

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

BOWERS OFFICE PRODUCTS, INC. )

v. )

DIVISION OF GENERAL SERVICES )

OAH No. 13-0226-PRO

**NOTICE REGARDING PROPOSED ORDER**

Attached is the administrative law judge's proposed decision. Under AS 44.64.060, you have the right to file a "proposal for action" requesting that the final decisionmaker do one of the following:

1. adopt the proposed decision as the final agency decision;
2. return the case to the administrative law judge to take additional evidence or make additional findings or for other specific proceedings;
3. revise the proposed enforcement action, determination of best interests, order, award, remedy, sanction, penalty, or other disposition of the case;
4. reject, modify, or amend a factual finding;
5. reject, modify, or amend an interpretation or application of a statute or regulation.

If you wish to file a "proposal for action," the deadline is **July 1, 2013**. Submit your "proposed action" document to the Office of Administrative Hearings. You must give the reasons for the proposed action you request. If you request proposed action 4 above, you should identify which evidence in the record (for example, documents or testimony given to the administrative law judge) supports your request to change the factual finding(s).

You do not have to file a "proposal for action." The proposed decision will become final in 45 days from the date of this notice or when the final decisionmaker adopts it, whichever comes first.

DATED this 6<sup>th</sup> day of June, 2013.

The undersigned certifies that this is a true and correct copy of the original and that on this date an exact copy of the foregoing was provided to the following individuals:

Bowers  
Witty, AAG } mail  
cc: Commissioner Hultberg  
Jessica D. Eydell 6/5/13  
Signature Date

By: Jessica D. Eydell  
Office of Administrative Hearings  
550 West 7<sup>th</sup> Avenue, Suite 1940  
Anchorage, Alaska 99501

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**DECISION**

**I. Introduction**

The Division of General Services (DGS) decided to standardize office furniture used throughout the state as part of its office-space utilization plan. DGS reviewed furniture offered by four different manufactures, and determined that three of the manufacturers could provide standardized furniture that would meet DGS' needs. DGS then requested additional information and price discounts from the Alaska furniture dealers for those three manufactures.

After evaluating the information provided, DGS selected a dealer and manufacturer for each of three regions of the state. This turned out to be the same dealer and manufacturer for all three regions. Bowers Office Products, Inc. (Bowers) had submitted a proposal to supply furniture in the northern region from a different manufacturer. When Bowers was not selected, it filed a protest. DGS denied the protest, and Bowers appealed.

There were errors in selecting the dealer for the office furniture purchase. Accordingly, that selection must be cancelled. Any new selection must occur in compliance with the State Procurement Code.

**II. Facts**

DGS issued what it called a Request for Submissions (RFS) on November 23, 2012.<sup>1</sup> This RFS stated that the state was considering adopting office furniture standards, and that it intended future purchases to be from a single manufacturer. The RFS said that this purchase would be made through a prior office furniture contract established by the Western States Contracting Alliance (WSCA), and that three manufacturers had been identified as potential vendors.<sup>2</sup>

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<sup>1</sup> DGS 000082 (the agency record consists of pages DGS 000001 – 000333).

<sup>2</sup> DGS 000083.

Several furniture dealers raised concerns about the RFS. In response to some of those concerns, a revised RFS was issued on December 19, 2012.<sup>3</sup> The revised RFS still stated that purchase would be made through the WSCA office furniture contract.<sup>4</sup> Under the revised RFS, the state was divided into three geographical regions,<sup>5</sup> and one dealer would be selected for each region.<sup>6</sup> The three manufacturers of product that would meet the state's needs were identified by DGS as Allsteel, Herman Miller, and Steelcase.<sup>7</sup>

The RFS states,

Based on an analysis of various factors; a dealer will be selected for each region that is qualified and capable of providing the highest level of design, installation, contract administration, and project management services that are the most advantageous to the state.<sup>[8]</sup>

Dealers were encouraged to submit product pricing that provided an additional discount from the existing WSCA contract prices.<sup>9</sup> Submissions were to be evaluated on 1) price, 2) contract administration and management plans, 3) asset management and warehousing, and 4) resell/recycle/disposal plans.<sup>10</sup>

Bowers submitted a response to provide Allsteel furniture in the northern region.<sup>11</sup> Capital Office Supply submitted its response to supply Steelcase furniture in all three regions.<sup>12</sup> Other dealers also submitted responses, but those responses are not directly at issue in this protest appeal.

