

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

FOX SYSTEMS, INC., )

v. )

DEPARTMENT OF HEALTH & )  
SOCIAL SERVICES. )

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) OAH No. 07-0594-PRO  
) RFP No. 2007-0600-6529  
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**RULING ON MOTION FOR STAY OF CONTRACT AWARD**

Following some discussion in a case planning conference held this date, this is the administrative law judge’s final ruling on the Motion for Stay of Contract Award filed by Fox Systems, Inc. at the end of the day on October 12, 2007. Because very limited time has been available to entertain the motion, the rulings on legal issues made here should not be regarded as precedent for future procurement appeals in which fuller briefing and consideration may be possible.

*A. Waiver*

DHSS has argued that Fox Systems waived any right to seek a stay by neglecting to include the request in its initial protest on August 24 or its appeal on September 20.<sup>1</sup> Certainly, Fox Systems waived its opportunity to have a stay put in place at that time, and took the risk that the award would proceed in the ensuing weeks. That said, nothing in AS 36.30 nor its implementing regulations provides adequate support for so unforgiving a process that a party who has omitted to ask for a stay at the outset cannot later seek one. AS 36.30.560(5) requires the initial protest to state the “form of relief requested,” but a stay is an interim measure, not the ultimate relief a party seeks. Moreover, 2 AAC 12.670 mandates an “informal” hearing process; a strict waiver in this context would not be in the spirit of that regulation. Finally, AS 36.30.575 clearly does not limit the discretion of the procurement officer to impose a stay to situations where one has been requested at the outset of the protest; indeed, a stay could be imposed without any request at all, if the procurement officer felt one was advisable.

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<sup>1</sup> DHSS also asserts that Fox did not seek a stay on its own initiative even at the case planning conference, but rather “merely responded to an inquiry by the hearing officer.” DHSS Opp. at 2. A review of the recording of the conference confirms that DHSS is mistaken.

Delay in seeking a stay is not an automatic disqualification, but it may in some circumstances affect the discretion exercised on the merits of the stay request.

*B. Authority to Entertain Motion*

DHSS contends that a request for stay should be made in the first instance to the procurement officer; an ALJ's only authority with respect to a stay is to review the officer's decision.<sup>2</sup> DHSS is correct on this procedural point. In this case, however, the parties stipulated on the record to a telescoped procedure that would respect the procurement officer's authority without requiring two rounds of briefing. The procedure was that Fox Systems would move for a stay within this proceeding, that the procurement officer's position would be communicated in DHSS's response, and that the ALJ's decision on the motion would constitute a review of the procurement officer's decision, applying any appropriate deference.<sup>3</sup> The ALJ has proceeded with that stipulated procedure.

*C. Authority to Grant a Stay*

1. Commissioner's Authority

Qualis Health argues that the sole authority to grant a stay rests with the agency procurement officer. Under this view, AS 36.30.575 sets up the procurement officer's discretion to administer stay authority, and AS 36.30.600 reserves to the Commissioner of Administration the authority to vacate the *grant* a stay in appropriate circumstances. Since the legislature knew how to grant oversight to the commissioner—as demonstrated in section 600—but elected not to set up oversight authority with respect to *denials* of a stay, one can surmise that the legislature intended to make procurement officer decisions to deny a stay the final administrative action regarding the stay of a particular award. Moreover, this would explain why the legislature made it possible for procurement officers to award contracts before, or at the same time as, they took action on a protest,<sup>4</sup> thereby wholly mooting the issue of a stay before the commissioner could possibly exercise any review powers. This view of the statutory structure is plausible. Agencies would be free to proceed with awards in the face of a protest, subject to no oversight from the commissioner. Of course, because a wide range of remedies can be available even after the

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<sup>2</sup> DHSS Opp. at 5 (“Reviewing the decision of a procurement officer [regarding a stay] would be the role of this tribunal.”).

<sup>3</sup> Digital Recording of proceedings on October 12, 2007 at 20:00.

<sup>4</sup> See AS 36.30.570 – 580 (award can precede initial decision on protest).

award of a contract, an agency that proceeds with an award in the face of a potentially valid protest assumes a risk that the award may be canceled.<sup>5</sup>

The opposing view is that AS 36.30.005 gives the commissioner plenary authority over procurement except as specifically provided otherwise in the Procurement Code. That section transferred to the Commissioner of Administration all powers previously exercised by agencies in the procurement arena, and one of those earlier powers would presumably have been the power to review their own decisions to deny a stay. Moreover, a decision to deny a stay is arguably, in effect, a “proposed award of a contract,” which perhaps can itself be protested under AS 36.30.560. It has been argued that in challenging a denial of a stay a protester is merely amending its protest to encompass the additional issue created by the denial.

