

LEGAL SERVICES

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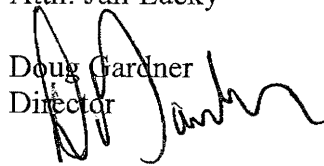
MEMORANDUM

November 6, 2013

SUBJECT: Proposed Procurement Amendments 7 and 10

TO: Representative Mike Hawker
Chair of Legislative Council
Attn: Juli Lucky

FROM: Doug Gardner
Director



After the October 30, 2013 Legislative Council meeting, I reviewed proposed Amendments 7 and 10 to the Legislative Procurement Procedures. Please find the enclosed replacement versions of proposed Amendments 7 and 10 with the following changes outlined below.

Amendment 7 was re-drafted to apply only to legislative contracts for the lease of legislative space that do not include subordination agreements. If Legislative Council adopts this amendment, the procurement officer of a lease for legislative space could approve a simple assignment (typically the result of the sale of the property containing the leased space by the lessor) without a committee meeting. All other contracts, or leases containing subordination agreements, would be unaffected by the amendment and continue to require the approval of a majority of the members of the committee, after a vote at a publicly noticed committee meeting.

Amendment 10 contains the same proposed language limiting damages in a successful bid protest to bid preparation costs only. The only change to this amendment is in the explanatory footnote, which was expanded with additional information to provide more detail for Legislative Council members.

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Enclosures

AMENDMENT NO. 7¹
TO PROCUREMENT PROCEDURES REVISED ON 6/7/13

* **Section 1.** Procurement Procedures sec. 160(a) is amended to read:

Sec. 160. NOVATION OR CHANGE OF NAME. (a) A legislative contract **for the lease of legislative space that does not include a subordination agreement, may be assigned with the consent of the procurement officer. Any other legislative contract** is not transferable, or otherwise assignable, without the consent of the procurement officer, and in the case of a contract for a committee, a majority of the members of that committee. However, a contractor may assign money receivable under a contract after due notice to the procurement officer.

¹ After the Legislative Council Meeting on October 30, 2013, further review of proposed Amendment No. 7 demonstrates that this amendment is most relevant to leases of legislative space that occur during the interim. This proposed amendment has been re-drafted to apply only to leases of legislative space that do not include subordination agreements. The previous proposed amendment applied to all legislative contracts and was broader than necessary and has been withdrawn.

AMENDMENT NO. 10¹
TO PROCUREMENT PROCEDURES REVISED ON 6/7/13

* **Section 1.** Procurement Procedures sec. 280 is amended by adding a new subsection to read:

(c) Notwithstanding (a) and (b) of this section, if a protest is sustained in whole or part, the protester's damages are limited to reasonable bid or proposal preparation costs.

¹ Although other types of remedies are available to a protestor, this amendment establishes a limit on the damages the protestor may be awarded. This is the same statutory limitation on damages that the executive branch has under AS 36.30.585(c). The rest of sec. 280 is already the same as AS 36.30.585(a) and (b).

This proposed amendment to Legislative Procurement Procedures is based on AS 36.30.585(c). The legislature added the limitation on damages that may be awarded in a successful bid protest as provided in AS 36.30.585(c), based on testimony during hearings on March 18, 1996, before the House Labor and Commerce Committee, regarding HB 482, by Mr. Dugan Petty, Director, Division of General Services, in relevant part as follows:

MR. PETTY said Section 33 would limit the protestors' damages to reasonable bid preparation costs or proposal preparation costs. That has been consistent with court settlements for a number of years. He noted they have been advised that was a bit different and the Department of Law has recommended that we protect ourselves by including this in the statute.

Since the passage of HB 482, Chapter 137 SLA 96, the limitation on damages that may be awarded in a successful bid protest, has been upheld by the Alaska Supreme Court in *Weed v. Bachner Co., Inc.*, 230 P.3d 697, 702 - 03 (Alaska 2010), based on the following reasoning:

Bachner responds that bid preparation costs can be a “pittance” when compared to the damages available in tort, and that the prospect of receiving bid preparation costs alone will not sufficiently incentivize disappointed bidders to engage in the protest process. It urges us to adopt the superior court's view that “[n]othing in the current system holds [procurement officials] accountable for their performance of their duties.” The superior court considered it necessary to the fairness and accountability of the system to afford procurement officials immunity only for those actions taken in good faith—i.e., qualified immunity.

Here, we think that the procurement officials have the better argument. In *Aspen Exploration* we concluded that a similar administrative process was an adequate alternative remedy for purposes of this factor. Although the hearing officer may not award money damages greater than bid preparation costs, the hearing officer may fashion an appropriate remedy, including sending the bids back for re-scoring or re-opening the bidding process. These are much more comprehensive remedies than are available in a civil suit. [Footnotes and internal citations omitted.]

In order to similarly protect the legislative branch from tort or other damages, Legislative Council may wish to adopt the above amendment, thus aligning the Legislative Procurement Procedures with AS 36.30 regarding limitation of damages in the event of a successful bid protest.