

INTERTIE

CONTRACTS



Official Business

Alaska State Legislature

Senate

Pouch V
State Capitol
Juneau, Alaska 99811

RESOURCES COMMITTEE

March 28, 1983
5:35 p.m.

211 Beltz Room

MEMBERS PRESENT

Senator Fahrenkamp

Senator Vic Fischer

Meeting on the Special Committee of Anchorage-Fairbanks
Intertie Contracts

Senator Fahrenkamp asked that the record reflect that the 1:00 meeting was canceled in hopes that Senator Eliason's flight would arrive in time for a 5:30 meeting; however, the plane was late.

Avrum Gross, from the law firm of Gross & Burke, counsel to Senator Fahrenkamp, advised that he had reviewed all of the briefs now pending and had done independent research and concluded that it is contrary to the law for the Power Authority to award bids granting a bidder's preference to a joint venture in which any of the members does not qualify for the bidder's preference. He further stated that, in his opinion, the arguments which the Power Authority has used in an attempt to justify its position are without merit.

Meeting adjourned at 5:45 p.m.



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March 28, 1983

The Honorable Jalmar M. Kerttula
President
Alaska State Senate
Juneau, Alaska 99811

Dear Senator Kerttula:

The Special Committee on the Anchorage-Fairbanks Intertie has recently reviewed the decision of the APA to award the bid on the Anchorage-Fairbanks Intertie contract. In making the award, the Authority granted an Alaska bidder's preference to a joint venture, one of whose members has not been doing business in the state for six months. AS 37.05.230(5), however, requires that a bidder who claims the five percent preference has been in business in Alaska for six months preceding the date of the bid. It is the theory of the Power Authority that a bidder's preference may be awarded to a joint venture even if one individual member of the venture would not qualify for the preference so long as another member of the joint venture is entitled to receive the preference.

It is our belief that this interpretation is contrary to the clearly expressed intent of the legislature in AS 37.05.230(5) and would reduce the bidder's preference to a meaningless benefit. The purpose of our hearings was to determine whether it was necessary to introduce amendments to the law to clarify legislative intent. Prior to doing so, we retained the firm of Gross & Burke to review the status of the controversy and to advise us whether the interpretation placed in the law by the Power Authority was correct. If the interpretation of the Authority was valid, we asked the firm to assist us in drafting legislation to make it crystal clear that an unqualified party could not obtain an Alaska bidder's preference simply through the means of linking itself with a party that was qualified.

The firm has furnished us with the attached opinion. They are convinced, as is the Committee, that the language and intent of the law is clear and that it requires no amendments at this time. We believe the court presently reviewing this case will hold that the APA violated the terms of AS

38.05.230(5) when it awarded an Alaska bidder preference to a joint venture, one of whose members was clearly unqualified to receive it.

If for any reason the court concludes that nonqualified bidders can achieve a bidder's preference simply by forming a joint venture with a qualified Alaska corporation, the Committee will immediately submit amendments to the law to make it even clearer that such a practice is not in accord with the intent of the Legislature. It appears at the present time, however, pending a court decision, that no such amendments are necessary and that the statute sufficiently expresses legislative intent.

Sincerely,

Dick Eliason, Chairman
Senate Labor and Commerce
Committee

Vic Fischer, Chairman
Senate State Affairs Committee

Bettye Fahrenkamp, Chairman
Senate Resources Committee

Attachment

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SUSAN A. BURKE

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March 28, 1983

MEMORANDUM

TO: Richard I. Eliason
Chairman, Special Committee on the Anchorage-Fairbanks
Intertie Contract

FROM: Avrum M. Gross
Susan A. Burke 

RE: AS 37.05.230(5) - Alaska Bidders Preference

One March 3, 1983, the Alaska Power Authority issued a notice of intent to award the bid on the Anchorage/Fairbanks Intertie to a joint venture composed of Irby Construction Company and Northface Construction, Inc. One of the joint venturers (Northface) had maintained a place of business in the state for more than six months prior to the bid. Irby Construction Company had not maintained a place of business here for six months prior to the bid. The joint venture was apparently created for the purpose of submitting the bid and as a joint venture it has not done any prior business in Alaska. APA awarded the joint venture an Alaska bid preference of five percent under the theory that since one of the joint venturers (Northface) qualified, the joint venture of which Northface was a member also qualified.

The Special Committee has expressed concern that through granting a bidder's preference to a joint venture, one of whose members is clearly unqualified to receive the preference, the APA has violated the terms of AS 37.05.230(5). You have asked our opinion on the validity of APA's grant of the bidder's preference and our advice as to whether the bidder's preference statute requires amendment to insure that only qualified Alaskan companies, in whatever legal form they choose to bid, receive the preference.

