

**ALASKA STATE LEGISLATURE
JOINT COMMITTEE ON
ADMINISTRATIVE REGULATION REVIEW
February 27, 2001
2:55 p.m.**

HOUSE MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Jeannette James
Representative Joe Hayes

HOUSE MEMBERS ABSENT

All House members present

SENATE MEMBERS PRESENT

Senator Robin Taylor, Vice Chair
Senator Lyda Green
Senator Georgianna Lincoln

SENATE MEMBERS ABSENT

All Senate members present

COMMITTEE CALENDAR

Review of "Best Value" Procurement under consideration by
University of AK, Fairbanks

PREVIOUS ACTION

No previous action to record

WITNESS REGISTER

WENDY REDMAN, Vice President
University Relations
University of Alaska
PO Box 755000
Fairbanks, Alaska 99775

POSITION STATEMENT: Provided information regarding the
university's procurement practices.

KATHLEEN SCHEDLER, Director

Facility Services
University of Alaska - Fairbanks
PO Box 757390

Fairbanks, Alaska 99775

POSITION STATEMENT: Presented an overview of the best value procurement process.

BERT BELL, President
Associated General Contractors [of Alaska]
2093 Van Horn
Fairbanks, Alaska

POSITION STATEMENT: Testified that AGC accepts best value procurement as long as it is done in a fair, open, and competitive manner.

JEFF ALLING
Alcan Builders, Inc.
PO Box 70752
Fairbanks, Alaska 99707

POSITION STATEMENT: Expressed concerns with best value procurement.

JACK WILBUR, President
Design Alaska
601 College Road
Fairbanks, Alaska

POSITION STATEMENT: Testified in support of best value procurement.

DENNIS MICHEL, President
American Mechanical
PO Box 72991
Fairbanks, Alaska

POSITION STATEMENT: Testified that best value procurement is the way to go for the university.

DICK ENGBRETSON
Aurora Construction Supply
(No address provided.)
Fairbanks, Alaska

POSITION STATEMENT: Expressed support of the university trying best value procurement.

JIM LYNCH, Associate Vice President
Finance;
Chief Procurement Officer
University of Alaska

(No address provided.)

POSITION STATEMENT: Offered his assistance on this issue.

DONNA BRADY-ROBERTSON, President

Sun-Air Sheet Metal, Inc.

3250 Easy Street

Fairbanks, Alaska 99701-7734

POSITION STATEMENT: Suggested a task force of interested parties to work with UAF.

MICHAEL SAMSON, President

Samson Electric, Inc.

3125 N. Van Horn Road

Fairbanks, Alaska

POSITION STATEMENT: Testified in regard to the rights of subcontractors.

DAN CROSS, US Army Garrison - Alaska

Chair, Source Selection Evaluation Board

(No address provided.)

POSITION STATEMENT: Expressed hope that the legislature would keep the process moving forward.

DAN FAWCETT, General Manager

Seimens (ph) Building Technologies for Alaska

(No address provided.)

Juneau, Alaska

POSITION STATEMENT: Testified that Seimens (ph) Building Technologies for Alaska is in support of best value procurement.

BILL WATTERSON, President

Watterson Construction Company

6500 Interstate Circle

Anchorage, Alaska 99518

POSITION STATEMENT: Testified as a best value procurement contractor.

GARY KLEBS, President

Klebs Mechanical

President, Associated Builders and Contractors, Inc.

2261 Cinnabar Loop

Anchorage, Alaska 99507

POSITION STATEMENT: Testified as a contractor in opposition to [best value procurement]. On behalf of ABC, he expressed concerns with best value procurement.

EDEN LARSON, Executive Director

Associated Builders and Contractors, Inc.
3380 C 5th Street, Suite 100
Anchorage, Alaska 99502

POSITION STATEMENT: Expressed concerns with best value procurement.

ACTION NARRATIVE

TAPE 01-5, SIDE A
Number 001

CHAIR LESIL MCGUIRE called the Joint Committee on Administrative Regulation Review to order at 2:55 p.m. Representatives McGuire, James, Hayes, and Senator Green were present at the call to order. Senators Taylor and Lincoln arrived as the meeting was in progress.

Review of "Best Value" Procurement under consideration by University of AK, Fairbanks

CHAIR MCGUIRE announced that the committee will hear a review of the "best value" procurement under consideration by the University of Alaska - Fairbanks.

Number 0123

WENDY REDMAN, Vice President, University Relations, University of Alaska, informed the committee that some of the university's people have had difficulty getting to Juneau and thus are in other locations. She suggested that Kathleen Schedler be allowed to provide the committee with an overview regarding the "best value" procurement. Ms. Redman also suggested that it would probably be most beneficial if the discussion was kept in general terms. She also indicated that Steve Titus was available via teleconference.

