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

NACHURS ALPINE SOLUTIONS, LLC v. DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES	)	OAH No. 20-0514-PRO RFP ITB 2520H027
NACHURS ALPINE SOLUTIONS, LLC v. DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES	)	OAH No. 20-0538-PRO RFP ITB 2520H028

DECISION

I. Introduction

Nachurs Alpine Solutions, LLC, submitted two bids to provide deicing products to the Department of Transportation and Public Facilities for use on airport runways in the state. For both of the bids, however, a different company, Blomfield Company, submitted the lowest bids. The procurement officer determined that Blomfield's bid were responsive. Nachurs protested the decision, arguing that the bids offered by Blomfield were not responsive to the two invitations to bid (ITBs).

Nachurs has come forward with many arguments regarding Blomfield's submissions. Some of these arguments raise concerns, including an erroneous reference to a specific product in one ITB, an omission of some testing parameters in one of Blomfield's bids, and submission by Blomfield of data from a product that did not conform to the requirements in the ITB. For none of these issues, however, has Nachurs met its burden of proving that the procurement officer abused his discretion in finding Blomfield's bid responsive. For some issues, Blomfield's submission was not a variance from the ITB. For others, although the issue raised a concern, Nachurs has not proved that the product actually offered by Blomfield did not conform to the ITB or meet the Department's needs. Accordingly, the procurement officer's decision that Blomfield's bids were responsive is affirmed.

II. Facts

In maintaining airport facilities in Alaska, the Department of Transportation and Public Facilities uses both solid and liquid deicers on runways. It arranges for the procurement of the

deicers well in advance of the winter season. For deicer to be used in the upcoming winter of 2020-21, the Department's Division of Statewide Contracting and Procurement issued two ITBs in February 2020—one for liquid, and one for solid, deicer.[1]

The bids were received on March 23rd. After accounting for preferences that affect the scoring of the bid, the Division determined that Blomfield Company was the low bidder for both procurements. On April 8th, it issued Notices of Intent to Award for both contracts to Blomfield.[2]

The company that submitted the runner-up bids in both procurements, Nachurs Alpine Solutions, LLC, protested the procurements. Nachurs has been supplying deicer to the Department under yearly contracts for several years.[3] In protesting the procurement, Nachurs alleged that Blomfield's bids were not responsive to the ITBs. For the solid deicer, Nachurs argued that the product offered by Blomfield was cheaper and inferior to the specifications required in the ITB. Nachurs also asserted that Bomfield had failed to obtain a necessary waiver for a foreign product and to identify subcontractors. For the liquid deicer, Nachurs argued that Blomfield's product failed a required technical test. Based on its allegations of error, Nachurs asked that the award of the contract to supply deicers be stayed pending hearing.[4]

On May 1st, the procurement officer, Chris Hunt, denied the protests and the stay requests.[5] In evaluating Nachur's arguments, Mr. Hunt consulted with an engineer at the State Material's Laboratory, Richard Giessel.[6] Although Mr. Giessel initially was concerned about the quality of Blomfield's solid deicer product, he confirmed that its chemical assay met the required specifications. He also noted that the results of further testing on the product would be provided when the chemicals arrived.[7] Mr. Hunt determined that Blomfield was a responsive bidder, finding that in both cases, the product offered by Blomfield comported with the specifications in the ITBs.

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[1] R. Solid at 1; R. Liquid at 1. This appeal consolidated two procurement appeals. The procurement for the solid deicer was ITB #2520H027. The procurement for the liquid deicer was ITB #2520H028. The records on appeal for both are bates stamped beginning at "State 1." For ease of identification, this order will refer to the different records as "R. Solid" and R. Liquid."

[2] Nachurs' Exhibits 10 and 11.

[3] Potts testimony.

[4] This decision addresses only the allegations of error that are included in Nachurs' Post-Hearing Brief. Issues raised in Nachurs' Protest but not briefed or argued on appeal will not be addressed.

[5] R. Solid at 719-22; R. Liquid at 529-31.

[6] Nachur's Exhibit 9.

[7] *Id.*

Nachurs appealed to the Commissioner of Administration. The appeals were referred to the Office of Administration. The appeals were consolidated. On June 19th, Nachurs filed a motion to stay the awards of the contracts to Blomfield.

III. Discussion

A. Was Blomfield's solid deicer bid not responsive because it offered a cheaper and inferior product?

In its bid, Nachurs offered a brand of solid deicer called "Ecoway."[8] Blomfield offered a different solid deicer, called "forcemelt," made by Pelican Chemicals.[9]

Solid deicers can be rated based on their percentage of sodium formate. Ecoway is rated at 98 percent sodium formate or better.[10] The solid deicer made by Pelican, however, is rated at 97 percent or better.[11]

A solid deicer that has 98 percent sodium formate will outperform a solid deicer that has 97 percent sodium formate.[12] In addition, the 98 percent sodium formate solid deicer is more expensive.[13]

Nachurs argues that the ITB for solid deicer required a product that was 98 percent sodium formate.[14] It notes that a bid would be considered nonresponsive if it did not conform in all material respects to the ITB.[15] Given that the higher-concentrate product will outperform the lower-concentrate product, Nachurs concludes that difference between the two products is material. Because Blomfield offered the lower-concentrate product, Nachurs asserts that it has proved that Blomfield's bid was nonresponsive.

