

**James Vernon Ricks, Jr.,
Michael Matthew Ricks,
Valley E. Ricks,
d.b.a.
Millington Aviation, LLC**

v.

Millington Municipal Airport Authority)

y.

This Final Decision and Order finds that the DD is supported by a preponderance of reliable, probative, and substantial evidence. The Ricks appeal did not contain persuasive arguments sufficient to reverse any portion of the DD. The Ricks appeal is limited to the reiteration of its earlier allegations, re-submittal of earlier supporting documentation, and submission of new evidence not previously in the record which was available before the DD was issued. The Ricks Complaint, filed on October 20, 1998, alleged the MMAA unlawfully denied Ricks a leasehold on the Airport, and the MMAA

granted to Tulsair the exclusive right to operate such a leasehold. The DD found Ricks failed to prove either of the allegations.

Subsequently, on July 22, 1998, Ricks filed a 253-page appeal with 19 exhibits containing various sub-exhibits. The appeal of the DD is an almost line-by-line response to the DD's discussions, analysis, and findings. In accordance with Part 16.241(c), the FAA has reexamined the entire record to reassess the findings in the DD. Based on this reexamination, the FAA affirms the DD which found no merit to the Ricks allegations.

A person disclosing a substantial interest in this final decision and order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. Section 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the Circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued.

Issues on Appeal

1. Do the 25 items of fact alleged by Ricks on appeal establish that the Directors Determination erred in finding that the MMAA's denial of an FBO leasehold to Ricks was reasonable and nondiscriminatory, and did not violate the exclusive rights prohibition or the prohibition of unjust economic discrimination?

2. Do the 25 items of fact alleged by Ricks on appeal establish that the Directors Determination erred in finding that the MMAA, by leasing hangars N-798, one-half of N-126, and N-7 to Tulsair exclusively, did not violate the exclusive rights prohibition, 49 USC § 40103(e), and the related sponsor assurance?

Airport

The Millington Municipal Airport (hereinafter referred to as NQA) is a public-use, general aviation airport located in Shelby County, Tennessee, approximately 25 miles north of Memphis International Airport. The Department of Defense, U.S. Navy owns the airport, and the MMAA leases the airport and many of the buildings from the Navy under a joint-use agreement. The MMAA is preparing to formally apply to the Navy to acquire title to the site, and the MMAA plans to use it for public airport purposes. The FAA has contributed to the planning and development of the airport with Airport Improvement Program (AIP) funds. The airport has approximately 28 based aircraft and 16,254 operations annually. [DD Exhibit 2]

Procedural History

On October 20, 1998, Ricks filed a Part 16 Complaint, Ricks v. MMAA.
[DD Exhibit 1, Item 1]

On November 13, 1998, the FAA issued a Notice of Docketed Complaint 16-98-19 informing the MMAA that Ricks had filed a complaint against the MMAA. [DD Exhibit 1, Item 2]

On December 7, 1998, MMAA filed its answer to Part 16 Complaint.
[DD Exhibit 1, Item 3]

Ricks filed a Motion to Dismiss Answer of MMAA dated December 12, 1998.
[DD Exhibit 1, Item 4]

On December 11, 1998, MMAA filed a Response to Motion to Dismiss Answer of MMAA [DD Exhibit 1, Item 5]

On December 12, 1998, Ricks filed a Reply to the Answer of MMAA [DD Exhibit 1, Item 6]

On December 28, 1998, MMAA filed a rebuttal to Ricks reply. [DD Exhibit 1, Item 7]

On April 27, 1999, the FAA issued a Notice of Extension of Time to issue the DD, extending the due date to June 28, 1999. [DD Exhibit 1, Item 8]

On July 1, 1999 FAA issued the Director's Determination. [Final Decision and Order Exhibit 1, Item 9]

On July 22, 1999, Ricks filed an Appeal of Director's Determination. [Final Decision and Order Exhibit 1, Item 1]

On August 25, 1999, MMAA filed a reply to the Appeal of Director's Determination and a Motion to Strike Deposition Testimony of Tom Seale from the Record on Appeal. [Final Decision and Order Exhibit 1, Item 2]

On August 31, 1999, Ricks filed a Response to the MMAA Motion to Strike Deposition of Tom Seale from the Record on Appeal. [Final Decision and Order Exhibit 1, Item 3]

On September 3, 1999, Ricks filed a "Rebuttal" to the Reply of MMAA on appeal [Final Decision and Order Exhibit 1, Item 4]

On September 13, 1999, MMAA filed a Motion to Strike Ricks' Rebuttal to MMAA's Reply on appeal. [Final Decision and Order, Exhibit 1, Item 5]

On October 25, 1999, the FAA issued a Notice of Extension of Time to issue the Final Agency Decision, extending the due date to December 31, 1999. [Final Decision and Order, Exhibit 1, Item 10]¹

Chronology Of Facts

In June 1994, MMAA published a request for proposals for a general fixed-base operator (FBO) for NQA. Milling Aviation Services, Inc. (MAS) was the only respondent and became the airport's general FBO. [DD Exhibit 1, Item 3]

In September 1994, MMAA entered into a joint use agreement with the United States Navy to operate NQA. The duration of the agreement was one year. [Id.]

On May 31, 1996, MMAA entered a lease with the U.S. Navy to lease portions of the Navel Support Activity, Memphis, Tennessee, and to operate it as NQA. The lease term expires May 30, 2021. In lieu of cash rental MMAA agreed to maintain the facility and provide security and fire protection. [Id.]