CHAIR MCGUIRE informed everyone that various members of the committee have been contacted by the companies who have expressed concern regarding the change [to best value procurement]. The purpose of this meeting is to provide a public forum to present the various sides. Furthermore, this meeting is a chance for the legislature to review what is and is not included in the procurement statutes. Presently, the university isn't included in the procurement statutes.

Number 0383

KATHLEEN SCHEDLER, Director, Facility Services, University of Alaska - Fairbanks, testified via teleconference. Ms. Schedler explained that when awarding capital construction projects, best value [procurement] is a source selection. Therefore, the contractor's qualifications are evaluated, as well as the mechanical and electrical subcontractors, on the basis of past experience, technical expertise, and bid price. The basis of past experience is derived from references provided by the [contractor or subcontractor]. The use of best value [procurement] would be determined project-by-project, specifically depending upon the priorities, complexities, and size of the project. Ms. Schedler said, "UAF believes that awarding capital construction projects solely on the basis of low bid does not necessarily ensure the best value, specifically as it relates to quality of construction, maximizing the budget, and assuring timely completion of the construction project."

MS. SCHEDLER informed the committee that the process of best value has been used by the federal government since 1995. Furthermore, numerous universities and states across the nation utilize this process. The use of this system elsewhere has been studied in order to integrate the best of those processes into the University of Alaska's process. Ms. Schedler pointed out that the university has successfully utilized source selection since 1988, specifically for the purchases of highly technical equipment. The university also used source selection for the contractor for the installation and construction of a diesel engine generator.

MS. SCHEDLER emphasized that the university has not proposed an extension of the 30-day timeframe to award a construction project. Nor does the university want to create an excessive burden on the contractors in responding to solicitations. Ms. Schedler explained that the desire is to develop a system that retains the contractor's reference information in order to avoid the [contractor] being burdened by responding to the same questions many times. The evaluation criteria is specifically restricted to the evaluation factors that are articulated in the bid document. Furthermore, [the university] has expressed willingness to debrief any contractor requesting a review of any specific project evaluation.

MS. SCHEDLER informed the committee that in January 2001 the university advertised the Physical Plant Renewal project as a best value source selection. This project amounts to about \$3.5 million and will renew five maintenance jobs in a building at UAF that will be fully occupied through the duration of

construction. At this time, this specific project won't be awarded on the basis of best value but rather will be awarded solely on low bid. This revision occurred because the project couldn't be delayed in order to respond to the numerous late-coming comments and suggestions that have been received. Therefore, it the university's intent to solicit additional comments and expressions of concerns from the contracting public and to finalize a best value process that UAF can use when it determines necessary.

Number 0728

REPRESENTATIVE JAMES remarked that she doesn't have any problem with a best value process. However, when the system was changed so drastically, was any thought given to notifying the contracting community in the area in order to explain this before the bid document.

MS. SCHEDLER replied yes and noted that it was explained to the Associated General Contractors (AGC). She estimated that approximately 80 people attended that [meeting]. At that time, many questions were fielded, but no specific concerns were heard such that would have warranted the university not moving forward with the process. Several suggestions were taken into account and incorporated into the specific project.

Number 0809

CHAIR McGUIRE inquired as to what procedure the university follows since it doesn't fall under the state procurement code.

MS. SCHEDLER answered that the university follows AS 36.30 and the university regulation 05.06.

CHAIR McGUIRE related her understanding then that the university has been following the state procurement code, although the university is not subject to it.

MS. REDMAN pointed out, "When the state procurement code was ... put in, the language 'substantially equivalent' ... is in effect meant to be the same."

Number 0947

BERT BELL, President, Associated General Contractors [of Alaska] (AGC), testified via teleconference. Mr. Bell said, "AGC's policy toward best value or alternate type procurement is one of

acceptance, provided that the documents are done in a fair, open, and competitive manner." With regard to the university, AGC has offered to work with it to bring [the best value process] into compliance with industry needs. Although the university made an attempt, [it seems that] some issues were unanswered or are in question. Mr. Bell pointed out that the private sector uses best value procurement and one shouldn't fear it. However, he did mention the need to diffuse the possibility of [inappropriate awards] to say relatives.

CHAIR MCGUIRE inquired as to whether Mr. Bell had a timeline relating to addressing the fair, open, and competitive issues for which he has expressed concern.

MR. BELL informed the committee that a number of models are being used throughout the nation such as that used by the US Army Corps of Engineers, which is heavier handed than what the university is proposing. Mr. Bell thought that, with industry input and review of working systems, a [model] could be up and running in a few months. That model could then be customized for specific projects. Mr. Bell remarked, "Every project doesn't need best value procurement, but there certainly are some that are in an owner's best interest and in the public's, by being in the owner's best interest, to have the best team available do it at the overall least cost."

