

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

J&S SERVICES, INC.,)
)
 Appellant,)
)
vs.)
)
DEPARTMENT OF NATURAL)
RESOURCES,)
)
 Appellee.)
_____)

Case No. 4FA-14-2651CI

DECISION ON APPEAL

I. Introduction

J&S is appealing a procurement decision by DNR. On September 22, 2014, J&S filed a notice of appeal.¹ The notice of appeal included twenty one points on appeal.² On November 3, 2015, J&S filed its Appellant’s brief presenting five issues.³ The Appellant’s arguments can be broken down into three general categories: (1) the selected airplane did not meet the RFP requirements due to the maintenance schedule; (2) the process was unfair due to bias, vagueness in the statutes and regulations, and futility; and (3) the decision was not supported by the evidence. These arguments overlap each other on a regular basis within the parties’ arguments.

¹ Notice Appeal, Sep. 22, 2014.

² *Id.*

³ Brief of Appellant, Nov. 3, 2015.

II. Background

On November 5, 2013, DNR issued a request for proposals (RFP) to purchase an airplane. Eight aircraft were submitted in response to the RFP. DNR selected a plane provided by Aero Air. J&S, a disappointed bidder, is appealing that decision.

A. Airplane Engines and Maintenance

[T]here are two sections of an engine. There's the compressor section and the hot section, which is actually where the fire is in the engine . . . The hot-section inspection is where you take the engine off the aircraft, you split the engine in half, and the half [of] the engine under the -- hot section part of the engine is the turbine section of the engine where the burner can is and where the actual fire in the engine is that produces the gases for the --to turn the turbines in a jet engine. . . . [A hot-section includes] [t]he turbine wheels, the bearings, the burner can, the igniters. . . . A turbine wheel. There are -- depending on the engine, there are multiple turbine wheels in particular engines. I think this one has three turbine wheels that actually the hot gases from the combustion process of the engine pass over these wheels, and these wheels are miniature propellers, if you will, that as these hot gases are expanding over these wheels, spin these wheels at a high rate of speed to produce the energy to turn the rest of the engine to produce thrust."⁴

Engine components have a life limit.

A life limit is a limit that the engine manufacturer puts on a particular component that is determined will be serviceable during those -- that particular timeframe, be it hours or cycles or whatever the frame is. And that's just based on components only for each -- there is a life limit on each particular component in those engines.⁵

The hot section⁶ is inspected more frequently than the overall engine "because most of the stresses induced on that engine are in that particular part of the engine where the heat is the greatest."⁷

⁴ Hrg. Tr. at 92:9-11; 92:25-93:6; 94:25-95:4; 8-17.

⁵ *Id.* at 93:25-94:6.

⁶ Hot section and hot seat are used interchangeably.

⁷ *Id.* at 93:18-21.

The relevant engines have two existing factory recommended maintenance schedules: an engine overhaul at 5400 hours with hot seat inspections at 1800 hours and 3600 hours (18/54) or an engine overhaul at 5000 hours with a hot seat inspection at 2500 hours (25/50).⁸ DNR is currently seeking approval from the FAA to operate on a schedule with an engine overhaul at 7000 hours and a hot seat inspection at 3500 hours (35/70).⁹ An airplane is eligible for either maintenance schedule until it passes an inspection point.¹⁰ For instance, when an airplane has flown 1800 hours since its last overhaul it is eligible for either maintenance program; but if it receives a hot seat inspection then it is only eligible for the 18/54 and if it does not receive a hot seat inspection it is only eligible for 25/50.¹¹ The FAA mandates that commercial operators maintain their planes on the 18/54 schedule.¹² DNR is not a commercial operator.¹³

DNR's employees provided inconsistent testimony as to whether the selected airplane was on a maintenance schedule during the bidding process. Steve Elwell testified that the airplane was not operating under a maintenance schedule;¹⁴ Steve Edwards testified that he did not know if it was operating under a maintenance schedule because it was irrelevant;¹⁵ and Doug Burts testified that it was irrelevant, but that it appeared to have been on the 18/54 schedule.¹⁶ Kilcullen testified for J&S that the plane had to be on the 18/54 schedule because of

⁸ *See id.* at 272:24-37:19; 291:1-17.

⁹ *Id.* at 271:2-272:12.

¹⁰ *Id.* at 264:19-22; 276:23-77:6; 272:24-273:9.