On August 27, 1997, according to Ricks, MMAA asked Ricks to substantiate its financial capability and business expertise so Ricks could take over the MAS operation. MMAA denies the conversation took place. [DD Exhibit 1, Item 1, Exhibit 32]

On March 18, 1998, MMAA provided Ricks with an application for a real property lease. [DD Exhibit 1, Item 1, Exhibit 1, Page 7]

On March 23, 1998, Ricks submitted an application for a real property lease. [DD, Exhibit 1, Item 3]. Ricks' intended use of the property was to operate as a general FBO which included hangar space, fuel sales and aircraft maintenance. [DD Exhibit 1, Item 1, Exhibit 36, p. 4]

On April 12, 1998, MMAA published its second RFP for general FBOs. [DD Exhibit 1, Item 3]

On April 20, 1998, Ricks responded to the April 12, 1998, RFP for general FBOs. As discussed more fully below, MMAA accepted Ricks March 23, 1998, application for real property lease as a proposal, requiring Ricks to redate the application to April 20, 1998. [Id.]

¹ Ricks September 3, 1999, "Rebuttal to MMAA's Reply on appeal will not be considered by the FAA because the Rules of Practice, 14 CFR Part 16 do not provide for a response to the Reply on appeal. Section 16.33 only provides for an appeal and a reply. Furthermore, Ricks has not given, and the record does not show, any reason why an additional response on appeal is necessary in this case. MMAA's Motion to Strike Ricks Rebuttal to MMAA's Reply on Appeal is granted.

On May 7, 1998, the MMAA lease committee met with Tulsair. Tulsair was one of four respondents to MMAA's April 12, 1998, RFP for general FBOs, interested in establishing a full service FBO at NQA. [Id.]

On May 12, 1998, Ricks met with one member of the MMAA lease committee. [Id.]

On May 18, 1998, the MMAA lease committee again met with Tulsair. [Id.]

On May 22, 1998, MAS, the original FBO, filed a Petition for Relief under Chapter 11 of the Bankruptcy Code that granted MAS an automatic stay. The Court called for MAS to pay MMAA \$93,365.73 for its failure to pay MMAA rent. [Id.]

On June 30, 1998, MAS failed to make its first installment payment of \$30,000 to MMAA required by the Court under the bankruptcy proceedings. [DD, Exhibit 1, Item 3]

On July 6, 1999, NQA's airport manager asked Ricks if it could be operational on short order. Ricks understood the conversation to mean that MMAA would enter an agreement where Ricks would become the general FBO or have some other operational status on the airport. MMAA denies the conversation conveyed a lease offer to Ricks. [Id.]

On July 8, 1998, Ricks alleges he came to the airport to sign the lease and FBO agreement. Ricks met with the chairman of the lease committee. [Id.]

On July 10, 1998, Tulsair issued a letter of intent concerning the use of the facilities located on NQA. [Id.]

On July 10, 1998, MAS vacated NQA pursuant to an Agreed Order. The lease committee voted to allow Tulsair to operate on the airport based on Tulsair's letter of intent. [Id.]

On July 11, 1998, Tulsair began operations, but was told there was no plan to award Ricks a lease. [Id.]

On July 13, 1998, Ricks submitted a proposal for FBO status. [Id.]

On July 17, 1998, Ricks requested that MMAA clarify the status of its application for T-hangars. [DD, Exhibit 1, Item 1, Exhibit 9]

On August 12, 1998, MMAA executed an occupancy agreement with Tulsair. [DD, Exhibit 1, Item 3]

On October 20, 1998, as stated above, Ricks filed the Part 16 complaint.

APPLICABLE LAW AND POLICY

The following is a discussion pertaining to the FAA's enforcement responsibilities; the FAA compliance program, the statutes, grant assurances, and policies relevant to this proceeding; the Complainant's right to file the formal complaint; the Complainant's right to appeal the Director's Determination; and the FAA's responsibility with regard to an appeal.

FAA Enforcement Responsibilities

The Federal Aviation Act of 1958, as amended (FAA Act), 49 U.S.C. Section 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. Various legislative actions augment the Federal role in encouraging and developing civil aviation. These actions authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance as well as ensuring the public reasonable access to the airport. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances.

FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring that airport sponsors comply with their Federal obligations through its Airport Compliance Program. Sponsor obligations are the basis for the FAA's airport compliance effort. The airport owner accepts these obligations when receiving Federal grant funds or accepts the transfer of Federal property for airport purposes. The FAA incorporates these obligations in grant agreements and instruments of conveyance to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA designed the Airport Compliance Program to ensure the availability of a national system of safe and properly maintained public-use airports which airport sponsors operate in a manner consistent with their Federal obligations and the public's investment in civil aviation. The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights which airport sponsors pledge to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that airport sponsors serve the public interest.

FAA Order 5190.6A sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for the grant of Federal funds or the conveyance of Federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the application of the assurances in the operation of public-use airports and facilitates interpretation of the assurances by FAA personnel.

Sponsor Assurances

As a condition precedent to providing airport development assistance under the AAIA, the Secretary of Transportation receives certain assurances from the airport sponsor.

The AAIA, 49 USC § 47107(a), et seq., sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. Section 511(b) of the AAIA, 49 U.S.C. 47107(g)(1) and (i) as amended by Pub. L. No. 103-305 (August 23, 1994) authorizes the Secretary to prescribe project sponsorship requirements to insure compliance with Section 511(a), 49 U.S.C. 47107(a)(1)(2)(3)(5)(6) as amended by Pub. L. No. 103-305 (August 23, 1994). These sponsorship requirements are included in every AIP agreement as set forth in FAA Order 5100.38A, Airport Improvement Program (AIP) Handbook, issued October 24, 1989, Ch. 15, Sec. 1, "Sponsor Assurances and Certification." Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding contractual obligation between the airport sponsor and the Federal government.