To prevail in this argument, however, Nachurs must prove that the ITB actually required the 98 percent concentrate.

1. Did the ITB for solid deicer require a product equal to or better than Ecoway?

The first question to address here is whether the ITB actually required that bidders must offer a solid deicer that was at least 98 percent sodium formate. As will be seen, Nachurs'

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8 Potts testimony

9 *See, e.g.,* R. Solid at 322; Nachurs Exhibit 6.

10 Potts testimony

11 Potts testimony.

12 *Id.*; see also R. Solid at 451 (email from Mr. Giessel to Mr. Hunt confirming that ">98% would be more effective and more expensive.").

13 Potts testimony.

14 Nachurs' Post-Hearing Brief at 3.

15 *Id.* (citing *Silver Bow Const. v. State, Dep't of Admin, Div. of Gen. Servs.,* 330 P.3d 922, 924-25 (Alaska 2014).

interpretation of the ITB hinges on a statement in the ITB that referred to a brand name. The ITB did not contain a specific requirement of the percentage of sodium formate contained in the product.

(a) What were the express specifications for solid deicer?

The ITB for solid deicer contained many different sections. One of the most important was the section labeled "product specifications." This section contained only one numbered specification, called Specification #1, which stated the following:

> **Specification #1:**
> SODIUM FORMATE
> Particle size: 2mm-6mm[16]

Although this section of the ITB did not include other numbered specifications, it did make clear that "[p]roducts offered must meet all requirements of the Federal Aviation Administration (FAA) Advisory Circular 150/5200-30D (or most recent version). Material must be free flowing. Caked or clumped material will not be accepted."[17] The section also quoted two excerpts from Chapter 4.6 of the FAA's advisory circular.[18] The quoted language informed bidders that the "approved specification" for the solid deicing product "is the latest edition of SAE AMS 1431E, entitled *Compound, Solid Runway and Taxiway Deicing/Anti-icing.*"[19]

SAE is a standards-setting organization. "AMS" stands for "Aerospace Material Specifications."[20]

Nothing in the FAA circular or the specifications adopted by the circular prohibit an airport from using a solid deicer that is 97 percent sodium formate.[21] Nothing in specification #1 in the ITB prohibits an airport from using a solid deicer that is 97 percent sodium formate. Therefore, Blomfield's bid met the requirements of the product specifications section of the ITB.

(b) Does the ITB's reference to Ecoway mean that the ITB required a chemical concentration of 98 percent or better ?

Further on in the ITB was a section called "bid schedule."[22] This section broke "Lot 1" of the ITB down into three subsections, Lot 1(A)1, Lot 1(A)2, and Lot 1(B)1. For each sublot, it described the type of delivery (in bulk or in bladders), the delivery location, and either the

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16 R. Solid at 18 (bolding, capitalization, and underlining in original).
17 R. Solid at 17 (underlining in original).
18 *Id.*
19 *Id.*
20 Potts testimony.
21 R. Solid at 451; Hunt testimony.
22 R. Solid at 20-22.

minimum quantity or the firm quantity required.[23] The bid schedule provided blanks for the bidder to fill in the unit cost and extended cost for each sublot, and then on the last page, blanks for the costs to be entered and summed up.[24]

Also included on the last page, written in a small font underneath the schedule for Lot 1(B)1, was the following: "Brand and chemical offered: Ecoway Sodium Formate (*The Bidder's failure to provide the brand and chemical offered may cause the bid to be declared non-responsive and the bid rejected.*)"[25]

In Nachurs' view, these lines in the ITB conveyed a strict standard—the offered product must have the same chemical at the same concentration as Ecoway. Nachurs then argues that this statement clearly conveyed to bidders that any product that had less than 98 percent sodium formate was not acceptable. Because Blomfield's product was only rated at 97 percent sodium formate, Nachurs argues that Blomfield's bid was nonresponsive. In short, Nachurs asserts that the plain language of the ITB makes Blomfield nonresponsive, and that strict construction based on the plain language of the ITB is required. As will be explained, Nachurs is wrong on both counts.

(i) Does the plain language of the ITB state that the concentration must be 98 percent or better?

First, the plain language of the ITB does not say that the solid deicer must be 98 percent or better.[26] After stated that the brand and chemical offered is "Ecoway, the ITB states that "[t]he Bidder's failure to provide the brand and chemical offered may cause the bid to be declared non-responsive and the bid rejected." In Nachurs' view, the plain language of the word "chemical" means "the same chemical at the same concentration."