Capital Office was selected as the dealer for each of the three regions.<sup>13</sup> Bowers filed its protest of that selection.<sup>14</sup> DGS responded to that protest. DGS initially stated its position that

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<sup>3</sup> DGS 000133; Testimony of Tom Mayer.

<sup>4</sup> DGS 000134.

<sup>5</sup> DGS 000136 – 000137.

<sup>6</sup> DGS 000134.

<sup>7</sup> DGS 000134.

<sup>8</sup> DGS 000135.

<sup>9</sup> DGS 000139.

<sup>10</sup> DGS 000140 – 000142.

<sup>11</sup> DGS 000177. There was testimony at the hearing that Bowers intended to submit a joint proposal with other dealers, covering all three regions. However, its proposal did not indicate a joint request. The proposal form did not have any method of indicating a joint proposal, and the testimony was that Bowers did not know how to indicate its intent. However, Bowers did not contact DGS to ask how to submit a joint proposal, and on its face Bowers' proposal was only for the northern region. DGS had no way to know that Bowers intended anything different.

<sup>12</sup> DGS 000266.

<sup>13</sup> DGS 000300.

<sup>14</sup> DGS 000301.

Bowers had no protest rights.<sup>15</sup> DGS did, however, respond to each issue raised in Bowers' protest, and determined there was no basis to revise the selection or conduct a new selection process.<sup>16</sup> Bowers responded with an additional letter,<sup>17</sup> and DGS answered that letter stating, in part, that Bowers could file an appeal with the Commissioner of Administration.<sup>18</sup> Bowers did file an appeal, and that appeal was referred to the Office of Administrative Hearings to conduct a hearing.

### III. Discussion

#### A. *Bowers Has Protest Rights Under the Procurement Code*

DGS argues that it was simply choosing a vendor to provide furniture<sup>19</sup> and other services pursuant to an existing competitively bid contract. DGS argued that, since the RFS process was neither an Invitation to Bid pursuant to AS 36.30.100 – 190 nor a Request for Proposals pursuant to AS 36.30.200 – 270, the protest and appeal rights provided in the State Procurement Code do not apply. DGS also argued that the Master Agreement under the WSCA contract anticipated that individual states would enter into separate agreements with vendors as part of the WSCA contract, and that these separate agreements could expand on the WSCA requirements without violating the Master Agreement. However, this case is not about whether DGS' agreement with Capital Office violates the WSCA contract; it is about whether that agreement was entered into in compliance with the State Procurement Code. Nothing in the WSCA contract authorizes – or could authorize – individual states to ignore their own procurement codes.

Under Alaska law,

[e]xcept for small procurements made under AS 36.340.320, the provisions of AS 36.30.560 – 36.30.615 apply to a solicitation, a proposed contract award, and an award of a contract for supplies, services, professional services, or construction.<sup>[20]</sup>

An interested party may protest “the award of a contract, the proposed award of a contract, or a solicitation for supplies, services, professional services, or construction by an agency.”<sup>21</sup>

Steelcase was contractually bound to sell furniture, through its dealers, to DGS at the prices

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<sup>15</sup> DGS 000321

<sup>16</sup> DGS 000321 – 000325.

<sup>17</sup> DGS 000326.

<sup>18</sup> DGS 000332.

<sup>19</sup> DGS proposed purchasing furniture systems (cubicles) as well as chairs, desks, tables, and storage cabinets, which could be easily reconfigured and moved as office needs and staffing changed.

<sup>20</sup> AS 36.30.550.

