup>

Kent Harrington, V.F. Grace's general manager, was the person who signed the affidavit requesting the preference. He testified that he thought Mr. Rush was the only owner. At the time of V.F. Grace's proposal, he was not aware that Mrs. Rush had any ownership interest, or that there were trusts involved. Evelyn Rush testified that Mr. Rush and two partners started the company. After his partners died, he bought out their ownership interest. Ownership was later distributed between Mr. Rush, Mrs. Rush, and the two trusts for tax planning purposes.<sup>6</sup> Mr. Rush stated that this information was not shared with the other managers or employees of the

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<sup>1</sup> Record at 42.

<sup>2</sup> Record at 43.

<sup>3</sup> Record at 82.

<sup>4</sup> Record at 83.

<sup>5</sup> Record at 438.

<sup>6</sup> Testimony of Evelyn Rush.

company, and that there was no reason that others in the company would be aware that Mr. Rush was not the only owner.<sup>7</sup>

### III. Discussion

#### A. Veteran Preference

The Procurement Code provides for a preference for Alaska veterans. This preference is limited to five percent or \$5,000, whichever is greater.<sup>8</sup> There are four categories of offerors who may qualify for this preference:

- (A) sole proprietorship owned by an Alaska veteran;
- (B) partnership under AS 32.06 or AS 32.11 if a majority of the partners are Alaska veterans;
- (C) limited liability company organized under AS 10.50 if a majority of the members are Alaska veterans; or
- (D) corporation that is wholly owned by individuals, and a majority of the individuals are Alaska veterans[.<sup>9</sup>]

Under this statute, the procuring agency must look to the number of individuals involved in the entity, and then determine whether a majority of those individuals are Alaska veterans.<sup>10</sup>

Procurement Officer Douglas Moore testified that he checked online to see who the corporate owners were, and concluded that since Mr. Rush owned more than half, V.F. Grace qualified for the preference. After the protest was received, he checked with his supervisors. Mr. Moore was directed to a prior Division of General Services' newsletter.<sup>11</sup> That newsletter included a discussion of the veteran preference and stated,

If there is documentation showing that between two or more partners, members, or owners, ownership is distributed such that the Alaska veteran owns 51% or more of the business, that would satisfy the majority requirement.<sup>[12]</sup>

The protest report relied on this newsletter as additional support for DMVA's prior decision.

While DMVA's reliance on this advice is understandable, the newsletter did not provide an accurate analysis of AS 36.30.321(f). This preference focuses on the number of individual owners who are veterans rather than their ownership shares. Thus, if one veteran owns 90%, and

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<sup>7</sup> Although not explicitly stated during the hearing, some of the testimony suggested that Mr. Rush is now deceased.

<sup>8</sup> AS 36.30.321(f).

<sup>9</sup> AS 36.30.321(f)(2) (emphasis added).

<sup>10</sup> Alaska veteran is defined in AS 36.30.321(f)(1). There is no dispute that Charles Rush was an Alaska veteran.

<sup>11</sup> Testimony of Mr. Moore.

<sup>12</sup> Record at 392.

two non-veterans own 5% each, that entity does not qualify because a majority of the owners are not veterans. Similarly, if the two owners with 5% each are veterans, and the 90% owner is not a veteran, the entity would qualify for the veteran preference because a majority of the individual owners are veterans.<sup>13</sup>

In this case, V.F. Grace was either owned by two owners (Mr. and Mrs. Rush) or four owners (when the two trusts are included). Under either scenario, only one owner is a veteran and does not constitute a majority of individual owners.<sup>14</sup>

During this litigation, DMVA reconsidered its position, and concluded that V.F. Grace should not have received a veteran preference.<sup>15</sup> DMVA recalculated the scoring of proposals without this preference, and issued a Revised Notice of Intent to Award.<sup>16</sup> It was undisputed at the hearing that V.F. Grace should not have received this preference.

### ***B. Forfeiture of Claim***

Under the procurement code,

A person who makes or uses in support of a contract claim under this chapter, a misrepresentation, or who practices or attempts to practice a fraud, at any stage of proceedings relating to a procurement or contract claim under this chapter

(1) forfeits all claims relating to that procurement or contract[.]<sup>17</sup>

SMP argued that V.F. Grace incorrectly claimed to be entitled to a preference. Based on that incorrect claim, according to SMP, V.F. Grace should forfeit its claim to this procurement award.