Use of Airport and Not Unjustly Discriminatory Terms

Assurance 22, "Economic Nondiscrimination," of the prescribed sponsor assurances implements the provisions of 49 U.S.C. 47107(a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport

"will make its airport available as an airport for public use on fair and reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical uses." Assurance 22(a)

"may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport." Assurance 22(h)

"may limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." Assurance 22(i)

Subsection (h) qualifies subsection (a) and subsection (i) represents an exception to subsection (a) to permit the sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions, which would be detrimental to the civil aviation needs of the public.

FAA Order 5190.6A describes the responsibilities under Assurance 22 assumed by the owners of public use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination. See Order, Secs. 4-14(a)(2) and 3-1.

The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities. See Order, Sec. 3-8(a).

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination. See Order, Sec. 4-13(a).

Prohibition Against Exclusive Rights

Section 308(a) of the FAA Act, 49 USC § 40103(e), provides, in relevant part, that "there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."

Section 511(a)(2) of the AAIA, 49 USC § 47107(a)(4), similarly provides that:

a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport, with a right given to only one fixed-base operator to provide services at an airport deemed not to be an exclusive right if

(A) the right would be unreasonably costly, burdensome, or impractical for more than one fixed-base operator to provide the services; and

(B) allowing more than one fixed-base operator to provide the services would require reducing the space leased under an existing agreement between the one fixed-base operator and the airport owner or operator."

Assurance 23, "Exclusive Rights," of the prescribed sponsor assurances requires, in pertinent part, that the sponsor of a federally obligated airport:

"...will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public...and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under the Airport and Airway Improvement Act of 1982."

In FAA Order 5190.1A, *Exclusive Rights*, the FAA published its exclusive rights policy and broadly identified aeronautical activities as subject to the statutory prohibition against exclusive rights. While public use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. See FAA Order 5190.1A, Para. 11.c.

The leasing to one enterprise of all available airport land and improvements planned for aeronautical activities will be construed as evidence of an intent to exclude others unless it can be demonstrated that the entire leased area is presently required and will be immediately used to conduct the activities contemplated by the lease. (See Order, Section 2[c].)

FAA Order 5190.6A provides additional guidance on the application of the statutory prohibition against exclusive rights and FAA policy regarding exclusive rights at public-use airports. See Order, Chap. 3.

The Appeal Process

Pursuant to 14 Code of Federal Regulations, Part 16, Section 16.33, the Associate Administrator will issue a final decision on appeal from the Director's determination, without a hearing, where the complaint is dismissed after investigation.

In each such case, it is the Associate Administrator's responsibility to determine whether (1) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (2) each conclusion of law is made in accordance with applicable law, precedent, and public policy.

SUMMARY OF ARGUMENTS

Ricks alleges on appeal that the DD contains errors of fact and analysis which caused the FAA to erroneously dismiss Ricks' complaint. Specifically Ricks alleges that 25 fact items, listed below, establish a violation of the exclusive rights prohibition by the MMAA, as well as unjust economic discrimination.

On appeal, Ricks explains "that it can provide comparatively few more facts, or information, that is not already the record; but [that Ricks] is compelled to reiterate the facts and information of the record that are clearly pertinent in this appeal process that were disregarded, misconstrued, or mishandled by the Director's reviewer." [Final Order and Decision Exhibit 1, Item 1, p. 3]². Ricks' 253-page appeal responds to almost every sentence of the DD.

In its reply to the appeal, MMAA argues that substantial evidence exists to support the DD in this case. In addition, the MMAA asserts that "... Ricks' Appeal raises and addresses numerous issues not relevant to the merits of this case ..." and "... is laced with inappropriate, contemptible, unsubstantiated, and libelous comments against everyone from the Vice-President of the United States to the Secretary at the Millington Municipal Airport." [Final Decision and Order Exhibit 1, Item 2, p. 3-4]

Specifically, Ricks argues on appeal that the following 25 fact items established a prohibited exclusive right, and unjust economic discrimination:

1. MMAA violated its own minimum standards by accepting a letter of intent from Tulsair on July 10, 1998, rather than a lease agreement.
2. MMAA breached its lease agreement with the U.S. Navy by accepting a letter of intent from Tulsair.
3. MMAA accepted vague wording in the letter of intent despite the fact that MMAA knew Ricks was "vying" for space on NQA.
4. MMAA's acceptance of the letter of intent allowed Tulsair special rental rates and the opportunity to select its own rental space even though these same terms were not offered to Ricks or any other tenant of NQA.
5. MMAA's acceptance of the letter of intent allowed Tulsair rental-credit for re-modeling the terminal building and special choices of areas to be leased even though these same terms were not offered to Ricks or any other tenant of NQA.

² Ricks' appeal does, however, contain 19 exhibits with various sub-exhibits, all but three of which appear to be new evidence not previously in the record. This matter will be discussed later in this decision.