<sup>21</sup> AS 36.30.560.

listed in its WSCA contract. DGS then solicited a new agreement with furniture dealers in Alaska. It asked those dealers to provide an additional discount from the WSCA prices, and also to provide additional services. Capital Office responded to that solicitation, and DGS accepted Capital Office's response as the most advantageous to the state. Capital Office is now legally obligated to provide furniture at a price different than provided for in the WSCA contract, and also legally obligated to provide additional services that are not included within the WSCA contract. That obligation is a contractual obligation that came about as a result of a solicitation. As an interested party, Bowers has the right to protest DGS' solicitation and contract award.

***B. Use of the WSCA Office Furniture Contract***

Cooperative purchasing agreements are an alternative procurement method that can save administrative time and money, and also result in more favorable prices.<sup>22</sup> Typically, a government agency will negotiate a contract with one or more vendors. Other participating government agencies are then allowed to take advantage of the negotiated price terms.<sup>23</sup>

The WSCA office furniture contract was created through a Request for Proposal issued by the State of Utah. The contract was intended to be awarded to multiple furniture manufacturers.<sup>24</sup> It was intended to include customer service, installation, and design services.<sup>25</sup> The products and services would then be provided to participating government entities by the manufacturer's authorized dealers.<sup>26</sup>

The WSCA contract also provides,

Each participating entity shall select the authorized dealer(s) they choose to do business with during the participating addendum process. A participating entity may require the authorized dealer(s) to submit additional information regarding their firm as part of the selection process during the execution of a participating addendum. This information could include, but is not limited to; business references, number of years in business, technical capabilities, and the experience of both their sales and installation personnel.<sup>[27]</sup>

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<sup>22</sup> See *Building Materials Corporation of America v. Board of Education of Baltimore County*, 53 A.3d 347, 352 (Md. 2012). Use of a cooperative purchasing agreement is still a "procurement" as that term is defined by AS 36.30.990(17).

<sup>23</sup> See *Alaska Structures, Inc. v. Department of General Services*, 979 A.2d 982, 991 (Pa. Commw. Ct. 2009).

<sup>24</sup> DGS 000004, WSCA contract §1.1.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

The price for furniture is stated as a percentage discount from the manufacturer's list price.<sup>28</sup> Installation of the furniture appears to be included in the furniture price.<sup>29</sup> Design services are an optional item. If offered by a manufacturer as part of this contract, the hourly rate is negotiated with each participating state.<sup>30</sup>

State law authorizes participation in cooperative purchasing.<sup>31</sup> Cooperative purchasing is defined as a procurement "conducted by, or on behalf of, more than one public procurement unit, or by a public procurement unit with an external procurement activity[.]"<sup>32</sup> DGS, as a division of the Department of Administration, is a public procurement unit.<sup>33</sup> Utah's Division of Purchasing and General Services, which established the WSCA contract,<sup>34</sup> is an external procurement activity.<sup>35</sup> Thus, DGS can participate in the WSCA contract at issue in this case.

### ***C. The Selection Process in This Case***

DGS didn't simply participate in the WSCA contract. In order to achieve a greater benefit for the state, it asked dealers for three of the four WSCA manufacturers if they would supply deeper discounts in exchange for the ability to meet DGS's furniture needs in one or more of the three regions. This was done through the RFS, a competitive process similar to what would be used in a Request for Proposals. One WSCA dealer was excluded from this process, as were all non-WSCA-participating dealers. Since those other dealers have not filed a protest, there is no need to decide in this case whether their exclusion was proper.<sup>36</sup>

It is necessary, however, to determine whether DGS complied with the procurement code in selecting Capital Office as its vendor for future furniture purchases. To the extent AS 36.30.700 authorizes DGS to participate<sup>37</sup> in the competitively bid WSCA contract, DGS cannot materially alter the terms of that contract without following the requirements of the procurement

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<sup>28</sup> DGS 000007, WSCA contract §1.9.

<sup>29</sup> DGS 000019, WSCA contract §3.12.

<sup>30</sup> DGS 000020, WSCA contract §3.13.

<sup>31</sup> AS 36.30.700.

<sup>32</sup> AS 36.30.790(1).

<sup>33</sup> AS 36.30.790(4) & (5).

<sup>34</sup> See DGS 000001.