It is our opinion that the grant of an Alaska bid preference by the Power Authority to Irby-Northface was contrary to the terms of the bidder's preference statute; that only qualified Alaskan bidders are entitled to the preference; and that if bidders choose to submit a bid as a joint venture, all members of the joint venture must qualify for the preference in order for the joint venture to receive the preference. We believe the terms of the statute are clear, and no amendment of those terms is presently required.

In reaching this conclusion, we have reviewed all of the briefs in the litigation presently pending before Judge Johnstone in Anchorage and have independently researched the legislative history of relevant statutes. We will not in this opinion, however, cite extensive legal authority. Suffice it to say that what we say here has been adequately researched and can be supported if necessary.

I. The Wording of AS 37.05.230(5) - The Bidders Preference

Statute

AS 37.05.230(5) defines an Alaska bidder as

a person who

- (A) holds a current Alaska business license,
- (B) submits a bid for goods or services under the name as appearing on his current Alaska business license,
- (C) has maintained a place of business within the state for a period of six months immediately preceding the date of his bid...

The words of the statute are clear. They require that a bidder hold an Alaska business license, that the bid be submitted in the name on that license, and finally, that the bidder have maintained a place of business within the state for a period of six months. In the case of an individual bidder, there is no problem whatsoever in determining whether the requirements have been met. In the case of a joint venture, the situation is slightly more complex but still, we believe, obvious. There can be three possible alternatives. The first is that a joint venture itself has been in business for six months prior to the submission of a bid. Such a joint venture would clearly qualify as would all of its component parts since through the mechanism of the joint venture, all parties to it would have been doing business in the state for more than six months. The second alternative is a

joint venture formed less than six months before a bid but made up of parties who were all doing business in the state for more than six months prior to the bid. As the APA mentions in its brief to the court, many joint ventures are formed solely for the purpose of bidding on specific jobs, so the situation presented in this second alternative is not unusual. We believe this type of joint venture would also qualify for the preference. If both firms to a joint venture meet all the requirements of the statute, the fact that they combine into a particular legal organization for the purpose of one job should not in any way affect their status. The whole, in short, is the sum of its parts; and if two firms which would qualify for a bidder's preference set up a legal entity in which they are the only members, that entity should also receive the preference.

The third situation is that found in the Anchorage-Fairbanks Intertie case. The joint venture that was awarded the bid has been in existence for less than six months. One party to the joint venture qualifies for the preference -- the other party does not. In essence, we have a situation where one party seeks to obtain a bidder preference to which it would otherwise not be entitled solely by selecting a particular form of business organization with which to submit its bid.

If the purpose of the bidders preference statute was to encourage the creation of joint ventures, the action of APA in granting a bidder's preference to this particular joint venture might make some sense. But the intent behind the statute has nothing to do with encouraging one particular legal structure as opposed to another. The obvious intent underlying the statute is to insure that Alaska businesses, which have furnished employment to Alaskans but whose costs of doing business here are much higher than elsewhere in the nation, will be able to compete fairly with outside firms who can frequently offer lower bids than Alaska firms. That purpose is only served by granting the preference to Alaska businesses which have been in past operation. As previously noted, the whole is comprised of its parts, and since a part of the joint venture at issue here cannot qualify for the preference, the joint venture itself cannot qualify.

The only conceivable ambiguity in AS 37.05.230(5) is over the question of whether joint ventures, which themselves have not been in existence for six months but both of whose members have been doing business in Alaska for at least six months, qualify for a bidder preference. The ambiguity stems from the fact that a literal reading of AS 37.05.230(5) suggests that if a joint venture has not been in operation for six months, it could not receive a preference no matter how long the members of the venture had done business in the state. . As previously noted, we believe that such a literal reading would be contrary to the purpose of the act and that

a joint venture, whose individual members would qualify would itself qualify for the preference. But no matter how that question is resolved, we believe there is no ambiguity as to the question of whether nonqualified bidders can gain the benefits of the statute simply by linking themselves in legal organization with a bidder who could so qualify. A contrary interpretation would render the bidder's preference a sham. Large outside corporations could link up with tiny Alaskan firms who by themselves could not even consider bidding on such jobs as the Intertie solely for the purpose of gaining a bidder's preference. The result would be that qualified Alaskan firms which had previously rendered employment opportunities to Alaskans and been subject to the higher costs of doing business in Alaska would not receive the benefits of a statute specifically aimed at affording them those benefits. That was clearly not the legislature's intent when they passed the act, and we are sure it is not the intent today.

