

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

J & S SERVICES, INC.)
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 v.)
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 DIVISION OF FORESTRY)
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OAH No. 13-0340-PRO
RFP No. 2013-1000-1600

DECISION

I. Introduction

The Division of Forestry (division) decided to purchase two used airplanes for its forest-fire fighting program. The division determined what it needed in an airplane, and issued a request for proposals (RFP) for this purchase. J & S Services, Inc., was one of several airplane brokers who responded to the RFP. After inspecting one of the airplanes offered by J & S, the division issued a Notice of Intent to Award a contract for the purchase of this airplane. However, when it went to pick up the airplane, the airplane had been sold to another buyer.

The division then inspected and selected a different airplane from a different vendor for purchase. J & S filed a protest raising two issues. First, that the division failed to follow the timeline stated in its RFP, causing J & S to be unable to provide the airplane originally selected for purchase. Second, J & S asserted that the airplane actually purchased by the division did not meet the minimum specifications set out in the RFP, and therefore should not have been evaluated for purchase.

The division denied J & S' protest, and J & S filed this appeal with the Commissioner of Administration. Prior to the hearing, summary adjudication was granted in favor of the division on the first issue raised by J & S. On May 17, 2013, a hearing was held on the second issue. Because the division complied with any enforceable timeline, and because the other vendor's offer to sell the selected airplane included a commitment that the airplane would meet the minimum specifications when delivered, the division's denial of J & S' protest is upheld.

II. Facts

On November 16, 2012, the division published its notice that it was soliciting proposals. The State of Alaska Dept. of Natural Resources is soliciting proposals for the provision of two (2) each turbine powered twin engine aircraft for outright

purchase by the State Div. of Forestry for use as lead planes in support of its fire suppression mission.¹

The RFP set out a timeline for when the division expected to open proposals, inspect and evaluate airplanes, and issue any Notice of Intent to Award.² The RFP also listed the minimum required specifications for an airplane that would meet the division’s needs.³ This included a requirement that each engine have “1000 hours minimum time remaining on each engine till Factory recommended overhaul[.]”⁴

The division received eight responses to the RFP, offering seven different airplanes.⁵ J & S services offered an airplane with the identification number N77HS.⁶ A different vendor, Eagle Creek, offered an airplane with the identification number N840N.⁷ The division issued a Notice of Intent to Award on January 22, 2013, selecting N77HS as the first of the two airplanes the division intended to purchase.⁸

As discussed in more detail below, the division was not able to complete the purchase of N77HS. Accordingly, a second Notice of Intent to Award was issued on February 6, 2013, selecting Eagle Creek’s N840N as the airplane the division intended to purchase.⁹

The division acknowledged at the hearing, and it is undisputed, that at the time of the second Notice of Intent, the right engine of N840N had less than 1000 hours remaining before the factory-recommended overhaul.¹⁰ This fact was disclosed in Eagle Creek’s response to the RFP, and as part of its proposal Eagle Creek promised to overhaul both engines prior to delivery.¹¹

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¹ DOF 00004. The agency record was marked as DOF 00001 – 00063.

² DOF 00010.

³ DOF 00028.

⁴ Id.

⁵ One airplane was offered for sale by two different brokers.

⁶ DOF 00046.

⁷ Id.

⁸ DOF 00047. The selection of the second airplane was delayed for reasons that are not relevant to this protest appeal.

⁹ DOF 00050.

¹⁰ See also Testimony of Brian Kilcullen. Mr. Kilcullen testified as J & S’ expert, and had worked with the owner of J & S, Jim Simko, in offering airplanes for sale to the state.

¹¹ Testimony of Marlys Hagen; Steve Elwell. Ms. Hagen was the procurement officer for this RFP. Mr. Elwell is the division’s Aircraft Supervisor, and was involved in the procurement.

III. Discussion

A. *The Division Did Not Fail to Comply with any Enforceable Time Line*

1. *Summary Adjudication Standard*

The division was granted summary adjudication on the first issue raised by J & S's protest. Summary adjudication in an administrative proceeding is similar to summary judgment in a civil proceeding, and the same basic legal principles apply. Summary adjudication may be granted where there are no material facts in dispute and one party is entitled to judgment as a matter of law.¹² The moving party has the burden of showing there is no genuine issue of material fact.¹³ In opposing summary adjudication, the non-moving party need not show that it will ultimately prevail, only that there are material facts to be litigated.¹⁴ All reasonable inferences of fact are drawn in favor of the party opposing summary adjudication.¹⁵ If the moving party has supported its motion with affidavits or other admissible evidence, the opposing party must show "by affidavit or other evidence" that a genuine factual dispute does exist.¹⁶ When appropriate, summary adjudication may be awarded against the moving party.¹⁷

