

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

Turbo North Aviation, Ltd.	)	
v.	)	
Department of Public Safety	)	OAH No. 05-0658-PRO
_____	)	DPS RFP No. 2005-1200-5559

**DECISION & ORDER**

**I. Introduction**

Turbo North Aviation, Ltd., protested the Department of Public Safety's (DPS's) decision regarding procurement of an aircraft and now appeals to the Commissioner of Administration from DPS's denial of that protest. Specifically, Turbo North argues that its proposal as to one of two aircraft it offered should not have been rejected as nonresponsive and that, absent that rejection, Turbo North's aircraft would have been selected.

DPS moved for summary judgment. Turbo North opposed that motion, asking for a hearing or, alternatively, for summary judgment to be entered in its favor. The undisputed material facts show Turbo North's aircraft did not meet the required specifications when the proposal was submitted. As a matter of law, DPS could award a contract only to an offeror who had submitted a responsive proposal. The DPS procurement officer did not abuse his discretion in concluding that Turbo North's plan to alter the aircraft, developed during the clarification process, modified the proposal after the deadline and thus that Turbo North's proposal was nonresponsive.

Accordingly, the DPS procurement officer did not err in rejecting Turbo North's proposal and the evaluation committee correctly proceeded to evaluate only the responsive proposals, which did not include Turbo North's. DPS's summary judgment motion, therefore, is granted and Turbo North's request for summary judgment in its favor is denied. This matter will not be scheduled for an evidentiary hearing.<sup>1</sup>

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<sup>1</sup> Turbo North maintains that "a hearing on the merits of this case" should be held. See October 27, 2005 Reply of Turbo North Aviation and Associated Motions (hereinafter "Turbo North's Reply") at p. 13. Turbo North, however, makes no showing of material facts in dispute on the responsiveness question. Rather, Turbo North asserts that the material disputed fact is whether Turbo North's proposal to provide the Falcon 10 aircraft "would have been the winning bid" if it had not been disqualified. See Turbo North's Reply at p. 9.

## II. Facts

### A. Background and Material Facts

DPS issued a Request for Proposals (RFP) to procure an aircraft.<sup>2</sup> As amended, the RFP required that offered aircraft possess several specific characteristics, including that they have a minimum baggage capacity of 55 cubic feet.<sup>3</sup> The deadline for proposals was June 29, 2005, at 3:00 p.m. Alaska time.<sup>4</sup>

In section 2.04, the RFP informed prospective offerors that amendments to proposals would not be accepted after the deadline unless made “in response to the State’s request in accordance with 2 AAC 12.290”—a regulation that deals with discussion of proposals that have been determined through the evaluation process to be “reasonably susceptible for award.”<sup>5</sup> The RFP went on in a separate section (2.07) to explain how this discussion process works, identifying the legal authorities authorizing it and, consistent with the regulation cited in section 2.04, emphasizing that the discussions would be held only with “offerors who have submitted a proposal deemed reasonably susceptible for award by the procurement officer.”<sup>6</sup>

In a third section (2.06), the RFP described the process for clarification of offers as follows:

In order to determine if a proposal is reasonably susceptible for award, communications by the procurement officer or the proposal evaluation committee are permitted with an offeror to clarify uncertainties or eliminate confusion concerning the contents of a proposal. Clarifications may not result in a material or substantive change to the proposal. The evaluation by the procurement officer or the proposal evaluation committee may be adjusted as a result of a clarification under this section.<sup>[7]</sup>

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<sup>2</sup> See generally June 8, 2005 Request for Proposals (RFP 2005-1200-5559) for Acquisition of a Turbojet/Turbofan or Turboprop aircraft with associated flight training.

<sup>3</sup> See RFP at pp. 22-24 (detailing specifications). Prior to amendment, the RFP listed the 55 cubic feet baggage capacity only for the turboprop-type aircraft. In response to questions by prospective offerors about the baggage capacity specifications, DPS amended the RFP to include the following requirement:

The baggage volume capacity must be at least 55 cubic feet for both aircraft types. This baggage volume capacity minimum requirement can be achieved using either an internal area, an external area or a combination of both internal and external areas. Offerors should clearly outline in their proposal the amount of baggage volume capacity for each aircraft offered.

June 27, 2005 Amendment Three to RFP 2005-1200-5559 at pp. 1-2.

<sup>4</sup> RFP at p. 5.

<sup>5</sup> RFP at p. 11.

<sup>6</sup> RFP at p. 12.

<sup>7</sup> RFP at pp. 11-12.

