

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT

REDOUBT DEVELOPMENT, LLC,

Appellant,

vs.

STATE OF ALASKA, DEPARTMENT  
OF ADMINISTRATION

Appellee.

Case No. 3AN-09-05095CI

**DECISION AND ORDER**

**I. INTRODUCTION**

Appellant Redoubt Development (Redoubt) appeals a decision from the administrative law judge (ALJ) who upheld the Department of Administration's (Department's) award of a request for proposal (RFP) for the lease of office space to 4600 Debarr, LLC (Debarr) rather than Redoubt. For the reasons stated below, the ALJ's decision is reversed. The matter is remanded to the Department for an award of bid preparation costs to Redoubt.

**II. FACTS AND PROCEEDINGS**

On August 13, 2008, the Division of General Services (DGS) in the Department issued RFP #2009-0700-8059. Pursuant to the RFP, the winning bidder would lease about 7,700 square feet of Anchorage office space for the Department of Labor and Workforce Development.<sup>1</sup> Redoubt and Debarr were the only two participants in the

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<sup>1</sup> Appellant's Br. at 3.

bidding process.<sup>2</sup> Pursuant to the RFP, five evaluators reviewed both proposals and awarded points based on five enumerated criteria in order to determine which bidder submitted the winning bid.<sup>3</sup> Forty points were based on technical factors.<sup>4</sup> If the technical points had been totaled and divided by the number of evaluators, Redoubt would have received a technical average score of 37.4 and Debarr would have received a score of 22.4.<sup>5</sup> The contracting officer did not round the technical average numbers.

After application of the Alaska bidder preference factor, the second half of the score was based on the lowest price. In order to determine the lowest price, DGS engaged in a complicated present value analysis as described in Section 5.3 of the RFP.<sup>6</sup> Debarr was awarded 50 points for receiving the low score.<sup>7</sup> After applying the PVA numbers in the formula articulated in Section 5.3 of the RFP,<sup>8</sup> Redoubt should have

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* Points were distributed based on the following criteria: 50 points for price; 15 points for function, planning, and design; 10 points for appearance and indoor environment; 15 points for public convenience and location; and 10 points for being an Alaska bidder.

<sup>4</sup> The technical factors were function, planning and design; appearance and indoor environment; and public convenience and location.

<sup>5</sup> Appellant's Br. at 5.

<sup>6</sup> R. 235-40.

<sup>7</sup> *Id.* 253.

<sup>8</sup> (low price) x 50 / (high price). See R. 236.

ended up with an unrounded price point score of 35.195352094011124601989247889513.<sup>9</sup> The contracting officer rounded down Redoubt's price point number to 35 rather than 35.2 or 35.195.<sup>10</sup> The applicable section of the RFP was silent on the issue of whether the contracting officer could round the price point number.<sup>11</sup>

After adding all the points awarded to both bidders, the contracting officer determined that Redoubt and Debarr ended in a tie.<sup>12</sup> Section 5.2 of the RFP stated that in the event of a tie, the determining measure would be price.<sup>13</sup> Since Debarr had the lower price, the Department issued a notice of intent to award the procurement to Debarr.<sup>14</sup> However, the parties only ended in a tie because the contracting officer rounded Redoubt's price point number to the nearest whole number. If the contracting officer had rounded the Redoubt price point number to 35.195 or 35.2, Redoubt would have received 82.6 or 82.595 total points as opposed to the total of 82.4 points received by DeBarr and would been the lowest responsible and responsive bidder.<sup>15</sup>

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<sup>9</sup> R. 4. The numbers applied to the formula are  $\$3,930,631 \times 50 / \$5,584,020$ .

<sup>10</sup> See Appellant's Br. at 6.

<sup>11</sup> See R. 236-40.

<sup>12</sup> R. 5.

<sup>13</sup> *Id.* 235.

<sup>14</sup> *Id.* 172.

<sup>15</sup> See R. 4.

