

**H.CARL McCALL
STATE COMPTROLLER**



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**STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER**

September 20, 2002

**Gunther K. Buerman, Chairman of the Board
American Rock Salt Company, LLC
P.O. Box 190
Mount Morris, New York 14510**

**Re: Bid Protest Concerning Bids Submitted
on Rock Salt Procurement
Contract No. PC 59691
SF-20020241**

Dear Mr. Buerman

This will respond to your letter in which you protest an award by the New York State Office of General Services ("OGS") to the International Salt Company in light of the reciprocal preference for New York State businesses found in Section 144-a of the State Finance Law. This contract is one of four awarded to low bidders on a county-by-county basis in response to an invitation for bids (IFB) for rock salt.

This Office has completed its review of the above-referenced OGS contracts and of the bid protest you filed on behalf of the American Rock Salt Company, LLC. For the reasons outlined in further detail below, we have denied the protest. Therefore, we have approved four contracts awarded by the OGS with respect to this procurement. The vendors and the estimated values of the contracts, depending on requirements, are as follows: (i) a contract with American Rock Salt Company in the amount of \$8,491,904.69, (ii) a contract with Cargill Incorporated in the amount of \$7,220,453.23, (iii) a contract with International Salt Company in the amount of \$5,943,857.23 and (iv) a contract with North American Salt Company in the amount of \$940,118.40.

This Office has also approved a separately bid contract awarded by the Thruway Authority for rock salt to two vendors – one to Cargill Incorporated in the estimated amount of \$1,995,720, and one to American Rock Salt Company in the estimated amount of \$954,820.

Of course, the "requirements" feature of this type of procurement is essentially dependent on the severity of the winter and makes it difficult to predict what the actual value of these contracts will be. Last year, for example, the weather was so mild that requirements were minimal. Two years ago the winter weather was so severe that demand for rock salt by New York local governments and State agencies exceeded the capacity of all vendors.

Background

The Office of General Services issued an Invitation For Bids for the acquisition of rock salt for the various counties of the State. The contract award, which was awarded in estimated quantities and will be made available to all State agencies as well as local governments, was made to the lowest bidder for each respective county. Some time after the opening of bids on July 11, 2002, OGS made contract awards to American Rock Salt Company, Cargill Incorporated, International Salt Company and North American Salt Company.

By letter dated July 18, 2002, American Rock Salt Company protested the award of eight of the sixteen counties that were awarded to International Salt Company. It asserted that since American Rock Salt Company's bid was within 7% of the bid of International Salt Company for these eight counties, in light of the requirements of SFL Section 144-a, these eight counties should have been awarded to American Rock Salt Company.

Protest

Based on the information contained in your correspondence, the International Salt Company is a Delaware corporation that sources its rock salt from the Republic of Chile. You assert that since the Republic of Chile imposes a 7% import duty on all imports into that country, including rock salt, 7% should be added to the bids submitted by International Salt Company pursuant to Section 144-a for the purpose of determining the winning bid. Specifically, you indicate that, with respect to the procurement of rock salt for Albany, Rensselaer, Saratoga, Schenectady, Ulster, Warren, Washington, and Fulton & Montgomery counties, the bids submitted by the American Rock Salt Company were the second low bids and these bids were less than 7% higher than the bids submitted by the International Rock Salt (the low bidder with respect to these counties). You, therefore, assert that the awards for these counties should have been made to American Rock Salt Company.

Following a telephone conference call with this Office, you have provided an internal legal analysis, dated October 15, 2000, prepared by the law firm representing the American Rock Salt Company in which potential preference statutes of several jurisdictions were reviewed. It notes, with respect to Chile, that the Republic of Chile no longer follows a "Buy Chile" policy in connection

with Chilean government procurements, but concludes that Chile's tariff on imported goods would trigger a preference under the proposed New York legislation. In addition, you have provided letters, dated September 13, 2002 and September 20, 2002, from the sponsors of the legislation that enacted Section 144-a indicating that it was their intent to include tariffs within the definition of "preferences."

