

# LEGAL SERVICES

## DIVISION OF LEGAL AND RESEARCH SERVICES LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

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### MEMORANDUM

March 15, 2010

**SUBJECT:** Questions regarding draft CSHB 225(FIN) relating to state procurement (Work Order No. 26-LS0791\P)

**TO:** Representative Anna Fairclough  
Attn: Crystal Koeneman

**FROM:** Theresa Bannister  
Legislative Counsel

You have asked several questions regarding the bill described above.

1. Why is the insurance provision at sec. 36.30.321(c) (page 9, ll. 20 - 22 of this bill) different from Department of Law's original draft? The bill version was a result of reorganization of the material and, with two exceptions, is basically the same as Law's draft. AS 36.30.170(d) reads:

(d) The procurement officer shall award an insurance-related contract based on solicited bids to the lowest responsive and responsible bidder after an Alaska bidder preference of five percent. In this subsection, "Alaska bidder" means a person who meets the criteria set out in (b)(1) - (5) of this section and who is an Alaska domestic insurer.

Law's draft was almost identical to AS 36.30.170(d), except that it added "is applied to cost" after "five percent." The bill version uses "price" instead of "cost," which, as I understand it, amounts to the same thing. The bill version also applies to proposals as well as bids.

In this bill, the direction to award the contract based on bids "to the lowest responsive and responsible bidder" after application of a preference is found in the general language at sec. 36.30.170 (p. 6, ll. 7 - 12) of the bill. Since the language at sec. 36.30.321(c) now covers proposals as well as bids, the corresponding general language for awarding a proposal found at sec. 36.30.255 (p. 8, ll. 8 - 13) would apply to proposals.

The bill requires the bidder or offeror to qualify as an Alaska bidder. In the bill, the meaning of "Alaska bidder" has been moved (from AS 36.30.170) to a general definition in AS 36.30.990 (sec. 37 of the bill). Since there is a general definition, the bill uses the term and does not refer to a person who "meets the criteria set out in (b)(1) - (5) of this section."

The meaning of "Alaska domestic insurer" is not defined in the current procurement statutes or in the bill. The term would be interpreted to mean an insurer who is organized under the laws of this state. The term, "domestic insurer," is defined at AS 21.90.900 for AS 21.90 to have this meaning. If you want to clarify the meaning for the bill, a definition could be added to refer to that meaning.

2. Exemptions from preferences. There has been a question whether the bill could exempt contracts for insurance, medical services, and legal services from the preference provisions. Contracts for medical doctors and dentists are exempted from the procurement code under AS 36.30.850(b)(4).

The exemptions could be added if they satisfy state and federal equal protection requirements. It is likely that the right to receive a preference for a state contract would be characterized as an economic right. Under federal law, the scrutiny is minimal and, unless the objective is economic protectionism, a legitimate state objective will suffice. Under state equal protection requirements, as an economic matter, minimum scrutiny requires showing that the state's objectives are legitimate and that the legislation bears a substantial relationship to its purpose.<sup>1</sup> Aside from these considerations, whether or not to adopt the exemptions will be a policy call.

3. Changes to "Alaska bidder" requirements. There has been a question whether the "Alaska bidder" preference could be changed to require that the business's principal place of business be located in Alaska or that the majority of the business be owned by state residents.

Since the state is buying services and products for itself directly, it would be considered a market participant, and the commerce clause has an exception when the state is acting as a market participant. So that clause does not appear to present a problem.<sup>2</sup>

The privileges and immunities clause probably is not an issue here because these contracts do not appear to be closely enough tied to employment to qualify as affecting a fundamental right. Even if they were determined to affect a fundamental right, the privileges and immunities clause has an exception for when the state is acting as a market participant. However, a variable standard is applied to determine what amount of deference is due to a state when acting as a market participant, so it is not clear how much deference would be given in this situation.<sup>3</sup>

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<sup>1</sup> See Glover v. State, Department of Transportation, Alaska Marine Highway Sys., 175 P.3d 1240, 1257 (Alaska 2008).

<sup>2</sup> See White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204, 214 - 215 (1983).

<sup>3</sup> See Robison v. Francis, 713 P.2d 259, 264 - 265 (1986).

Representative Anna Fairclough

March 15, 2010

Page 3

With regard to the federal equal protection clause,<sup>4</sup> which has a very lenient test in commercial matters, it must at least be shown that the provision does not have a rational relationship to the achievement of a legitimate state goal. This clause becomes an issue only if the reason for these changes is economic protectionism, which is not considered a legitimate state goal for state laws.<sup>5</sup> The state equal protection clause<sup>6</sup> does not appear to be an issue because art. I, sec. 23, allows the state to give preferences to state residents to the extent allowed by federal law. However, this provision has not been interpreted.

