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

J&S SERVICES, INC.	)	
	)	
v.	)	
	)	
DEPARTMENT OF NATURAL RESOURCES	)	OAH No. 14-0472-PRO
	)	RFP No. 2014-1000-2257

DECISION

I. Introduction

After evaluating eight offers for the sale of a turbine-powered twin-engine aircraft, the Division of Forestry, in the Alaska Department of Natural Resources, purchased an aircraft offered by Aero Air, LLC. A disappointed offeror, J&S Services, Inc., filed an appeal, arguing that the engines on the aircraft the Division purchased did not meet the Division's specification for the time remaining before a major maintenance event would be required. The manufacturer of the engines, however, permitted the owner to choose between two different maintenance intervals. J&S's calculation that the time remaining was insufficient was based on the former owner's maintenance interval, but the Division evaluated all offers based on the interval that would be most favorable to the offeror. Under this methodology, the aircraft offered by Aero Air met the requirements for the procurement. Therefore, the Division did not make an error, and its rejection of J&S's protest is affirmed.

II. Facts

The Division of Forestry needs to have airplanes available when it fights forest fires. Although the Division in the past has sometimes leased planes to meet its needs, in 2012 it determined that its needs would be better met by buying two aircraft. Therefore, in November 2012, it issued a Request for Proposals (the 2012 RFP) to purchase two turbine-powered twin-engine aircraft. Only one plane was finally purchased through that procurement, however.[1] In

[1] J&S spent some time describing its view of the history of the November 2012 RFP. Jim Simko, the owner of J&S, testified that the reason only one plane was purchased under the 2012 RFP was because the Division spent an inordinate amount of time researching a plane located in South Africa, which it never purchased. That plane was offered by a broker named Aero Air, LLC., which is the same broker that was awarded the 2013 contract. As a result of the Division's delay in the 2012 RFP, J&S was unable to deliver the aircraft it had offered in 2012 (which was sold during the delay to a different buyer by a different broker) to the Division, even though that aircraft scored very highly under the 2012 RFP. For additional background on the 2012 RFP, see *J&S Services, Inc. v. Division of Forestry*, OAH No. 13-0340-PRO (Department of Administration 2013). For additional background on J&S's past

November 2013, the Division issued another Request for Proposals (the 2013 RFP) in order to purchase a second plane, and this second procurement is the subject of this appeal.[2] Four brokerage firms submitted proposals, offering a total of eight different aircraft.

J&S Services, Inc., is a broker that sells airplanes. J&S is located in Fairbanks, Alaska. Typically, a broker does not own the aircraft that it leases or sells, but acts as a middleman on behalf of the owner, which is what J&S did in submitting proposals in response to both the 2012 and the 2013 RFPs.

Aero Air, LLC., is also a broker that sells and leases aircraft. Aero Air is located in Oregon. It also submitted proposals in both 2012 and 2013.[3]

The November 2013 RFP described the requirements for the turbine-powered twin-engine aircraft that the Division sought. Section 7 of the RFP described the evaluation criteria and the number of points that would be awarded for each criterion. Cost and the Alaska offeror's preference accounted for 50 of the 100 total possible points.[4] Twenty points could be awarded for what was termed "Other Desired Specifications" under subsection 7.6. Subsection 7.6 listed twelve different desired features, including time remaining on specified components (other than the engine), communications capabilities, fuel capacity, general condition, and so on.[5] The twenty points awarded under this section were the only points that required the evaluators to use subjective judgment.

The remaining thirty points were all to be awarded based on the time remaining before two crucial engine maintenance procedures would have to be performed under the factory-recommended maintenance schedule for the engine. Under subsection 7.2, up to 10 points could be awarded for time remaining until the factory recommended overhaul of the left engine; under subsection 7.4, up to 10 points for the same criterion on the right engine. Any engine that had less than 100 hours of use since the last overhaul would receive 10 points; any engine that had less than 1000 hours remaining before the next overhaul would receive zero points.