6. MMAA's acceptance of the letter of intent allowed Tulsair special refunding of refurbishment costs for hangar N-798 even though these same terms were not offered to Ricks or any other tenant of NQA.
7. MMAA's acceptance of the letter of intent allowed Tulsair to occupy NQA facilities on a short-term basis and without long-term financial obligations even though these same terms were not offered to Ricks or any other tenant of NQA.
8. MMAA's acceptance of the letter of intent allowed Tulsair to set aside space in hangar N-126 for its future use even though these same terms were not offered to Ricks or any other tenant of NQA.
9. MMAA's acceptance of the letter of intent violated its lease with the U.S. Navy, because the letter permitted Tulsair access to hangar N-126 which the U.S. Navy excluded from its lease with MMAA due to environmental hazards.
10. MMAA's acceptance of the letter of intent conveyed to Tulsair the exclusive right to the NQA's fuel tanks even though those same rights were not conveyed to NQA's prior FBO.
11. Contrary to the requirements of MMAA's minimum standards and the lease agreement between MMAA and the U.S. Navy, the MMAA permitted Tulsair to occupy Airport facilities without first obtaining the \$5 million liability insurance even though it required all other lessee's of NQA to comply with the insurance requirements.
12. MMAA's acceptance of the letter of intent permitted Tulsair to assume the marshaling and fueling of Federal Express aircraft without being competitively bid and in violation of terms of the contract.
13. The MMAA did not inform Ricks of the requirement to submit financial statements or a business plan.
14. The MMAA did not take action against Tulsair when its owner threatened bodily harm against Matt Ricks even though the MMAA instigated an eviction notice against another airport tenant for cutting some locks off certified fire exits.
15. MMAA violated its own minimum standards and the lease with the U.S. Navy when it executed an occupancy agreement with Tulsair on August 12, 1998, rather than a lease.
16. The MMAA's execution of the occupancy agreement permitted Tulsair to occupy NQA space at no cost to Tulsair.

17. The MMAA did not obtain the U.S. Navy's pre-approval of the occupancy agreement nor did MMAA prepare the occupancy agreement in the approved U.S. Navy format.
18. The MMAA executed the occupancy agreement with Tulsair on August 12, 1998, rather than on August 9, 1998, as spelled out in the letter of intent, even though Ricks was not offered any delays for any reason when discussing business with MMAA.
19. The MMAA allowed the occupancy agreement to be retroactive from August 12, 1998, to July 11, 1998, even though Ricks was not given any indication that backdating would ever be accepted in any way by the MMAA.
20. MMAA's execution of the occupancy agreement permitted Tulsair to occupy hangar N-126 without verbally or pictorially describing the area in the agreement even though Ricks was never afforded any vague descriptions.
21. MMAA permitted Tulsair to violate the occupancy agreement because, contrary to the agreement, Tulsair did not fully use hangars N-798, N-7 or N-126. In addition, Ricks states that he was never afforded the opportunity to tie up any space to eliminate competition, or to have in a no-cost reserve mode.
22. MMAA's execution of the occupancy agreement allowed Tulsair to rent the space on a month to month basis even though Ricks was not offered a lease for any period of time.
23. MMAA's execution of the occupancy agreement allowed Tulsair time to assess the advisability of providing FBO service on NQA, even though Ricks was not afforded the same opportunity.
24. MMAA's execution of the occupancy agreement allowed Tulsair to occupy NQA facilities without the \$5 million liability insurance which the U.S. Navy requires of the MMAA's tenants, and in violation of MMAA's own minimum standards for fixed based operators.
25. The MMAA permitted contractors of Tulsair to operate at NQA without first obtaining the \$5 million liability insurance.

ANALYSIS AND DISCUSSION

In the DD, the Director addressed two alleged violations of Sponsor Assurances and Federal law. First, the Director considered and dismissed

allegations that MMAA violated the prohibitions against unjust economic discrimination and exclusive rights, Sponsor Assurances 22 and 23, respectively, by denying Ricks an FBO leasehold. Second, the Director considered and dismissed allegations that MMAA had violated the exclusive rights prohibition, 49 U.S.C. § 40103 and Sponsor Assurance 23, by leasing hangars N-798, one-half of N-126, and N-7 to Tulsair exclusively. Each of the aforementioned 25 alleged fact items are discussed below, as they are determined relevant to the Director's findings of fact and conclusions of law.³

Unjust Economic Discrimination

The DD found that MMAA did not unjustly discriminate against Ricks when it denied Ricks an FBO leasehold because the record indicated that MMAA management assisted Ricks in making sure that his application (of March 23, 1998) was submitted in accordance with the RFP; Ricks failed to demonstrate "financial responsibility" by providing certain financial information the MMAA

³ Ricks' appeal raises the threshold issue of whether new evidence not previously in the record of the Director's Determination may be considered on appeal. On appeal Ricks submitted 19 exhibits, many with sub-exhibits. Ricks admits in its Response to MMAA's Motion to Strike Deposition of Tom Seale that all of the appeal exhibits except Nos. 13 and 15 were not part of the record of the DD. [Final Decision and Order, Exhibit 1, Item 3] A review of the 19 appeal exhibits confirm that 16 of them (except for Nos. 13, 14, and 15) are new evidence not previously in the record. All of the new 16 exhibits were dated before the July 1, 1999, date of the Director's Determination. The new exhibits include correspondence from Ricks or addressed to Ricks and presumably in his possession when written or received. Pursuant to 14 CFR § 16.23(b)(2) and (g) Ricks was required to have submitted all his pleadings "...with all documents then available in the exercise of reasonable diligence" in support of his case because in rendering its Director's Determination the FAA could rely entirely on the pleadings and supporting documents in the record. 14 CFR § 16.29 (b)(1). After the pleadings closed but before the DD was issued Ricks could have submitted new evidence by motion under section 16.19(a). The reason for this expedited FAA procedure is that Part 16 is "...intended to expedite substantially the handling and disposition of airport related complaints." Summary, Rules of Practice for Federally Assisted Airport Proceedings, 61 F.R. 53998(1996). Furthermore, it is well established that in an internal agency appeal process new evidence need not be admitted unless the new evidence was not available and could not have been discovered or presented at the prior proceeding. Charles H. Koch, Jr. Administrative Law and Practice, Vol. 1, § 6.76. (1997). The new evidence will not be considered if the party could reasonably have known of its availability. Koch, supra, § 6.76. It appears from the dates of the new evidence, including the deposition of Tom Seale of February 2, 1999, in the state court proceedings against US Aerospace (another aeronautical tenant on NQA at the time of the DD), and the lack of any explanation by Ricks on appeal as to why any of this new evidence was not available and could not have been discovered or presented during the prior proceeding before the DD was issued on July 1, 1999, that the new evidence was available to Ricks but it chose not to present it prior to the DD. A party may not correct a mistake in its original selection of evidence by compelling the agency to consider it on appeal. Koch, supra, § 6.76. For these reasons the 16 appeal exhibits from Ricks consisting of new evidence, including the deposition of Tom Seale, and the one appeal exhibit of MMAA to its Reply (Exhibit A) will not be considered in this appeal. MMAA's Motion to Strike Deposition of Tom Seale from the Record on Appeal is granted.