In the past, before OAH came into existence, the Commissioner of Administration and hearing officers employed by the commissioner leaned toward the second view. The commissioner issued stay orders on occasion.<sup>6</sup> The creation of OAH did not deprive the commissioner of any authority that may have rested with the commissioner in the past.

## 2. OAH Authority

Under OAH’s regulations, administrative law judges may grant stays only “as provided in a statute or regulation or upon delegation by the final decision-maker of authority to order a stay.”<sup>7</sup> If the Commissioner of Administration has authority to order a stay of award, that authority could be assigned to OAH by regulation or by delegation. This has not been done, however. As to statutes, there is only one that potentially gives OAH some jurisdiction over this area: AS 44.64.040 allows ALJ’s to “exercise the powers authorized by law for exercise by that agency . . . in connection with the hearing.”<sup>8</sup> Notably, however, these powers are only powers

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<sup>5</sup> Cf., e.g., *In re Aetna Life Insurance*, OAH No. 06-0230-PRO, Final Decision and Order, May 25, 2006, at 40 (“the division must live with the consequences of its own decisions” to deny a stay); *In re Bachner Co.*, Dept. of Administration Case Nos. 02.06/.07, Oct. 9, 2002, at 18-19 (“DGS, not the offerors or the court, bears primary responsibility for the conduct of a solicitation and for staying an award when appropriate . . . . DGS, rather than the protestors, bears primary responsibility for the current status of the procurement. In that light, to the extent this circumstance is relevant, it supports cancellation.”).

<sup>6</sup> See *In re Electronic Data Systems, Inc.*, Dept. of Administration No. 02.23, Dec. 27, 2002, at 3 (“[C]ounsel for DHSS wrote to counsel for EDS and advised that DHSS’ position was that no stay of the contract award had been granted. . . . EDS filed an appeal with the commissioner from the denial of a stay. By letter . . . the commissioner directed DHSS not to award the contract . . .”).

<sup>7</sup> 2 AAC 64.140.

<sup>8</sup> Rightly or wrongly, this was the basis for the ALJ’s interposition of a very short interim stay in this case. The reasoning was that since no award was to occur in the ordinary course of events for another two weeks, a brief stay would act only to prevent any decision to accelerate the award with the purpose of undermining the viability of the appeal process.

“in connection with the hearing.” The Procurement Code does not make consideration of a stay part of the hearing process.

Since there is currently no statute, regulation, or delegation bringing stay authority within the purview of OAH, OAH does not have authority to order a stay of award.

### 3. OAH Role in Commissioner Review of Stay

This case is before OAH through a referral from Commissioner Kreitzer signed October 1, 2007. The single matter referred was Fox’s September 20, 2007 appeal. Had that appeal either contested a prior denial of a stay or requested a stay in the first instance, the question of a stay would now be before OAH on referral, and OAH could consider the issue and *recommend* a decision to the commissioner. However, the question of a stay was not within the September 20 appeal letter. Accordingly, that question has not been referred to OAH.

Under these circumstances, if Fox wishes to obtain review of the procurement officer’s October 16, 2007 denial of a stay,<sup>9</sup> it must seek that review from the commissioner. If the commissioner believes she has authority to consider a stay (see Part C-1 above), she may entertain the request. The commissioner may elect to refer the stay issue to OAH (with or without a temporary stay to preserve the status quo while OAH considers the question of a longer stay), or may choose to act upon it on her own.

#### *D. Order*

The Motion for Stay of Contract Award filed by Fox Systems, Inc. on October 12, 2007 is denied. The denial is without prejudice to any rights Fox may have to seek a stay directly from the Commissioner of Administration.

DATED this 23<sup>rd</sup> day of October, 2007.

By: Signed \_\_\_\_\_  
Christopher Kennedy  
Administrative Law Judge

**Certificate of Service:** The Undersigned certifies that on the \_\_\_\_ day of \_\_\_\_\_, 2007, a true and correct copy of this **document** was **sent by pdf attachment** to the following: Max Garner (counsel for Fox Systems); Marne Woods (co-counsel for Fox Systems); Robert K. Stewart, Jr. (counsel for proposed intervenor Qualis Health); Marjorie Vandor, AAG; Linda Hulse, DHSS.

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

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<sup>9</sup> By stipulation, DHSS’s brief in response to the motion for a stay represents the procurement officer’s decision.