CHAIR MCGUIRE asked if Mr. Bell's last statement meant that there are some projects that wouldn't be served by the best value bidding process.

MR. BELL answered that in the case of some straightforward projects [best value procurement would not need to be used]. However, when there are complicated projects or projects that are located in a heavily used building that can't be closed, then [the university] would want to look for experience in order to confirm ahead of time that the bidder can do the work.

Number 1249

JEFF ALLING, Alcan Builders, Inc., testified via teleconference and noted that he is a member of the Associated Builders and Contractors, Inc. Mr. Alling informed the committee that his company, Alcan Builders, began as a small general contractor approximately 20 years ago. Due to the current free and open bidding system, his company has been able to grow. Mr. Alling remarked that he enjoys the current system because it is objective and doesn't allow for any subjective evaluation. As

long as the low bidder can provide a bond that basically states that the bidder will complete the project or the bonding company will pay for some other contractor to complete the project, the bidder can proceed with the project. He noted that the low bidder must also have his paperwork in order.

MR. ALLING expressed the following concerns regarding "this subjective evaluation." He felt that use of best value procurement results in a loss of freedom. Furthermore, he didn't feel that best value procurement has served Fairbanks well. On the military bases there has been much poor evaluation of bidders, in his opinion. For example, a contractor who bid a project on Eielson Air Force Base a few years ago didn't receive the bid because he hadn't done any Department of Defense contracting for many years. However, this contractor had the ability to complete this project "with one arm tied behind his back." That is merely one example of how the process is unfair. Mr. Alling also expressed concern with accountability as well as the government locking him into a specific category due to the size and scope of prior projects, which would not allow growth. He also expressed concern with tying up bonding, the "black balling" of subcontractors, cumbersome paperwork, marrying of contractors and subcontractors, and the "good ole boy" system.

MR. ALLING turned to solutions that the university is facing. As mentioned earlier, quality is one of the concerns. Also time is of concern, although there are currently liquidated damages stipulated that hold contractors to schedules. Mr. Alling offered to answer questions.

Number 1645

JACK WILBUR, President, Design Alaska, testified via teleconference in support of best value procurement. He attributed the concerns surrounding best value procurement to be because of unfamiliarity with the process. The architectural and engineering community is very accustomed to best value procurement because that is how their services have been procured for years. He informed the committee that architectural and engineering teams are developed. Mr. Wilbur said that best value procurement does allow firms to grow. Furthermore, an emerging firm that can demonstrate its capabilities is likely to grow more quickly than someone attempting to grow their firm through low bid procurement.

MR. WILBUR informed the committee that he has worked with teams under best value procurement. From that experience, he has seen

contractors get along much better with the owner and the design firm. There is the impetus [for the contractor] to work well [with others] because the next job would be dependent upon getting along with the owner and doing a good job for the owner. However, that impetus doesn't exist with low bid procurement. A contractor who is awarded a contract with low bid procurement only knows that he can obtain the next project by being the low bidder and thus there is no incentive to be cooperative. However, Mr. Wilbur clarified that he wasn't saying that contractors obtaining jobs through the low bid process aren't cooperative.

Number 1860

CHAIR MCGUIRE inquired as to how many times Mr. Wilbur has bid under best value procurement and whether any of those bids resulted in another team besides Mr. Wilbur's being selected for a university project.

MR. WILBUR, in his 25 years with Design Alaska, said that his services have been procured through best value procurement for the university. He pointed out that there was one unfortunate circumstance in which the university didn't follow [best value procurement], but that was sorted out. He said that one case didn't sour him on the [best value] process. Mr. Wilbur informed the committee that Design Alaska has never been selected by the university under any other [procurement] process "or really by any other government sector entity."

CHAIR MCGUIRE restated her question: "Has there ever been an occasion where your company has gone up against another company in which another company was selected over yours by the university under the best value system of procurement?"

MR. WILBUR replied yes, many times. In further response to Chair McGuire, Mr. Wilbur estimated that Design Alaska is successful in 25 percent of the projects that it attempts with the university. However, lately Design Alaska's success rate has been higher than 25 percent.

MR. WILBUR, in response to Senator Taylor, confirmed that [Design Alaska] is an engineering and architectural [firm].

SENATOR TAYLOR surmised then that Design Alaska isn't bidding on the construction of anything, but rather is submitting a Request For Proposals (RFP) for professional or personal services. Senator Taylor stressed, "That is an entirely, totally different

contract than what we're talking about here that the university is now moving into for the actual erection or construction of a building designed by an architect or engineer."