¹¹ *Id.*

¹² *See id.* at 233:23-24.

¹³ *Id.* at 337:21-338:2.

¹⁴ *Id.* at 101-105.

¹⁵ *Id.* at 262-63.

¹⁶ *Id.* at 321-233.

the FAA regulations and to provide reference points for mechanics and inspectors.¹⁷ Aero Air's proposal states that it is being operated under the FAA regulations for commercial operators.¹⁸

Elwell testified that, "The turbine wheels are – and the replacement thereof is not relevant to any hot section inspections times. They are based on cycles, and you can replace turbine wheels without doing a hot-section inspection."¹⁹

To do a hot-section inspection, you have to remove the engine, break the engine in half, and they have to inspect the aircraft – or inspect the engine. To change a third-stage turbine wheel, you can do that while the engine is still on the aircraft, and you do not have to break it into sections. They can just do that while on the aircraft. So it's significantly less expensive to do that, especially on the third-stage turbine wheel. Which is the more – the rear-most turbine wheel in the engine, so it's the most accessible.²⁰

Brian Kilcullen, J&S's aviation expert testified that while it is possible to replace a third-stage turbine wheel without performing a hot-seat section, industry practice is to perform a hot seat inspection when changing a major component in order to limit the number of times that the plane is taken out of commission.²¹

B. Prior history

J&S and DNR have a contentious relationship that pre-exists the challenged procurement decision.

In November 2001 the Department of Natural Resources issued a request for proposals (RFP), seeking to lease an airplane for fighting fires. Matthew Tomter, the department's director of aviation, was the project manager for the RFP. . . . Tomter contacted several companies soliciting additional proposals. He reportedly complained to an officer of one of the companies he contacted that J & S was "a pain in the ass." A second company, Toram, submitted two proposals by the extended deadline date. One of Toram's two owners, Russ Torrison, was a

¹⁷ *Id.* at 231-236.

¹⁸ Aero Air Proposal at 5 (stating that it is operating under part 135).

¹⁹ Hrg. Tr. at 152:24-153:3.

²⁰ *Id.* at 160:22-161:8.

²¹ *Id.* at 246:20-247:17.

close friend of Tomter. . . . Tomter communicated with Torrison repeatedly during the bid evaluation process. The department ultimately declared Toram's proposal superior to J & S's and awarded the contract to Toram.²²

In 2012 DNR issued an RFP for two airplanes. Based on J&S' statements, DNR was initially going to purchase a plane brokered by J&S, however, DNR was delayed in issuing the purchase contract because they were examining a plane put forth by Aero Air in South Africa. During this delay, the owner of the plane advanced by J&S sold it to someone else through a different broker. The plane in South Africa did end up not being available. J&S purchased a third plane.

The three members of the selection committee with technical expertise have had business dealings with Aero Air — mainly relating to aircraft parts procurement — for years.²³ DNR personnel testified that this business relationship did not create a conflict of interest for the committee members.²⁴

C. Procedural History

1. *Request for Proposals*

On November 5, 2013, DNR issued an RFP for the purchase of an airplane. The selection committee consisted of: Marlys Hagen, the procurement officer;²⁵ Doug Burts, DNR's aviation chief pilot;²⁶ Steve Edwards, the aviation maintenance inspector;²⁷ and Steve Elwell.

²² *J & S Serv., Inc. v. Tomter*, 139 P.3d 544, 546 (Alaska 2006).

²³ Hrg. Tr. at 149-51.

²⁴ *Id.* 149-51; 313:14

²⁵ Hrg. Tr. at 172:18.

²⁶ *Id.* at 80: 6-10.

²⁷ *Id.* at 261:24.

Elwell, Edwards, and Burts were responsible for evaluating the technical elements of the RFP and Hagen was responsible for the administrative aspects.²⁸

The RFP required that “the plane is offered to the State such that it will meet all specifications below when it is delivered to the State.”²⁹ The disputed mandatory specification is” “Engines: . . . 1000 hours minimum time remaining on each engine till Factory recommended overhaul and 450 hours minimum time remaining on each engine till ‘Hot Section Inspection.’ ”³⁰ Bids were awarded up to 10 points for each engine for the time remaining until “factory recommended overhaul,” up to 5 points for each engine for “time remaining until factory recommended hot seat inspection,” up to 20 points for other desired specifications, up to 40 points for cost, and 10 points if the offeror qualifies for the Alaska Bidder Preference.³¹

Points were awarded for the next hot seat evaluation using a mathematical formula.³² When an engine was eligible for more than one maintenance schedule, DNR evaluated it using the schedule that was most beneficial for the offeror.³³ A plane offered by Aero Air, N83WA, received the most points with 68.8; the plane offered by J&S, N840TC, received the second most points with 68.6.³⁴

²⁸ *Id.* at 176:4-10

²⁹ Request for Proposal § 5.1.

