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Alaska State Legislature

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House of Representatives

MEMORANDUM

TO: Representative Mitch Abood, Chairman House State Affairs

FROM: Representative Barb Lacher *BL*

DATE: February 20, 1984

RE: HB 415

A large, handwritten signature in black ink, consisting of a large, stylized letter 'B' with a loop, enclosed within a large oval.

Dear Mitch,

HB 415, an Act relating to Bidder Preference is currently in State Affairs awaiting action. I respectfully request that this bill be scheduled for hearing as soon as possible. Thank you.

Alaska State Legislature

HB 415

REPRESENTATIVE
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House of Representatives

MEMORANDUM

TO: Representative Lacher

FROM: Sarah Robinson

DATE: May 13, 1983

RE: HB 415

HB 415 amends AS 37.05 by adding a preface stating the intent of the Alaska Bidder's Preference Law. The purpose of this preface (AS 37.05.225 new Section) is to protect the existing Alaskan Bidder's Preference Law from imminent constitutional challenge. Research has indicated that an amendment to add a preface with intent will provide the necessary protection by providing other grounds than "residency" for the Bidder's Preference Law. An examination of bidder's preference laws in other states tends to support this view.

The bill adds a new subparagraph to AS 37.05.230 (5), D. to require all parties of a joint venture to comply with the requirements for an Alaskan bidder under the same Section. This amendment has been found necessary in light of the recent Alaskan Supreme Court Decision on the Irby-Northface contract award from the Alaska Power Authority.

There is strong evidence to support the view that the Alaskan Bidder's Preference Law should remain at 5% and not be raised to 15%, as suggested by HB 106, due to clear constitutional challenges that would result from such an increase.

HB 415

M E M O R A N D U M

TO: Representative Barbara Lacher
FROM: Sarah Robinson
SUBJECT: Alaska Bidder's Preference
DATE: March 26, 1983

T A B L E O F C O N T E N T S

- I The Application of Joint Venture to Alaska Bidders Preference Laws
- II Nonresponsive Bidders
- III Discussion of Current APA Policy and Recent Challenges to the Bid to Irby-Northface, A Joint Venture
- IV Questions

Attachments: Reference in the following Memorandum to attachments are indicated with the use of "[]" indicating the attachment number.

1. 2/17/83 telegram from IBEW to Yould of APA.
2. 1/25/83 letter from Attorney General Gorsuch's office to Perkins of APA.
3. 9/25/81 Memorandum Decision and Order Denying Injunctive Relief, Judge Shortell (3AN-81-6291).
4. Alaska Statutes concerning Joint Ventures, AS 08.18.011.
5. Earlier Attorney General's Opinions concerning the responsiveness of bids and the time at which a business license is obtained, 7/16/63, 7/15/66, and 2/24/67.
6. Alaska Statutes concerning Alaska Bidder's Preference and Supplements, includes 1982 amendment from 1982 SCS CSHB 156 (Rules), AS 37.05.230, AS 37.05.240.
7. 2/25/83 letter to Eberle of APA from Attorney's Wagg and Davis concerning nonresponsive bids.
8. 2/23/83 certification from DOL concerning Irby Construction, Inc.'s out-of-state license and no registered Electrical Administrator, and attached list of 47 cease and desist orders issued in AK between 7/80 and 1/83 for the absence of an Electrical Contractor's license.
9. 2/23/83 cease and desist orders issued to Northface Construction, Inc., and Irby Construction, Inc. for the absence of a licensed Electrical Administrator, and supporting documents.
10. 2/23/83 cease and desist order issued to Shirley Schinderline for operating as an Electrical Administrator for two companies, at once, and supporting documents.
11. Alaska Statutes regarding electrical administrators and their license requirements, AS 08.40.130, and cease and desist orders, AS 08.40.175.
12. 2/16/83 letter to APA from Irby and Northface stating intent to form a joint venture for the purpose of bidding on the Anchorage-Fairbanks Intertie, and supporting documents.
13. 1/10/83 memorandum to Commissioner Robinson, of the Department of Labor, regarding discussions between APA and others concerning the

use of joint venture within the Alaska Bidder's preference for the bid evaluation on the Anchorage-Fairbanks Intertie, and supporting documents.