MR. WILBUR agreed, but pointed out that the results have similarities.

SENATOR TAYLOR agreed that there are similarities in the results, but pointed out:

As an attorney, I also, in the past, have submitted a response to a request for proposal from professionals. The cities and boroughs and everybody does it with consultants, ... architects, and ... engineers. But when we get the project designed, we don't go out and then choose willy-nilly among the contractors based upon ... some discretionary decision process where we like the color of one guy's trucks better than we do the other fellow.

MR. WILBUR charged that Senator Taylor was demeaning the process by his comments. He didn't believe that it would evolve into such a selection process.

SENATOR TAYLOR related his observance of Fairbanks' history in which trucks of one color were the correct color for Bill Sheffield when he decided who would receive a lease of a building for state offices. Mr. Sheffield was almost indicted over that and thus the entire procurement code of the state was changed. Senator Taylor said, "I think I need something a little more objective within the categories to provide security to people in the state that those contracts are being let to a responsive, and that's the key term here, ... low bidder." Senator Taylor remarked that if Mr. Wilbur feels that [best value procurement] is such a good system, that perhaps the state needs to move towards design-build [contracts] in which the "architects and the engineers [would be] directly in bed with the contractor and then put the whole thing up for best value."

MR. WILBUR noted that he has also worked on design-build teams for best value procurement and that is also a good process.

Number 2134

DENNIS MICHEL, President, American Mechanical, testified via teleconference. He noted that he has been in business in Fairbanks for 19 years and thus he has been through many of the

bidding processes. He also noted that he is currently working with the federal government on some design-build procurement, which seems to be working well. In regard to best value procurement, Mr. Michel felt that it would potentially work well for the university because best value procurement would shorten the timeframe and "time is money." Mr. Michel informed the committee that the Corps of Engineers is [utilizing] best value procurement or design-build [for] 90 percent [of its projects]. Best value procurement could be a better bargain for the people of the State of Alaska. Mr. Michel concluded by saying, "I firmly believe that this would be the right way for the university to go."

SENATOR TAYLOR questioned whether the word "responsive" already provides the discretion that is being sought.

MR. MICHEL replied, "Not necessarily." A responsive bidder in a low bid system means that there is a bid bond, which doesn't necessarily guarantee quality and a price-conscientious project for the owner. He explained:

If you want the job, you can buy a job at a low bid. And then you have to go back in and fight with the owner for change orders and claims. And you have then, a contracting agency spending very valuable time trying to defend the university's position against a contractor that went in and bought a job and that's now trying to make a few bucks. That's the way it is up here. ... that's not good for the contractors and that's not good for the owners. The federal government recognized that; that's why they've gone to best value and design-build.

SENATOR TAYLOR explained that his concern is drawn from his experience at the municipal level where even though a person was a low bidder, that person, due to their past, wasn't considered to be as responsive a bidder as the next bidder. He acknowledged that such discretion runs the risk of challenge in court by the low bidder. Senator Taylor said, "It seems to me that this, in essence, just carrying word responsive one step further out to provide some additional criteria for coverage in exercising what I think people at times have exercised in the past."

Number 2340

CHAIR MCGUIRE related her understanding of the Administrative Manual [for state procurement] that 40 percent [of the decision] must be based on cost and 60 percent is subject to the discretion referred to by Senator Taylor. Therefore, she questioned whether discretion is already built into the system by way of only weighing the cost at 40 percent.

MR. MICHEL explained how [procurement] works practically. If a low bidder doesn't get a job, for whatever reason, then the low bidder sees an attorney. Then the project is put on hold until there is a resolution and thus the owner loses. Mr. Michel didn't believe the guarantees are present because of the legal system.

Number 2417

REPRESENTATIVE JAMES reiterated her belief that all contracts should be determined by best value procurement. However, how is best value defined. She expressed the need for openness in order to thwart any perception of impropriety. Representative James then asked how one would get started in the [contracting] business if one is evaluated on their past work history.

MR. MICHEL noted that when he began contracting, as a minority contractor, 19 years ago it was tough. He explained that if subcontractors produce a product for a prime contractor who is going after a project, the subcontractor bid will be evaluated based on cost and experience level as well. Therefore, there will be an avenue for subcontractors to enter the process [by] building on the prime contractor's reputation. In regard to prime contractors entering the scene, the bonding capabilities are there. With regard to past experience, that is something that people in the business community have to do in the private sector as well as the government sector.

CHAIR MCGUIRE returned to the question she and Senator Taylor have stated regarding the current procurement code, which allows 60 percent [of the decision] to be subjective and can be based on past failure of performance or lack of responsiveness.

