

MEMORANDUM

State of Alaska Department of Law

TO: Marsha Hubbard, Director
Division of General Services
Department of Administration

DATE: March 4, 1999

FILE NO: 663-00-0083

TELEPHONE NO: 465-3600

SUBJECT: Limited Liability Companies;
Qualification for Alaska
Bidders' Preference under
AS 36.30.170

FROM: Marjorie L. Vandor
Assistant Attorney General
Governmental Affairs Section – Juneau

You have asked us to advise on whether limited liability companies (LLCs), organized under AS 10.50.010 – 10.50.995, may qualify for the Alaska bidder's preference under AS 36.30.170. In short, we believe a LLC that is properly organized under AS 10.50, meets the criteria specified in AS 36.30.170(b)(1)--(3), and whose manager is a resident of Alaska would qualify for the preference. Our reasons follow.

A limited liability company is recognized to do business in Alaska. AS 10.50.010. In terms of its organizational structure, it is generally described as being a business entity that is a hybrid between an S-corporation and a partnership. It combines the tax advantages of a partnership with the legal safeguards of a corporation. Limited liability companies are not considered to be incorporated entities. Instead, they are considered to be "organized". *See* AS 10.50.070; AS 10.50.075. Limited liability companies have managers and members rather than directors and stockholders. *Id.* The managers of limited liability companies do not have to be members of the limited liability company (i.e., similar to a registered agent), but they do have a fiduciary duty to the limited liability companies that members do not (unless a member is a manager). AS 10.50.120 -- 10.50.135.

Limited liability companies were first allowed to organize in Alaska in 1994. Ch. 99, SLA 1994. Such entities, therefore, were not contemplated at the time AS 36.30.170 passed in 1986. Ch. 106, SLA 1986. However, we believe the language of

AS 36.30.170(b)(4) may be read to allow for entities such as limited liability companies to qualify for the Alaska bidder's preference. AS 36.30.170(b)(4) reads:

(b) . . . "Alaska bidder" means a person who

. . .

(4) is incorporated *or qualified to do business under the laws of the state*, is a sole proprietorship and the proprietor is a resident of the state, or is a partnership and all partners are residents of the state;

(emphasis added).

We believe that it is a reasonable and legally defensible reading of AS 36.30.170(b)(4) to consider LLCs, if properly organized under AS 10.50, as being "qualified to do business under the laws of the state." However, beyond just being qualified to do business under the laws of the state, we believe, in the realm of LLCs, that it is also important to consider the hybrid nature of LLCs when applying the preference. As stated earlier, they are a cross between an S-corporation and a partnership. Therefore, we believe it would be proper to consider a LLC to be eligible for the Alaska bidder preference if it meets the criteria in AS 36.30.170(b)(1) -- (4) (i.e., holds a current Alaska business license; submits bid in name on the current Alaska business license; has maintained a place of business within the state for six months preceding the bid; is organized under AS 10.50); *and* if the manager of the LLC is an Alaska resident. The reason for requiring a manager to be a resident of the state is due to the hybrid nature of the entity. It is not a true S-corporation, which AS 36.30.170(b)(4) clearly recognizes as qualified for the preference. And, it is not a true partnership for which all partners would have to qualify for the preference. *Id.* So, to keep with the legislative purpose for which the Alaska bidder preference is given (i.e., to provide a preference to Alaska firms) and the strict application of the preference,¹ we believe it would be prudent to require the manager of a properly organized LLC to be a resident of Alaska because the manager is the person recognized in law as having a fiduciary duty to the LLC.

We believe that to completely deny the preference to LLCs just because they are not specifically mentioned as qualifying business entities in AS 36.30.170,

¹ 1989 Inf. Op. Att'y Gen. (663-89-0635; July 1)(laws authorizing preferences that result in the state having to pay a premium are to be strictly construed).

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would be found to be an improper denial if legally challenged. Even though it has consistently been the opinion of this office that preferences, like the Alaska bidder preference, are to be strictly applied, the issues related to recognizing LLC's as able to qualify for the preference are similar to those addressed by the Alaska Supreme Court in *Irby-Northface v. Commonwealth Electric Company*, 664 P.2d 557 (Alaska 1983). In *Irby-Northface* the court held that it was proper for the state to award the Alaska Bidder Preference to a joint venture where one of the ventures did not qualify for the preference. The court upheld the state's award of the preference to the joint venture because *inter alia* the preference law in effect at that time, AS 37.05.230(5), did not require both ventures to independently qualify for the preference. The court believed that to deny the preference to the joint venture when at least one of the ventures was an Alaska-based business that was qualified would be contrary to the legislative objective "of insuring that Alaskan firms receive a preference." 664 P.2d at 560. We think it is likely that the court would make a similar finding with respect to LLCs, namely, that, absent law to the contrary, LLCs organized under AS 10.50 should be considered as "qualified to do business under the laws of the state" for the purposes of AS 36.30.170(b).

Finally, while we believe you may implement our advice now, we suggest that the department consider seeking legislation or adopting regulations that address this issue.

Please call me if you have questions.

MLV:jn