The RFP directed offerors to include in the proposal “[f]or each specific aircraft(s) offered (by serial number) ... a detailed itemization of **current** aircraft systems and equipment in terms of meeting the Specification.”<sup>8</sup> It also informed prospective offerors that proposals first would be “reviewed to determine if they are technically responsive” and “then be evaluated using the criteria set out in RFP Section SEVEN.”<sup>9</sup> Section Seven set out the criteria for evaluation and contractor selection.<sup>10</sup>

Turbo North and 12 other offerors, collectively offering 17 aircraft, submitted proposals by the June 29<sup>th</sup> deadline.<sup>11</sup> Like two of its competitors, Turbo North offered more than one aircraft. It offered a 1981 Lear 35A at \$2,398,000 and a 1980 Falcon 10 at \$1,576,000.<sup>12</sup> Turbo North had acknowledged receipt of the amendment clarifying the baggage capacity requirement,<sup>13</sup> but when it submitted its proposal, Turbo North did not “outline the amount of baggage volume capacity” or otherwise indicate what the existing baggage capacity was for either the Lear 35A or the Falcon 10.<sup>14</sup>

The day after the proposals were submitted, DPS’s procurement officer and Turbo North began exchanging email questions and answers about the Falcon 10.<sup>15</sup> On June 30<sup>th</sup> the procurement officer asked Turbo North questions about the Falcon 10’s baggage capacity, ground air conditioning, and lavatory specifications in an email with the subject line beginning “Proposal Clarification Questions.”<sup>16</sup> The baggage capacity question asked: “Please confirm the internal and external baggage capacity in cubic feet per the RFP specification and RFP Amendment Three.”<sup>17</sup> Turbo North responded that it would “get on this immediately.”<sup>18</sup>

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<sup>8</sup> RFP at p. 25 (section 6.01) (emphasis added).

<sup>9</sup> RFP at p. 26 (section 6.06).

<sup>10</sup> RFP at pp. 27-28 (setting criteria and allocating points for Experience and Qualifications; Aircraft Engines; Airframe Age; Airframe and Systems Inspection; Contract Cost; and Alaskan Offeror’s Preference).

<sup>11</sup> See August 5, 2005 Notice of Intent to Award Contract at pp. 2-3 (listing the 13 offerors and the 17 aircraft they offered).

<sup>12</sup> See June 29, 2005 Turbo North Proposal (hereinafter “Turbo North’s Proposal”) at pp. 2 and 20 of 37 unnumbered pages.

<sup>13</sup> See June 27, 2005 RFP 2005-1200-5559 Receipt & Acknowledgement, Amendment Three, signed by “Rob Heckman” for Turbo North.

<sup>14</sup> See Turbo North’s Proposal at p. 12 (listing the Lear’s features and showing nothing on baggage capacity) and p. 21 (listing the Falcon’s features, with the only reference to baggage being “Aft Cabin Baggage” as an item on the “Additional Information” list, with no indication of the capacity).

<sup>15</sup> The record suggests that proposal clarification questions and answers concerning the Lear 35A did not begin until July 5<sup>th</sup>. See July 5, 2005 2:21 p.m. Email from DeGroot to Turbo North and Turbo North’s 3:14 p.m. response thereto (attached as Item D(7) to the protest report). At the prehearing conference, Turbo North’s representative, Robert Heckman, confirmed that the company’s protest appeal concerns only the disqualification of the proposal for the Falcon 10. Accordingly, this decision focuses on the Falcon 10.

<sup>16</sup> June 30, 2005 3:05 p.m. Email from DeGroot to Turbo North, attached as Item D(1) to the protest report.

<sup>17</sup> Id.

The next morning, Turbo North's owner, Robert Heckman, wrote to the procurement officer that he was "working on the baggage capacity question" and that he was "waiting on a confirmation of the increased baggage capacity that the aft baggage mod provides."<sup>19</sup> He also provided some information on the air conditioning and lavatory questions.<sup>20</sup> About an hour and a half later, Turbo North's owner emailed the procurement officer a report that he was "having trouble reaching the engineers today due to the holidays to see if we can incorporate a mod to increase the baggage area."<sup>21</sup> He went on to write:

So far no luck, but they are working on this. I cannot guarantee that we can do it. Possibly! But then who knows of the expense! One could hang additional baggage above the potty area I am told. Keep in mind that except for a few Cubic feet in difference 90% of these sized jets have only baggage in the forties cubic foot ranges, jumping up to larger cabin jets would offer more baggage but also over budget purchase wise. I believe the Beech 400 has more however it does not offer the range, the DPS needs or called for. The only one that I know of is the Westwind which offers more, but I couldn't find a suitable aircraft trying to stay competitively under the cost numbers, offering good times, Equipment etc,etc.<sup>[22]</sup>