Another crucial maintenance interval for a turbine engine is what is called the "hot-section inspection." A turbine engine has both a cold (compression) section and a hot

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experience with bias in the Division, see *J&S Services, Inc., v. Tomter and State, Dep't of Nat. Res.*, 139 P.3d 544 (Alaska 2006).

[2] Division Ex. 2 (RFP 2014-1000-2257) R. 2-39.

[3] Aero Air is also an operator and it was the operator of N83WA, the aircraft that was purchased as a result of the 2013 RFP.

[4] R. 29.

[5] *Id.*

(combustion) section. In-between doing a full engine overhaul, the hot section must be inspected on established intervals, to determine the condition of the components that are subject to extreme stress. A hot-section inspection is time-consuming and expensive. The engine must be removed from the aircraft, and the hot section of the engine sent to an approved facility for inspection.[6] Under subsection 7.3 of the 2013 RFP, up to five points could be awarded for a left engine that was within 100 hours of its last hot-section inspection; under subsection 7.5, up to five points could be awarded on the same criterion for a right engine. An engine that had 450 or fewer hours remaining before the next factory-recommended hot-section inspection was not responsive under section 5 (and would receive zero points on subsections 7.3 and 7.5).

This case concerns a complexity in the schedule for the hot-section inspection. The complexity is due to the fact that the manufacturer of the turbine engines involved in this dispute, Honeywell, allows the owner of the aircraft to choose between two different maintenance schedules. Under one schedule, the engine would be fully overhauled after 5,400 hours of use. Under that schedule, the engine would have two hot-section inspections, one at 1,800 hours, and one at 3,600 hours, during the interval between overhauls. Under the other maintenance schedule, the engine would be overhauled at 5,000 hours. Under the 5,000 hour-overhaul schedule, only one hot-section inspection is required—at 2,500 hours. The issue in dispute between the parties is whether the Division correctly evaluated the hot-section inspection times for the successful offer, aircraft N83WA.

To evaluate the proposals that it received in response to the November 2013 RFP, the Division appointed three division employees, Aircraft Supervisor Steve Elwell, Aircraft Maintenance Inspector Steve Edwards, and Chief Pilot Doug Burts, to a proposal evaluation committee. The committee awarded points for subsections 7.1-7.6 of the RFP. The Department's procurement officer, Marlys Hagen, awarded points for cost and the Alaska offeror's preference.

To award points for the two subsections on the hot-section inspection, 7.3 (left engine) and 7.5 (right engine), the committee needed a formula that was based on the hours of use since

[6] Elwell testimony. Steve Elwell is the aircraft supervisor for the Division. Another issue in aircraft maintenance is that parts have a "life limit," meaning that after a certain number of hours of use, the part must be replaced. A turbine engine has multiple turbine wheels—essentially miniature propellers that spin at a high rate of speed propelled by the hot gasses generated by the combustion. These wheels have a life limit that is not necessarily related to the hot-section inspection. Although the RFP did not have a category for scoring the life limit of the turbine wheels, the parties disputed whether it would make sense to replace the third-stage turbine wheels mid-cycle between hot-section inspections.

the last hot-section inspection. Mr. Edwards testified that he devised and applied the following formula to award points under subsections 7.3 and 7.5:

$$\#\text{ points} = 5 - \frac{H}{\left(\frac{x-450}{5}\right)}$$

Where: H = hours of use since the last hot-section inspection; and

x = factory recommended hours of use after the last hot-section inspection or overhaul before the next inspection or overhaul.[7]

If more than one value for x was possible (as was the case for N83WA, which would have been eligible for either an 1,800-hour hot-section inspection or a 2,500-hour hot-section inspection), Mr. Edwards selected the value for x that was most favorable to the offeror.[8] In practice, that meant that all aircraft would receive the benefit of the 2,500-hour hot-section inspection interval, unless that aircraft had already had at least one hot-section inspection at the 1,800-hour interval since its last overhaul.[9] That aircraft would be required to have either another inspection, or an overhaul, after the next 1,800 hours of use.