14. 3/10/83 letter to Oczkus of IBEW, from Attorney Cohen of Ely, Guess and Rudd Law Firm, regarding the application of joint venture to Alaska Bidder's Preference Laws.
15. 3/1/83 certification that Irby Construction, Inc. has no Alaska business license, from the Department of Revenue (AS 37.05.230 (5) (B)).
16. 3/1/83 certification that Irby Construction, Inc. has not filed with Alaska under AS 10.05.597, as a foreign corporation.
17. 2/22/83 letter to Kennedy, President of Northface Construction, Inc. requesting a copy of the joint venture agreement with Irby, and attached documents from IBEW.
18. Alaska Statutes and Supplements concerning the formation of APA and the duties and regulations of APA. Note that the statutes clearly require APA to call for, evaluate, and award bids, and do not authorize APA to contract consultants for this purpose.
19. Current status of 1983 House Bill 106, "An Act relating to Bidder's Preference," which raises the 5% advantage for Alaskan bidders to 15%.

I JOINT VENTURES

The IBEW sent a telegram, on February 17, 1983, to Eric Yould, Executive Director of the APA, protesting the bid contract award to Irby Construction, Inc. and Northface Construction, Inc., a joint venture, hereafter referred to as Irby/Northface, for the Anchorage-Fairbanks Intertie. The telegram lists six factors which make Irby/Northface a nonresponsive¹ bidder and which should disqualify them from having been awarded the bid [1].

It is difficult to piece together the full sequence of events between the opening for bids and the final award to Irby/Northface, but the cease and desist orders dated February 23, 1983 seem to have followed the award to Irby/Northface and the orders were overridden by the Attorney General's office between February 23 and 25, 1983. Irby/Northface had been granted the contract again by February 25, 1983.²

On February 25, 1983, Perkins of APA received a letter from the Attorney General's office, from Richard P. Kerns, Assistant Attorney General, Transportation Section. This letter specifically addressed all six reasons listed in the IBEW telegram that were cited as evidence that Irby/Northface is a nonresponsive bidder.

1. nonresponsive bidder refers specifically to bid contract violations. To be responsive a bid must comply with all meaningful (or material) aspects with the instructions to bidders in terms of the method and timeliness of bid submission and in terms of the substance of any resulting contract. All bidders stand on equal footing and the integrity of the formal advertising system is maintained. See Section II below.
2. Further investigation is required to fully document this sequence of events and the full role of Attorney General Gorsuch's office.

Two of the six examples of nonresponsiveness in the Irby/Northface bid listed in the IBEW telegram are concerned with the applicability of the joint venture statutes to the Alaska Bidder's Preference Laws. The other four instances of nonresponsiveness listed are more directly related to nonresponsiveness as defined in footnote 1. I will address the joint venture issue in this first section and then turn to the issue of nonresponsiveness in section II of this memorandum.

The applicability of the joint venture statute [4] to the Alaska Bidder's Preference Law has been raised in this recent challenge to the Irby/Northface bid contract award, and in an earlier case [3].

Attorney General Gorsuch's office addressed all six issues raised in the IBEW telegram [2], the two most directly related to joint venture are 1) Irby/Northface should not qualify for Alaska Bidder's Preference because neither contractor has performed similar work within the state (AS 37.05.230 (1)(B), and supplement AS 37.05.230 (5)(C)). The 1982 amendment to this statute specifically states that:

An Alaska bidder, for the purpose of bid awards under (1)(B) of this section [A bid shall be awarded to an Alaska bidder₃ if his bid is not more than five percent higher³ than the lowest nonresident bidder's], is a person who (5) has maintained a place of business within the state for a period of six months immediately preceding the date of this bid.

And, 2) IBEW points out that Irby/Northface does not have an Alaska business license listed in the name of the firm as a joint venture.

APA and Attorney General Gorsuch argue that the license need only be in the name of one of the parties of a joint venture and that the "business license requirement does not take effect at the time of the bid, but at some later time," ([2], page 2). This position is in direct contrast to that taken by earlier Attorney Generals Hayes (Opinion No. 14, 7/16/63); Colver (Opinion No. 4, 7/15/66), and Benesch (Opinion No. 3, 2/24/67), [5] where it is repeatedly argued that it is unlawful for a bidder to submit a bid without a license unless it is clearly stated as such in the bid at its initial submission. Furthermore, Attorney General Gorsuch's argument directly contradicts the requirements stated in the Alaska Bidder's Preference Statutes. Which state that "the bidder must submit a bid for goods and services under the name as appearing on his current Alaska business license," (AS 37.05.230 (5)(B)). [6]

Two conflicting interpretations of the applicability of joint venture to Alaska Bidder's Preference are represented in the current challenge to the APA bid contract award to Irby/Northface. APA, and the Attorney General's office argue that joint venture applies to the Alaska Bidder's Preference Law, while the IBEW argues that the Bidder's Preference statutes are quite clear in their use of the English language and that a joint venture is not the same as a business, unless the bidder has a license under that name, as a joint venture, and has been operating as a business in the State under that name for a period of at

3. House Bill 106, sponsored by Ward, would amend this statute to award a 15% preference to Alaska bidders.

least six months prior to the bid. If a joint venture had filled these requirements, which are stipulated in the Bidder's Preference statutes [6] then they would qualify for preference as Alaska bidders. The APA and Attorney General Gorsuch's office, on the other hand, argue by analogy that a joint venture and a business are the same entity, and further that only one of the members of a joint venture need fill the Alaska residency requirements or license requirements in order to qualify for preference as an Alaskan bidder.