The plain meaning of the word "chemical," however, is "a substance (as an acid, alkali, salt, synthetic organic compound) obtained by a chemical process."[27] Under a plain-language

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[23] R. Solid at 21-22.

[24] R. Solid at 22.

[25] R. Solid at 22 (bolding and italics in original).

[26] From a plain-language perspective, the reference to Ecoway is indecipherable. On its face, the statement first seems to say that Ecoway *is* being offered ("Brand and chemical offered: Ecoway Sodium Formate.") It does not say "brand and chemical required to be offered." This makes no sense in an ITB, since an ITB is a request for offers, not an offer. Saying "brand and chemical offered" may well be "procurementspeak" for "brand and chemical required to be offered," but it is not plain language. The next sentence appears to confirm that when the ITB referred to a brand being "offered" it means that the brand must be offered by the bidder: "The Bidder's failure to provide the brand and chemical offered may cause the bid to be declared non-responsive and the bid rejected." The plain language here, however, means that all bidders had to bid Ecoway Sodium Formate and only Ecoway Sodium Formate. Yet, this is not Nachurs' argument—most likely because the "boilerplate" standard terms and conditions contained in the ITB allow bidders to offer a different brand even when a brand name is specified. R. Solid at 2.

[27] Webster's Third New Int'l Dict. at 384 (1986).

approach, the "chemical" here would be sodium formate. This sentence does not say that "the failure to provide the same chemical at the same concentration" as Ecoway would be grounds for declaring the bid nonresponsive. Thus, as long as a bidder offered sodium formate, it would meet the plain-language requirement of this sentence (if, indeed, this sentence imposes any requirement).

In short, from a plain-language perspective, the sentence regarding Ecoway is not very informative. It does not say that the bidder has to offer a product with same chemical concentration as Ecoway, or of the same "quality" as Ecoway.

Furthermore, Nachurs' argument is not helped by the references in the ITB that explain what it means when a brand name is specified in the ITB. On page nine, the ITB explains that "[u]nless otherwise specified, when manufacturer and brand names are used to specify the type and quality of the goods desired, Bidders must clearly indicate the manufacturer and brand names they intend to provide."[28] Here, however, the reference to Ecoway Sodium Formate on page 22 does not state that bidders must provide a product that meets the same chemical percentage concentration as Ecoway. The reference on page 22 not establish any quality parameters or requirements other than being the same chemical. It certainly does not say that the brand offered must meet the same chemical concentration, and nothing in the reference to "quality" on page nine would suggest that a 97 percent concentrate would be unacceptable.

With regard to the standard terms and conditions on page two, they state that "product brand names or model numbers specified in this ITB are examples of the type and quality of product required, and are not statements of preference."[29] Thus, from this, we can conclude that Ecoway Sodium Formate is an example of a chemical that meets the requirement. We cannot conclude with certainty, however, that a product with a lower concentration of sodium formate would not also be an example of a product that would meet the specifications in the ITB. Indeed, the most straightforward interpretation of the language in the ITB is that any product that meets the specifications would be comparable to Ecoway.

Moreover, the boilerplate on page two also notes that "[i]f the specifications describing an item conflict with a brand name or model number describing the item, the specifications govern."[30] This tells us that the proper place for describing the attributes of the product is in the

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[28] R. Solid at 9.
[29] R. Solid at 2.
[30] R. Solid at 2.

specifications. This makes sense because a product's "quality" can mean many things. Which parameters of quality are important can best be delineated by explicit statements of the parameters, rather than by an oblique reference to a brand.

The only statement in the ITB that supports Nachurs' argument is that statement in the standard terms and conditions that "[r]eference to a brand name or number does not preclude an offer of a comparable or better product."[31] This statement, however, does not mandate a 98 percent or better product or preclude an offer of a product with a lower concentration. It relates to the preceding sentences, which make clear that the "comparable or better" requirement only applies when a brand name is intended to impose a quality requirement. Here, the reference to Ecoway does not appear to be imposing a quality requirement. The reference is located in the bid schedule, rather than in the specifications. The purpose of the reference is unclear at best. Without some language in the ITB to alert the reader that the reference to Ecoway was intended to impose a chemical concentrate requirement, the reader would not know what the reference meant.

Here, nothing in the specifications states a requirement that the product be 98 percent sodium formate or better. Reading only the specifications, a bidder would conclude that a 97 percent product would be acceptable. Nachurs argues that interpreting the reference to Ecoway in the bid schedule to impose a 98 percent requirement is not a conflict with the specifications, merely an addition. To a bidder who is offering a product that meets the specification, however, finding a requirement of 98 percent chemical concentrate based on a reference to a product would be a conflict.

In sum, Nachurs has argued that the plain language of the ITB sets out a 98 percent or better requirement for the percentage of sodium formate in the solid deicer. That is not, however, what the ITB says. Although a 98 percent or better requirement could be gleaned from one sentence in the ITB, no such requirement is clearly stated on the face of the ITB.