2. *Additional Facts Related to Summary Adjudication*¹⁸

On December 27, 2012, the division informed J & S that it wished to inspect airplane N77HS.¹⁹ That inspection occurred on January 3, 2013.²⁰ The owner of N77HS agreed to fix four problems observed during the inspection.²¹ In return, the division stated it would seek final procurement authority, so that it could issue a Notice of Intent to Award during the week of January 11.²²

Between January 3 and January 18, 2013, J & S did not receive any communication from the division. J & S's purchase agreement with the owner of the airplane was set to expire on

¹² *Smith v. State*, 790 P.2d 1352, 1353 (Alaska 1990); 2 AAC 64.250(a).

¹³ *Alaska Rent-A-Car, Inc. v. Ford Motor Company*, 526 P.2d 1136, 1138 (Alaska 1974).

¹⁴ *Alaska Rent-A-Car*, 526 P.2d at 1139.

¹⁵ *Id.*

¹⁶ 2 AAC 64.250(b).

¹⁷ Alaska Rule of Civil Procedure 56(c).

¹⁸ These additional findings of fact are based on viewing the evidence in the light most favorable to J & S.

¹⁹ Simko Affidavit ¶ 6 (Affidavits from Jim Simko and Brian Kilcullen were attached to J & S' opposition to the division's motion, and were relied on in ruling on that motion).

²⁰ *Id.*

²¹ Simko Affidavit ¶ 7.

²² *Id.* January 11, 2013, was a Friday. January 3 was a Thursday. Official notice is taken of various days and dates in December of 2012 and January and February of 2013. At the time the summary adjudication ruling was issued, the parties were informed that they could request an opportunity to refute these days and dates. See 2 AAC 64.300(a). Neither party made such a request.

January 18.²³ If the division had provided some form of communication about the delay in issuing a Notice of Intent, J & S would have been able to extend its purchase agreement with the airplane's owner.²⁴

On January 22, 2013, the division issued its Notice of Intent to Award a contract for the purchase of N77HS from J & S.²⁵ The division did not, however, provide a deposit or set up escrow directions as requested by J & S.²⁶ Accordingly, the owner of N77HS sold the airplane to a different buyer. That sale occurred on February 5, 2013.²⁷

3. *Compliance with Timeline*

Section 1.02 of the RFP sets out the following timeline:

The contract term and work schedule set out herein represents the State of Alaska's best estimate of the schedule that will be followed. If a component of this schedule, such as the opening date, is delayed, the rest of the schedule will be shifted by the same number of days.

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The approximate contract schedule is as follows:

- Issue RFP **November 16, 2012**
- Deadline for receipt of Proposals **4:00 PM Alaska Time on December 11, 2012**
- Open Proposals, **December 12, 2012**
- The aircraft offered in the top proposal(s) deemed to be reasonably susceptible to award will be inspected by State personnel and/or the State's agent for physical, mechanical and structural condition **Week of December 17, 2012**
- Proposal Evaluation Committee complete evaluation by **December 28, 2012**
- Contract negotiations with successful offeror(s) (if necessary) **January 2 - 3, 2013**
- State of Alaska issues Notice of Intent to Award a Contract **January 4, 2013**
- State of Alaska issues contract **January 15, 2013**^[28]

J & S argued that the division was required to follow this time line. J & S acknowledged that there could be delays, but any delay would only extend the dates by the amount of that

²³ Simko Affidavit ¶¶ 8 – 11.

²⁴ *Id.* ¶12.

²⁵ Attachment to Protest Report.

²⁶ Simko Affidavit ¶¶ 15 – 18; Kilcullen Affidavit ¶ 20.

²⁷ Simko Affidavit ¶ 21.

²⁸ RFP §1.02 at 5 – 6 (bold type in original, underlined emphasis added).

delay, and that the division would then be required to comply with the modified time line. The original time line called for inspections the week of December 17. That week ended on Friday, December 21. The Notice of Intent to Award was to be issued two weeks later, on January 4, 2013.

Had the original timeline been followed, then when the inspections were delayed until the week ending on January 4, 2013, the Notice of Intent would have been issued approximately two weeks later, January 18. In addition, according to J & S, the division was to have issued a notice informing offerors of the extended timeline dates.