If I may be of further assistance, please advise.

TLB:ljw

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<sup>4</sup> Amendment XIV, section 1 of the Constitution of the United States.

<sup>5</sup> Protection of in-state industries from out-of-state competition is almost never a legitimate local purpose. State laws that amount to economic protectionism are virtually always invalid. Philadelphia v. New Jersey, 437 U.S. 617, 624, 57 L.Ed.2d 475, 481 (1978) (discussing the privileges and immunities clause).

<sup>6</sup> Art. I, sec. 1, Constitution of the State of Alaska.

## Crystal Koeneman

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**From:** Jones, Vern O (DOA) [vern.jones@alaska.gov]  
**Sent:** Friday, March 12, 2010 1:21 PM  
**To:** Crystal Koeneman  
**Subject:** Questions on HB 225

Several questions were posed in (or immediately after) the House Finance Committee hearing yesterday regarding HB225. Three of the questions that I could not immediately answer are addressed below:

**Question:** How many states have in-state preferences that require a "principal place of business" in the state to qualify?

**Response:** After the hearing, I emailed this question to my counterparts around the country via the National Association of State Procurement Officials (NASPO) listserv. So far, I have received ten responses. None of the states responding have such a preference. Keep in mind that only a few states have in-state preferences to begin with. I know of no states that have such a restrictive definition connected to their in-state preference, so these results seem to validate my assumption on this question – that no other states have a preference like this.

**Question:** How many of the state's office space leases fall in the range of 7,000 square feet?

**Response:** Of the 250 current office space leases, 160 are under 7,000 square feet, and 80 are over 7,000 square feet in size. However, the total square footage of all the leases under 7,000 square feet is 380,960 square feet, with lease payments of \$7,958,331/year. The total square footage of all leases over 7,000 square feet is 2,261,190, with lease payments of \$35,389,383/year. This illustrates my point about needing to focus our efforts more on the higher stakes leases we acquire with the more in depth, complicated and lengthy formal procurement process, and access the lower value leases via the simplified small procurement process. As I mentioned in the hearing, using the small procurement process for leases in no way implies a less transparent or competitive process.

**Question:** How many disabled people are supported by the "employers of the disabled" preference HB 225 would eliminate?

**Response:** The information we have indicates that a total of two disabled employees are supported by this preference.

## Crystal Koeneman

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**Subject:** FW: lease space question...

**From:** Jones, Vern O (DOA) [mailto:vern.jones@alaska.gov]  
**Sent:** Tuesday, March 16, 2010 1:21 PM  
**To:** Crystal Koeneman  
**Subject:** RE: lease space question...

Crystal:

Of the 160 state leases of 7,000 square feet or less, 116 are located outside Juneau, Anchorage, or Fairbanks. This supports the need to increase this threshold, because doing so would put these leases in the "small" or "informal" category. We get complaints about our lease procurement documents being too large, complex and cumbersome, especially for our less sophisticated lessors. The lessors we deal with in rural areas are typically smaller businesses not accustomed to the more complex and time consuming formal procurement process. I've heard from several potential lessors that they do not compete for state leases because of all the paperwork involved in bidding. Moving these leases to the "informal" category simplifies the process for our lessors and would make it less expensive and time consuming for them to participate. As I mentioned earlier, changing this threshold in no way limits competition, because we provide the same form of public notice as we do for formal procurements.

I would also like to point out that the numbers of leases we manage in DGS has grown with the size of government, yet our staff of leasing Contracting Officers has shrunk by half since I've been involved in the process. Making this change will help us become more efficient in managing this increasing workload.

An example of the cost of the employers with disabilities preference:  
RFP 2003-0800-4074, for an office building lease in Fairbanks. The Bachner Company won because of their employers of the disabled preference (one disabled employee). Had that preference not been counted, Thompson Investment would have won the award. Thompson Investment's cost was \$55,321 less than Bachner's.

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**From:** Crystal Koeneman [mailto:Crystal\_Koeneman@legis.state.ak.us]  
**Sent:** Tuesday, March 16, 2010 10:36 AM  
**To:** Jones, Vern O (DOA)  
**Subject:** lease space question...

Hi Vern...

So with your response about how many lease spaces are under 7000sqft can you provide us the number of leases outside of Anc, Fbx, Jnu or other large muni, of those that are under 7000.

Also can you give us an example of one purchase (if there has been one) that was qualified by the employers of persons with disabilities preference so we can see the impact to the state...

Crystal Koeneman  
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