For the eight aircraft that were proposed under this RFP, Mr. Edwards evaluated only one aircraft using an x value of 1,800.[10] All other aircraft received the benefit of an x value of 2,500, without regard to whether the owner of the aircraft intended or had elected a maintenance schedule under which the owner's mechanics would have conducted a hot-section inspection at 1,800 hours if the aircraft had not been sold.

Mr. Edwards testified, however, that when he reviewed the data in preparation for the hearing in this case, he discovered an error his calculations. The aircraft offered by J&S,

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[7] Edwards testimony; Exhibit 18. The formula was derived based on Mr. Edwards's testimony and Exhibit 18. Under this formula, the term $\left(\frac{x-450}{5}\right)$ (the divisor of H in the formula) represented the number of hours of use that would result in the loss of one point. For the Honeywell engines at issue here, the value of x (the maximum number of hours that an aircraft could go between hot-section inspections) would be either 2,500 or 1,800 hours, depending on which maintenance schedule applied. For an engine on a 2,500-hour hot-section inspection schedule, the result of $\left(\frac{x-450}{5}\right)$ was 410; for an engine on the 1,800 hour inspection schedule, the result was 270. The formula was designed so that an engine on an 1,800 hour hot-section inspection schedule with 1,350 hours of use since the last hot-section inspection would get zero points, and an engine on the 2,500 hour schedule with 2,050 hours would get zero points. Edwards testimony.

[8] Edwards testimony.

[9] Apparently, all eight of the aircraft had Honeywell engines with the same maintenance intervals. Although the two maintenance interval options could have been taken into account in subsections 7.2 and 7.4, it appears that under those subsections the Division awarded points based on time since the last overhaul, and did not take the complexity regarding the time remaining until the next overhaul into account. Exhibit 18. That issue is not part of this appeal, however, and no testimony on that issue was offered.

[10] Exhibit 18.

N840TC, should have been given an *x* value of 1,800 because it had already had a hot-section inspection at 1,800 hours. Mr. Edwards, however, mistakenly plugged 2,500 hours in as the value of *x* for N840TC.[11] This meant that the procurement scoring had an error of 0.4 points in J&S's favor.

After totaling up the scores for the eight different aircraft on all subsections, the highest scoring aircraft was Aero Air's N83WA, with 68.8 points. The next aircraft was J&S's N840TC with 68.6 points.[12] On January 9, 2014, the Division issued a notice of its intent to award the contract to Aero Air. J&S filed a protest on January 21, 2014. J&S argued that the successful aircraft, N83WA, was nonresponsive because it was under the 5,400-hour overhaul interval, making the 1,800-hour hot-section inspection interval mandatory, and at the time of delivery, N83WA would have less than 450 hours remaining for a hot-section inspection.[13] The procurement officer denied the protest on February 5, 2014, finding that under Honeywell's specifications for the engine, the operator can choose either the 5,000-hour overhaul interval or the 5,400-hour overhaul interval at any time up until 1,800 hours of operation has been reached.[14]

On January 29, 2014, the Division issued a contract to Aero Air for the purchase of N83WA. On February 21, 2014, J&S filed an appeal of the procurement officer's decision, and a request for a stay.[15] The appeal was referred to the Office of Administrative Hearings for a hearing. During pre-hearing proceedings, J&S filed three motions, one asking that Mr. Simko's partner, Brian Kilcullen of Skynight Air, have equal standing, one asking that the stay be granted, and one requesting discovery of the names of every employee in the Division. The motion for equal standing was granted to the extent that Mr. Kilcullen was allowed to assist Mr. Simko in presenting his case.[16] The motion for stay was denied because the Division had already purchased (and taken delivery of) the aircraft.[17] The motion for discovery was denied as untimely and not appropriate for these proceedings.[18]

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[11] Edwards testimony. N840TC's engines had already had one hot-section inspection at 1,800 hours since the last overhaul.
[12] R. 188.
[13] R. 190-92.
[14] R. 194.
[15] R. 208.
[16] *See* Order on Motions (May 29, 2014).
[17] *Id*.
[18] *Id*.