(ii) Does the ITB's reference to Ecoway require rejection of Blomfield's bid?

The analysis above establishes that Nachurs' interpretation of the ITB is not compelled by the reference to Ecoway. Nevertheless, Nachurs' interpretation that the reference to Ecoway meant that a bidder had to offer a product of comparable chemical concentration to Ecoway is a plausible interpretation of the ITB. Indeed, as stated above, the standard terms and conditions in the ITB provide some support for this interpretation because they state that "[r]eference to a brand

[31] R. Solid at 2.

name or number does not preclude an offer of a comparable or better product."[32] If the reference to "comparable or better" were considered to be a reference to chemical concentrate, it would mean that Nachurs interpretation was plausible. Thus, this decision agrees that the reference to Ecoway creates an ambiguity.[33]

This showing of an ambiguity, however, does not help Nachurs. First, although Nachurs' reading is plausible, it is a strained interpretation of the ITB. Simply put, Nachurs is interpreting the ITB to impose an implied standard of 98 percent purity when no such standard is stated in the specifications found in the ITB. In contrast, the procurement officer is interpreting the ITB to be controlled by the explicit specifications. The reference to Ecoway, placed in the bid schedule, is baffling. A very good argument could be made that Nachurs' interpretation, although plausible, is unreasonable because it hides the ball. It would be unfair to bidders to impose specifications that are not clearly stated in the ITB.

Moreover, the burden on Nachurs is much higher than a mere showing of an ambiguity. "[E]ven when there is a clear discrepancy between the written specification and the offered product, a bid can be responsive if it is shown that the product offered will meet the purchasing agency's actual needs."[34] That means that even if this decision were to accept Nachurs' argument that the ITB's reference to Ecoway incorporated the 98 percent minimum requirement, the procurement officer could still accept a 97 percent solution if the product would actually meet the department's needs.

Construction Machinery explains that the burden is on the protestor to show that a discrepancy is material.[35] Thus, even if Nachurs were correct, the procurement officer could accept the 97 percent product unless Nachurs proved that the 97 percent product would not melt ice at a sufficient rate to meet the Department's needs.

Here, Ms. Potts testified that the 98 percent product would be more effective than the 97 percent product.[36] No evidence indicates, however that the 97 percent product would fail to melt

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[32] R. Solid at 2.

[33] If Nachurs reasonably relied on an ambiguity to its detriment, then Nachurs could request bid preparation costs. That is not, however, Nachurs' argument here. As the Order denying stay correctly noted, an argument that a bidder reasonably relied on a plausible interpretation of the ITB to its detriment is different from the argument that the prevailing bidder was nonresponsive. Given that neither party has briefed the issue of whether any reliance was reasonable, the decision will not address that issue.

[34] *Construction Machinery Indus., LLC v. Dep't of Trans. and Publ Fac.,* OAH No. 10-0258-PRO at 7 n.23 (Dep't of Trans. and Publ Fac. 2010) (citing *Gunderson v. University of Alaska, Fairbanks,* 922 P.2d 229 (Alaska 1996)) *available at* https://aws.state.ak.us/OAH/Decision/Display?rec=4749.

[35] *Id.* at 7.

[36] Potts testimony.

ice or otherwise disrupt airport function.[37] Furthermore, Mr. Hunt testified that the reference to Ecoway was a mistake, meaning that the Division never intended the reference to impose a requirement for a higher concentrate.[38] Because Nachurs has not proved that Blomfield's product would not meet the department's needs, it cannot prevail on its argument that the reference to Ecoway in the ITB means that Blomfield's bid was nonresponsive.

2. Can due deference be given to a procurement officer's interpretation of the ITB?

As stated above, here, the procurement officer interpreted the reference to Ecoway in the ITB as having no effect on the percentage of sodium formate in the solid deicer. He explained that the reference was an error and that, in his view, the explicit specifications in the ITB should control.

Nachurs argues that the commissioner is not allowed to defer to the procurement officer's decision. In Nachurs' view, the commissioner must exercise independent judgment in interpreting the ITB. Nachurs asserts that if this decision were based on independent judgment, Blomfield would be found nonresponsive, citing the reference to Ecoway, the interest in having a better product, and the fact that Nachurs' product would actually cost less if we ignore the effect of the preferences that are required under the procurement code.[39]

The administrative decisions applying the procurement code generally allow the commissioner to give due deference to procurement officer's decision on the issue of responsiveness.[40] Yet, as Nachurs argues, deference is not always conferred. Whether deference will be given to a decision depends on many factors.[41]

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[37] Further, although the department's subject matter expert did not testify, the record contains evidence that he was aware of the difference between the 98 percent product and the 97 percent product, and that he did not raise any objection to the utility of the 97 percent product. R. Solid at 451. This supports an inference that the 97 percent product would meet the Department's needs.