Number 2563

MS. SCHEDLER explained that the current system is as exactly as stated by Senator Taylor in that the contractor has to be responsive and responsible. Responsive addresses whether the bidder has submitted everything in the proper order. Responsible addresses whether the bidder has the ways and means

to accomplish the project. Ms. Schedler said, "It takes a great deal to determine that a contractor is nonresponsible." For example, a contractor who in a past project had excessive amounts of change orders and didn't meet deadlines could still not amount to being nonresponsible. Therefore, the current system doesn't provide what best value procurement does.

SENATOR TAYLOR related his belief that [best value procurement] accomplishes the same as the word responsible was intended to accomplish. However, the word responsive seems to carry about 95 percent of the decision because of the fear of litigation when exercising the discretionary portion of the statute as embodied in the word responsible.

MS. SCHEDLER agreed, although she, as the UAF procurement officer, didn't believe that she is driven by fear in regard to whether a contractor is responsible or not. However, the burden of proof is excessive.

Number 2694

SENATOR TAYLOR said that he wasn't certain that the words and definitions in best value procurement are sufficient to carry the university beyond the state procurement requirements. However, he acknowledged that the university, in its somewhat autonomous existence, may be able to do this type of contracting while the Department of Transportation & Public Facilities may not. Senator Taylor guaranteed the university that it will find itself in court when it makes discretionary decisions, even under [best value procurement]. Senator Taylor expressed his fear that the university may be entering into a larger "mess" than it already feels it has.

MS. SCHEDLER clarified that a bidders past experience is not drawn from rumors or hearsay but rather comes from the reference list submitted by the bidder.

CHAIR MCGUIRE inquired as to why that can't be done under the responsible language.

MR. SCHEDLER pointed out that under best value procurement, the process would be more defined and more out in the open than if past experience [was reviewed] with a traditional low bid. She highlighted the fact that under best value procurement, the bidders are told upfront the specific criteria that are being evaluated.

Number 2790

MS. REDMAN informed the committee that over the course of discussion of [best value procurement], better ways to proceed forward have been discovered. She acknowledged that there are ways to move forward to provide a more open and objective review of the subjective analysis. In regard to whether [best value procurement] is legal under the state procurement code, the current state procurement code does provide an option for innovative procurement, which [best value procurement] would fall under. She recognized that [best value procurement] isn't a shield against litigation. However, she hoped that this process and further discussion could result in lowering the likelihood [of litigation].

SENATOR TAYLOR interpreted this as a way for the university to protect itself against litigation from a low bidder that wasn't awarded the bid. "All you're shielding yourself from is the person who tries to come in and buy a job," he surmised. The university is seeking a criteria that affords the ability to turn down a low bidder based on concern with the quality of job that bidder would do. Senator Taylor said he didn't see [best value procurement] as providing the university with the type of basis that will produce a strong defensible position.

Number 2948

MS. REDMAN noted that discussions with AGC and ABC have revealed that difficulty is created for all good contractors when low bidders buy jobs.

TAPE 01-5, SIDE B

MS. REDMAN indicated that [best value procurement] may not be best for all projects. In regard to the "good ole boy" system, there have been some innovative suggestions one of which was to take points away from those that have had projects under best value procurement so that the work is spread around.

Number 2903

SENATOR TAYLOR asked if the university is under constraints, under state and federal law, to provide a percentage of bid benefits to minorities under the Indian Self-Determination Act due to the mixing of federal funds.

MS. SCHEDLER replied no.

CHAIR McGUIRE asked if the university is proposing a repeal of AS 36.30.005.

MS. REDMAN reiterated that statute includes a provision for innovative procurement processes.

CHAIR McGUIRE remarked that she wasn't sure that it comported with the intent of the statute.

MS. REDMAN echoed earlier testimony that best value procurement is not new to the state agencies or the university or anyone else who falls under the state procurement code [for professional services]. She indicated that [best value procurement] may be new for construction projects.

CHAIR McGUIRE related her understanding that [best value procurement] is new for construction projects, which is the issue.

MS. REDMAN noted that she would have the university's general council, who did review the statutes, communicate directly with the chair.

CHAIR McGUIRE reiterated that the state procurement code does specifically exempt the university. However, the aforementioned provision places the university back in somewhat. The same applies to the Legislative Council and the court system. What is being done is precedent setting because this is an issue relating to the entire state procurement code. Chair McGuire clarified that the committee isn't opposed to innovation, but the issue's potential broad implications deserves scrutiny.

MS. REDMAN related the university's belief that [best value procurement] is covered under the existing procurement code.

Number 2711

DICK ENGEBRETSON, Aurora Construction Supply, testified via teleconference. Mr. Engebretson related his belief that best value procurement should be tried at the university. However, he acknowledged that best value procurement made need some tweaking.