A telephonic hearing was held on June 12 and 16, 2014. Mr. Simko and Mr. Kilcullen presented the case for J&S. AAG Rachel Witty presented the case for the Division. After the hearing, the record was held open for submission of supplemental exhibits, including the operation specifications of N83WA. Closing arguments were heard on July 7, 2014.

III. Discussion

J&S argues that N83WA was not responsive under subsection 5.2 of the RFP, which required that, at the time of delivery, each engine have a minimum of 450 hours remaining until the next hot-section inspection. J&S's argument unfolds as follows:

- The FAA required that N83WA's previous owner/operator be under an approved maintenance schedule;
- N83WA's previous owner/operator had elected to have N83WA be maintained on the 5,400-hour overhaul/1,800 hour hot-section inspection schedule;
- Although the owner/operator could change to the 5,000-hour schedule at any time up until 1,800 hours were reached, the previous owner/operator had not changed the maintenance schedule;
- Therefore, in J&S's view, at the time of the sale, and at the time of delivery, N83WA was required to have a hot-section inspection at 1,800 hours;
- At the time of delivery, N83WA's engines had 1474.8 hours of use since the last hot-section inspection, leaving only 325.2 hours to reach 1,800 (and 425.2 to reach 1,900, the level allowed by Honeywell under a 100-hour grace period);
- Therefore, even taking into account Honeywell's allowance of a 100-hour grace period (meaning the engine would not be out of compliance until it reached 1,900 hours), NW83WA failed the 450-hour-to-next-hot-section-inspection requirement of subsection 5.2.

The Division contests J&S's underlying assumptions that the previous owner had "elected" any maintenance schedule. Even if such an election had been made, the Division argues that the previous owner's election would not be relevant. The parties' arguments are discussed below.

A. Did the previous owner/operator elect to have N83WA on a 5,400-hour overhaul/1,800-hour hot-section inspection schedule?

The Division disputes the premise to J&S's argument. It argues that J&S has not proved that the previous owner/operator was required to have selected a maintenance schedule for its engines. The Division cites to Honeywell documents that clearly allow an owner to select either the 5,400 or the 5,000 hour overhaul maintenance schedule.

Mr. Kilcullen testified, however, that when N83WA was being used as an air taxi regulated under "Part 135" of the FAA's regulations, the owner/operator would have been required to have a maintenance schedule for the aircraft.[19] Mr. Kilcullen's testimony was credible. He had experience as a Part 135 operator, and he was very knowledgeable about aircraft and aircraft maintenance.[20] In addition, the documents in the record show that the previous owner/operator had considered N83WA's engines to be under the 5,400-hour overhaul/1,800-hour hot-section inspection schedule.[21] Therefore, J&S has established the threshold premise for its argument: that for N83WA's previous owner/operator, N83WA's engines were on a 5,400-hour overhaul/1,800-hour maintenance schedule at the time of sale and delivery of the aircraft.[22] This decision turns next to the Division's assertion that the previous owner/operator's maintenance schedule is not relevant to this procurement.