[38] Hunt testimony; *see also* R. Solid at 720 (procurement officer's decision stating that "[a]ny reference to the Ecoway brand product or any other brand was administrative [oversight].")

[39] Nachurs Brief at 1-6.

[40] *See, e.g., Davis Wright Tremaine, LLP v. Dep't of Law,* OAH No. 11-0377-PRO (Dep't of Admin. 2011) at 3 ("[d]ue deference is given to the procurement officer's decision to accept a late protest."); *aff'd, Davis Wright Tremaine LLP v. State, Dep't of Admin.,* 324 P.3d 293, 300-01 (Alaska 2014); *In re Waste Management, Inc.,* Dep't of Admin. Case No. 01.08 at 7 (Dep't of Admin. 2002), *available at* http://aws.state.ak.us/officeofadminhearings/Documents/PRO/00-11.htm. *Waste Management* also advised, however, that the review by the commissioner may be less deferential than that of a court because the discretion committed to the *agency* (as opposed to the procurement officer) ultimately resides in the commissioner. *Id.*

[41] *See, e.g., Quality Sales Foodservice v. Department of Corrections,* OAH No. 06-0400-PRO at 12-16 (Dep't of Admin. 2006) (describing issues where deference could be accorded) , available at https://aws.state.ak.us/OAH/Decision/Display?rec=4732; *Granite Const. Co. v. Dep't of Trans. and Pub. Fac.,* OAH No. 17-0472-PRO at 6 (Dep't of Trans. and Pub. Fac. 2017) ("In reviewing the procurement officer's exercise of judgment, I will give deference to the procurement officer's decision where the written decision includes an

In a 2002 procurement appeal, the Commissioner of Administration explained that no deference will be given when the issue in dispute is "within the scope of the commissioner's general procurement oversight, and not within a purchasing agency's discretion."[42] Deference is appropriate, however, when the issue involves whether the product will meet the department's needs. "[W]hen the facts are undisputed, the procurement officer's determination that a particular bid requirement is material is generally persuasive, since the purchasing agency is in the best position to make judgments about its own needs."[43] Here, allowing the agency staff to interpret the meaning of the reference to Ecoway would be consistent with allowing the agency to determine its needs. It is not a matter requiring heightened oversight. The procurement officer's decision was not anticompetitive—it allowed for more bidders not participate in the procurement. In short, Nachurs has not raised any policy grounds for the commission to exercise oversight.

Moreover, Nachur's argument that no deference is due applies when the procurement officer's decision was contrary to an *express* provision of the ITB: "If the terms of the solicitation expressly require compliance with a particular specification as a condition of responsiveness, the procurement officer generally does not have discretion to accept a product that fails to meet the mandatory specification."[44] As made clear above, however, in this case the procurement officer's decision accords with the express provisions of the specifications in the ITB. Although Nachurs has asked the procurement officer to imply an additional specification from the reference to Ecoway, the procurement officer declined to do so. Because the issue in this case involves an implied condition rather than an express condition, this is an appropriate case to give deference to the procurement officer.

In sum, because the procurement officer is in the best position to make the initial determination of whether the product offered by Blomfield meets the department's needs, and Nachurs has not proved otherwise, this decision will defer to the procurement officer's decision that Blomfield's bid on the solid deicer was responsive.

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understandable and reasonable explanation for the basis for the decision. Where the decision does not offer an explanation, or where the explanation is not reasonable, no deference will be given."); *available at*: https://aws.state.ak.us/OAH/Decision/Display?rec=4782.

[42] *Waste Management,* DOA Case No. 01-08 at 13 (2002).

[43] *Id.* at 12.

[44] *Construction Machinery,* OAH No. 10-0258-PRO at 7 n.23.

3. Was Blomfield provided a competitive advantage by the procurement officer's decision to ignore the mistaken reference to Ecoway?

Ms. Potts testified that Nachurs could have bid a product with 97 percent sodim formate.[45] Nachurs argues that because it could have bid a different product, it has proved that the procurement officer's interpretation of the ITB was a material variance from what the ITB required. This is because, in Nachurs' view, the ambiguity created by the reference to Ecoway created a competitive advantage for Blomfield. A variance is material if it provides a competitive advantage to one bidder over another.[46]

Nachurs argument, however, is based on an assumption that a variance exists. That is not correct. An ambiguity in an ITB does not create a variance. Just because Nachurs' interpretation is plausible does not make it mandatory for Blomfield to follow it or the procurement officer to adopt it. Thus, because Blomfield's bid was not a variance from the clearly stated specifications in the ITB, the procurement officer's decision did not give Blomfield a competitive advantage. Indeed, Nachurs, like Blomfield, had the opportunity to bid any product that conformed to the specifications, to ask the department to clarify the ambiguity, or to protest the ambiguity in the ITB before the date of the bid opening.[47]

B. Was Blomfield's solid deicer bid not responsive because Blomfield did not obtain a waiver to provide deicer manufactured outside of the United States?