³⁰ *Id.* at 5.2.

³¹ *Id.* at Section 7.

³² Hrg. Tr. at 263-67.

³³ *Id.*

³⁴ Pleadings Disc Eval. Summ.

2. *Administrative appeal*

On January 9, 2014, DNR issued a Notice of Intent to Award for the plane offered by Aero Air.³⁵ J&S filed a protest on January 21 on the grounds that the selected airplane did not meet the RFP requirements due to the hot seat inspection schedule.³⁶ On January 29, 2014, DNR awarded the contract for purchase of plane to Aero Air.³⁷ On February 5, 2014, the procurement officer denied the protest.³⁸ J&S appealed this decision on February 22, 2014.³⁹

The grounds for appeal were that the decision:

- a. Overlooked required compliance with FAA regulations;
- b. Incorrectly state that Aero Air's proposal met the requirements of the RFP, Section 5 requiring a minimum of 450 hours till "hot seat inspection" . . .
- c. Incorrectly and in violation of FAA Regs. [14 C.F.R. §§] 91.403(c), 91.405, 91.409(a), 91.409(e), 91.409(f), stated that the current owner/operator can choose a maintenance program which nest fits his needs randomly at 1800 hours and without the need to document this in current logbooks.
- d. Violated public records requests by submitting incomplete and evasive documentation.⁴⁰

J&S filed a request to stay the award on February 20, 2014.⁴¹

In April 2014, J&S sent a few emails that requested a stay and for Brian Kilcullen and Sky Knight Air to receive "equal standing" in the case.⁴² On May 8, 2014, the hearing officer (ALJ) requested that J&S file something that clarified what he was requesting.⁴³ DNR filed a response on May 27, 2014.⁴⁴ J&S requested discovery on May 28, 2014.⁴⁵ J&S filed a reply on

³⁵ Pleadings Disc Protest Report, Mar. 3, 2014.

³⁶ Pleadings Disc J&S Protest.

³⁷ Pleadings Disc Protest Report.

³⁸ *Id.*

³⁹ Pleadings Disc J&S Appeal and Request for a Stay.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Pleadings Bates 25-28.

⁴³ Hrg. Tr. 32-33.

⁴⁴ Pleadings Bates 172.

⁴⁵ *Id.* at 174.

May 29, 2014.⁴⁶ On May 29, 2014, the ALJ issued an order that permitted Kilcullen to assist in J&S's case, stated there was no pending action to be stayed, and ruled that the motion for discovery was not timely.⁴⁷ Arguments were held on June 12, June 14, and July 17, 2014. ALJ ruled in favor of DNR on July 21, 2014.⁴⁸ J&S filed a proposal for action on August 15, 2014.⁴⁹ The proposal for action claimed that the ALJ made a misstatement of fact when it found that the selected airplane met the RFP requirements and that the selection process used unstated criteria.⁵⁰ The Commissioner adopted the ALJ decision on August 22, 2014.⁵¹

III. Discussion

A reviewing court applies the 'reasonable basis' test when reviewing administrative decisions involving complex issues that require agency expertise. Under the 'reasonable basis' standard of review, we give deference to the agency's determination 'so long as it is reasonable, supported by the evidence in the record as a whole, and there is no abuse of discretion.' We exercise 'independent judgment' when determining whether an agency complied with procedural requirements.⁵²

The Court reviews whether a decision is supported by the evidence using "the substantial evidence test. Substantial evidence to support an agency decision exists when there is such relevant evidence as a reasonable mind might accept as adequate to support the conclusion."⁵³

Appellate review is limited to issues included in the points on appeal.⁵⁴ The points on appeal can be supplemented by a motion for cause.⁵⁵ "[C]laim[s] against an agency" for violations of the procurement code are limited to the procedure set out in the procurement

⁴⁶ *Id.* at 175-77.