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[19] The fact that N83WA was formerly regulated under Part 135 came up frequently in the hearing. Although no in-depth definition of the term was provided, Mr. Kilcullen and Mr. Burts explained that a commercial nonscheduled air taxi or charter operator would be regulated under Part 135. A quick review of Federal Aviation Administration regulations provides some support for Mr. Kilcullen's explanation of federal requirements. *See, e.g.*, 14 C.F.R. § 91.403(c) (requiring that a Part 135 operator adhere to inspection intervals set by the manufacturer or in operations specifications approved by the FAA). An in-depth review of FAA regulations is beyond the scope of this decision, however, and this decision will not purport to interpret aviation laws or requirements. Accepting Mr. Kilcullen's representation that FAA regulations require the previous owner/operator to have selected a maintenance schedule, as this decision does, does not result in an outcome in J&S's favor.

[20] Mr. Kilcullen was forthright in admitting facts that were not in his favor and he did not shade or spin his testimony. For example, he readily admitted that N83WA was superior to N840TC for purposes of the subjective criteria scored under subsection 7.6 of the RFP. Kilcullen testimony.

[21] *See* Exhibit A to Ralston Affidavit (Exhibit 16) (Operation Specifications for N83WA); Ralston Affidavit ¶¶ 7, 10 (engines configured for 5,400 hour overhaul/1,800 hour hot-section inspection; would take change in operation specifications to effect the 5,000 hour overhaul/1,800 hour hot-section inspection option).

[22] J&S also makes a good argument that the condition of the third-stage turbine wheels—which were close to their life-limit and would need to be replaced long before a 2,500 hour hot-section inspection—adds weight to the conclusion that N83WA was on an 1,800 hour interval. The RFP itself does not, however, address the life limits of the turbine wheels as a matter that could be considered in evaluating the aircraft, so the committee was not required to, and did not, address this issue. Interestingly, Aero Air's proposal did address the third-stage wheels, offering to replace them and the windshield for an extra $100,000. R.36-37. This might have opened the door to allow the committee to consider the issue, but because the issue was not part of the RFP, the committee did not err by not considering it.

B. Is the previous owner's maintenance schedule relevant to this procurement?

For the following reasons, the Division is correct that the previous owner's maintenance schedule is not relevant to this procurement:

- The language of the RFP makes clear that the time requirements for the next hot-section inspection were to be based on "time remaining until ***factory recommended*** hot-section inspection."[23] It did not say "time remaining based on a maintenance schedule selected by previous owner." Therefore, the only relevant consideration is the factory recommendation, which all parties agreed allows for either the 5,400/1,800 configuration or the 5,000/2,500 configuration. The RFP is not ambiguous and provides no reason to give consideration to what the previous owner had selected.
- Regardless of what is required for a Part 135 owner/operator, all parties agreed that the Division is not governed by Part 135. Therefore, the previous owner/operator's election under Part 135 is not relevant.
- J&S Services's argument requires a "magic moment" event: In its view, at the moment of transfer, N83WA was under the previous owner's maintenance schedule. Therefore, it concludes, N83WA, at the moment of delivery, was not responsive under the RFP, even though after the Division took title, the previous owner/operator's maintenance schedule no longer applied. This formal analysis, however, is not persuasive. Given that the previous owner/operator's maintenance schedule was nonoperative the moment the Division took title, trying to determine what maintenance schedule was in place at the precise moment of delivery is a metaphysical exercise of no consequence.[24] In short,

[23] R. 28-29 (§§ 7.3, 7.5 of RFP) (emphasis added).

[24] At the hearing, it was revealed that the Division had not yet determined what hot-section inspection interval it would employ for its new aircraft. Elwell, Edwards testimony. Although the Division had expected to use the 5,000-hour overhaul schedule, it was negotiating with the FAA and Honeywell for a 7,000-hour overhaul schedule. J&S believes that this information proved that the 5,400-hour overhaul schedule was the *only* schedule and that the 1,800-hour hot-section inspection interval had to be employed in the responsiveness analysis. But the previous owner/operator's schedule still was not applicable or binding after the Division took title, so absent a "magic moment" effect, the 1,800 schedule was merely one of two (or perhaps now three) options available to the Division. Because this decision rejects the "magic moment" approach (and for the other reasons described in the text) the previous owner's maintenance schedule remains irrelevant in spite of the fact that the Division has not yet determined a maintenance schedule.