The ITB for the solid deicer required that "all services proved under this contract by the Contractor and all subcontractors will be performed in the United States."[48] If the bidder was unable to certify that all work would be performed in the United States, the bidder was required to request a waiver of this requirement.[49]

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45 Potts testimony.

46 *Quality Sales Foodservice v. Department of Corrections,* OAH No. 06-0400-PRO at 12-16 (Dep't of Admin. 2006), available at https://aws.state.ak.us/OAH/Decision/Display?rec=4732. *Quality Sales* advised that a variance would be considered material if "it gives the bidder a substantial advantage over other bidders, and thereby restricts or stifles competition." *Id.* at 12-13 (quoting *King v. Alaska State Housing Auth.,* 512 P.2d 887, 892 (Alaska 1973) (citations omitted by *Quality Sales*.).

47 *See* R. Solid at 2 (advising potential bidders to "carefully review this ITB for defects and questionable or objectionable material"; AS 36.30.565(a) (instructing that "[a] protest based on alleged improprieties or ambiguities in a solicitation must be filed at least 10 days before the due date of the bid or proposal."). For an example of the question, answer, and amendment process in a procurement, see, e.g., R. Liquid at 27-30.

48 R. Solid at 7.

49 *Id.*

The solid deicer product sold by Blomfield was manufactured in China.[50] Blomfield did not obtain a waiver to sell a product manufactured outside the United States.[51] Mr. Hunt testified that he did not consider finding that Blomfield was nonresponsive based on its failure to obtain a waiver because he did not think the provision applied.[52]

Nachurs argues that the failure to obtain a waiver means that Blomfield's bid must be found nonresponsive.[53] Nachurs' asserts that a definition of "subcontractor" from chapter 90 of title 36 should be applied here. Under that definition, "subcontractor" includes a person "who provides materials."[54] Further, Nachurs argues that no deference can be given to the procurement officer because he did not exercise any discretion regarding whether a waiver was required. Instead, he did not consider requiring a waiver. In Nachurs' view, because the definition of subcontractor is a question of law, the decisionmaker is required to exercise independent judgment on this issue.

Turning first to the question of whether the definition in AS 36.90.290 applies to the procurement code, Nachurs' argument is not persuasive. The lead-language to the definition of "subcontractor" states that the definition applies "[i]n AS 36.90.200 – 36.90.290." The procurement code is located in AS 36.30, so the definition does not directly apply to procurement. Further, in regards to whether the definition could be applied by analogy, the statutes in AS 36.90.200 – 36.90.290 address prompt payment of contractors and subcontracts under state construction and public works projects. It makes sense to apply prompt payment requirements to suppliers as well as other subcontractors. With regard to a waiver of a requirement that "work" and "services" be performed in the United States, Nachurs has not explained why it would make sense to extend the requirement to purchases of goods manufactured abroad. Given that many products or components of products are manufactured outside the United States, Nachurs' interpretation might well apply to most purchases of goods. On this record, Nachurs has not shown that its interpretation of the ITB is correct.[55]

Moreover, here, even if a waiver were required, Nachurs has not shown that the procurement officer abused his discretion in failing to obtain a waiver. First, under the terms of

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50 Potts testimony (referencing a U.S. Customs import report).
51 *Id.*
52 Hunt testimony.
53 Nachur's brief at 7.
54 AS 36.90.290(2).
55 Nothing in this decision prevents the State Procurement Officer from clarifying the intent of the waiver provision in ITBs.

the ITB, the absence of a waiver did not automatically make a bid submission nonresponsive.[56] Second, the record shows that no solid deicer is manufactured in the United States.[57] By requesting a bid for solid deicer, the Division was necessarily requesting a foreign-made product. Regardless of the subjective reason Mr. Hunt did not obtain a waiver, objectively, a procurement officer could reasonably conclude that a waiver here would not be meaningful. Nothing in this record shows that a waiver would serve the Department's purpose or that not having a waiver would mean that the product would not meet the Department's needs. In short, Nachurs has not met its burden of proof on the waiver issue.

C. Was Blomfield's solid decier bid not responsive because it failed to provide subcontractor information?

The standard terms and conditions included in the ITB include a requirement that "[w]ithin five (5) working days of notice from the state, the apparent low bidder must submit a list of the subcontractors that will be used in the performance of the contract."[58] Blomfield did not submit a list of subcontractors.[59] Nachurs has established, however, that Blomfield may well need to use subcontractors to warehouse and deliver the solid deicer product. Nachurs explained that the subcontractor in Anchorage will need special equipment because the bulk delivery means that the delivery truck will have to be sanitized.[60] Nachurs concludes that the Division may need to check up on the ability of the subcontractor to comply with this requirement and therefore Mr. Hunt abused his discretion in failing to find that Blomfield was nonresponsive based on its failure to provide a list of subcontractors.[61] In response, the Division argues that the requirement of identification of subcontractors adheres only upon a notice from the state.[62]