Turbo North faxed the procurement officer a "Loading Arrangement" excerpt from a Falcon 10 "Loading Manual," showing that a Falcon 10 can have five (A-E) baggage/cargo areas but noting on the fax cover sheet that the aircraft offered in Turbo North's proposal then "currently" had only three (A, D and E) installed.<sup>23</sup>

Later that day, the procurement officer sent Turbo North a follow-up question, asking whether "there [is] a STC approved now or a field approved modification for additional baggage capacity for that particular serial number?"<sup>24</sup> The email's subject line began "Proposal Clarification Question."<sup>25</sup> The next day, in a response to a separate follow-up proposal clarification question concerning the Falcon 10's engines, Turbo North's owner wrote

I have been hard at work since 6 AM trying to come up with the Baggage Issue. We can, as I understand, put in an additional 15 Cubic feet, by using a restraint system on the floor after removing the 2 Right Hand Bench seats. I am waiting for conformation [sic] from the Mod Facility, there

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<sup>18</sup> June 30, 2005 4:32 p.m. Email from Turbo North to DeGroot, attached as Item D(2) to the protest report.

<sup>19</sup> July 1, 2005 9:56 a.m. Email from Turbo North to DeGroot, attached as Item D(4) to the protest report.

<sup>20</sup> Id.

<sup>21</sup> July 1, 2005 10:25 a.m. Email from Turbo North to DeGroot, attached as Item D(6) to the protest report.

<sup>22</sup> Id.

<sup>23</sup> July 5, 2005 11:33 a.m. Fax at pp. 1-3, attached as Item D(8) to the protest report.

<sup>24</sup> July 1, 2005 5:39 p.m. Email from DeGroot to Turbo North, attached as Item D(5) to the protest report.

<sup>25</sup> Id.

would be an amendment in the AFM weight & Balance wise. There is also an STC to modify the Front Baggage area. I at this time don't know the costs and hope that they will get back to me before noon.<sup>[26]</sup>

Less than an hour later, but fully one week after the proposal deadline, in an email expressing frustration at how late in the proposal period Amendment Three had been issued, Turbo North remarked that it "did not have the time to research the market and come up with an aircraft that had the Mod done or get the necessary info to be able to comply with Amendment Three."<sup>27</sup>

The next day, Turbo North submitted to the DPS procurement officer a workplan dated July 7, 2005, from Aerodynamics, Inc., describing how it could "install and certify safe for flight a palletized cargo net assembly" in place of a seat to provide 14 cubic feet of additional baggage capacity.<sup>28</sup> Turbo North's transmittal asserted that this addition would give the Falcon 10 "a minimum of 55 Cubic ft or better" of baggage capacity.<sup>29</sup> A couple of hours later, the DPS procurement officer requested written confirmation from Turbo North on six issues concerning Aerodynamics' proposed alteration of the aircraft, FAA approval of it, the effect on the price offered in Turbo North's proposal, and the availability of the aircraft.<sup>30</sup> The next day, Turbo North responded (in a signed letter on company letterhead, as requested) to each of the six points.<sup>31</sup>

In a series of July 22, 2005 memoranda to the file, the procurement officer recorded his determinations on which of the proposals were considered responsive. The memoranda recorded not just his determinations but also some of the reasons for them such as proposal clarifications, results of other follow-up inquiries (e.g., searches of business license records, references checks) and waivers given.<sup>32</sup>

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<sup>26</sup> July 6, 2005 11:27 a.m. Email from Turbo North to DeGroot, attached as Item D(9) to the protest report.

<sup>27</sup> July 6, 2005 12:22 p.m. Email from Turbo North to DeGroot, attached at Item D(10) to the protest report.

<sup>28</sup> See July 7, 2005 2:49 p.m. Email from Turbo North to DeGroot and attached letter from Aerodynamics, Inc., addressed to "Stephen LaPointe of O.E.M. & Associates" but referring to the Falcon 10 with the same serial number as included in Turbo North's proposal.

<sup>29</sup> Id. at p. 1 (email message).

<sup>30</sup> July 7, 2005 4:21 p.m. Email from DeGroot to Heckman, attached as Item D(14) to the protest report.

<sup>31</sup> See July 8, 2005 Letter from Heckman to DeGroot, attached as Item D(15) to the protest report.

<sup>32</sup> See, e.g., July 22, 2005 Memorandum to Procurement File re: Pruhs Corp/Aero Air proposal (summarizing business license check, clarification regarding subcontractor, and waivers); July 22, 2005 Memorandum to Procurement File re: J&S Services proposal (summarizing reference checks leading to conclusion that company did not meet the prior experience requirement of the RFP); July 22, 2005 Memorandum to Procurement File re: Aircraft Marketing proposal (summarizing reference checks leading to conclusion that company did meeting the prior experience requirement of the RFP).