Attorney General Gorsuch's response to this "statute violation,"⁴ argued by the IBEW, is in keeping with an earlier bidder's challenge [3]. This is 3AN-81-6291, Pacific Ventures, Inc., Plaintiff, Dillingham Corporation, Plaintiff in intervention, v.s. APA, Defendants, Southeast-Harrison Western, a joint venture, defendant in intervention. The Attorney General's office argues, in the February 25, 1983 letter to the APA, that this statute "does not require the bidder to have performed similar work within the state... (but) simply to have maintained a place of business within the state." This is the same conclusion drawn by Judge Brian Shortell in the 1981 Memorandum Decision and Order Denying Injunctive Relief (p.7).

In determining that Southeast-Harrison Western was qualified for an Alaska bidder preference pursuant to AS 37.05.230 the APA consulted with and relied upon the interpretation of the senior purchasing agent in the Anchorage office of the Division of General Services and Supply, Alaska Department of Administration, that in this situation the joint venture would be entitled to the Alaska bidder preference so long as one of the partners satisfied the requirements. (3AN-81-6291:7 emphasis added)

The difference between the Attorney General's argument and Judge Shortell's is that the former implies this application of joint venture while the latter explicitly states it.⁵ These two positions endorse APA's policy interpretation of the Bidder's Preference which includes the use of joint venture, and implicitly endorse APA's use of a consulting firm to derive that interpretation.

In both the 1981 litigation and in the present pending hearing for a bidder's challenge, the plaintiffs have argued, with IBEW, that joint venture does not apply to the Alaska Bidders Preference statutes. The crux of the argument is therefore the acceptability of the analogy used between a joint venture and an Alaska business, as it is applied in APA policy. The constitutionality of this interpretation could be challenged.

IBEW has argued that there is a legal difference between a business license and a joint venture license.⁶

4. It should be noted that the letter from Gorsuch's office (2/25/83) cites AS 37.05.230 (1)(B) with an unusual typographic error, as AS 17.04.230 (1)(B); AS 17 is concerned with food and drugs!

5. AS 08.18.011 specifies a joint venture, see [4].

6. These two kinds of licenses have different contexts. A business license is regulatory of fiscal responsibility for a legal business entity, while a joint venture license is a form of tax revenue. Preference statutes state, in plain English, "business license" and not "joint venture license."

Clearly the APA has been operating under their current interpretation of the Alaska Bidder's Preference law and the applicability of the joint venture statutes to this law in evaluating bids since 1980, and they will continue to do so until either the statutes are explicitly amended to read, in even clearer English, or until a bidder's challenge goes beyond a memorandum from the Superior Court, as in the 1981 challenge.

II NONRESPONSIVENESS

A second area of challenge to APA's recent contract award to Irby/Northface is in terms of contractual errors and irregularities in the bidding process. These issues of nonresponsiveness are raised in the IBEW telegram to the APA and are a reiteration, in part, of an earlier challenge on the grounds of "nonresponsiveness" in the 1981 case 3AN-81-6291 [5].

Attorneys for HW-Newberry, Wagg and Davis of Faulkner, Banfield, Doogan and Holmes Law Offices of Anchorage, sent a letter to Eberle, of the APA, on February 25, 1983, which directly addresses the legal arguments for the nonresponsiveness of Irby/Northface's bid. [7] It is pointed out, in this letter, that Irby/Northface did not follow the instructions contained in paragraph 4.1.4 of the bid price form in filling out the bid. This resulted in Irby/Northface's failure to attribute its indirect costs (supervision, overhead and profit) only to sub-item (a) as required by the instructions in the solicitation for bids.