The procurement code distinguishes between contract claims and other types of procurement proceedings. A contract claim involves an assertion that an existing contract is not being administered properly.<sup>18</sup> A protest is a different type of dispute, and questions whether a particular entity should be awarded a contract, or questions the contents of a solicitation.<sup>19</sup>

In drafting AS 36.30.687(a), the legislature also distinguished between contract claims and other types of claims. This statute says that forfeiture can result from a misrepresentation only in a contract claim. On the other hand, fraud during any type of procurement proceeding,

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<sup>13</sup> See Comments of Representative Gruenberg, House State Affairs Committee Hearing, April 7, 2009 (the language invites someone to give 1% to nine buddies in order to qualify for the preference).

<sup>14</sup> No ruling is made here as to whether the trusts should be treated as separate legal entities for purposes of this preference.

<sup>15</sup> Motion for Summary Adjudication, page 1.

<sup>16</sup> Record at 556. The original Intent to Award is at page 268 of the record.

<sup>17</sup> AS 36.30.687(a).

<sup>18</sup> See AS 36.30.620.

<sup>19</sup> AS 36.30.560.

including contract claims, could result in forfeiture. If the legislature didn't intend different meanings for the terms "misrepresentation" and "fraud," there would have been no need to include the first half of AS 36.30.687(a).

Misrepresentation normally includes the intent to deceive,<sup>20</sup> but there can be instances of innocent or negligent misrepresentations. Fraud, on the other hand, is a "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."<sup>21</sup> To the extent the legislature intended to allow forfeiture for a negligent or innocent misrepresentation, that intent only applies to contract claims. Fraud is required to impose forfeiture for other types of procurement claims, and fraud requires a knowing misrepresentation.

Thus, SMP must show that V.F. Grace knew it did not qualify for the veteran preference in order to show fraud that would justify a forfeiture of its claims.<sup>22</sup> SMP presented evidence of changes in the percentage of Mr. Rush's ownership interest on December 9, 2013,<sup>23</sup> shortly after the November 2012 newsletter was issued by the Division of General Services. The RFP was issued on December 4, 2013.<sup>24</sup> SMP suggested that there may have been discussions occurring between various individuals related to creating an interpretation of the preference that V.F. Grace qualified for, and that Mr. and Mrs. Rush then changed their ownership interests so that V.F. Grace could obtain the preference.

Even if all that had occurred – and SMP has not met its burden of proving that it did – these actions would only be fraudulent if V.F. Grace knew that the newsletter's advice was an incorrect statement of the law.<sup>25</sup> There is nothing fraudulent about changing a company's ownership to meet the statutory requirements for a preference. More importantly, the testimony of Mr. Harrington and Mrs. Rush show that the V.F. Grace employees submitting the proposal in this procurement were not aware that anyone other than Mr. Rush, who was a veteran, had any

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<sup>20</sup> Black's Law Dictionary (9<sup>th</sup> Ed).

<sup>21</sup> *Id.*

<sup>22</sup> The statute says that the party committing the misrepresentation or fraud forfeits its claims. This does not necessarily require the agency to impose that penalty when forfeiture might not be in the agency's best interests. This decision makes no ruling on whether the procuring agency has discretion to not impose that penalty.

<sup>23</sup> Supplement to Exhibit 4 filed by SMP on May 21, 2014.

<sup>24</sup> Record at 21.

<sup>25</sup> It might also be improper for state employees to intentionally change their interpretation of this preference, and communicate that change to V.F. Grace, in order to assist V.F. Grace in obtaining this contract. The evidence here is insufficient to show that this occurred.

ownership interest in V.F. Grace. SMP has not proven that V.F. Grace made a knowing misrepresentation in requesting this preference.

**IV. Conclusion**

Select Medical Products protested the Notice of Intent to Award a contract to V.F. Grace. It has not proven that V.F. Grace should have forfeited its claim to that contract. The decision denying the protest is therefore AFFIRMED.

DATED this 30<sup>th</sup> day of May, 2014.

*Signed* \_\_\_\_\_  
Jeffrey A. Friedman  
Administrative Law Judge

**Adoption**

This Order is issued under the authority of AS 36.30.675. The undersigned, on behalf of the Commissioner 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 8<sup>th</sup> day of July, 2014.

By: *Signed* \_\_\_\_\_  
Signature  
Curtis Thayer  
Name  
Commissioner  
Title

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