needed to properly evaluate Ricks' application; and Ricks' final application and FBO proposal (submitted on July 13, 1998) included a contingency – the novation of the Defense Fuels Contract to Ricks. That contingency did not come to fruition. [Final Decision and Order Exhibit 1, Item 9, p. 20]

Ricks' Initial Application

In his appeal, Ricks asserts that the Director erred when he found that MMAA management assisted Ricks in making sure that Ricks' application was submitted in accordance with the RFP. According to Ricks, the Ricks never responded to any RFP. A response to an RFP is a Proposal and Eligibility Form. On March 23, 1998, Ricks submitted an Application for Real Property Lease that was redated April 20, 1998, at the airport manager's insistence to a shorter operational lead time. Both of these documents submitted to the MMAA by Ricks are Applications to Lease Real Property with integral business plans. Neither of these documents has had a response stating any defect in their content, or form, from the MMAA. [Final Decision and Order, Exhibit 1, Item 1, p. 173]

The FAA is unpersuaded by Ricks' arguments on appeal. The fact that Ricks did not specifically fill out a Proposal and Eligibility Form does not substantiate that Ricks was not aware that his application would be considered under the RFP process rather than individually, under the Application for Real Property Lease process. Moreover, the Director addressed this allegation in the DD. Specifically, the DD cites Ricks' admission that he received the RFP for General Fixed Based Operator at NQA via facsimile on April 20, 1998. In addition, the Director considered Ricks statement that the airport manager told Ricks that "the MMAA would accept the March 23, 1998, proposal redated to April 20, 1998, . . . as a 'Proposal for a General for a General Fixed Base Operator . . .', citing the statement to the record. [Final Decision and Order Exhibit 1, Item 9, p. 9]⁴

⁴ In his appeal, Ricks also argues that when he received the facsimile of the RFP, he advised the airport manager that this was not what Ricks wanted to do – that Ricks already had an Application for Real Property Lease in to the MMAA and did not want to embark on any new, extraneous process that was not necessary to obtain a leasehold on NQA. [Final Decision and Order Exhibit 1, Item 1, p. 86] On appeal, the Associate Administrator finds this argument unpersuasive. The fact that Ricks advised the airport manager that "this is not what Ricks wants to do" did not require the MMAA to treat Ricks separate and apart from the RFP process. Moreover, even if the FAA were to find that Ricks was not technically competing with leasehold candidates in the RFP process, Ricks allegation does not give rise to a violation of unjust economic nondiscrimination. No matter how Ricks was to be considered, the record unquestionably supports that there were three other potential lessee's seeking facilities on NQA at that time. As stated by the Director, "[w]hat matters here is that each applicant (emphasis added) was required to provide similar information and that the type of information required is reasonable." [Final Decision and Order Exhibit 1, Item 9 p. 20]

To overcome the Director's conclusion, in his appeal Ricks alleges that the financial statements by Tulsair were stale and useless in any real sense because they were three to four years old. [Appeal Exhibit 1, Item 1, p. 185] In addition, Ricks alleges that while Tulsair Beechcraft Inc., of Tulsa, OK responded to the RFP, Tulsair Beechcraft/Memphis, Inc. submitted a business plan. Ricks' concludes that Tulsair Beechcraft Inc., of Tulsa, OK is a different legal entity than Tulsair Beechcraft/Memphis, Inc. and therefore did not file a business plan.

The FAA is equally unpersuaded by Ricks' assertion that neither the March 23, 1998, application nor the April 20, 1998, application had a response stating any defect in content or form. As discussed more fully below, the Associate Administrator finds that a preponderance of the evidence substantiates that Matthew Ricks, son of Ricks, was specifically requested by MMAA to provide certified financial statements and a business plan in addition to the April 20, 1998, proposal submitted by Ricks. Consequently, the Associate Administrator affirms the Director's finding that MMAA management assisted Ricks in making sure that his application was submitted in accordance with the RFP.

Consideration of Ricks' Application in the RFP Process

The DD found that Ricks failed to demonstrate "financial responsibility" by providing certain financial information the MMAA needed to properly evaluate Ricks' application [Final Decision and Order Exhibit 1, Item 9, p. 20]. On appeal Ricks argues that the DD indicates that the reviewer did not examine the complaint exhibits, only relying on input to him from the MMAA. Ricks then references Complaint Exhibit 36 (March 23, 1998 Application for Real Property Lease), Complaint Exhibit 40 (April 20, 1998, redated March 23, 1998, Application for Real Property Lease), and Complaint Exhibit 52 (July 13, 1998, Proposal and Eligibility Form), asserting that all of the applications/proposals supplied proper financial data and business plans in accordance with their rules. [Final Decision and Order Exhibit 1, Item 1, p. 176]

The FAA disagrees with Ricks' assertion that the reviewer disregarded the referenced complaint exhibits. Ricks apparently makes this assertion because the Director chose to cite MMAA's answer to the complaint, rather than the referenced complaint exhibits. On appeal the FAA reviewed the referenced documents relevant to Ricks' application/proposal considered in the RFP process [DD Exhibit 1, Item 1, Exhibits 36 and 40]⁵ and found that the Director was correct in his conclusion that "... while Ricks did submit financial information (a listing of his assets and liabilities), he did not submit a business plan or an audited financial statement."