The Division is correct that the standard terms and conditions do not require identification of subcontractors in all cases. Here, the Division did not send a notice requiring identification of subcontractors, so Blomfield was not obligated to identify subcontractors. To the extent that Nachurs is arguing that Mr. Hunt abused his discretion by failing to send a notice requiring identification of subcontractors, Nachurs has not shown that the Department typically contacts

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[56] R. Solid at 7 ("Failure to comply with these requirements may cause the State to reject the bid as non-responsive").
[57] Potts testimony.
[58] R. Solid at 3.
[59] Hunt testimony.
[60] Potts testimony. Mr. Hunt testified that he understood Blomfield would not be using any subcontractors. Hunt testimony. He admitted, however, that he did not know how Blomfield would deliver or warehouse the product. *Id.*
[61] Nachurs' Brief at 7-8.
[62] Division's Post-Hearing Memorandum at 6-7.

delivery subcontractors or inspects delivery vehicles. Indeed, Mr. Hunt testified that he had no need for identification of the delivery subcontractor.[63] If the Department was not intending to follow up with the subcontractors, then requesting the names of the subcontractors would not serve any departmental purpose. It follows that Mr. Hunt was not required to request the names of the subcontractors. Further, even if Mr. Hunt erred on this matter (which, on this record, he did not), it would not make Blomfield's bid nonresponsive.

D. Was Blomfield's solid deicer bid not responsive because it failed to include evidence that the product complied with specifications?

The ITB included a requirement that the bidder submit evidence of compliance with the specifications, including an "[a]cceptance test from your most recent lot produced."[64] An "acceptance test" provides data on the following attributes:

- Total water content;
- pH;
- Flash point; and,
- Chloride content.[65]

The ITB stated that failure to provide the required evidence "may cause the State to determine the bid non-responsive and reject the bid."[66]

Blomfield included a "Certificate of Analysis" with its bid.[67] The Certificate of Analysis identified the moisture content and the pH of the lot of solid deicer manufactured by Pelican Chemical. It also stated that the product conforms with AMS1431E. It did not, however, specifically identify the flash point or the chloride content.[68]

Ms. Potts testified that the flash point and the chloride content are important attributes.[69] A nonconforming flash point could cause a fire and result in damage. Too much chloride could cause corrosion.[70] Ms. Potts was a knowledgeable witness. Her testimony on these issues was not controverted.

Mr. Hunt testified that he was not concerned about the incomplete reporting of evidence. In his view, the certification that the product met AMS1431E and the requirement that the full

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63 Hunt testimony.
64 R. Solid at 10.
65 Potts' testimony; R. Solid at 451.
66 R. Solid at 10.
67 Division's Exhibit 3a.
68 *Id.*
69 Potts testimony.
70 *Id.*

acceptance test be produced at the time of delivery provided the assurance needed that the product would meet the Department's needs.[71]

Based on Ms. Potts' testimony, here, Nachurs has shown a slight variance in Blomfield's bid submission from the precise terms of the ITB in that the acceptance test included in the bid did not have all of the information that should have been included in the test results. It has not, however, shown that the variance was material. Although the flash point and chloride content are certainly important, Nachurs has not proved that Blomfield's product did not meet the requirements for flash point or chloride content. It has not proved that Blomfield's product would not meet the agency's need. It has not shown that the failure to identify the flash point or the chloride content gave Blomfield a competitive advantage. As established above, Nachurs has the burden of proving that the variance was material. Because it has not met that burden, it has not established that Mr. Hunt abused his discretion or that this decision should not defer to Mr. Hunt's decision that Blomfield's bid was responsive.

E. Was Blomfield's liquid deicer bid nonresponsive because it included a nonconforming acceptance test?

For the liquid deicer, potassium acetate, the ITB, much like the one for solid deicer, had a specifications section that relied on an FAA advisory: "Potassium Acetate offered must meet all requirements of Federal Aviation Administration (FAA) Advisory Circular 150/5200-30D (or most recent version)."[72] Unlike the solid deicer ITB, however, the liquid deicer ITB did not require that the evidence of compliance submitted with the bid include an acceptance test.[73]

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71 Hunt testimony.

72 Nachurs Exhibit 11 at 17.

73 The ITB told bidders to include the following with their bid:

> **EVIDENCE OF COMPLIANCE:** Bidders must submit written confirmation with their bid that the product offered meets the specifications set forth in this ITB.
>
> Bidders must submit the following with their bid:
>
> Material Safety Data Sheets;
>
> Certified independent laboratory test results from the manufacturer's initial preproduction test for the offered chemical. Test results must demonstrate clear indication that the offered chemical conforms to each specification set forth in this ITB; and
>
> Certified independent laboratory Periodic test results dated within 24 months prior to the bid opening date. Test results must demonstrate clear indication that the offered chemical conforms to each specification set forth in this ITB.Nachurs Exhibit 11 at 10-11 (underlining in original).