<sup>35</sup> AS 36.30.790(2) (defining "external procurement activity" as a buying organization that would qualify as a public procurement unit if it were located in Alaska).

<sup>36</sup> The RFS specifically stated that protests would not be allowed. DGS 000139. As stated above, interested parties do have protest rights. Whether the statement in the RFS that there are no protest rights would justify acceptance of a late protest is also beyond the scope of this decision.

<sup>37</sup> The statute does not define what is meant by "participating" in a cooperative purchase agreement, and there are no implementing regulations defining this term. For purposes of this decision, it is assumed that DGS can participate in the WSCA contract by purchasing furniture at the competitively bid prices in that agreement from any one or more of the WSCA manufacturers without any additional competition.

code.<sup>38</sup> A material change is one that tends to subvert the purposes of competitive bidding.<sup>39</sup> Here, DGS made multiple changes to the WSCA contract. Most significantly, the price for the furniture being purchased was changed. Several dealers in Alaska offered to sell furniture to the state at a lower price than the already discounted price contained in the WSCA contract. In addition, the new contract had an hourly labor rate for reconfiguring existing cubicles,<sup>40</sup> and asset management and inventory reports at no additional cost.<sup>41</sup> The new contract also includes a resell/recycle/disposal program for old office furniture being replaced by new furniture.<sup>42</sup> These changes, cumulatively if not individually, materially altered the WSCA contract in a way that subverted the purposes of competitive bidding. Other dealers of equal quality furniture may have been able to provide an offer more advantageous to the state had they been allowed to participate.<sup>43</sup>

Because DGS wished to materially alter the terms of the WSCA contract, it was required to enter into a new contract for the furniture being purchased. In creating that new contract, DGS was required to comply with the terms of the State Procurement Code. Bowers appealed the solicitation that did occur, along with the award of the contract to Capital Office. Bowers' protest is upheld.

#### ***D. Other Issues Raised By Bowers***

Because this decision finds that DGS did not use a proper competitive process in selecting Capital Office Furniture as the dealer in each region, many of Bowers' other issues need not be addressed. One issue will be discussed because it may come up again if DGS decides to reissue a similar request for proposals.

The RFS divided cost elements into categories, and gave different weights to each element in determining which dealer offered the lowest price. Bowers argued that low cost items

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<sup>38</sup> See *McKinnon v. Alpetco Co.*, 633 P.2d 281, 287 (Alaska 1981) (material changes to a competitively bid contract is tantamount to forming a new contract).

<sup>39</sup> *Kenai Lumber Company, Inc. v. LeResche*, 646 P.2d 215, 221 (Alaska 1982).

<sup>40</sup> DGS 000141.

<sup>41</sup> *Id.*

<sup>42</sup> DGS 000142.

<sup>43</sup> DGS suggested in its RFS that it was simply creating specifications as authorized by 2 AAC 12.070. Specifications "must, to the extent practicable, emphasize functional or performance criteria necessary to meet the needs of the state." 2 AAC 12.080(b). DGS looked at four manufacturers, and determined that three of them could provide furniture that met the state's functional and performance needs. To the extent it was creating specifications, that process was complete when DGS found that three manufactures had acceptable products. Picking one of those three to purchase from went beyond creating specifications.

were given a disproportionate amount of weight, resulting in the lowest cost proposal getting fewer points than a proposal with the highest overall cost.

A total of 60 points were available for the cost component. Of these, 30 points were for product purchases, 20 points for project management, and 10 points for hourly labor.<sup>44</sup> Thus, the combined weight given to the hourly labor and project management items was equal to the weight given to product cost.<sup>45</sup>

To estimate product cost, the RFS contained a typical office layout consisting of cubicles and associated furniture,<sup>46</sup> and asked each proposer to list the price of the different parts necessary to create the typical layout.<sup>47</sup> The project management fee was set as a percentage of the product cost, with each proposer free to select the percentage it wished to add for this item.<sup>48</sup> The hourly labor component was evaluated based on submitted labor rates for various types of work multiplied by an estimated number of hours needed for that work.<sup>49</sup>

In the northern region, the product cost ranged from a low of \$86,673.01 to a high of \$125,129.18.<sup>50</sup> The total of the management fee and labor cost ranged from \$25,870.02 to \$39,327.47.<sup>51</sup> While the management fee and labor costs were a much smaller part of the total project cost, those costs were given equal weight as the cost of actually purchasing furniture.