II. The Interpretation of the APA

The Power Authority has attempted to justify its interpretation of the act on two primary grounds. First, APA argues that since under AS 08.18.011 (registration of contractors) a joint venture is considered to be registered if only one party to the joint venture is registered, the same theory would allow APA to extend a bidders preference to a joint venture in which only one party is entitled to the preference. Second, APA argues that whatever the statutes may appear to mean, an administrative agency is

permitted to make reasonable interpretations of the law, and its past interpretations have extended the bidders preference to joint ventures which included only one party which by itself would qualify. APA then argues that the past practice of administrative agencies are given great weight by the courts in interpreting the terms of a statute and should be given similar weight here.

Neither of these arguments has any real merit. The contractors registration statute, for instance, has no logical or legal relation to the bidders preference statute -- they are entirely different statutory provisions with entirely different purposes, and the interpretation of one has no bearing on the interpretation of the other. AS 08.18.011 requires the registration of contractors for the purpose of insuring fiscal responsibility. It is no surprise, therefore, that only one member of a joint venture need be registered for the joint venture itself to be registered. All members of a joint venture bear responsibility for the debts of the venture, and if one registered party can insure the financial security of those with whom the venture deals, it is not important whether other members of the venture would also be able to post the necessary proof of financial ability. The bidders preference statute, however, is a special benefit awarded because of past activities within the state, and it makes a great deal of difference whether all parties in the venture are entitled to that benefit. If one party could

simply qualify, by joint venturing with a qualified bidder, the otherwise unqualified party would receive a legislatively conferred benefit that they have not earned and to which they are not entitled.

There is another basic flaw in APA's attempting to link the contractors' registration statute with the bidders preference statute. The Alaska bidders preference law covers all bidders for state contractor purchases. If the Authority is correct in applying the interpretation of AS 08.18.011 to the bid preference statute, then an out of state contractor who has never done business in Alaska can obtain the preference simply through linking itself with a qualified Alaska bidder. But what of bidders who are not contractors and are not required to register under AS 08.18.011? Suppose for instance the state seeks a bid for providing office equipment for all state buildings, and an outside office supply firm seeks to form a joint venture with an Alaskan office supply firm which by itself would qualify for a bidder's preference. Since office supply firms are not required to post financial security, there is no comparable provision to AS 08.18.011 for office supply firms, and, therefore, no justification for arguing by analogy that a joint venture made up of qualifying and nonqualifying firms qualifies for a preference. This would mean (at least according to the Power Authority's theory) that outside contractors can achieve an Alaska bidders preference through

means denied to every other outside firm that seeks to bid on state contracts. That makes no sense and it makes no sense because the contractors registration statute has nothing to do with the Alaska bidders preference act. The purposes of the two acts are different, and arguments made by analogy from one to the other inevitably lead to illogical conclusions.

The second argument of APA based on its past interpretations of the bidder's preference statute is also without merit. It is true that a settled administrative interpretation of the terms of an act made by an agency particularly entrusted with its enforcement is given weight by the courts in interpreting the act. That rule has no application if the statute is clear on its face and the agency's interpretation is clearly erroneous as it is in this case. But even if the statute were ambiguous, this is not a situation where agency interpretation would be given any weight at all. The "settled interpretation" of the agency appears to consist of two decisions made roughly six years ago under unknown circumstances by one official in the Department of Administration. There has been no attempt to establish that interpretation as a settled agency interpretation by reducing it to written form or adopting it as a regulation. What we have here is one state employee stating that he interpreted the act this way six years ago as justification for a present judicial interpretation of the act. When one reviews the cases in which

agency interpretations have been given some weight by the court, it becomes clear that this is not remotely like the situation envisioned by those cases.

One further point bears some mention in this analysis because it is raised in the arguments of all the parties to the Intertie litigation. On September 25, 1981 the Superior Court in Anchorage in an unrelated case, concluded that the Power Authority did not violate the law when it awarded a contract to a joint venture, one of whose members apparently did not qualify for the preference at the time the bid was submitted (Pacific Ventures and Dillingham Corporation v. APA et al. and Southeast-Harrison Western, case #3AM-81-6291). The case, however, is entitled to very little weight for two reasons. First, no real analysis of the issue involved here was made by the court. Second, the case is completely confusing on just why the court reached its conclusion. The court held that one of the parties qualified for the preference prior to the submission of the bid and that at the time of the actual award of the contract, the joint venture qualified through having been in existence for more than six months. It is not clear what the court would have done if the joint venture had been in existence for less than six months at the time of the award, nor is it clear why this point was given any significance whatsoever,

since AS 37.05.230(5) requires that a party seeking a preference have been doing business for six months prior to the date of the bid. We do not believe under these circumstances that the decision will be given any real weight by a court resolving the present controversy.

It is, therefore, our view that the statute is clear on its face and that no legislative action at this time is required to clarify its meaning. We are confident that the courts will hold that a joint venture, one of whose members do not qualify for the preference, is not in itself a bidder entitled to the preference.

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