JIM LYNCH, Associate Vice President, Finance, and Chief Procurement Officer, University of Alaska, testified via teleconference. Mr. Lynch informed the committee that the

university is interested in the comments of the contracting community regarding best value procurement. The university is also interested in working with the community to develop an amicable solution to the issues. Mr. Lynch made his services available to the committee.

Number 2616

DONNA BRADY-ROBERTSON, President, Sun-Air Sheet Metal, Inc., testified via teleconference. Sun-Air Sheet Metal has been in business in Alaska for 25 years. Ms. Brady-Robertson read the following:

Our company has been contracting for 25 years and my family has been in the contracting business for over 45 years in Alaska. My background is building construction and the family background is road construction. I have seen a deterioration in the contracting industry due to the low bid system. In many instances, low bidders have targeted jobs with problem designs because of the change order opportunities. Bidders who see obvious problems and put money in for the problems at time of bid are at a disadvantage and most likely will not get the job. The low bidder system mandates that a bidder must only bid what the prints and specifications show and further changes must be covered by change orders. This puts the contractor/owners' rep/designer in an adversarial position. The contractor must prevail if he is to stay in business because if the money is not in his bid he has to recover for changes.

So, in my opinion the low bid system is flawed and we need to try to improve it. the University of Alaska's attempt at best value procurement is a step in the right direction, but the process was not developed to the point that it was ready to put out to bid. The opposition to the method is, I believe, a reaction to the genuine concern that abuse in the selection method could occur if checks and balances are not in place.

I have been following other bidding methods in other areas and I know that it is a monumental task to develop one that meets all of the concerns in the market and it thus takes considerable time and resources. I do not believe that we should start from scratch but that we should take the most evolved

system that appears to be working and start from that point with customization. Hawaii has had a system in place that seems to be working very well. It is the most evolved system that I am aware of and the method actually puts in-state local contractors in a more advantageous position relative to mainland contractors who come for the mini-booms or to cherry pick particular projects - and doesn't this seem very much like Alaska's situation at times. Wyoming, Utah, and Georgia, and private enterprises have also used this performance-based system successfully on projects. This method of best value is performance-based contracting where contractors with the best track record rise to the top in the performance scores and that in conjunction with the bid price and the risk of the project to the owner determines who the best bidder is, not necessarily the low bidder. On more complex and time sensitive projects the best performing contractors are at an advantage. Where projects are low risk or not time critical the lowest bidder is advantaged. This is the ultimate desired state by society. Those who do the best work at the best price should be the preferred contractors. More bang for the public buck, better constructed capital projects, a true win-win situation.

I'm on the Board of Directors of the AGC of Alaska and we represent a broad cross section of union and nonunion contractors at all tiers. We are not the only organization that represents contractors however and I suggest a task force of interested parties should work with UAF in investigating and developing a method that addresses the very real concerns of the contracting community. I have forwarded to Steve Titus, of UAF, the information on the performance-based contracting method.

Number 2408

MICHAEL SAMSON, President, Samson Electric, Inc., testified via teleconference. Mr. Samson expressed his interest in everyone's concern about general contractors, who, historically, do a small percentage of the work on jobs. There doesn't seem to be concern regarding the subcontractors, who, historically, do 50-80 percent of the work. Under the current RFP system, there seems to be a buddy system in which general contractors are selecting the subcontractors, the ones who do the majority of

the work, for the owners. Mr. Samson expressed concern that discussion has revolved around the party that provides perhaps 15 percent of the work. Mr. Samson encouraged the university to review a system that addresses subcontractors. Perhaps review of a system that bids subcontractors separately could occur.

Number 2270

DAN CROSS, US Army Garrison - Alaska; Chair, Source Selection Evaluation Board, testified via teleconference. Mr. Cross informed the committee that he was with the Corps of Engineers for seven years as a contracting officer in Anchorage. For the federal government, the design-build capital construction jobs have allowed [the federal government] to please its customers in several ways. [The design-build capital construction job] assures that there is a quality project and provides for an expedited schedule. Mr. Cross recalled that early on it was difficult to educate the contractors in regard to the process. Hearing the discussion today and reviewing the legislative hearing proposal, he felt that the education is occurring. Mr. Cross expressed the hope that the legislature would continue to move [best value procurement] forward.