The reason unit prices are used in bids is that quantities, for many reasons, can overrun or underrun. Irby/Northface, by not following the instructions for placement of indirect cost by bidding both sub-items equally, will be paid the sub-item (b) price for any overruns instead of the sub-item (a) price minus indirect costs. This must be contrasted with the situation where a bid is correctly submitted. A correct bid would have all indirect costs in sub-item (a) (for example at \$100.00 per unit), and only direct costs in sub-item (b) (for example at 75.00 per unit). Obviously any overrun on the job will be paid by the owner at the sub-item (b) rate, which logically will be lower than the sub-item (a) rate, if the bid

7. Ross Kopperrud, (personal communication in a phone conversation on March 18, 1983), of the Anchorage office of the Attorney General's Office, stated that APA went to an outside consultant in 1980 to derive this "legal" interpretation of the statutes in regard to the use of joint ventures in evaluating Alaska bidders.

instructions are followed. Thus, the State would obtain the benefit of a lower charge for overruns. However, Irby's bid, in effect, has made both (a) and (b) unit prices at \$100.00. Any overruns would be charged to the State at \$100.00 per unit instead of \$75.00 per unit as set out above. The possibility of additional cost resulting from Irby's improper bidding practices is obvious, and more importantly, goes directly to price. Thus in an overrun, the public, who are the people competitive bids are designed to protect, can and will pay substantially more. The failure of Irby/Northface to conform to the instructions "could" effect the price and therefore their bid is nonresponsive.

([7], pages 3, 5)

The second area of nonresponsiveness that Wagg and Davis point out is the presence of line item changes in the bid (crossed out lines and altered figures) that have no signature, such that it is impossible to determine who made the changes and when. The bidder instructions stipulate that (paragraph 11, p2-9):

a bid shall be rejected for the following reasons:
(e) the bid contains a material alteration or erasure which is not initialed by the signer of the bid.

(ibid)

There are twelve (12) instances where quantities were changed without a signature or initial in the Irby/Northface bid.

Pacific Venture's motion as plaintiff in 3AN-81-6291, as cited in section I of this memorandum, was based upon a similar argument of nonresponsive bidding. The court argued in that case that:

the law with regard to an agency finding of nonresponsiveness in bidding situations does not favor the unsuccessful bidder,

and further argued in that case that the plaintiff:

needs to show reasonable basis for nonresponsiveness in order to qualify for judicial review of agency actions. (3AN-81-6291, p.6)

The defendant in the 1981 case was Southeast-Harrison Western, a joint venture, and (perhaps) ironically they are the plaintiff in the current bidder's challenge to be heard in Anchorage next week, against Irby/Northface. It should be obvious, therefore that joint venture firms, such as Southeast-Harrison Western and Irby/Northface seem more concerned with submitting a successful bid than any constitutional question concerning APA's bid evaluation procedures or with the responsiveness of their own bids. This is clearly illustrated by the above joint venture taking both sides of the fence in this argument.

While I have yet to have access to the legal briefs from the 1981 bidder's challenge, it would seem that there is a more substantial case nonresponsiveness in the present bidder's challenge against APA and Irby/Northface, than in the 1981 case.

The IBEW telegram points out that, at the time of bid submission, Irby/Northface had no electrical administrator. On February 23, 1983 the Licensing Examiner (AK Dept. of CED) certified that Irby/Northface had no licensed electrical administrator [8]. Attached to this certification are 4 cease and desist orders issued to contractors for the same bid violations, issued by DOL. The cease and desist orders [9] issued to Irby and Northface (February 23, 1983) were overridden by the Attorney General's Office, in contrast to the previous 47 cease and desist orders issued between 7/80 and 1/83, why? This is the intervention of the Attorney General's Office that are constituent mail refers to and protests.

A cease and desist order was issued to Irby/Northface on February 23, 1983 was accompanied by a cease and desist order to Shirley Schinderline of Eide Construction Co. for serving as an electrical administrator for two companies at the same time [10]. Attached to this is the certification from the licensing examiner of the same date, which certifies that she had sent a letter to the Division of Occupational Licensing, dated February 10, 1983, and received February 16, 1983, which states her intention of serving as electrical administrator for two construction companies at the same time. DOL rejected this, on the grounds covered in AS 08.40.130 and AS 08.40175 [11].

It should be pointed out here that upon initial inquiry into this matter, as a part of routine investigation to answer constituent mail, I was directed to Ross Kopperrud of the Attorney Generals' Office who gave me only the APA side of the story and made no mention of any of these documents or of the IBEW investigations. He further provided me with the case number for the 1983 bidder's challenge, but gave me the wrong number, when I was unsuccessful in obtaining a copy of the case from the clerk's office of the Anchorage Superior Court, I called him back. At which time he stated that "that's the number on his copy and he couldn't help me." Needless to say, did not mention any other documents or investigations or involved parties. It was not until I contacted IBEW that I was able to obtain the other side of the story, and the correct case number, etc.