R. Liquid at10-11. Thus, for this ITB, no acceptance test was required. To the extent that Nachurs is arguing that an acceptance test was impliedly required, there is no support for that argument and it is rejected.

Although not required to do so, Blomfield submitted an acceptance test for the liquid deicer with its bid. The acceptance test included by Blomfield in its bid was a test for a batch of potassium acetate that was manufactured on February 20, 2020.[74] That lot had a pH of 8.6.[75] Because the pH of 8.6 varied by more than 0.5 from the pH of the preproduction value for the product, the February 20th lot of potassium acetate did not pass the requirements of SAE AMS1435D § 3.2.3.[76] Thus, the lot failed the acceptance test. The lot manufactured on February 20th did not conform to the requirements of the bid.

Nachurs argues that "the specific testing required by SAE AMS1435D is [] incorporated into the ITB." [77] From that, Nachurs concludes that "bidders were required to demonstrate compliance with SAE AMS1435D's quality assurance regimen."[78] Nachurs then concludes that Blomfield's submission of a nonconforming acceptance test proves that Blomfield's product did not meet the requirements of the ITB.

Nachurs' argument that the submission of a failed acceptance test raised concern about the quality Blomfield's product is sound. If Blomfield was offering to sell nonconforming product then its bid was nonresponsive. Further, Nachurs has established that the mere existence of a failed test is grounds for concern. The requirement that pH not vary more than plus or minus 0.5 from the preproduction test was to ensure quality control.[79] Because Blomfield's manufacturer had produced a batch in 2020 that did not pass the acceptance test, Nachurs suggests that the manufacturer did not exercise appropriate quality control and its product should not be purchased.

Thus, as stated above, Nachurs has established grounds for concern. Indeed, Mr. Hunt testified that he was concerned.[80] He was reluctant, however, to declare a bid nonresponsive based on data included in the bid that was not required. Instead, after further inquiry with Blomfield and Pelican, Mr. Hunt obtained an acceptance test for product that conformed to the specifications in the ITB.[81] That lot was within the acceptable pH variance.[82] Mr. Hunt then found that Blomfield's bid was responsive, noting in his decision that "the State has confirmed the product will meet the applicable specification as required."[83]

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[74] R. Liquid at 588.
[75] *Id.*
[76] Potts testimony; Hunt testimony. *See* Order Denying Stay at 6.
[77] Nachurs' Brief at 10.
[78] *Id.*
[79] Potts testimony.
[80] Hunt testimony.
[81] Hunt testimony. *See also* Nachurs Exhibit 12.
[82] *Id.*
[83] R. Liquid at 530.

Nachurs has not shown that this decision should not defer to the procurement officer on this matter. This issue involves the quality of the product and the Division's ability to ensure that the product actually delivered meets the specifications of the ITB and the Department's needs. The Division is in the best position to make that determination. Although that determination can be challenged with evidence, the evidence in this record does not suggest that the product to be delivered by Blomfield will not meet the needs of the Department. Because Mr. Hunt had evidence that the product offered by Blomfield would conform to the requirements of the ITB, he did not abuse his discretion in finding Blomfield's bid responsive to the ITB.

IV. Conclusion

Nachurs has raised several issues regarding the two ITBs. It has not, however, met its burden of proving that any of these issues made Blomfield's bids nonresponsive.

For some issues raised by Nachurs, including the absence of a waiver for imported product and the identity of Blomfield's subcontractors, Nachurs has not proved that Blomfield's bids failed to meet any requirement of the ITB or the procurement code. With regard to the erroneous reference to Ecoway in the solid deicer ITB, although the reference gave rise to an ambiguity, Nachurs has not proved that the reference amended the specifications for the product being requested or that the product offered by Blomfield did not meet the Department's needs.

As for the omission of two test measurements in the acceptance test for the solid deicer provided by Blomfield, Nachurs has not proved that the omission was a material variance. The omitted information was obtained by the Division and the ITB explicitly gave the procurement officer discretion to determine whether an omission of evidence was material. Because the product actually provided to the Department will meet the requirements of the testing parameters, the omission does not require a finding that Blomfield's bid was nonresponsive.

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With regard to the potentially nonconforming-product data that Blomfield provided in the liquid deicer bid, submission of that data was not required by the ITB. The procurement officer had discretion to inquire further regarding the conformity of Blomfield's product. Because the evidence shows that Blomfield's actual product will conform to the ITB, the procurement officer did not abuse his discretion in finding Bomfield's bid responsive. Accordingly, the procurement officer's decision that Blomfield's bid was responsive is affirmed.

DATED: September 8, 2020.

By: *Signed*
Stephen Slotnick
Administrative Law Judge

Adoption

Under a delegation from the Commissioner of Administration, I adopt this Decision, under the authority of AS 44.64.060(e)(1), 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 Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 22nd day of October, 2020.

By: *Signed*
Name: Kelly Tshibak, DOA

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]