DAN FAWCETT, General Manager, Seimens (ph) Building Technologies for Alaska, testified via teleconference. Mr. Fawcett noted Seimens (ph) Building Technologies for Alaska is in support of best value procurement because it promotes partnership and allows the best performers to develop. Mr. Fawcett pointed out that the discussion has centered on the best value and its association with the first cost. Best value procurement will ensure that other aspects of the building will be properly represented. He referred to a study that evaluated buildings for over a 40 year life cycle period and all the costs associated with the buildings were evaluated. The study found that the first cost of the building amounts to about 11 percent of the total life cycle cost of the building. Therefore, many other areas need to be [considered] when selecting contractors and best value procurement should help that process. Mr. Fawcett concluded by reiterating that Seimens (ph) Building Technologies for Alaska is in support of best value procurement and is confident that obstacles can be overcome.

Number 2047

BILL WATTERSON, President, Watterson Construction Company, informed the committee that Watterson Construction has been in business in Anchorage since 1980. Mr. Watterson also informed

the committee that Watterson Construction is a best value procurement contractor. Currently, Watterson Construction has over \$65 million of contracts of which \$2.5 million are not best value procurements. Watterson Construction has five active best value procurements with the Corps of Engineers and two with Fred Meyer. Although Mr. Watterson said that he loved best value procurement, he acknowledged that there are problems.

MR. WATTERSON informed the committee that he and his wife are UAF alumni who make contributions to UAF and have recently had a scholarship named after them. Although he hoped the aforementioned wouldn't influence anyone on the committee dealing with contracts, he wasn't sure. He also informed the committee that he had worked with one of the employees in UAF's contracting administration when he started construction, which could be a problem. Therefore, he wasn't sure how one could get away from the fact that Fairbanks is a small community. Furthermore, Mr. Watterson noted that he constantly hears, from architects and engineers under best value procurement for professional services, that it is someone else's turn, which he didn't believe to be the spirit of best value procurement.

Number 1898

MR. WATTERSON recalled earlier testimony regarding the marriage of contractors. He read the university's proposal to mean that there will be teams. For example, Watterson Construction is bidding on a project for the Corps of Engineers under best value procurement. The project is a two-step proposal for which there are only three contractors that qualify. Watterson Construction is the only contractor that takes more than one mechanical and electrical bid. The other two contractors are teamed up sole source. He noted that a local electrical company has told Watterson Construction that without them, the electrical company wouldn't have the opportunity to bid on such jobs. Therefore, that is problematic. Mr. Watterson related his belief that the real crux of the problem is: "contracting methods of the month are no cure for ineffective contract administration." As a successful best value procurement contractor, Mr. Watterson said that he had many questions about the university's proposal.

Number 1767

REPRESENTATIVE JAMES remarked on the perception of bias. Although she believes that it is merely a perception of bias, there are those who are bias and thus everyone has to pay the price. Representative James asked if it would be appropriate

for a board member to excuse him/herself from the decision-making process when the member has some personal contact with the contractor.

MR. WATTERSON remarked that although such would be a good idea, the Fairbanks community is small.

REPRESENTATIVE JAMES expressed the possibility of having a system that has some sort of point allocation with an appeal process. Representative James reiterated her belief that all contracts should be awarded with best value procurement. However, the issue is how best value is measured. She recalled being on the planning board, which was subjective and thus [resulted in] conflict. The situation resulted in the planning board taking the most troubling [decision] and listing all of its findings, reasons the decision was made, in order to make the decision defensible. Perhaps something similar could be utilized in this process.

MR. WATTERSON returned to Chair McGuire's earlier questions and estimated that disqualifying [a low bidder] on a conventional bid occurs less than 5 percent of the time.

Number 1456

CHAIR MCGUIRE returned to the "responsive" and "responsible" language that already exists as a way to move around the cost issue. She related her understanding that there is no confidence in the "responsible" language due to the possibility of legal challenges. Therefore, she questioned why one would think that a process that is more subjective and open would work better when the "responsible" language doesn't work.

MR. WATTERSON explained that early on his company decided that it wouldn't be adversarial and thus when best value procurement came around, Watterson Construction had a clean record. Mr. Watterson said that he didn't have an answer.

REPRESENTATIVE JAMES remarked that she has always been troubled by the low bid process.

Number 1286

GARY KLEBS, President, Klebs Mechanical; President, Associated Builders and Contractors, Inc. (ABC), informed the committee that he would first speak as a subcontractor. Mr. Klebs said that he didn't support [best value procurement], which he viewed

as setting the university up for lawsuits. He pointed out that in the case of the university, taxpayers' money and private donations are being used. Therefore, [the ability to] not take the low bid is not so clear. The low bid process has worked for years. Mr. Klebs mentioned that the most successful projects that he has been involved with are those that were very well laid out and designed. He indicated that perhaps better planning could be done from the beginning.

MR. KLEBS then spoke as the representative of ABC and expressed the following concerns that are embodied in a letter from ABC.

The [best value procurement] procedure calls for the evaluation of bids to occur in private, outside the public process.

