

AAC 64.120 to refer the case to OAH.¹ Without two pending proceedings to consolidate, consolidation is not an available procedural tool.

As to intervention, the July 24 order should not be construed as a ruling that intervention can never be permitted in a procurement proceeding. The order should be understood to hold that a party in Peterkin's position has no *right* to intervention. Permissive intervention, while possible in an appropriate case, is a matter of discretion, and the order exercises that discretion to deny intervention based on the procedural and factual circumstances.

B. Circumventing Appeal

Peterkin complains that the July 24 order is "premised on the mistaken belief that Peterkin's Motion represents an improper attempt to circumvent the protest and appeal procedure." The order did not claim that Peterkin's effort was improper. Instead, it simply observed that there is an appeal process available to Peterkin and, since Peterkin has not advanced very far in that process, it is not, in the view of this tribunal, a good candidate to join another protester's fully ripe appeal.

In denying that it is improperly circumventing appeal procedures, Peterkin has argued factually that it did properly perfect an appeal of its own.² This argument only accentuates the divergent factual and procedural elements of the Peterkin and Quality claims. To import Peterkin's claim into the Quality case would add issues not present in the Quality matter, such as the sufficiency of Peterkin's appeal under AS 36.30.625 and the lack of a protest report.

C. Compelling Reason

Peterkin contends that the July 24 order failed to recognize that Peterkin has a compelling reason to intervene. Peterkin says that intervention will "expedite and simplify" consideration of the issues and "eliminate the cost of duplicative efforts." This argument is difficult to credit, given that the Quality appeal is fully ripe for decision, with the record closed and the drafting of a proposed decision underway. It seems more efficient for Peterkin to seek, independent of the Quality action, to resolve the status of its own purported May 22 appeal. In the meantime, the

¹ If it is true, as Peterkin may allege, that an appeal was duly initiated and was ignored by Department of Corrections staff or by others in the executive branch, Peterkin may have a remedy with the Commissioner of Corrections, with the Commissioner of Administration (*see* AS 36.30.005), with the Chief Procurement Officer (*see* AS 36.30.010), or with the Superior Court (*see* AS 44.64.060(b)). It would not have a remedy with OAH for a failure to refer an appeal. OAH has not been empowered to reach out and take jurisdiction over unrefereed matters.

² Peterkin's assertion that the department "did not offer any evidence to the contrary" is slightly unfair, as Peterkin did not raise the issue of its prior appeal until its reply brief.

Quality appeal will likely be resolved, and if Peterkin does prove to have a live appeal pending, the resolution of the similar case may permit Peterkin's case to be decided very efficiently.

D. Conclusion

For the reasons outlined above, the motion for reconsideration is denied.

DATED this 28th day of July, 2006.

By: Signed
Christopher Kennedy
Administrative Law Judge

Certificate of Service: The Undersigned certifies that on the 28th day of July, 2006, at _____ .m., a true and correct copy of this **document** was faxed and mailed to the following: Carolyn Y. Heyman-Layne, counsel for Peterkin Distributors; John Burns, counsel for Peterkin and Quality Sales Foodservice; Jack Gregson, Department of Corrections; and Marjorie Vandor, Assistant Attorney General.

By: _____
Linda Schwass

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