⁴⁷ *Id.* at 178-79.

⁴⁸ *Id.* at 222-33.

⁴⁹ *Id.* at 218-20.

⁵⁰ *Id.*

⁵¹ *Id.* at 234.

⁵² *Ellis v. State*, 944 P.2d 491, 493 (Alaska 1997) (internal quotations omitted).

⁵³ *Treacy v. Anch.*, 91 P.3d 252, 260 (Alaska 2004) (internal quotation omitted).

⁵⁴ *See SW Marine, Inc. v. State*, 941 P2d 166, 176 (Alaska 1997); R. App. Proc. 602(c)(1)(A).

⁵⁵ R. App. Proc. 602(c)(1)(A).

code.⁵⁶ Damages for a violation of the procurement code are “limited to reasonable bid or proposal preparation costs.”⁵⁷

A. Request for Stay

J&S repeatedly refers to the ALJ’s handling of his request for a stay, and Kilcullen’s status as evidence of a due process violation. Someone who files a protest of a procurement decision is not entitled to a stay.⁵⁸ Stays are only issued if the procurement officer determines that the protest has a reasonable probability of being sustained or that a stay “is not contrary to the best interests of the state.”⁵⁹ There is no evidence that either determination was made. The relevant contract was also awarded before J&S first requested a stay.⁶⁰ The ALJ correctly ruled that the issue was moot.⁶¹

B. Kilcullen’s Standing to Challenge

Kilcullen was not entitled to equal status or service in the proceedings. Only J&S Services was mentioned in their proposal.⁶² The RFP specifically stated that joint ventures would not be permitted to submit a proposal.⁶³ As part of the J&S Proposal, Simko swore that he qualified for both the Alaska Veteran Preference and the Alaska Bidder Preference.⁶⁴ J&S received evaluation points for both of those preferences.⁶⁵

“Alaska bidder” means a person who
(A) holds a current Alaska business license;

⁵⁶ AS 36.30.690.

⁵⁷ AS 36.30.585.

⁵⁸ AS 36.30.575.

⁵⁹ *Id.*

⁶⁰ Admin Rec. 172.

⁶¹ *Id.* at 178.

⁶² J&S Proposal.

⁶³ RFP § 1.16.

⁶⁴ J&S Proposal 5-6.

⁶⁵ Evaluation Summary.

- (B) submits a bid or proposal for goods, services, or construction under the name appearing on the person's current Alaska business license;
- (C) has maintained a place of business in the state staffed by the bidder or offeror or an employee of the bidder or offeror for a period of six months immediately preceding the date of the bid or proposal;
- (D) is incorporated or qualified to do business under the laws of the state, is a **sole proprietorship and the proprietor is a resident of the state**, is a limited liability company organized under AS 10.50 **and all members are residents of the state**, or is a partnership under former AS 32.05, AS 32.06, or AS 32.11 and **all partners are residents of the state**; and
- (E) if a joint venture, is composed entirely of ventures that qualify under (A)--(D) of this paragraph.⁶⁶

The Alaska Veteran Preference requires the bidder be a

- (A) **sole proprietorship** owned by an Alaska veteran;
- (B) partnership under AS 32.06 or AS 32.11 if a **majority of the partners** are Alaska veterans;
- (C) limited liability company organized under AS 10.50 if a **majority** of the members are Alaska veterans; or
- (D) corporation that is wholly owned by individuals, and a **majority** of the individuals are Alaska veterans.⁶⁷

J&S received the 10 point Alaskan bidder preference and had the cost of its plane reduced by \$111,000 through the application of the Alaskan bidder preference and the Alaskan veteran preferences.⁶⁸ Without the price adjustment, J&S would have received 32.3 cost points for its plane instead of 35.9 cost points.⁶⁹ Losing its eligibility to receive the Alaskan bidder and Alaska veteran preferences would have reduced J&S' final score by 13.6 points.

Kilcullen was not entitled to service and standing to challenge a procurement decision when his presence on the bid would have disqualified the bid from receiving claimed preferences. It is also important to note that the RFP expressly states that "Joint ventures will

⁶⁶ AS 36.30.990; *see also* 2 AAC 12.260(d), (e) (implementing regulation that requires that a bidder meet the requirements of AS 36.30.990(2) to receive the Alaska bidder's preference.

⁶⁷ AS 36.30.321(f).

