

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

SEWARD SHIP'S DRYDOCK INC., )  
 )  
 Plaintiff, )  
 v. )  
 )  
 STATE OF ALASKA, )  
 )  
 Defendant, )  
 )  
 \_\_\_\_\_ ) Case No. 3AN-14-10878 CI

**ORDER REGARDING PENDING MOTIONS**

**I. INTRODUCTION**

Seward Ship's Drydock Inc. (SSD) has a construction contract appeal currently pending before the Office of the Administrative Hearings (OAH). Pending before this court are several motions: (1) SSD's *Motion for Preliminary Injunction*, wherein SSD asks this court to enjoin further OAH proceedings and enjoin DOT from referring the appeal to OAH; (2) the Commissioner of the Department of Transportation and Public Facilities' (Commissioner) *Motion to Dismiss SSD's Complaint*; and (3) SSD's *Motion to File First Amended Complaint*.

The court held oral argument on the pending motions on April 13, 2016. On May 11, 2016, the court requested the parties to submit additional briefing on several legal questions related to the issue of jurisdiction. The parties submitted the requested briefing in late May.

As discussed below, this court finds that OAH does have jurisdiction in this matter. The court also rejects SSD's equitable estoppel and due process arguments.

## II. JURISDICTION

Boiled down to its essence, SSD's position is that AS 44.64.030(a)(25) explicitly carves out construction contract claim appeals from OAH's mandatory jurisdiction, and thus OAH lacks jurisdiction over SSD's appeal. The Commissioner, on the other hand, believes that while OAH is not required to hear such appeals, it may agree to hear them under AS 44.64.030(b).

AS 44.64.030 does expressly remove construction contract claim appeals under AS 36.30.72(a)(2) from OAH's mandatory jurisdiction. Specifically, AS 44.64.030 sets out 50 different types of matters over which OAH has mandatory jurisdiction, but the 25<sup>th</sup> item listed in subsection (a) excludes appeals such as SSD's: "The [OAH] shall conduct all adjudicative administrative hearings required under the following statutes or under regulations to implement the statutes ... (25) AS 36.30 (State Procurement Code), other than AS 36.30.627(a)(2)." SSD recognizes that "an agency may request the [OAH] to conduct an administrative hearing ... under statutes not listed in (a) of this section" but believes that AS 36.30.627(a)(2) is "listed" under subsection (a) and thus cannot be the subject of an agreement for OAH to hear the appeal.

For his part, the Commissioner does not believe that subsection (b) should be interpreted to prohibit OAH from exercising permissive jurisdiction over any matter. Rather, if a particular hearing is not included in OAH's mandatory jurisdiction under

subsection (a), then it is not “listed” for purposes of subsection (b). In other words, “listed” does not include every statute referenced, regardless of how, in the AS 44.64.030(a)(1)-(5). Instead, “listed” refers to those hearings included in the list of hearings that OAH must conduct under subsection (a).

The court concludes that AS 36.30.627(a)(2) is not “listed” in AS 44.64.030(a) as the term “listed” is used in subsection (b). Rather, AS 36.40.627(a)(2) is excepted from the list. Specifically, subsection (a) requires the OAH to conduct “all adjudicative administrative hearings” under the listed statutes. Thus, matters included in the list should be automatically referred to OAH. The exceptions from the list, including AS 36.30.627(a)(2), do not fall under the OAH’s mandatory authority. In other words, the exceptions signal that Legislature did not mean to include certain types of proceeding in the “list” of matters that OAH must hear. In AS 44.64.030, as in most other contexts, “except” means “not including.”

The court’s inquiry does not end with interpreting AS 44.64.030(a) and (b). It is also important to recognize that AS 36.30.670, a provision of the Procurement Code, appears to require OAH to conduct all hearings relating to construction contract claim appeals under AS 36.30.627(a)(2), thereby conflicting with the Commissioner’s position that OAH has discretionary – as opposed to mandatory – jurisdiction over appeals such as SSD’s matter. This would also conflict with AS 44.64.030(a), which explicitly carves out appeals arising under AS 36.30.627(a)(2) from OAH’s mandatory jurisdiction.

The court notes that the statutes were all either enacted or amended at the same time,<sup>1</sup> and they deal with the same subject. Accordingly, the statutes are to be construed in *pari materia* and interpreted together.<sup>2</sup> Moreover, where one statute deals with a subject in general terms, and another statute deals with a part of the same subject in a more detailed way, the two should be harmonized if possible. If there is a conflict, the more detailed statute will prevail over the general regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.<sup>3</sup>

Here, AS 44.64.030(a) is the specific statute that establishes OAH's jurisdiction while AS 36.30.670 is a general procurement code procedural statute. As the more detailed statute, the court finds AS 44.64.030 governs on the question of OAH's jurisdiction to hear the underlying construction claim appeal. Accordingly, the court believes that the Commissioner has discretion to refer construction contract claim appeals to OAH pursuant to the authority granted to it by AS 44.64.030.