Moreover, the FAA is unpersuaded by Ricks' argument that he demonstrated "financial responsibility" because Ricks complied with the instructions of the

On appeal, the FAA is not convinced that Tulsair did not provide the requested information. First, Ricks failed to demonstrate how said financial information proved to be useless by the MMAA in its evaluation of Tulsair. Second, FAA's review of Tulsair's business plan on appeal revealed that the business plan at issue was submitted by "Tulsair Beechcraft/Memphis, Inc." and its parent company (emphasis added) "Tulsair Beechcraft, Inc.", of Tulsa, OK. [DD Exhibit 1, Item 3, Exhibit J, Cover Page]

⁵ Ricks also referenced DD Exhibit 1, Item 1, Exhibit 52. Said exhibit is not relevant to MMAA's consideration of Ricks' proposal in the RFP process. Exhibit 52, dated July 13, 1998, is the proposal Ricks submitted to the MMAA after he was denied a leasehold on NQA through the RFP process, discussed more fully below.

application for real property lease. As indicated by the Director, "[a]t the May 12, 1998, meeting with Michael Matthew Ricks, the leasing committee requested a business plan and an audited financial statement."⁶ To support this conclusion, the DD specifically cites the MMAA Lease Evaluation Committee meeting minutes. [Final Decision and Order Exhibit 1, Item 9, p. 19]

In his appeal Ricks alleges that "[i]t has been proven that the minutes of Matt Ricks and two other Lease Committee minutes were somehow contrived by [the airport manager]." To support this allegation, Ricks offers a deposition of the Chairman of the MMAA Lease Committee.⁷ As previously explained the FAA will not consider this new evidence on appeal.

In its Reply to the Appeal the MMAA responds:

Ricks contends that the minutes of Matt Ricks' May 12, 1998, meeting with the Lease Committee were contrived after Vernon Ricks requested them. Ricks' position is absurd on its face and is without merit. The simple fact is that the Secretary's handwritten notes of the minutes had not been transcribed at the time Vernon Ricks requested them. Once they had been transcribed, they were forwarded to Vernon Ricks. It is interesting to note that a group deemed so incompetent by Ricks would have the wherewithal to make up such minutes. Additionally, it is interesting to note that nowhere in his lengthy Affidavit (DD Exhibit 1, Item 1, Exhibit 2) does Matthew Ricks, the primary applicant who actually met with the Lease Committee, dispute the validity of the minutes, the attendance of Ms. Smith, Secretary at that meeting, or the request of the Lease Committee for the detailed business plan and the audited financial statement. (Compl. Ex. 2.). [Final Decision and Order, Exhibit 1, Item 2]

Based on the foregoing explanation by MMAA, the FAA is unpersuaded that the minutes relied upon by the Director were somehow contrived. Consequently, the Associate Administrator affirms the Director's finding that Ricks failed to demonstrate "financial responsibility" by providing certain financial information the MMAA needed to properly evaluate Ricks' application. Therefore, it was

⁶ Elsewhere in the DD, the Director concludes that MMAA has discretion to define what types of information need to be submitted. [Final Order and Appeal, Exhibit 1, Item 9, p. 21] The Associate Administrator agrees that MMAA has the discretion to require certified financial statements as a prerequisite to obtaining a lease on NQA. Federal law and FAA policy do not dictate the procedures by which airport sponsors must evaluate and consider proposals for tenancy on an airport, so long as those procedures are reasonable and not unjustly discriminatory. Based on the circumstances at NQA, the Associate Administrator finds MMAA's request for certified financial statements reasonable and not unjustly discriminatory. As indicated in the administrative record, MMAA evicted the original FBO of NQA (MAS) for failure to pay rent. In addition, certified financial statements appear to be one reasonable way to verify an entity's "financial responsibility."

⁷ The FAA notes that the deposition of the Chairman of the MMAA Lease Committee, Tom Seale, was not part of the record considered in the DD. The deposition occurred as a result of the eviction proceedings MMAA initiated against U.S. Aerospace, another aeronautical tenant on NQA leasing space in Hangar N-126 at the time of the DD.

reasonable and not unjustly discriminatory for the MMAA to not award a lease to Ricks as a result of the RFP process.

Ricks' Final Proposal

The DD found that Ricks' final application and FBO proposal (submitted on July 13, 1998) included a contingency – the novation of the Defense Fuels Contract to Ricks [Final Decision and Order Exhibit 1, Item 4, p. 20]. On appeal, Ricks argues that “[n]o contingency that Ricks put on the [f]orm ever affected it in any way. The [f]orm was doomed before it was submitted.” [Final Decision and Order Exhibit 1, Item 1, p. 178] To support this allegation, Ricks alleges a conspiracy to have the Defense Fuels Contract placed into the MAS bankruptcy proceedings. Specifically, Ricks alleges that the contract was placed into the bankruptcy court proceeding at the insistence of the MMAA's attorney. After it was too late for Ricks to get into business on NQA, the U.S. Attorney released the contract from any consideration from the bankruptcy court, and the contract was subsequently given to MMAA. [Final Decision and Order Exhibit 1, Item 1, p. 140-141]

In its reply to the appeal, MMAA states that “[t]he actions of MMAA with respect to the Defense Fuel contracts in bankruptcy court were based upon information and belief that consideration had been paid by a third party to MAS for the contract. If in fact such payment had been made, such funds belonged to the bankruptcy estate.” [Final Decision and Order Exhibit 1, Item 2, p. 13]

On appeal, the FAA does not find sufficient evidence to persuade us that a conspiracy actually transpired to ‘harm Ricks [and] help the MMAA help Tulsair.’ [Final Decision and Order Exhibit 1, Item 1, p. 140] Rather, the Associate Administrator finds that it is possible that MMAA had a reasonable concern that NQA and/or its potential FBO candidates may not receive the revenues from the contract in the event that said “third party” was not provided a leasehold on the airport. Consequently, the Associate Administrator agrees with the Director's conclusion that it was reasonable and not unjustly discriminatory for MMAA not to offer Ricks a lease as a result of this contingency.