Redoubt initiated a timely bid protest of the notice of intent to award.<sup>16</sup> In accordance with AS 36.30.605(a), the contracting officer prepared a report to the Commissioner of Administration on the bid protest.<sup>17</sup> In the report, the contracting officer expressed the view that he erred in rounding Redoubt's price point number down to the nearest integer.<sup>18</sup> The contracting officer stated that although the RFP went into great detail regarding the actual price number being round to the nearest whole number to determine value, the RFP was silent on the rounding of price points.<sup>19</sup> With the silence in the RFP on the rounding of price points, the contracting officer concluded that there was no basis for the rounding of price points.<sup>20</sup> The contracting officer recommended that the notice of intent to award be rescinded and that the offerors be required to submit best and final offers or, alternatively, that the solicitation be cancelled and a new solicitation be reissued.<sup>21</sup>

The Commissioner of Administration delegated her final decision making authority on the bid protest to the ALJ assigned by the Office of Administrative

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<sup>16</sup> See R. 278-81. Section 2.7 of the RFP sets forth the requirements for a bid protest. See R. 194.

<sup>17</sup> R. 273-76.

<sup>18</sup> *Id.* 274.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* 275.

Hearings.<sup>22</sup> DeBarr intervened in the proceedings.<sup>23</sup> The bid protest was decided on the basis of summary judgment motions. In its summary judgment motion, the Department took the position that the contracting officer correctly concluded that the notice of intent to award had been issued in error based on the ambiguity in the RFP relative to price point rounding.<sup>24</sup> Redoubt came to the same conclusion in its briefing although the Department and Redoubt differed as to the remedy that should be utilized to correct the contracting officer's error.<sup>25</sup> DeBarr claimed that the notice of intent to award was issued properly.<sup>26</sup>

On January 14, 2009, the ALJ affirmed the contracting officer's original decision to issue the notice of intent to award to DeBarr.<sup>27</sup> The ALJ stated that the decision to round to the nearest whole number was consistent with DGS past practices.<sup>28</sup> Additionally, he noted that the contracting officer's decision to round in no way impacted the parties' preparation for bidding.<sup>29</sup> The ALJ stated that "[w]ithout knowledge of a

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<sup>22</sup> R. 171.

<sup>23</sup> R. 159.

<sup>24</sup> R. 64-77.

<sup>25</sup> R. 48-57.

<sup>26</sup> R. 43-7.

<sup>27</sup> R. 1-11.

<sup>28</sup> See R. 4. "It has occurred in 12 of 13 leasing procurements for which evidence is available, including one recent procurement which Redoubt participated."

<sup>29</sup> R. 7.

competitor's price, an offeror cannot know what price points will be assigned to its proposal and therefore cannot foresee how rounding might affect those points."<sup>30</sup> The ALJ said that rounding could not be "gamed"; differing expectations between the participants were viewed as unimportant.<sup>31</sup>

Redoubt timely appealed the ALJ's decision to this court. Redoubt argues on appeal that the contracting officer did not calculate the bids as stated in the RFP. Redoubt states that the contract award to Debarr was erroneous as a matter of law because the RFP cannot be read to require the rounding of price points or to give the contracting officer discretion to do so. The Department reversed course in its arguments before this court. Contrary to the position taken by the Department on the bid protest, the Department now maintains that the ALJ correctly decided the protest. Debarr has not participated in this appeal since the Department awarded the lease to Debarr based on the ruling of the ALJ.

### III. APPLICABLE STANDARDS OF REVIEW

In reviewing an administrative action, the superior court acts in an appellate capacity.<sup>32</sup> Courts apply varying standards of review. The "reasonable basis" test applies

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Pederson-Szafran v. Baily*, 837 P.2d 124, 127 (Alaska 1992).

to questions of law involving agency expertise, and the “substitution of judgment” test applies to questions of law that do not involve agency expertise.

#### **A. Reasonable Basis Test**

The reasonable basis test is utilized whenever an agency is, in effect, making law by creating standards or setting criteria which will be used to evaluate future situations in addition to the individual case before it.<sup>33</sup> A second application of the reasonable basis test is for situations where the particular rationale may not be broadly applicable to future matters coming before the agency, but the nature of the individual case is such that policy questions involving the agency's area of expertise are paramount to and inseparable from the facts underlying the administrative decision.<sup>34</sup> Under the reasonable basis standard, the court will determine whether the agency's decision is supported by the facts and has a reasonable basis in law, even if the court may not agree with the agency's ultimate determination.<sup>35</sup>

#### **B. Substitution of Judgment Test**

The “substitution of judgment” test is the appropriate standard for interpreting regulations when the agency interpretation does not concern administrative expertise as

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<sup>33</sup> *Galt v. Stanton*, 591 P.2d 960, 965-66 (Alaska 1979).