In sum, though construction contract claim appeals are excluded from the mandatory OAH jurisdiction under AS 44.64.030(a), AS 44.64.030(b)<sup>4</sup> gives the

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<sup>1</sup> AS 36.30.627 was adopted in 2003, AS 36.30.620 was amended in 2003, AS 44.64.030 was adopted in 2004.

<sup>2</sup> See *Peters vs. State*, 949 P.2d 418, 420 (Alaska 1997).

<sup>3</sup> *State, Dep't of Highways v. Green*, 586 P.2d 595, 602 (Alaska 1978) (quoting 2A Sutherland Statutory Construction sec 51.05 at 315 (4th ed. 1973)).

<sup>4</sup> An agency **may** request the office to conduct an administrative hearing or other proceeding of that agency or to conduct several administrative hearings or other proceedings under statutes not listed in (a) of this section. The office may provide the Order Regarding Pending Motions

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Commissioner the discretion to request OAH to conduct administrative hearings on construction contract claim appeals.

### III. DUE PROCESS AND EQUITABLE ESTOPPEL

Even if OAH lacks jurisdiction, SSD argues that it is entitled to have a private hearing officer conduct the administrative hearing based on due process and equitable estoppel concerns. Specifically, SSD contends that the OAH process is an inappropriate and unfair one. SSD also emphasizes that, historically, the Commissioner has referred these types of appeals to a private hearing officer, and that the Assistant Attorney General (AAG) originally assigned to this matter actually filed a joint request with SSD on behalf of Alaska Marine Highway System (AMHS) to have this appeal heard by a private hearing officer. Indeed, denial of the request surprised both the AAG/AMHS and SSD.

The basic elements of due process in an administrative hearing are notice, an opportunity to be heard by an impartial decision maker, and a sufficient record to allow for judicial review.<sup>5</sup>

Here, the court agrees with the Commissioner that SSD will be afforded due process. ALJ Slotnick has over 20 years of experience in administrative law, including significant experience in public procurement. He also has 20 months' plus experience in serving as a neutral decision-maker in administrative hearing and has attending trainings

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service after entering into a written agreement with the agency describing the services to be provided and providing for reimbursement by the agency to the office of the costs incurred by the office in providing the services. (emphasis added).

<sup>5</sup> See, e.g., *State of Alaska v. Ludgren Pac. Const. Co., Inc.*, 603 P.2d 889, 892 (Alaska 1979).

from the National Judicial Council in conducting administrative hearings. There is no reason to believe that ALJ Slotnick cannot competently hear and decide SSD's construction contract appeal.

Moreover, due process claims are typically raised *after* a proceeding when a party believes that the process did not meet due process requirements. If, after conclusion of the hearing, SSD believes that a due process violation has occurred, SSD may pursue relief.

As for SSD's equitable estoppel argument, SSD must prove that: (1) the agency asserted a position; (2) SSD reasonably relied on the agency's assertion of that position; (3) SSD was harmed by its reliance on that position; and (4) estopping the agency from taking a contrary position is in the public interest.<sup>6</sup> SSD is required to prove all four elements.

In this matter, the court does not believe that SSD suffered prejudice or harm as a result of the Commissioner's decision to refer the matter to OAH. Prejudice is a denial of or a detriment to an identifiable interest that a person holds, not just a disappointment that the person's preferred process was not selected. The department has discretion to refer the case to OAH or to appoint a private party to serve as a hearing officer. There is no right or identifiable interest in having the underlying matter heard by a private hearing

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<sup>6</sup> *State, Dep't of Comm. and Eco. Dev. v. Schnell*, 8 P.3d 351, 356 (Alaska 2000.)  
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officer. The department choosing to exercise its statutory discretion in a manner that was not SSD's preferred form process does not constitute prejudice or harm to SSD.<sup>7</sup>


The applicable statutes give the agency discretion to appoint a private hearing officer or to refer the matter to OAH. The past practice of the Commissioner to appoint a private hearing officer does not establish a right to have this form of process in future matters, and neither does a recommendation from the AAG that the Commissioner do so.

### I. CONCLUSION

Based on the above, this court grants the Commissioner's motion to dismiss, denies SSD's motion for preliminary injunction, and deems SSD's motion to amend moot.


IT IS SO ORDERED.

DATED at Anchorage, Alaska this 28 July 2016.

  
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Dani Crosby  
Superior Court Judge

I certify that on July 28, 2016 a copy of the above was mailed to each of the following at their address of record:

Baker  
LaPorte  
Graz  
Welsh  
Gustafson

  
Marta Matthews-Klingebiel, Judicial Assistant

<sup>7</sup> See, e.g., *Exxon Corp. v. State*, 40 P.2d 786, 798-700 (Alaska 2001) ("Exxon has not been prejudiced by the department's use of its discretion to deny the expansion to the PBU. Thus, estoppel does not apply here.").