Discussion

This Office has previously determined, in reviewing the applicability of the reciprocal preference granted under Section 144-a as it relates to businesses with a principal place of business or that source rock salt from the Republic of Chile, that the operation of a tariff is not a "preference" for purposes of Section 144-a. We made that determination in 2001 prior to the date Section 144-a was extended without change.

We recognize that the statute expressly refers to and is clearly intended to include a sovereign nation as one of the entities that could apply a preference within the meaning of Section 144-a to which New York State would respond in kind. However, the term "preference" was intended to mean a competitive advantage provided in connection with a government procurement. Specifically, subdivision 4 of section 144-a requires the Comptroller to maintain a list of jurisdictions that give a preference to native bidders or producers of rock salt "under their bids... of public rock salt contracts." (Emphasis supplied.) A tariff operates independently of the government procurement process and is not specific to government procurement. As such, in our view, a tariff is not a "preference" within the meaning of Section 144-a as written, and, therefore, does not implicate the reciprocal preference that would be granted thereunder. Accordingly, the Republic of Chile did not appear on any list of preference-granting jurisdictions compiled by this Office under Section 144-a.

We note that our determination that the Republic of Chile is not a preference-granting jurisdiction for purposes of Section 144-a is consistent with the finding of the Commissioner of Economic Development that the Republic of Chile is not a "discriminatory jurisdiction" (i.e. one that grants a preference) for purposes of Section 165 of the State Finance Law.

The sponsor's memorandum in support of the legislation from the Legislative Session of 2000 when Section 144-a was enacted expressly refers to preferences granted by the State of Ohio and the Province of Ontario (2000 Legislative Annual p. 294). We are not aware of any similar, contemporaneous legislative record, either at the time the statute was originally enacted or at the time it was extended, that Section 144-a was intended to include tariffs within the meaning of "preferences."

Even under a construction of "preference" within the meaning of Section 144-a that includes a tariff, however, we do not conclude that the reciprocal preference provided for in the statute would apply to the procurement challenged herein. The statute triggers a reciprocal preference "against a business that submits a bid from a state or county or political subdivision thereof which applies a preference law against out-of-state or out-of-country bidders or rock salt not sourced in such state or country or political subdivision thereof." (Emphasis supplied.) We agree with your assertion that section 144-a is not a "Buy New York" provision but, rather, an effort to create a level playing field. Accordingly, the reciprocal preference would apply in cases where another jurisdiction applies a preference for its rock salt producers that disadvantages New York producers when they attempt to sell rock salt to that other jurisdiction or one of its political subdivisions. In that regard, we are advised by the government of Chile that "Chile does not have any law, similar to that of the State of Ohio or the Province of Ontario, that creates a 'preference' for domestic rock salt specifically. In fact, Chile has virtually no domestic market for rock salt." Moreover, this Office has no evidence before it that any New York producer of rock salt has sold or sought to sell rock salt to the government of Chile or one of its political subdivisions or, for that matter, to any other entity in Chile. It also appears that there are regions in Chile where rock salt (or other commodities) could be shipped and sold without the imposition of the tariff. In that case, it could not be assumed that a New York supplier would, necessarily, be impacted by the tariff even in the event that Chile or one of its political subdivisions undertook a procurement of rock salt.

Finally, we note that to interpret Section 144-a as applying to tariffs might, possibly, raise federal constitutional issues, since such an interpretation could be viewed as an impermissible interference by a state into the fields of foreign affairs and foreign commerce, which the United States Constitution assigns exclusively to the Federal government (Contrast, Zschernig v Miller, 389 US 429 [1968] and Clark v Allen, 331 US 503 [1947]).

Since this Office has determined that the Republic of Chile is not a preference-granting jurisdiction for the purposes of Section 144-a, the bids submitted by the International Salt Company were not required to be adjusted by 7% in determining the low bidder with regard to the procurement conducted by the New York State Office of General Services. Accordingly, the protest filed on behalf of the American Rock Salt Company is hereby denied.

Sincerely,



Helen M. Fanshawe
Deputy Counsel

HMF:jap