<sup>34</sup> *Id.* citing *State, Dep't. of Natural Resources v. Universal Education Society, Inc.*, 583 P.2d 806 (Alaska 1978).

<sup>35</sup> *State, Dept. of Admin. v. Bachner Co. Inc.*, 167 P.3d 58, 61 (Alaska 2007).

to either complex subject matter or fundamental policy.<sup>36</sup> This standard is appropriate where the knowledge and experience of the agency is of little guidance to the court or where the case concerns “statutory interpretation or other analysis of legal relationships about which the courts have specialized knowledge and experience.”<sup>37</sup> Application of this standard permits a reviewing court to substitute its own judgment for that of the agency even if the agency's decision had a reasonable basis in law.

#### IV. DISCUSSION

##### A. No Matter What Standard of Review is Applied, the Decision of the ALJ was Erroneous.

The ALJ claims that he reviewed the bid protest by applying the reasonable basis standard of review.<sup>38</sup> In fact, the ALJ substituted his judgment for that of the contracting officer by determining that the contracting officer was not reasonable in admitting that he made an error in rounding Redoubt's price point number. The Department correctly noted in its briefing before the ALJ that if the ALJ failed to give effect to the contracting officer's report on the bid protest, he would be substituting his judgment for that of the contracting officer.<sup>39</sup>

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<sup>36</sup> *Borkowski v. Snowden*, 665 P.2d 22, 24 (Alaska 1983).

<sup>37</sup> *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 756 P.2d 896, 903 (Alaska 1987).

<sup>38</sup> R. 10.

<sup>39</sup> R. 69.



In any event, this court disagrees with the proposition that the rational basis standard of review is applicable here. The Alaska Supreme Court has applied the substitution of judgment standard of review to matters involving contract interpretation.<sup>40</sup> The case at hand is surely one of contract interpretation. In addition, the Alaska Supreme Court has also stated that the substitution of judgment standard of review is applicable where the question is whether proper procedures were followed.<sup>41</sup> The central issue in the case is whether the contracting officer's decision to round Redoubt's price point number was a proper procedure. Also the contracting officer's interpretation of the RFP did not require agency expertise. Thus this court will apply the substitution of judgment standard of review.

If this court is wrong in its application of the standard of review, the result will not be different. The critical administrative determination is the contracting officer's

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<sup>40</sup> See *Northern Timber Co. v. State of Alaska, Department of Transportation and Public Facilities*, 927 P.2d 1281, 1284 n.10 (Alaska 1996). "In this case we must examine the agency's interpretation of a contract and its bidding documents. This presents a question of law. We have set forth two standards of review applicable to questions of law: (1) the rational basis standard under which the court defers to an agency's interpretation of its regulations unless it is unreasonable; and (2) the substitution of judgment standard under which the court interprets the relevant statutes and regulations independently.... We use the rational basis standard when the questions of law involve agency expertise or where the agency's specialized knowledge and experience are particularly probative as to the meaning of the statute.... Although this case concerns interpretation of construction bidding documents, and thus potentially implicates DOT/PF's special expertise and knowledge, the Engineer, Contracting Officer, Hearing Officer, and Deputy Commissioner do not appear to have invoked that expertise or knowledge. We therefore apply the substitution of judgment standard in interpreting the contract documents."

<sup>41</sup> *State of Alaska v. The Aleut Corp.*, 541 P.2d 730, 736 (Alaska 1975).

decision that the bid protest had merit and the contracting officer's admission that he erred in rounding Redoubt's price point number. On a reasonable basis standard, that determination by the contracting officer was reasonable. The decision should not have been overturned by the ALJ.

The present case is unique. The parties have cited no cases, and the court has found none in Alaska, or indeed in the history of American jurisprudence, where a contracting officer has made a critical discretionary call without contractual authorization to round to a whole integer a price point number submitted by a bidder in response to an RFP. The two decisions cited by the ALJ to support his decision are not on point.<sup>42</sup> *Kreps* involved the rounding of total scores that included technical scoring which allowed for certain administrative discretion as opposed to the mathematical precision involved in the price point rounding in this case. *Thompson* was actually a criminal case where bid number rounding was discussed in passing. In neither of the cited cases did the contracting officer admit that he made a rounding error as happened in the case at bar.