Letter of Intent and Occupancy Agreement

As listed in the “Summary of Argument” section above (Items 1, 3, 4, 5, 6, 7, 8, 10, 12, 15, 16, 18, 19, 20, 21, 22, and 23), Ricks' reiterates several allegations on appeal regarding MMAA's acceptance of Tulsair's letter of intent and execution of an occupancy agreement with Tulsair. Generally, Ricks alleges that MMAA's acceptance of the letter of intent and MMAA's execution of an occupancy agreement with Tulsair demonstrate a pattern of wrongdoing and special handling of Tulsair and is in violation of its minimum standards.

The DD found that "[b]ecause of the departure of a bankrupt FBO, the MMAA was under pressure to get the selected FBO in place. As a result, the MMAA did not have time to negotiate a long-term lease (as is required in its minimum standards)". [Final Decision and Order, Exhibit 1, Item 9, p. 20] Moreover, the Director found the month to month leasehold beneficial to ensuring that MMAA remains in compliance with its Federal obligations. Specifically, the Director recommended to the MMAA that it refrain from extending the term of the current holdings, at this time. [Final Decision and Order Exhibit 1, Item 9, p. 27]

On appeal the Associate Administrator finds Ricks' argument speculative and not supported by the evidence in the record. "As stated in the DD, in this case, the question comes down to whether MMAA's FBO selection process was reasonable and not unjustly discriminatory toward Ricks. If it was, then no exclusive right could have been constructively granted." [Final Decision and Order, Exhibit 1, Item 9, p. 20] The Director's conclusion is supported by FAA policy. Specifically, FAA Order 5190.6A, as cited by the Director, provides that a single FBO activity on an airport does not constitute an exclusive right if there was no understanding, commitment, express agreement, or apparent intent to exclude other reasonably qualified enterprises. As discussed above, the Associate Administrator affirmed the Director's finding that MMAA did not unjustly discriminate against Ricks when it denied Ricks an FBO leasehold. Consequently, Ricks could not have been denied similar treatment since Ricks was never officially offered tenancy on NQA, in either a lease, letter of intent, or occupancy agreement, as a result of Ricks' March 23, April 20, and July 13, 1998 applications/proposals. Moreover, Ricks did not demonstrate that other similarly situated tenants on NQA requested said special treatment and were denied for unjust reasons.

Alleged Violations of the U.S. Navy Lease

As listed in the "Summary of Argument" section above (Items 2, 9, 11, 15, 17 and 24), Ricks' reiterates several allegations on appeal regarding MMAA's violation of the U.S. Navy lease. The Associate Administrator finds these allegations irrelevant to the issues before the FAA. The FAA does not have jurisdiction to ensure that MMAA complies with all of the requirements of a Department of Defense lease agreement. Even if FAA had jurisdiction, the alleged violations are not tantamount to unjust economic discrimination because Ricks did not demonstrate that Ricks and/or other similarly situated tenants requested the same treatment and were denied for unjust reasons.

Insurance Requirements

As listed in the "Summary of Argument" section above (Items 11, 24, and 25), Ricks' reiterates several allegations on appeal regarding required liability insurance for tenants of NQA. Specifically, Ricks alleges that the MMAA violated its Minimum Standards when it allowed Tulsair and its contractors to occupy NQA facilities without first obtaining the \$5 million liability insurance. According to Ricks, all other lessee's of NQA are required to comply with the insurance requirements.

The DD found that Tulsair did, in fact, provide the required \$5 million liability policy. In addition, the Director specifically cited the evidence in the record that supported this conclusion. [Final Decision and Order Exhibit 1, Item 9, p. 21]

On appeal, Ricks argues that "[t]he esteemed reviewer in his haste to find for the MMAA/Tulsair failed to state when the insurance was provided and who it covers." Ricks alleges that the certificate of insurance is for Tulsair Beechcraft/Memphis, Inc., a totally different legal entity than Tulsair Beechcraft, Inc. of Tulsa, OK, and the alleged respondent to the RFP. Ricks also asserts that the 'Certificate of Insurance' was not made available until the December 7, 1998, MMAA answer to the complaint. To further support his allegation, Ricks references, DD Exhibit 1, Item 3, Exhibit I. [Final Decision and Order Exhibit 1, Item 1, p. 185]

On appeal, the FAA reviewed the aforementioned document referenced by Ricks. Our review of the 'Certificate of Insurance' showed that the name of the insured is "Tulsair Beechcraft, Inc.," of Tulsa, OK. [DD Exhibit 1, Item 3, Exhibit I] In any event, as indicated in footnote 4 of this document, the FBO business plan provided to the MMAA was submitted by both "Tulsair Beechcraft/Memphis, Inc.," and its parent company "Tulsair Beechcraft, Inc." of Tulsa, OK. [DD Exhibit 1, Item 3, Exhibit J].

While it does appear that a 'Certificate of Insurance' was not provided to MMAA until December 1998⁸, the FAA is not convinced that Tulsair's delay in providing this document unjustly discriminated against Ricks. At best it establishes that Tulsair was late in providing "written" verification of insurance. However, it also establishes that the \$5 million coverage was in effect prior to Tulsair's tenancy on NQA on July 11, 1998. Consequently, the Associate Administrator affirms the Director's finding that Tulsair did, in fact, have the required \$5 million liability policy.