J&S's argument is rejected because it would elevate form over substance.[25]

In sum, under the RFP, the Division was allowed to consider any maintenance schedule allowed under factory recommendations. It was not locked into the schedule selected by the previous owner. Therefore, Aero Air's offer of N83WA was responsive at the time of delivery.

C. Did the Division err by not informing offerors that it would consider the maintenance schedule most favorable to the offeror in evaluating offers?

J&S correctly argues that it had no way of knowing that the Division would award points under subsections 7.3 and 7.5 based on the hot-section inspection schedule most favorable to the offeror. Although the RFP makes clear that the factory recommendation will control, the RFP does not specify how the Division would choose between different available factory recommendations. In addition, the RFP did not explain that points would be awarded under the formula devised by Mr. Edwards. For the following reasons, however, this omission from the RFP is not grounds for ruling against the Division:

- Under AS 36.30.565, this argument is not timely. The potential ambiguity is contained in the structure of the RFP. An offeror must bring such ambiguities to the attention of the Division at least 10 days before the proposal is due.[26] That would have given the Division time to cure the ambiguity for all offerors. Although J&S argues that it had no way of knowing that the Division would even consider such an approach until it saw the evaluation form, in fact, the RFP makes clear that points for hot-section inspection time would be awarded based on the factory recommended hot-section inspection intervals. Because J&S knew that Honeywell allowed two different inspection intervals, it knew, or should have known, that a potential ambiguity existed for an engine that would be eligible for more than one factory-recommended interval, at the option of the new owner.[27]

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[25] *Cf., e.g., Laidlaw Transit, Inc. v. Anchorage School Dist.*, 118 P.3d 1018, 1033 (Alaska 2005) ("[u]nder the circumstances presented here, rigid enforcement of this requirement would have elevated form over substance, frustrating the district's and the regulation's clear intent to create a competitive bidding process"); *Solomon v. Interior Regional Housing Authority*, 140 P.3d 882, 885 (Alaska 2006) (rejecting argument that "case turns on mere inclusion of a boilerplate sentence in Solomon's appeal" because to bar "claims for something so ministerial, we believe, would be an unnecessary exaltation of form over substance").

[26] AS 36.30.565.

[27] *Cf., e.g., Right! Systems, Inc. v. Enterprise Tech. Systems*, OAH No. 12-0008-PRO at 3 (Department of Administration 2012) (good cause for delay in filing protest not found because plainly stated language in procurement documents sufficient to alert offeror of possible ambiguity).

Therefore, J&S did not have good cause for failing to timely file its protest regarding the ambiguity in the RFP.

- Even if the issue were timely, J&S was not harmed by the omission in the RFP of a more precise explanation of how the hot-section inspection interval would be determined. The formula was fair and even-handed. Mr. Edwards applied the same formula to all offers, and all offers received the benefit of being evaluated under the inspection interval most favorable to the offeror. Although J&S argued that, if it had known in advance how the formula was to be applied, it might have offered other aircraft, this assertion is speculative—J&S did not identify any aircraft that but for this omission it would have offered, and that was not the basis of this protest and appeal.

D. Was the committee biased in favor of Aero Air?

J&S argues that the only reasonable explanation for the outcome in this procurement and the 2012 procurement is that the Division is biased in favor of Aero Air. In particular, J&S focuses on the 2012 procurement, and its view that it lost the sale of the best aircraft offered under that procurement because of what it believes was the Division's unconscionable delay while investigating Aero Air's offer.