When evaluating responses to a RFP, the contracting agency must include price as an evaluation factor, and must give the maximum number of price points to the lowest cost proposal.<sup>52</sup> DGS argues that it complied with this requirement because the highest points were given to the lowest cost within each cost item. Bowers argues that the estimated costs need to be combined so that DGS awards the highest points to the proposal with the lowest overall cost. Otherwise, according to Bowers, the highest number of price points could be awarded to the proposal that is the most expensive for the state.<sup>53</sup>

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<sup>44</sup> DGS 000140 – 000141.

<sup>45</sup> The costs submitted in each proposal was based on the cost of design, purchase, and installation of a typical office set up.

<sup>46</sup> DGS 000150 – 000155.

<sup>47</sup> DGS 000156.

<sup>48</sup> DGS 000140 – 000141.

<sup>49</sup> DGS 000141.

<sup>50</sup> Exhibit 25-8. Bowers proposed the lowest cost and Capital Office the highest.

<sup>51</sup> Exhibit 25-8. Bowers had the highest costs and Capital Office the lowest.

<sup>52</sup> 2 AAC 12.260(c) (highest points to lowest cost except for architectural, engineering, and land surveying contracts).

<sup>53</sup> See Exhibit 25-8.



Bowers has the better argument. For the price evaluation factor, the only thing that matters is the total cost to the state. To the extent skill, management efficiency, or experience are important to the contracting agency, those can be listed as additional factors, and separately scored, under 2 AAC 12.260(f).

### ***E. Remedy***

The selection process used in the RFS did not comply with the requirements of the State Procurement Code. Bowers properly raised concerns about the RFS before proposals were considered, and filed a formal protest after Capital Office was selected as the dealer.

The available remedies in a protest appeal include an award of proposal preparation costs, termination of an existing contract, declining to exercise options under an existing contract (non-renewal), cancellation of the solicitation with or without resolicitation, re-evaluation, and corrective administrative action (*e.g.*, referral to the Attorney General for investigation under the Ethics Act, referral to departmental personnel for disciplinary proceedings, or referral to the Chief Procurement Officer for consideration of changes to applicable law or policies). The commissioner has a “substantial amount of discretion” in determining the appropriate remedy.<sup>[54]</sup>

When a protest is sustained, the following factors must be considered: 1) the seriousness of the procurement deficiencies; 2) the degree of prejudice to other interested parties or to the integrity of the procurement system; 3) the good faith of the parties; 4) the extent the procurement has been accomplished; 5) costs or other impacts to the agency of a proposed remedy; and 6) any urgency of the procurement for the welfare of the state.<sup>55</sup>

Bowers argued that the proper remedy is to cancel the selection of Capital Office. DGS argued that, if any remedy is necessary, the items added to the WSCA contract<sup>56</sup> should be removed and that DGS should be allowed to continue purchasing from Capital Office at the new price. The difficulty with DGS’ remedy is that the price of the furniture being purchased was also a material change from the original WSCA contract. In addition, the inclusion of these additional items was likely a factor considered by each dealer when deciding the price of the furniture included in each proposal.

In this case, DGS attempted to use an existing contract to obtain the best possible value for the state. Prior decisions do not provide guidance for agencies wishing to use existing

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<sup>54</sup> *Nana Management Services, LLC v. Dept of Transportation and Public Facilities*, OAH No. 09-0068-PRO (Commissioner of Transportation and Public Facilities 2010), page 16 (internal footnotes omitted).

<sup>55</sup> AS 36.30.585(b); *Nana Management Services*, OAH No. 09-0068-PRO, page 17.