Requests for proposals are generally governed by AS 36.30 and 2 AAC 215-315. The Commissioner of Administration and the chief procurement officer have authority over the procurement of supplies, services, and professional services.<sup>43</sup> The Commissioner is charged with adopting regulations governing the procurement,

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<sup>42</sup> *General Electric Co. v. Kreps*, 456 F.Supp. 468 (D.D.C. 1978), and *United States v. Thompson*, 484 F.3d 877 (7<sup>th</sup> Cir. 2007).

<sup>43</sup> AS 36.30.006(a).

management, and control of supplies, services, professional services, and construction by agencies including as they pertain to bids and offers.<sup>44</sup> An RFP must contain information necessary for an offeror to submit a proposal.<sup>45</sup> The request must also provide a description of the factors to be considered when evaluating the proposals, including the relative importance of price and other evaluation factors.<sup>46</sup> The problem in this case is that the contracting officer initially considered a factor (price point rounding) that was nowhere explained in the RFP. The contracting officer's initial decision to round the price number was not consistent with the RFP or state law. The decision was not fair.<sup>47</sup>

To support the reasonableness of the rounding, the ALJ makes the point that DGS had regularly rounded price point numbers in past procurements.<sup>48</sup> The problem with that argument is at least twofold. First, past mistakes don't make future conduct right. The real problem in this case is that DGS has a defective RFP that doesn't define whether the contracting officer can do price point rounding. The deficiency in the specification can't be covered up by past conduct. Second, the Department's past conduct is inconsistent.

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<sup>44</sup> AS 36.30.040(a).

<sup>45</sup> AS 36.30.210(c).

<sup>46</sup> *Id.*

<sup>47</sup> The contracting officer's initial decision to round down Redoubt's price point number also had a real economic impact on the bidding process. The decision result in an increase in Redoubt's price number by a sum of \$31,167 greater than the price that Redoubt bid. See Appellant's Brief at 11. To most people, \$31,167 is real money.

<sup>48</sup> R. 4.

The undisputed evidence is that in procurements other than leasing, the Department advises bidders that price point scores should be carried to one decimal place.<sup>49</sup>

Alaska courts have stated that “in exchange for a bidder's investment of the time and resources involved in bid preparation, a government agency must be held to an implied promise to consider bids honestly and fairly.”<sup>50</sup> In this case, the contractually unauthorized price point rounding to a whole number was not immaterial, was prejudicial to Redoubt, and was fundamentally unfair.

In the case at bar, AS 36.30.250(a) directs the contracting officer to award the contract to the “offeror whose proposal is determined in writing to be the most advantageous to the state taking into consideration price and the evaluation factors set out in the request for proposals. Other factors and criteria may not be used in the evaluation. The contract file must contain the basis on which the award is made.” By rounding the price portion of Redoubt's score, the contracting officer altered the outcome of the bid in a manner that was not contemplated in the RFP. Given the precise requirements articulated in state statute, the administrative regulations, and in the 70-page RFP, the procurement officer's initial action was improper. The contracting officer should have

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<sup>49</sup> Appellant's Br. at 19.

<sup>50</sup> *King v. Alaska State Housing Authority*, 633 P.2d 256 (Alaska 1981).

determined that Redoubt was the low bidder.<sup>51</sup> At this point, Redoubt's only remedy is the recovery of bid preparation costs.<sup>52</sup>

## V. CONCLUSION

The decision of the ALJ is reversed. This matter is remanded to the Department to determine and award bid preparation costs to Redoubt related to the office lease procurement in question.

DATED at Anchorage, Alaska this 5<sup>th</sup> day of May, 2010.

FRANK A. PFIFNER  
Superior Court Judge

I certify that on 05/06/10 a copy of the above was mailed to each of the following:

J. Sarafin  
R. Witty

Jeff Baird, Law Clerk

(This document has been modified to conform to technical standards of publication.)

<sup>51</sup> Whether Redoubt should have been awarded the lease is an issue that is not before this court. There are numerous questions, not relevant to this appeal, that relate to whether Redoubt could have been awarded the lease given the fact that Redoubt's bid amount allegedly exceeded agency funding and that the contracting officer's proposed fix to the bid problem by demanding best and final offers from each bidder might in itself have been a violation of the RFP and state law.

<sup>52</sup> *King v. Alaska State Housing Authority*, 633 P.2d 256 (Alaska 1981), holds that an aggrieved bidder is not entitled to lost profits under the contract; the bidder's sole remedy is recovery of bid preparation costs.