With regard to the 2013 procurement, however, J&S did not come forward with any evidence of bias. "In the absence of any evidence of bias or prejudgment, procurement officials are presumed to act in good faith and to exercise honest and impartial judgment. To overcome the presumption, a protestor must provide direct evidence of actual bias or prejudgment, rather than speculation."[28]

Here, the points awarded for the issue in dispute—time remaining before the next hot-section inspection—were determined by formula. The only subjective area in which bias could have been manifested was "Other Desired Specifications" under subsection 7.6. Mr. Kilcullen testified on behalf of J&S, however, that J&S did not disagree with the distribution of points or exercise of judgment under that subsection. Moreover, in this procurement, J&S came within a hair's breadth of prevailing—the evaluation summary in the record shows that J&S was within

[28] *North Pacific Erectors, Inc. v. Division of Gen. Servs.*, OAH No. 11-0061-PRO at 14 (Department of Transportation and Public Development 2011) (citing *Bruner v. Petersen*, 944 P.2d 43, 49 (Alaska 1997); *Earth Resources v. State, Department of Revenue*, 665 P. 2d 960, 962 n. 1 (Alaska 1983)).

two-tenths of the successful offer.[29] Given that the committee did not know how cost would affect the scoring at the time that it was awarding points, having scores be this close would tend to refute an assertion that scores were skewed by bias. In short, the evidence supports an inference that the 2013 procurement was free from bias. No evidence rebuts the presumption that the public officers serving on the committee acted impartially.[30] Accordingly, J&S has not met its burden to prove actual bias.

E. Did the procurement officer abuse her discretion by not granting a stay?

Under AS 36.30.575, after a protest is filed, a procurement officer may stay an award. J&S argued that the procurement officer abused her discretion by not staying the award of the contract to Aero Air. The Division argues that J&S did not preserve this issue because J&S did not request a stay until an appeal was filed with the commissioner after the protest was denied. At that time, the contract award had already been made.

J&S is correct that the procurement officer could have stayed the award after receiving the protest, without regard to whether J&S requested a stay. The Division is correct, however, that this issue is moot. The contract has been awarded, and, as this decision shows, J&S's appeal is not persuasive. The issue is moot because a decision on the issue will make no difference to the outcome.[31]

IV. Conclusion

J&S has not met its burden of proving that the Division made an error in the 2013 RFP (RFP 2014-1000-2257). In awarding points for the time remaining before the next hot-section inspection, the Division followed the express terms of the RFP, and awarded points based on the manufacturer's recommended hot-section inspection interval. Under the terms of the RFP, the interval chosen by the previous owner/operator did not matter. The Division's award of points for this criterion was based on an objective formula and all offers were treated the same—each offer was given the benefit of the most favorable schedule available under the manufacturer's recommendations. To the extent that J&S was alleging that the Division's failure to describe in

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[29] R. 188. The closeness of the points, Mr. Kilcullen's concession that the points awarded under "other desired specifications" were appropriate, and Mr. Edward's testimony that the same formulae were applied to all aircraft refute J&S's arguments that the procurement was a sham and that the Division merely identified its favorite aircraft and then bought it.

[30] With regard to the 2012 procurement, that matter is over and not at issue. Although collateral issues such as a previous procurement could be relevant to the issue of bias, here, where the protestor has not made a *prima facie* case of bias in this procurement, detailed inquiry into a past event would not be allowed.

[31] *See, e.g., Tsuru Maritime v. Dep't of Env. Cons.*, OAH Nos. 10-0620-PRO; 10-0633-PRO at 3 (Department of Administration 2011) (issue in procurement appeal is moot if decision would make no difference to outcome).

the RFP how it would evaluate this criterion was error, that allegation is not timely and J&S has not shown any prejudice from the omission. Finally, J&S has not overcome the presumption that Division personnel were impartial, and the issue of whether a stay should have been granted is moot. Accordingly, the Division's denial of J&S's protest is affirmed.

DATED this 21st day of July, 2014.

Signed
Stephen C. Slotnick
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. 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 Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 22nd day of August, 2014.

By: *Signed*
Signature
Curtis Thayer
Name
Commissioner
Title

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