⁶⁸ *See* Evaluation Summary.

⁶⁹ Points=cost of cheapest plane (in this case 895,500)*40/cost of plane.

not be allowed.”⁷⁰ Kilcullen was provided with extensive opportunity to participate in this process. Of note, he was the primary participant in the hearing. The level of standing provided to Kilcullen is evidence that the ALJ was actually providing more due process than was actually required.

C. Due Process

Appellant raised a variety of miscellaneous general due process claims throughout the proceedings. These include issues with discovery, concerns about not being able to have both Simko and Kilcullen question the same witness, the fact that a status conference was scheduled for a limited time, a Bates numbered copy of the administrative record was not delivered to the ALJ prior to the hearing, it was not served a timely copy of the administrative record, and technical issues that caused Simko to be dropped from the line several times during the hearing.

[D]ue process does not require a full-scale hearing in every situation to which due process applies. More specifically, regarding administrative matters . . . minimal due process requirements do define necessary requirements of all adjudicatory proceedings. Without providing at least notice and the opportunity to participate to those who might be affected, no administrative action can either resolve the dispute to the satisfaction of all of the parties or be considered final despite later objections . . . And as a matter of public policy, the need for efficiency in government commands that the process be able to function quickly and dependably.⁷¹

OAH is “an independent office of administrative hearings.”⁷² OAH has jurisdiction over appeals of State procurement decisions.⁷³ Discovery is limited in OAH hearings.⁷⁴ Whether the parties are required to share pre-hearing exhibits, exhibit lists, and witness lists is subject to

⁷⁰ RFP § 1.16, p 9.

⁷¹ *Laidlaw Transit Inc. v. Anch. Sch. Dist.*, 118 P.3d 1018, 1026-27 (Alaska 2005).

⁷² AS 44.64.010.

⁷³ AS 44.64.030.

⁷⁴ 2 AAC 64.240

the ALJ discretion.⁷⁵ Pre-hearing discovery is not permitted unless it is specifically authorized by statute or regulation, the parties stipulate to it, or the ALJ finds good cause to require discovery.⁷⁶ The rules of evidence are merely advisory in OAH hearings, unless the parties stipulate to them.⁷⁷ The moving party bears the burden of proof by a preponderance of the evidence.⁷⁸

J&S was afforded sufficient due process in the administrative proceeding:

- OAH is an independent agency that is not answerable to DNR.
- The OAH hearing took place over three days and its transcript is over 400 pages.
- The final day of the hearing occurred a month after the second day to allow for the inclusion of supplemental evidence.⁷⁹
- The ALJ talked J&S through the procedure and allowed Kilcullen to participate in the hearing.
- While the State didn't provide a list of all forestry employees, they named who was on the selection committee.
- The delay between the second and three day of the hearing should cure any problems from the State providing information late.⁸⁰
- Technical issues with J&S's phones and electrical issues do not constitute a denial of due process.

No due process violation took place.

⁷⁵ 2 AAC 64.240(a).

⁷⁶ 2 AAC 64.240(b).

⁷⁷ 2 AAC 64.290(b).

⁷⁸ 2 AAC 64.290(e).

⁷⁹ See Hrg. tr.

⁸⁰ See *McGilvary v. Hansen*, 897 P.2d 605, 607 (Alaska 1995) (*stating* that a continuance is a valid remedy for a discovery violation in a civil case).

D. Insufficient Record, Evidence

There are four recognized standards employed to review administrative decisions: the ‘substantial evidence’ test for questions of fact; the ‘reasonable basis’ test for questions of law involving agency expertise; the ‘substitution of judgment’ test for questions of law where no expertise is involved; the ‘reasonable and not arbitrary’ test for review of administrative regulations.⁸¹

“Substantial evidence to support an agency decision exists when there is such relevant evidence as a reasonable mind might accept as adequate to support the conclusion.”⁸² “The determination by a public agency of the responsiveness of a [proposal] is within the agency's discretion, subject, on judicial review, to an ascertainment that there was a reasonable basis for the agency's action.”⁸³ “Under this standard, we seek to determine whether the agency’s decision is supported by the facts and has a reasonable basis in law, even if we may not agree with the agency’s ultimate determination.”⁸⁴ The record must contain evidence sufficient to show “the relationship between evidence and findings, and between findings and ultimate action.”⁸⁵

“[A] public entity is required to reject bids which vary materially from the specifications set forth in the published request for proposal. . . . [A] variance is considered material if it gives one bidder a substantial advantage over other bidders and thereby restricts or stifles competition.”⁸⁶ The relevant portion of the RFP reads: “Minimum Required Specifications: Engines: Turbine powered . . . twin engine, 1000 hours minimum time remaining on each

⁸¹ *Anchorage v. Coffey*, 893 P.2d 722, 726 (Alaska 1995) (internal quotation omitted).

⁸² *Treacy v. Anchorage*, 91 P.3d 252, 260 (Alaska 2004).

⁸³ *Chris Berg, Inc. v. State*, 680 P.2d 93, 94 (Alaska 1984); see also *Gunderson v. Univ. Alaska, Fairbanks*, 922 P.2d 229, 233 (Alaska 1996).

⁸⁴ *Gunderson*, 922 P.2d at 233 (internal quotation omitted); *Laidlaw*, 118 P.3d at 1032.

⁸⁵ See *White v. Alaska Commercial Fisheries Entry Com'n*, 678 P.2d 1319, 1322 (Alaska 1984).

⁸⁶ *Gunderson*, 922 P.2d at 235.

engine till Factory recommended overhaul and 450 hours minimum time remaining on each engine till ‘Hot Section Inspection.’ ”⁸⁷

J&S alleges that the decision was not supported by the evidence in two main ways: that the selected plane did not meet the RFP’s requirements and that DNR erred in determining that the selected plane’s prior maintenance schedule was irrelevant. J&S has also argued that the record is insufficient because the State failed to provide a list of all the forestry employees and that the ALJ did not have a complete Bates numbered copy of the administrative record at the time of the hearing. He has also claimed that the evidence does not support the agency’s finding because one of the State’s witnesses was evasive was not credible.

The Record contains sufficient evidence to support a finding that that it was reasonable for DNR to determine that Aero Air’s proposal met the requirements of the RFP0.

The engines have two existing factory recommended maintenance schedules: 18/54 and 25/50.⁸⁸ An airplane is eligible for either maintenance schedule until it passes an inspection point.⁸⁹ The FAA mandates that commercial operators maintain their planes on the 18/54 schedule,⁹⁰ but DNR is not a commercial operator.⁹¹

There was inconsistent testimony about the selected airplane’s maintenance schedule during the bidding process. Elwell testified that the airplane was not operating under a maintenance schedule;⁹² Edwards testified that the maintenance schedule was irrelevant;⁹³ Burts

⁸⁷ 2014 RFP at § 5.2.

⁸⁸ *See id.* at 272:24-37:19; 291:1-17.

⁸⁹ *Id.* at 264:19-22; 276:23-77:6; 272:24-73:9.

⁹⁰ *See id.* at 233:23-24.

⁹¹ *Id.* at 337:21-338:2.

⁹² *Id.* at 95-105.

⁹³ *Id.* at 262-63.

testified that it was irrelevant, but that it appeared to have been on the 18/54 schedule;⁹⁴ and Kilcullen testified that the plane had to be on the 18/54 schedule.⁹⁵ The RFP refers to the factory recommended maintenance schedule, not the schedule that the airplane was being maintained under by the prior owner.⁹⁶ Aero Air's plane had fewer than 1800 hours since its last engine overhaul, so it was reasonable for DNR to find that it met the RFP's requirements.⁹⁷

There is no indication that the ALJ did not have a complete copy of the administrative record when he made his decision. While DNR did not provide a complete list of all its forestry employees, the four employees who were involved with this procurement decision were identified.⁹⁸ There was testimony that the three employees with technical expertise had prior business interactions with Aero Air.⁹⁹ Aero Air is the main parts supplier for the Northwest for a type of airplane that DNR uses.¹⁰⁰

J&S knew the identities of the committee members and their pre-existing business relationship between the committee members and Aero Air for at least a month before the final hearing date. There is no evidence on the record that these pre-existing relationships caused any bias in favor of Aero Air. All of the committee members testified at the hearing.

The record had sufficient evidence to determine that Aero Air's plane met the RFP. There is no reason to believe that the ALJ did not have a Bates numbered copy of the record for his decision. J&S had sufficient information to develop the record on its bias claim, but failed to do so.

⁹⁴ *Id.* at 321-22.

⁹⁵ *Id.* at 231:18-34:19; 236:2-37:14.