<sup>56</sup> Additional labor, asset management, and recycling or disposal of old furniture.

cooperative purchasing agreements, and because of that, DGS' errors are understandable. There has been no proof of bad faith or improper conduct by DGS or any involved entity.<sup>57</sup> Because DGS did use a method similar to an RFP, other proposers suffered less prejudice.

On the other hand, DGS limited competition to dealers for only three manufacturers without first determining that other manufacturers could not meet the state's needs. It also made material changes to the existing WSCA contract without the requirements for competition set out in AS 36.30. DGS also did not comply with the notice requirements or preference requirements in the State Procurement Code.

DGS has apparently just begun the process of replacing more than 2000 cubicle offices around the state.<sup>58</sup> There are advantages to DGS from having one type of furniture in each region; however, DGS has determined that three different manufactures can provide furniture that will meet its needs. The products were to be obtained through the WSCA contract, which will expire no later than 2016 and possibly as soon as 2014.<sup>59</sup> Thus, DGS might need to solicit a new dealer, and may end up with a different brand of furniture, in less than one year.

Because this solicitation materially changed the terms of the WSCA contract, the appropriate remedy is to cancel the existing selection of Capital Office as the dealer for the office furniture standardization. Because the cubicle renewal is an ongoing project, and different office renewals might be in different stages, the cancellation need not be immediate. Instead, the cancellation must occur no later than 30 days from the date the final agency decision is made in this protest appeal. This will give DGS time to take any future action it desires consistent with this ruling. In addition, Bowers Office Furniture is allowed its proposal preparation costs.

#### **IV. Conclusion**

The Division of General Services did not comply with the State Procurement Code when it selected Capital Office Supply as its dealer for office furniture. Accordingly, that selection must be cancelled no later than 30 days from the date the final agency decision is issued. In addition, Bowers Office Products is entitled to its proposal preparation costs, and should submit

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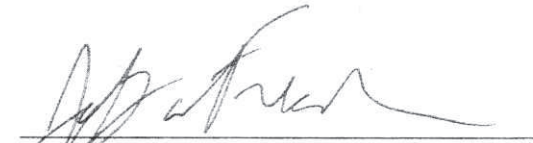
<sup>57</sup> Bowers raised some concerns along these lines, but did not prove any misconduct actually occurred.

<sup>58</sup> DGS 000137.

<sup>59</sup> DGS 000007 (three-year contract beginning in 2011, with one two-year optional extension).

its costs to the Division of General Services within 15 days from the date the final agency decision is issued.

DATED this 5<sup>th</sup> day of June, 2013.



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Jeffrey A. Friedman  
Administrative Law Judge

## Adoption

This Order is issued under the authority of AS 36.30.675. 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 Rule 602 of the Alaska Rules of Appellate Procedure within 30 days after the date of this decision.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

By: \_\_\_\_\_

Name:

Title:

**Non-Adoption Options**

A. The undersigned, on behalf of the Commissioner of Administration and in accordance with AS 44.64.060, declines to adopt this Decision and Order, and instead orders under AS 44.64.060(e)(2) that the case be returned to the administrative law judge to

take additional evidence about \_\_\_\_\_;

make additional findings about \_\_\_\_\_;

conduct the following specific proceedings: \_\_\_\_\_.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

By: \_\_\_\_\_

Name:

Title:

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B. The undersigned, in accordance with AS 44.64.060(e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as set forth below, and adopts the proposed decision as revised:

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Rule 602 of the Alaska Rules of Appellate Procedure within 30 days after the date of this decision.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

By: \_\_\_\_\_

Name:

Title:

C. The undersigned, on behalf of the Commissioner of Administration and in accordance with AS 44.64.060(e)(4), rejects, modifies or amends one or more factual findings as follows, based on the specific evidence in the record described below:

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Rule 602 of the Alaska Rules of Appellate Procedure within 30 days after the date of this decision.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

By: \_\_\_\_\_  
Name:  
Title:

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D. The undersigned, on behalf of the Commissioner of Administration and in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for these reasons:

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Rule 602 of the Alaska Rules of Appellate Procedure within 30 days after the date of this decision.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

By: \_\_\_\_\_  
Name:  
Title: