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

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QUALITY SALES FOODSERVICE,

v.

DEPARTMENT OF CORRECTIONS.

OAH No. 06-0400-PRO RFP No. 2006-2000-6020

ORDER DENYING EXPEDITED MOTION FOR RECONSIDERATION

This case originated on June 1, 2006, when Quality Sales Foodservice, a disappointed bidder on Lot 3 of ITB 2006-2000-6020, sought a formal appeal hearing from Commissioner Nordstrand. On July 19, four business days before the scheduled hearing, Peterkin Distributors, Inc. filed a Motion to Intervene as an appellant. Peterkin was a disappointed bidder on Lot 1 of the same ITB.

Because the undersigned was out of the state, Administrative Law Judge Kay Howard ruled on the motion in an order faxed to the parties early on the morning of July 24, the day before the hearing. She denied intervention. On July 25, the hearing went forward as scheduled, with Quality Sales Foodservice presenting its case. A witness from Peterkin testified for Quality, but the details of Peterkin's bid were not fully explored.

On July 27, 2006, Peterkin moved for reconsideration of the July 24 ruling. Peterkin has advanced three reasons for reconsideration, which will be considered in turn.

A. Discretion to Allow Intervention or Consolidation

Peterkin first argues that the July 24 order erroneously held that intervention is legally unavailable in a proceeding such as this, and contends that OAH regulations "permit intervention by way of consolidation." At the same time, Peterkin suggests that intervention and consolidation are parallel procedural tools under which "the resulting relief is identical," and seems to propose that its grievance regarding ITB 2006-2000-6020 should be heard with Quality's by way of the consolidation procedure under 2 AAC 64.190.

There are two responses to this argument. First, consolidation may well have been appropriate had there been two appeals before OAH regarding ITB 2006-2000-6020. However, Peterkin has no proceeding pending in this forum. It may (or may not) have an appeal pending before Commissioner Nordstrand, but if it does, he has not acted under AS 44.64.060(b) and 2

AAC 64.120 to refer the case to OAH.¹ Without two pending proceedings to consolidate, consolidation is not an available procedural tool.

As to intervention, the July 24 order should not be construed as a ruling that intervention can never be permitted in a procurement proceeding. The order should be understood to hold that a party in Peterkin's position has no *right* to intervention. Permissive intervention, while possible in an appropriate case, is a matter of discretion, and the order exercises that discretion to deny intervention based on the procedural and factual circumstances.

B. <u>Circumventing Appeal</u>

Peterkin complains that the July 24 order is "premised on the mistaken belief that Peterkin's Motion represents an improper attempt to circumvent the protest and appeal procedure." The order did not claim that Peterkin's effort was improper. Instead, it simply observed that there is an appeal process available to Peterkin and, since Peterkin has not advanced very far in that process, it is not, in the view of this tribunal, a good candidate to join another protester's fully ripe appeal.

In denying that it is improperly circumventing appeal procedures, Peterkin has argued factually that it did properly perfect an appeal of its own.² This argument only accentuates the divergent factual and procedural elements of the Peterkin and Quality claims. To import Peterkin's claim into the Quality case would add issues not present in the Quality matter, such as the sufficiency of Peterkin's appeal under AS 36.30.625 and the lack of a protest report.

C. <u>Compelling Reason</u>

Peterkin contends that the July 24 order failed to recognize that Peterkin has a compelling reason to intervene. Peterkin says that intervention will "expedite and simplify" consideration of the issues and "eliminate the cost of duplicative efforts." This argument is difficult to credit, given that the Quality appeal is fully ripe for decision, with the record closed and the drafting of a proposed decision underway. It seems more efficient for Peterkin to seek, independent of the Quality action, to resolve the status of its own purported May 22 appeal. In the meantime, the

¹ If it is true, as Peterkin may allege, that an appeal was duly initiated and was ignored by Department of Corrections staff or by others in the executive branch, Peterkin may have a remedy with the Commissioner of Corrections, with the Commissioner of Administration (*see* AS 36.30.005), with the Chief Procurement Officer (*see* AS 36.30.010), or with the Superior Court (*see* AS 44.64.060(b)). It would not have a remedy with OAH for a failure to refer an appeal. OAH has not been empowered to reach out and take jurisdiction over unreferred matters.

² Peterkin's assertion that the department "did not offer any evidence to the contrary" is slightly unfair, as Peterkin did not raise the issue of its prior appeal until its reply brief.

Quality appeal will likely be resolved, and if Peterkin does prove to have a live appeal pending, the resolution of the similar case may permit Peterkin's case to be decided very efficiently.

D. <u>Conclusion</u>

For the reasons outlined above, the motion for reconsideration is denied.

DATED this 28th day of July, 2006.

By:

<u>Signed</u> Christopher Kennedy Administrative Law Judge

<u>Certificate of Service</u>: The Undersigned certifies that on the 28th day of July, 2006, at ______ .m., a true and correct copy of this **document** was faxed and mailed to the following: Carolyn Y. Heyman-Layne, counsel for Peterkin Distributors; John Burns, counsel for Peterkin and Quality Sales Foodservice; Jack Gregson, Department of Corrections; and Marjorie Vandor, Assistant Attorney General.

By: ____

Linda Schwass

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