J & S argued that in buying and selling airplanes, the average time between inspection and payment for an airplane is about two weeks, and that no

aircraft owner seeking to sell their aircraft would ever commit to removing their aircraft from the market for a 90 day period merely in the hope that the State may choose their aircraft.^[29]

According to J & S, the time frame set out in RFP §1.02 was necessary, and was relied on by prospective sellers as assurance that they would not have to wait an inordinate amount of time between inspection and sale.³⁰ The division's failure to notify offerors of changes in the schedule prevented J & S from extending its agreement with the airplane's seller to keep N77HS available for sale to the division.³¹

To the extent J & S and any airplane owners relied on the timeline in believing they were not removing their airplane from the market for 90 days, that reliance was not reasonable. Section 1.17(g) of the RFP says that offerors certify "that the offers will remain open and valid for at least 90 days."³² Section 2.01 states

All proposals must be signed by an individual authorized to bind the offeror to the provisions of the RFP. Proposals must remain open and valid for at least ninety (90) days from the opening date.^[33]

Assuming the standard in the industry is for faster action, that standard was not adopted by this RFP. Instead, this RFP made it clear that any offer to sell an airplane must remain open for 90 days. A person interested in selling an airplane to the division pursuant to this RFP was

²⁹ Protest, DOF 00052.

³⁰ *Id.*

³¹ Appeal, DOF 00059; Simko Affidavit; Kilcullen Affidavit.

³² DOF 00013.

³³ DOF 00016. The signature page, DOF 00041, also contains an acknowledgment by the offeror that the offer would remain valid for at least ninety days.

required to agree to take the airplane off the market through February 14, 2013, which was 90 days after the proposal opening date. The estimated timeline told offerors that the division expected to move faster than that, but made no enforceable promise to do so.³⁴

In addition, §1.02 specifically states that the timeline is an estimate. Even if no delay in the inspection date had occurred, the division was still not obligated to issue a Notice of Intent to Award on January 4, 2013, as estimated in the RFP. That was only the division's estimate. When the inspection was delayed to January 3, offerors knew – by reading §1.02 – that the division's estimated date for issuing the Notice of Intent to Award had been automatically extended, but that new date was still only an estimate. The division was not obligated by the terms of the RFP to issue a notice on that date, and its failure to do so was not a violation of the terms of the RFP.³⁵

B. N840N Was Required to Meet Minimum Specifications by Date of Delivery

The second issue raised by J & S was whether the division should have refused to consider N840N because it had less than the minimum time remaining on its engines. Under RFP §5.01, airplanes were required to meet certain minimum requirements “in order to be considered by the State.”³⁶ One minimum requirement was that the time remaining until overhaul on each engine be at least 1000 hours.³⁷ Airplanes that did not meet this minimum requirement would not be further evaluated.

Upon opening, proposals will be reviewed on a Pass/Fail basis to determine if the offered aircraft meets the minimum specifications as detailed in Section 5. Proposals for aircraft meeting the minimum specifications will be forwarded to [the] evaluation committee for evaluation and scoring. Evaluation and scoring of aircraft will be based on the information provided in the proposal and physical inspection of the aircraft and all maintenance records; therefore, it is critical that all proposals be complete, clear and concise.^[38]

³⁴ The division did move faster; it issued the Notice of Intent to Award three weeks earlier than the ninety day deadline.

³⁵ Since the division issued its Notice only a few days after the extended timeline date, and since the dates were stated as estimates, the division actually did comply with the timeline set out in the RFP.

³⁶ DOF 00028.

³⁷ *Id.*

³⁸ RFP §7.01, DOF 00031. *See also* RFP §6.04, DOF 00029 – 00030 (proposals reviewed to determine if they meet minimum requirements; only those that meet requirements will be evaluated).

The right engine of N840N had only 289 hours of running time left until its next scheduled overhaul.³⁹ That overhaul did not occur until April 11, 2013,⁴⁰ two months after the Notice of Intent to Award.

Mr. Kilcullen testified that he and J & S considered offering airplane N840N in response to the RFP, but discounted that possibility because the airplane did not meet the minimum requirements. He further testified that there were very few airplanes in the United States that actually met all of the minimum requirements. According to Mr. Kilcullen, it would cost at least \$200,000 to overhaul an engine of this type, and since there is no benefit in having the work done early, few owners would waste remaining time on the engine by having that work done early.⁴¹

Ms. Hagen testified that the division considered N840N to meet the minimum requirements because Eagle Creek promised the airplane would have zero hours on both engines at the time it was delivered to the division. While some potential offerors may have read the “pass/fail” language differently, nothing in the RFP specifically prohibits the division from considering an aircraft that will meet the requirements by the delivery date. Moreover, under the reasoning of a prior decision, the division’s consideration of N840N was appropriate.

In *Turbo North Aviation v. Department of Public Safety*,⁴² the Commissioner of Administration considered an RFP issued by the Division of Public Safety for the purchase of an airplane. The RFP specifications required at least 55 cubic feet of baggage capacity.⁴³ Turbo North submitted more than one airplane in response to the RFP. After the proposals were submitted, the procurement officer contacted Turbo North to obtain clarifications about several issues, including confirming the baggage capacity in one airplane.⁴⁴ Turbo North responded that it was “working” on that question.⁴⁵ Subsequent communications established that the airplane

³⁹ Testimony of Brian Kilcullen; Division’s Exhibit 14; J & S Exhibit 7.

⁴⁰ J & S Exhibit 9.

⁴¹ Mr. Elwell testified the overhaul cost was approximately \$250,000. The record suggests that this type of engine must be overhauled after 5400 hours of use. Thus, the time would be worth about \$37 per hour if the overhaul cost is \$200,000. At that value, the 289 remaining hours were worth over \$10,000.

⁴² OAH No. 05-0658-PRO (Commissioner of Administration 2006).

⁴³ *Turbo North*, OAH No. 05-0658 at 2.

⁴⁴ *Turbo North*, OAH No. 05-0658, at 3.

⁴⁵ *Turbo North*, OAH No. 05-0658, at 4.

under consideration did not currently meet the minimum requirement of 55 cubic feet of baggage capacity, but that it could be reconfigured to meet that requirement.⁴⁶

The procurement officer rejected Turbo North's proposal as non-responsive, stating the 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.⁴⁷

The procurement officer rejected Turbo North's proposal because it did not include the reconfiguration as part of its original proposal. The Commissioner upheld that rejection, saying:

Simply put, the RFP required that, by the June 29th 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.^[48]

Turbo North's proposal was not responsive because it did not include a "then-existing plan" to add the additional baggage capacity. In this case, on the other hand, Eagle Creek's proposal was responsive. Even though the right engine still needed to be overhauled, the proposal included an existing plan to have that overhaul completed before delivery of the airplane.

The inclusion of the plan with the RFP is crucial in this case.⁴⁹ It gave the division the ability to evaluate the plan and determine whether the plan could be accomplished. It also confirmed that the purchase price included the work to be performed under that plan because Eagle Creek clearly offered N840N with two overhauled engines at a set price. By comparison, in *Turbo North*, the procurement officer had to ask whether the proposed alterations would have an effect on the price.⁵⁰ Not knowing for certain the price being offered in an RFP makes it difficult to compare competing offers, and in some instances will give one offeror a competitive advantage.⁵¹

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⁴⁶ *Turbo North*, OAH No. 05-0658, at 4 – 5.

⁴⁷ *Turbo North*, OAH No. 05-0658-PRO, at 6 (quoting letter from procurement officer).

⁴⁸ *Turbo North*, OAH No. 05-0658-PRO, at 12.

⁴⁹ The inclusion of the plan also distinguishes this case from the nearly identical example given at page 14 of the *Turbo North* decision. Eagle Creek's plan to overhaul the engines came with the proposal, and was not created afterwards.

⁵⁰ *Turbo North*, OAH No. 05-0658-PRO at 5.

⁵¹ The offeror would be free to choose between including the modifications in the price, or saying the modifications would cost extra depending on market conditions after the proposals were opened.

IV. Conclusion

The division complied with the time requirements set out in its RFP by issuing a Notice of Intent to Award within 90 days of the proposal due date. The division also reasonably concluded that airplane N840N met the minimum requirements of the RFP because Eagle Creek’s proposal included a promise to have both engines overhauled before delivery. Accordingly, the division’s denial of J & S’ protest is affirmed.

DATED this 24th day of May, 2013.

Signed _____
Jeffrey A. Friedman
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 36.30.675. The undersigned, on behalf of the Commissioner of Administration and in accordance with 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 Rule 602 of the Alaska Rules of Appellate Procedure within 30 days after the date of this decision.

DATED this 8th day of July, 2013.

By: *Signed* _____
Signature
Becky Hultberg
Name
Commissioner
Title

[This document has been modified to conform to the technical standards for publication.]