⁹⁶ RFP at § 5.2.

⁹⁷ Aero Air proposal at 2.

⁹⁸ Marlys Hagen, Doug Burts, Steve Elwell, and Steve Edwards.

⁹⁹ Hrg. tr. at 149-51; 313.

¹⁰⁰ Hrg at June 14, 2014, 12:45.

E. Expertise

J&S's challenges to the expertise of the reviewing body focus on the ALJ's expertise in procurement cases of a technical nature and in technical aviation issues. Appeals of protest decisions for procurement cases are within OAH jurisdiction.¹⁰¹ The issues in the procurement appeal were within the ALJ's expertise. OAH has jurisdiction over procurement appeals and there is no evidence that the ALJ was not competent to weigh the evidence presented to him and reach a decision on whether or not the selected airplane qualified under the RFP requirements. The fact that he does not have technical aviation knowledge does not change that competency.

F. Bias

“[A] disappointed bidder [must] meet a high standard of proof in order to recover for breach of an agency's implied promise to consider bids honestly and fairly.”¹⁰² A claim of bias has to be supported by evidence.¹⁰³

J&S argues that there was favoritism shown towards Aero Air, that the whole procurement system is biased, and that the ambiguity relating to maintenance schedules in the RFP makes the whole process subject to arbitrary enforcement. At different points, J&S alleges that incidents in front of the ALJ show bias.: that preferential treatment of the State's attorney; the State was not required to provide support for its the argument against the stay; the State was allowed to file responses late, but J&S was not permitted to request late discovery; and the ALJ only allowed either J&S or Kilcullen to question each witness.

None of J&S's examples from the OAH hearing actually indicate bias. They are all occurrences that occur regularly in courtrooms. J&S did not provide any evidence that the State

¹⁰¹ AS §§ 36.30.615; 36.30.670.

¹⁰² *Laidlaw v. Anchorage Sch. Dist.*, 118 P.3d 1018, 1037 (Alaska 2005).

¹⁰³ *Laidlaw*, 118 P.3d at 1037.

showed favoritism to Aero Air. There was evidence presented that Aero Air regularly did business with members of the committee in their professional capacity, but that does not indicate bias. There was no evidence presented to support any of J&S's other claims of bias relating to this RFP.

G. Potential concerns in the scoring of points

“A claim of unfair scoring of a public bid proposal does not show bad faith unless the misconduct is motivated by malice or personal interests.”¹⁰⁴

While the record does not support a finding that there was bias in the RFP process, a careful review of the record indicates that there are potentially issues with how the planes were scored. Of particular note is the extremely small margin between the first and second place scores. The point system allowed quite a few points in a discretionary category. The margin of discretionary points awarded between first and second place was quite large. This could be viewed as somewhat consistent with an allocation of discretionary points designed to reach just enough of a threshold to arbitrarily select the winner.

In response to the ALJ's question about Aero Air's evaluation score, Burts testified that the Aero Air plane had the best radio package and electronic instruments.¹⁰⁵ He stated that the electronic instruments are more accurate than traditional gyros when used in firefighting.¹⁰⁶ Kilcullen stated that J&S was not challenging the evaluation score.¹⁰⁷ By not challenging the evaluation score, and instead focusing on the maintenance schedule, J&S did not preserve any argument regarding the discretionary points. To the contrary, they appear to agree that it was

¹⁰⁴ *Bachner Co. v. Weed*, 315 P.3d 1184, 1193 (Alaska 2013).

¹⁰⁵ Hrg. 1:07:20, June 14, 2014. Tr. 346.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1:09:45.

reasonable. Even more so, it appears that J&S agrees that this was a far more favorable type of aircraft.

VI Conclusion

The evidence supports a finding that while Aero Air was operating on the 18/54 schedule, it was still eligible under the RFP. There are no apparent due process violations. The record is sufficient to support DNR's and the ALJ's findings. J&S had sufficient opportunity to build the record for his bias claim, but failed to do so. There is no apparent lack of expertise, either of the side of the ALJ or DNR. While the record does include places where bias could have occurred, there is not enough evidence in the record to support the finding. For these reasons the Decision of the ALJ below and the Division of Natural Resources is affirmed.

Dated this 10th day of October, 2016 at Fairbanks, Alaska

Signed _____
Ben A. Seekins
Superior Court Judge, Pro Tem

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