On February 16, 1983, Kennedy and Davis of Irby/Northface sent a letter to Eberle of the APA, to notify them of their joint venture formed for the purpose of bidding and constructing the Intertie (APA-83-0015). [12]

The evidence for nonresponsiveness in the bidding contract of Irby/Northface seems strongest in terms of 1) the double licensing of Shirley Schinderline as Electrical Administrator, 2) in terms of the erasures, etc., on the bid and 3) in terms of their failure to comply with the bid instructions in the sub-item unit prices in their actual bid.

8. Note the suggestion of backdating in the Schinderline letters to DOL, compare the documents in [10].

IBEW suggests that Irby/Northface is also nonresponsive in their lack of demonstrated work experience within the state, and therefore their noncompliance with the EEO plan in hiring within the state.

It is not clear that these nonresponsive arguments would hold up in court, given the earlier failure of a bidder's challenge on similar grounds. Further research is required at this stage, into the grounds for the 1981 challenge of nonresponsive bidding.

III DISCUSSION

It does seem that a court case could be made for the constitutionality of APA policy interpretation of the Alaska Bidder's Preference Law, which employs the use of joint venture, by analogy, to refer to Alaska business.

Clearly APA has blatantly chosen to operate with their own interpretation of the Alaska Bidder's Preference Law. To date I have been unable to examine the minutes of the Committee meetings which resulted in the final form of CSHB 156, sponsored by the Rules Committee, in 1982 and which was enacted into law. This bill amended the Bidder's Preference statutes AS 37.05.230 and AS 37.05.240. It would be interesting to see if there was any discussion at that time of the joint venture statute in relation to the Bidder's Preference statutes, and if so, why did the resulting amendment not address this problem?

Attorney Charles W. Cohen, of Ely, Guess and Rudd Law Offices, sent a letter of March 10, 1983, to Oczkus of IBEW, which argues that there is a legal case to be made for the unconstitutionality of applying joint ventures to the Bidder's Preference statutes [14].

If we were to read the Alaska statutes AS 37.05.230 (5)(B) in their literal sense, the bid contract award to Irby/Northface is not in compliance with Alaska State Law. Furthermore, Irby Construction Co., Inc. does not have an Alaska Business license [15], nor do they have a foreign corporation license, as required by Alaska State Law, under AS10.05.597 [16]. Finally no license is registered for Irby/Northface, as a joint venture. In other words, the APA has accepted Northface's license as the legal ("business") license in compliance with AS 37.05.230 (5)(B), even though the contract has been awarded to the joint venture and not the smaller Alaskan firm.

Out of a very real concern for Alaskan hire, the IBEW has been most active in their attempts to get an investigation underway. First, in their own attempt to investigate the contract awarded to Irby/Northface [17], and later in terms of the telegram to APA, the IBEW has encountered obstacles that could be interpreted as obstruction of justice.

IV QUESTIONS

1. What is the intent of the Alaska Bidder's Preference Law?
 - a) To protect Alaskan firms
 - b) To protect Alaskan workers

- c) To promote the development of Alaskan firms qualified to handle large contracts
 - d) To protect the Alaskan public from overspending on large State contracts
 - e) To allow small Alaskan firms to enter into larger contracts by allowing for larger out-of-state firms to piggy-back on them in a joint venture and thereby compete in bids
2. Why has there been no legislative attempt to amend the Alaskan Bidder's Preference Law in terms of the question of joint venture and its applicability (or non-applicability) to this law? Witness pending legislation in the 1983 Session which does not address this and 1982 legislation which did not, why?
 3. Who will profit from the passage of HB 106 this year?
 - a) Large out-of-state firms in Alaskan joint venture firms
 - b) And/or smaller Alaskan firms
 - c) Alaskan workers
 - d) The Alaskan people
 - e) The APA
 4. Is there some unforeseen harm to Alaskan businesses if we were to amend the Alaska Bidder's Preference to include joint ventures explicitly? If we were to exclude it?
 5. Should we draft legislation to amend the Bidder's Preference Law, or should we leave it to the courts and eventual executive order?
 6. Is there sufficient evidence for obstruction of justice, in the current bidder's challenge, on the part of the office of the Attorney General?
 7. Has the APA acted irregularly or illegally in its use of a consultant in the bidding process?
 8. Has the APA acted irregularly or illegally in its policy interpretation of the Alaska Bidder's Preference Law?
 9. What restrictions for Alaska hire apply to joint venture bidders who have received a Alaska Bidder's Preference contract? How does this compare to a fully Alaskan firm who has received a contract under an Alaska business license?