⁸ Based on the faxed date indicated on the 'Certificate of Insurance', it appears the 'Certificate of Insurance' was faxed to the MMAA on December 3, 1998. [DD Exhibit 1, Item 3, Exhibit I] Tulsair occupied facilities at NQA on July 11, 1998.

Exclusive Rights

The DD finds that there are two aviation enterprises operating on the airport, at the time (Tulsair and U.S. Aerospace); Tulsair has been leased all of hangar N-798 (19,000 square feet), one-half of hangar N-126 (18,000 square feet), and all of hangar N-7 (8,000) square feet; and there is no more available space to be leased on the airport at this time.

Against this background the DD concludes that while Tulsair has been leased a majority of the existing, leaseable hangar space, this fact is not necessarily indicative of the unlawful granting of an exclusive right." As FAA Order 5190.6A makes clear, a single FBO activity on an airport does not constitute an exclusive right if there is not understanding, commitment, express agreement, or apparent intent to exclude other reasonably qualified enterprises. In addition, the leasing to one enterprise of all available airport land and improvements planned for aeronautical activities will be construed as evidence of an intent to exclude others unless it can be demonstrated that the entire leased area is presently required and will be immediately used to conduct activities contemplated in the lease. [Final Decision and Appeal Exhibit 1, Item9, p. 24]

Based on the record, the Director states that FAA cannot conclude that Tulsair's current tenancy or operation at NQA is in violation of the prohibition of exclusive rights. To support this conclusion, the Director cites MMAA's answer to the complaint in which MMAA states that it limited Tulsair to available space that it could show was presently required and could be used immediately, and all leased space to Tulsair is being used by it to conduct its FBO activities. The DD indicates that an FAA on-site inspection supports MMAA's answer to the complaint. [Final Decision and Appeal Exhibit 1, Item9, p. 24]

On appeal Ricks argues that Ricks has provided *prima facie* evidence, that numerous misdeeds by MMAA have resulted in a violation of the exclusive rights provision. In addition, Ricks argues that MMAA never limited Tulsair to available space and Tulsair has never properly utilized all of the space it was awarded, not even hangar N-798. Ricks asserts that the airport never conducted a hangar space analysis to know what was space presently required and could be used immediately by Tulsair. In support of this argument, Ricks cites several exhibits to the appeal, none of which were in the record before the Director's Determination was issued. [Final Decision and Order Exhibit 1, Item 1, p. 216 – 226] Consequently, as previously explained, the FAA did not consider this new evidence on appeal.

That said, the FAA remains unpersuaded by Ricks' arguments that the record shows by a preponderance of evidence that numerous misdeeds

have resulted in a violation of the exclusive rights prohibition. The Associate Administrator previously considered the alleged misdeeds and special handling of Tulsair and found Ricks evidence to be speculative and not supported by the evidence in the record. In addition, the Associate Administrator concludes that Ricks' allegation regarding MMAA's failure to perform a hangar space analysis does not overcome the record evidence. As stated previously, the DD stated that a FAA on-site inspection revealed that all leased space to Tulsair is being used by it to conduct its FBO activities. Ricks offers no substantial evidence to refute the FAA inspection. [Final Decision and Order, Exhibit 1, Item 1, p. 230] Consequently, the Associate Administrator affirms the Director's conclusions that at that time Tulsair had not been granted an exclusive right.⁹

Conclusion

Based on the foregoing discussion and analysis, the Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent and FAA policy as described above. The appeal does not provide sufficient basis for reversing the Director's Determination with regard to the MMAA's obligations under 49 U.S.C. 40103(e), 47107(a)(1) and (4) and the applicable grant assurances.

⁹ Notwithstanding the aforementioned, the Associate Administrator notes that the Director expressed his concern that most of the available space that is suitable for an FBO leasehold has been leased to a sole entity. Against this background, the Director made several recommendations in the DD to the MMAA in order to help the MMAA remain in compliance with its Federal obligations. The Director specifically advised the MMAA that it may not arbitrarily limit the airport to one general FBO and that actions by the MMAA to extend the terms of a single, existing leasehold that comprises all or most of the available facilities may be considered evidence of a violation of the exclusive rights provision. Finally, the Director noted that FAA would monitor this situation. [Final Decision and Order, Exhibit 1, Item 9, p. 25-26]

In the course of monitoring the activities of MMAA as a federally funded airport, since the DD was issued, this office received in the ordinary course of business, separate and apart from this proceeding, information indicating that the MMAA may have acted contrary to the Director's advice and recommendations in that since the DD was issued the MMAA has extended Tulsair's month to month lease to a long-term lease, including the expansion of said leasehold to include space that was vacated by the U.S. Navy. Consequently, the Director of the FAA Office of Airport Safety and Standards will conduct a new investigation, pursuant to 14 CFR Part 16.101, regarding recent MMAA actions apparently contrary to the Director's advice and recommendations regarding the Federal prohibition of the granting of an exclusive right.

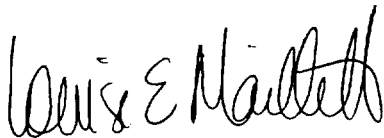
Order

The FAA dismisses this Appeal and affirms the Director's Determination pursuant to 14 CFR Part 16.33.¹⁰

This Decision constitutes the final decision of the Associate Administrator for Airports, pursuant to 14 CFR 16.33(a), under the authority of 49 U.S.C. Section 47122.

APPEAL RIGHTS

A person disclosing a substantial interest in this final decision and order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. Section 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the Circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued.



Louise E. Maillett
Acting Associate Administrator for
Airports

Date: DEC 30 1999

¹⁰ All motions not expressly granted are denied.