One of the July 22<sup>nd</sup> memoranda recorded the procurement officer's "Specification Responsiveness Determination" for nine aircraft (offered by five offerors) that he found did not meet the specifications. Some were found nonresponsive for failure to meet the hours on airframe or remaining engine life or minimum payload and range requirements.<sup>33</sup> Both of Turbo North's offered aircraft (the Falcon 10 and the Lear 35A) and a second 1980 Falcon 10 aircraft offered by one of Turbo North's competitors were all found nonresponsive for failure to meet the baggage capacity requirement.<sup>34</sup>

On August 5, 2005, the DPS procurement officer issued the notice of intent to award the contract to Aircraft Marketing, Limited, which had offered a 1984 Westwind II, one of several Westwind II aircraft offered by various offerors.<sup>35</sup> A few days later, Turbo North emailed the procurement officer, asking that he clarify his "objection to cargo mod" and asserting that "[t]his modification met the 55 Cu.Ft criteria [sic]."<sup>36</sup> The procurement officer responded in an August 10<sup>th</sup> letter, explaining that Turbo North's Falcon 10 proposal had been disqualified as failing to meet the minimum specifications and why Turbo North's proposal modification could not be accepted.<sup>37</sup> The procurement officer concluded that Turbo North's "proposed modification was not insignificant; it would have resulted in a 34% increase in baggage capacity originally offered, and would have required a certification process, possibly lengthy, that clearly was not a part of [Turbo North's] original proposal."<sup>38</sup>

#### B. Procedural Facts

On August 10, 2005, Turbo North filed a protest asking that its offer of the Falcon 10, as now proposed to be altered to add baggage capacity, be considered timely, and that the contract award be reassigned "to the aircraft that meets the DPS requirements for performance and monetary costs."<sup>39</sup> Turbo North's protest listed 11 points, most related to the baggage capacity issue.<sup>40</sup> The DPS procurement officer denied the protest on August 17, 2005, responding point-

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<sup>33</sup> See July 22, 2005 Memorandum to Procurement file re: Specification Responsiveness Determinations at pp. 1-3.

<sup>34</sup> Id. at p. 2, item 3.a (Turbo North's aircraft) and item 3.g (Iviation-Global Jet Falcon 10).

<sup>35</sup> See August 5, 2005 Notice of Intent to Award Contract at pp. 1 & 2.

<sup>36</sup> August 8, 2005 Email from Turbo North to DeGroot, attached as Item E(1) to the protest report.

<sup>37</sup> See August 10, 2005 Letter from DeGroot to Robert Heckman of Turbo North, attached as Item #(2) to the protest report.

<sup>38</sup> Id. at pp. 1-2.

<sup>39</sup> August 10, 2005 Turbo North Aviation Protest at p. 3. Attached as Item E(4) to the protest report.

<sup>40</sup> See id. Points 1, 2, 3, 4, 6 and 7 each related to the baggage capacity issue and Turbo North's efforts to comply with that requirement. Point 5 objected to the time it took DPS to issue the Notice of Intent to Award. Point 8 took exception to a comment allegedly made by DPS representatives about the Falcon 10's range. Point 9 raised a

by-point to each of Turbo North's 11 protest points, and concluded that he found "no factual or legal grounds exist to sustain [Turbo North's] protest."<sup>41</sup> He also found "no basis to stay the award" of the contract.<sup>42</sup>

Turbo North timely filed a protest appeal with the Commissioner of Administration.<sup>43</sup> The protest appeal essentially incorporates by reference Turbo North's protest points and goes on to argue that DPS's selection of the Westwind is not in "the best interest of the State" because the aircraft Turbo North offered is cheaper, faster and more versatile.<sup>44</sup> A few days later, Turbo North supplemented its appeal statement with a four-page document that argues Turbo North had timely filed "a compliant and responsive bid" that was "not modified" and that DPS has "recognized [Turbo North's] bid as compliant."<sup>45</sup>

At the September 16, 2005 prehearing conference, the parties discussed the issues raised by Turbo North's appeal in an effort to identify and simplify them, and to determine how to resolve them most expeditiously.<sup>46</sup> Turbo North identified issues that concern

1. disqualification of the Falcon 10 offered by Turbo North based on baggage capacity limits;
2. best interest of the state in selecting the Aircraft Marketing Ltd.-offered Westwind II;
3. business license of Aircraft Marketing Ltd.<sup>47</sup>

DPS took the position that all of these issues could be resolved without an evidentiary hearing and subsequently moved for summary judgment.<sup>48</sup>

DPS's Motion argued that the undisputed facts show "Turbo North failed to provide an aircraft that met the specifications of the RFP" by the proposal deadline and DPS did not accept

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business license issue. Points 10 and 11 asserted that the Falcon 10 is superior to the Westwind II in some respects or more suitable for use in bush communities.

<sup>41</sup> August 17, 2005 Letter from DeGroot to Robert Heckman of Turbo North at p. 8.

<sup>42</sup> Id.

<sup>43</sup> See August 22, 2005 Memorandum from Robert Heckman of Turbo North to Department of Administration Commissioner's Office.

<sup>44</sup> Id. at p. 1.

<sup>45</sup> See August 26, 2005 Fax from Turbo North to Commissioner's Office at pp. 2-3.

<sup>46</sup> Under Alaska's procurement statutes, one of the purposes of holding "prehearing conferences [is] to settle, simplify, or identify the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding ...." AS 36.30.670(b)(1).

<sup>47</sup> See September 21, 2005 Prehearing Order at p. 1.

<sup>48</sup> See September 21, 2005 Prehearing Order at p. 1; generally October 17, 2005 Department of Public Safety's Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment (hereinafter "DPS's Motion").

Turbo North's post-deadline proposal modification for the Falcon 10.<sup>49</sup> Concerning a "best interest" argument Turbo North had made about where the Westwind II can land, DPS pointed out that suitability of the selected aircraft for all areas of the state was not an evaluation criterion and that Turbo North's argument is, in effect, an untimely protest of the RFP specifications.<sup>50</sup> On the business license issue, DPS pointed out that the RFP did not require offerors to be Alaska residents or maintain a place of business in Alaska.<sup>51</sup>

DPS also addressed two issues previously raised by Turbo North but not carried forward at the prehearing conference. It argued that missing the RFP's estimated Intent to Award date is not actionable.<sup>52</sup> It also argued that there is no evidence to support Turbo North's supposition that the evaluation committee inflated the score for the selected aircraft.<sup>53</sup>

In its response to DPS's Motion, Turbo North argued that the Falcon 10 aircraft it offered "was in compliance with all requirements of the RFP" and that its offer to provide the Falcon 10, therefore, was improperly rejected.<sup>54</sup> Turbo North went on to argue that, if its offer of the Falcon 10 had been accepted and the proposal scored, Turbo North's proposal would have received the highest score.<sup>55</sup> Turbo North argued counterpoints to DPS's argument that it had not accepted Turbo North's post-deadline proposal modification, essentially taking the position that the procurement officer's clarification requests and other post-deadline communications gave Turbo North reason to believe its proposal would be considered responsive.<sup>56</sup>

Turbo North's response concluded that "the State of Alaska paid too much money for an aircraft with inferior capability"<sup>57</sup> but the response otherwise did not pursue the "best interest" point it had raised at the prehearing conference. Turbo North also did not pursue the business licensing issue identified at the prehearing conference, or address the Intent to Award and score inflation issues. Instead, Turbo North summarized its appeal as follows:

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<sup>49</sup> DPS's Motion at pp. 9-14 (arguing that the proposal was not responsive) & 14-16 (arguing that "there is no basis for estoppel against DPS" arising out of the post-deadline clarification process communications).

<sup>50</sup> DPS's Motion at p. 21.

<sup>51</sup> DPS's Motion at p. 17-18.

<sup>52</sup> See DPS's Motion at pp. 16-17.

<sup>53</sup> See DPS's Motion at pp. 19-20. Also compare August 26, 2005 Fax from Turbo North to Commissioner's Office at pp. 3-4 (asserting that the evaluation score for the Aircraft Marketing Westwind "appears to have been inflated" because the score "seems impossible" for an out-of-state offeror whose offering price is "more than a million dollars more" than Turbo North's).

<sup>54</sup> See October 27, 2005 Reply of Turbo North Aviation and Associated Motions (hereinafter "Turbo North's Reply") at pp. 2-6; also Turbo North's Reply at pp. 7-8 (arguing that "[t]he RFP is silent as to exactly when the aircraft was to be delivered in compliant condition").

<sup>55</sup> Turbo North's Reply at pp. 6-7.

<sup>56</sup> Turbo North's Reply at pp. 10-11.



There are really only two questions to be answered here. Did Turbo North file a responsive bid, and was its bid modified after the due date of the bids.<sup>[58]</sup>

### III. Discussion

Turbo North is correct that the only issues that need be addressed here concern responsiveness and modification. By electing not to reply to the arguments in DPS's Motion on other issues the company previously had raised, Turbo North has abandoned those issues, in favor of focusing on its core concern: disqualification of its Falcon 10 for insufficient baggage capacity.<sup>59</sup> That will be the focus of this discussion as well. First, however, this discussion will address the standard for summary judgment.

#### A. TURBO NORTH'S APPEAL CAN BE DECIDED WITHOUT AN EVIDENTIARY HEARING.

Under Alaska's procurement code, a protest appeal can be decided in a number of ways, ranging from rejection of the appeal by adoption of the procurement officer's protest decision, without any kind of hearing, to conducting an evidentiary hearing at which new evidence is presented.<sup>60</sup> In administrative adjudications, the right to a hearing does not require development of facts in an evidentiary hearing when no factual dispute exists.<sup>61</sup> For protest appeals specifically, the law provides that a decision can be issued without holding an evidentiary hearing "if the appeal involves questions of law without genuine issues of fact."<sup>62</sup> A protest appeal in which the existing record provides all of the facts needed to resolve the legal issues is especially suitable for summary adjudication.

Summary adjudication of an administrative appeal uses the same standard as summary judgment in court: if the material facts are undisputed, they are applied to the relevant law and

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<sup>57</sup> Turbo North's Reply at p. 11.

<sup>58</sup> Turbo North's Reply at p. 11.

<sup>59</sup> As a general rule, a party is considered to have abandoned issues raised initially in an appeal if the party does not pursue them (e.g., does not brief the issues or respond to the opposition's briefing on them). *See, e.g., Casciola v. F.S. Air Service, Inc.*, 120 P.3d 1059, 1062-63 (Alaska 2005) (finding that jet broker had abandon appeal point on compensatory damages because did not allege errors or articulate a legal theory and explaining that even under the more lenient standard applied to *pro se* litigants, the appellant still must allow the opponent and the tribunal "to discern the *pro se's* legal argument"). Because one purpose of allowing protest appeals is to protect the integrity of the procurement process, in some circumstances it might be appropriate for the Commissioner to consider appeal points raised but later abandoned by the protestor-appellant. Here, however, Turbo North's election to focus on the responsiveness and related modification issues makes good sense, and there is no need for this decision to do otherwise.

<sup>60</sup> *See* AS 36.30.610; AS 36.30.670.

<sup>61</sup> *See Smith v. Dep't of Revenue*, 790 P.2d 1352, 1353 (Alaska 1990).

<sup>62</sup> AS 36.30.610(b).

the resulting legal conclusions determine the outcome. Only if the parties genuinely dispute a material fact (not legal conclusion but a *material* fact) is it necessary to hold an evidentiary hearing.<sup>63</sup>

Disqualification of Turbo North's proposal as nonresponsive to the RFP's baggage capacity specifications for the Falcon 10 raises no disputed material fact issues. The existing record establishes the material facts in the following categories, as detailed in the Facts section of this decision:

- The contents of the RFP;
- The timing of Turbo North's proposal;
- The contents of Turbo North's proposal;
- The post-proposal-deadline written communications between Turbo North and the procurement officer about the Falcon 10's baggage capacity and Turbo North's efforts to find a way to alter the aircraft to increase that capacity to meet the RFP specifications.

No other facts are material to deciding whether the procurement officer correctly determined that the Falcon 10 proposal was nonresponsive to the RFP, or to decide whether Turbo North's post-proposal offer to *alter the aircraft* was an untimely attempt to *modify the proposal* not allowed under the procurement laws.

#### B. TURBO NORTH'S PROPOSAL WAS NONRESPONSIVE.

A procurement officer may not award a contract to an offeror who submitted a proposal that is not "responsive."<sup>64</sup> To be "responsive" a proposal must "conform in all material respects to the solicitation."<sup>65</sup> Nonconformity found to be immaterial does not preclude the award, but a material departure from the requirements does.<sup>66</sup> A proposal may be modified "before the time and date set for receipt of proposals[.]"<sup>67</sup> Once that time and date have passed, however, a proposal may not be modified unless the RFP itself provides otherwise.<sup>68</sup> The RFP's language,

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<sup>63</sup> A fact is not "material" unless it would make a difference to the outcome. *Whaley v. State*, 438 P.2d 718, 720 (Alaska 1968).

<sup>64</sup> See AS 36.30.250(a).

<sup>65</sup> See 2 AAC 12.990(9) (defining "nonresponsive" as "a bid or proposal that does not conform in all material respects to the solicitation").

<sup>66</sup> *Id.*; also compare 2 AAC 12.840(c) (providing for rejection of proposals when the offeror places a condition on the offer that "requires a change to a material term of the solicitation ...").

<sup>67</sup> 2 AAC 12.230.

<sup>68</sup> 2 AAC 12.250.

therefore, is the key to determining whether Turbo North's proposal was "responsive" within the meaning of the law and whether a post-deadline proposal modification could be accepted.

When a state agency uses the RFP process to procure supplies (includes equipment),<sup>69</sup> the RFP must describe "the supplies ... to be provided under the contract, and the terms under which the supplies ... are to be provided."<sup>70</sup> DPS's RFP describes the aircraft sought in Section 5 and in the amendments, which collectively list and clarify the specifications. The baggage capacity specification in the RFP, as amended, for all aircraft is a minimum of 55 cubic feet. Turbo North admits that the Falcon 10 did not have that much capacity at the time its proposal was submitted. The description of "the supplies [aircraft] to be provided" (particularly whether the aircraft must have at least 55 cubic feet of baggage capacity) is not the disputed point between Turbo North and DPS.

The dispute is over whether the RFP's "terms under which the supplies are to be provided" should be construed as requiring that the offeror had to offer

- (1) an aircraft that actually met the specifications on the proposal deadline date, **or**
- (2) an aircraft that did not meet the specifications on the proposal deadline date but could be altered to meet them later, coupled with a post-proposal promise that the aircraft would meet them on some other date (e.g., date of inspection, contract award, delivery).

The first is DPS's position; the second is Turbo North's. The question is which of these did the RFP's terms require and did Turbo North's June 29<sup>th</sup> proposal offer that one.

The RFP's proposal content requirements said that proposals had to contain, among other things, "a detailed itemization of current aircraft systems and equipment in terms of meeting the Specification" for each specific aircraft offered.<sup>71</sup> Specific aircraft, identified by serial numbers, had to be offered.<sup>72</sup> A promise to deliver a conforming but unidentified aircraft at some point was not enough. As to baggage capacity, Amendment Three underscored the requirement that offerors "clearly outline in their proposals the amount of baggage volume capacity for each aircraft offered."<sup>73</sup> Thus, the proposal content had to

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<sup>69</sup> As used in Alaska's procurement and contract statutes, the word "supplies" is defined at "all property of an agency, including equipment, materials, and insurance ...." See AS 36.30.990(24).

<sup>70</sup> AS 36.30.210(a).

<sup>71</sup> RFP at p. 25 (section 6.01).

<sup>72</sup> Id.

<sup>73</sup> June 27, 2005 Amendment Three to RFP 2005-1200-5559 at p. 2.

- identify the specific aircraft offered—the individual aircraft, identified by its unique serial number—not just a type or model of aircraft;
- provide a detailed itemization of the then-current (not potential future) aircraft systems and equipment;
- present that detailed itemization “in terms of meeting the Specification” (which included the 55 cubic feet of baggage capacity requirement); and
- include the “amount of baggage volume” for each individual aircraft offered.

Certainly, the RFP language could have been crafted to better communicate that the “detailed itemization” in the proposal needed to link up with the specific requirements of the RFP “Specification”—for instance, that it needed to provide concrete numbers for quantitative requirements, not just general lists of aircraft features.

The language, however, unambiguously communicates that the proposal must provide an itemization of systems and equipment that is “detailed” **and** “current” at the time of the proposal. Simply put, the RFP required that, by the June 29<sup>th</sup> deadline, an offeror had to submit a proposal offering an aircraft that already conformed to the specifications or a proposal offering an aircraft with a then-existing plan to make it conform which plan was included in the proposal. The RFP language is not reasonably susceptible to being construed as inviting proposals to supply a nonconforming aircraft and later come up with a way to alter it to make it conform.

If a proposal is not clear on its face, the procurement officer can engage the offeror in a clarification process, and one purpose of that process can be to determine whether the proposal is responsive.<sup>74</sup> Any clarification provided, however, cannot result in “a material or substantive change to the proposal.”<sup>75</sup>

The DPS procurement officer engaged Turbo North (and other offerors) in the post-proposal clarification process. For Turbo North’s Falcon 10 proposal, the needed clarifications extended beyond baggage capacity to include questions about the ground air conditioning and lavatory. Turbo North’s proposal documents did not indicate how much baggage capacity the Falcon 10 had. The procurement officer asked. Turbo North’s honest answers revealed that the aircraft was short of the minimum requirement by 14 cubic feet. The inquiry might have stopped there. The procurement officer might have determined that the proposal, on its face and as clarified in the first few email exchanges after the deadline, did not conform in all material

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<sup>74</sup> See AS 36.30.240; 2 AAC 12.285.

respects to the requirements of the RFP—i.e., that it was nonresponsive under the procurement regulations.<sup>76</sup> That he decided to explore further before making the determination that the nonconformity was material, and that Turbo North’s plan to alter the aircraft was an untimely modification of the proposal, does not undermine the ultimate conclusion that the proposal was nonresponsive when the deadline passed.<sup>77</sup>

### C. THE PROCUREMENT OFFICER DID NOT ABUSE HIS DISCRETION.

The agency record for the procurement must show a reasonable basis for the procurement officer’s responsiveness determination for that determination to be upheld.<sup>78</sup> The procurement officer has the discretion (may, but is not required) to go beyond the four corners of the written proposal to see if the offer conforms “in all material respects” to the RFP requirements and therefore can be deemed “responsive.” The clarification process serves precisely that purpose.

A procurement officer, however, does not have the discretion to award a contract to an offeror whose proposal did not conform in a material respect to the RFP’s requirements.<sup>79</sup> The procurement officer, by law, must reject an offer that varies materially from the RFP’s specifications.<sup>80</sup> It is not an abuse of discretion to follow the law.

The DPS procurement officer concluded that the plan to add baggage capacity to the Falcon 10 that Turbo North developed after submitting its proposal was an untimely, material modification of the proposal.<sup>81</sup> In his August 10, 2005 letter to Turbo North, he reasoned that

- the plan was not a part of the proposal submitted on June 29<sup>th</sup> (i.e., was untimely);
- the plan Turbo North finally settled on was the second of two it considered;
- the change to the aircraft would be a (not insignificant) 34% increase in baggage capacity over that offered at the time of the proposal;
- the change to the aircraft would require engineering and design certification;
- the certification process the change might be lengthy and was not a part of Turbo North’s June 29<sup>th</sup> proposal.

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<sup>75</sup> 2 AAC 12.285.

<sup>76</sup> See 2 AAC 12.990(9).

<sup>77</sup> Indeed, even if a proposal has previously been deemed acceptable, information revealed during the clarification process can provide the basis for a finding of nonresponsiveness. See *Azimi-Tabrizi v. Dept. of Administration*, 2003 Westlaw 23002625 \*5 (Alaska 2003).

<sup>78</sup> See *Chris Berg, Inc. v. Department of Transportation and Public Facilities*, 680 P.2d 93, 94 (Alaska 1984).

<sup>79</sup> See AS 36.30.250(a) (using the word “shall” to mandate that contracts go to “responsible and responsive offerors whose proposal[s] are] most advantageous to the state”).

<sup>80</sup> See *Chris Berg*, 680 P.2d at 94.

The agency record supports each of these reasons, although it is not clear from the record how long the certification process likely would take.

Even if alteration of the aircraft and certification could have been accomplished quickly, those steps were not part of Turbo North's June 29<sup>th</sup> proposal. Deeming Turbo North's proposal "responsive" in light of the post-proposal plan to physically alter the aircraft and obtain certification of the change so as to meet one of the specifications would have the effect of allowing a material variance that gives Turbo North a competitive advantage. It would be like deeming "responsive" one of the proposals offering aircraft with too little engine time remaining before the next major overhaul if, *after* the proposal deadline, the offeror came up with and presented a plan to swap out the engine for a recently overhauled one.

In sum, the record contains a reasonable basis for the procurement officer's conclusion that Turbo North's solution to the baggage capacity shortage was an untimely modification of the proposal and that the proposal submitted by the deadline was nonresponsive. The procurement officer's decision, therefore, should be affirmed.<sup>82</sup>

#### IV. Conclusion

The undisputed material facts show that Turbo North's proposal was nonresponsive. The procurement officer did not abuse his discretion in disqualifying Turbo North's proposal to supply the Falcon 10. The record contains a reasonable basis for his determination that Turbo North's plan to increase the baggage capacity was an untimely modification of the proposal. Accordingly, DPS's summary judgment motion is granted.

DATED this 21<sup>st</sup> day of December, 2005.

By: \_\_\_\_\_  
Terry L. Thurbon  
Chief Administrative Law Judge

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<sup>81</sup> August 10, 2005 Letter from DeGroot to Robert Heckman of Turbo North at pp. 1-2, attached as Item E(2) to the protest report.

<sup>82</sup> The doctrine of equitable estoppel does not yield a different result. Turbo North willingly participated in the clarification process to try to keep itself in the running for the contract. Turbo North's investment of time and resources to come up with a plan to expand the Falcon 10's baggage capacity was a natural extension of its decision to participate in the procurement process, not a change in position relative to the one it occupied when it submitted the nonresponsive proposal.

**Adoption**

This Order is issued under the authority of AS 36.30.675, AS 44.21.010 – AS 44.21.020, AS 44.17.010, and AS 44.64.030(c). The undersigned, on behalf of the Commissioner of Administration and in accordance with AS 36.30.675 and AS 44.64.060, adopts this Decision and Order 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 17<sup>th</sup> day of January, 2006.

By: \_\_\_\_\_

Terry/L. Thurbon  
Chief Administrative Law Judge

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

Robert Heckmann

Marjorie Vander AAG

Signature

Date

1.17.06