While bids will be reviewed by a committee, the best value contractor will be identified at the sole discretion of the contracting officer. This leads to the possibility or appearance of impropriety. The procedure must be seen as fair for all bidders.

The process is subjective and does not rely on measurable, objective criteria.

The process may be in direct conflict with state procurement code, which calls for objective measure of bids and public bid openings.

It is inappropriate for an entity that accepts tax deductible donations from industry to subjectively evaluate industry when awarding work.

The process, which evaluates prior experience of a similar scope, runs the risk of locking contractors into one level of performance, eliminating companies from growing and expanding their scope of work. Again, this allows for the possibility or appearance of favoritism based on criteria other than merit. Contract awards should not be viewed as political.

Number 1021

EDEN LARSON, Executive Director, Associated Builders and Contractors, Inc., began by informing the committee that the aforementioned concerns of ABC were in reference to the specific project that the university let as a best value procurement and

thus may not apply to other best value procurements. Ms. Larson stated that ABC Alaska Chapter has not opposed best value procurement on its face. The university faces the challenge of making a subjective process objective. Although there has been testimony that some are enjoying best value procurement that is expanding into design-build work, Ms. Larson said that over time the bidding pool shrinks [under such a system]. Therefore, there is concern in regard to how dramatically and quickly the bidding pool is limited. Ms. Larson recognized that there is concern with those low bidders who aren't able to do the work, but the solution [being proposed with best value procurement] reaches more than the 10 percent of low bidders who aren't able to do the work. Best value procurement runs the risk of overkill due to the narrowing of the pool and ultimately that lack of competition will increase costs.

Number 0798

CHAIR McGUIRE asked if Ms. Larson had any suggestions regarding working with the best value concept by perhaps augmenting it with some checks and balances.

MS. LARSON answered that personally she had thought of having an experience rating that would be developed separate from bidding on the job.

CHAIR McGUIRE reiterated that these deliberations are precedent setting because these discussions could potentially impact the way Legislative Council and the court system procures, and even the state agencies.

CHAIR McGUIRE related a request from Senator Lincoln to have the university draft responses to the concerns expressed in a letter by Alcan Builders, Inc., which is included in the committee packet.

Number 0564

MS. REDMAN clarified that under the current procurement statutes for the university and all state agencies, those policies do allow use of the RFP process as opposed to the request for bid process. The RFP process is used for any purchase, including construction. Therefore, Ms. Redman pointed out that this is already happening in many forms.

REPRESENTATIVE JAMES related her understanding that the discussion has been in regard to a bid process, not an RFP, under best value procurement.

MS. REDMAN said that what is being discussed is a hybrid. The RFP differs from a straight invitation to bid, the low bid. There are two versions of the RFP process. One of which is source selection that utilizes the qualifications and low price under a specific quantifiable point system. The other version is best value, which is what the university is proposing, under which the contractor's qualifications and experience are evaluated in a rank order.

TERRY KELLY, Purchasing, University of Alaska - Fairbanks, testified via teleconference. Mr. Kelly agreed with Ms. Redman that this isn't really a precedent-setting move because the RFP process, which includes best value, has been in place prior to 1988. The best value process is an extension of that is more recently being applied to construction. Mr. Kelly clarified that best value procurement is not an invitation for bid.

CHAIR MCGUIRE asked if [best value procurement] has been used in the actual construction bidding process.

MR. LYNCH answered that [best value procurement] hasn't been used in the past nor is it the intent that this would be the standard for all procurement. [Best value procurement] is intended to address special needs when dealing with situations in which the experience and background of the contractor are important to the institution.

Number 0219

REPRESENTATIVE JAMES recalled that there was a particular RFP that brought up this issue. She inquired as to why this [best value procurement] process was chosen for use in that proposal.

MR. LYNCH explained that [best value procurement] was chosen because the project was large enough to involve the contractors.

REPRESENTATIVE JAMES emphasized that the answer didn't specify what special qualities this project had that created the need for a more subjective review.

MS. SCHEDLER explained that the physical plant renewal project was chosen because there are approximately 150 maintenance workers in that shop. Furthermore, five maintenance jobs will

be revitalized while the building remains occupied and work continues. Such a situation creates a higher degree of scheduling and coordination than any prior project.

REPRESENTATIVE JAMES asked if that specific requirement was outlined in the RFP.

Number 0003

STEVE TITUS, Director, Design and Construction Department, University of Alaska - Fairbanks, testified via teleconference. [From the committee secretary's log notes, Mr. Titus indicated that the requirement wasn't specifically mentioned.]

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Number 0047

CHAIR MCGUIRE reiterated her point that this really is precedent setting with respect to large construction bids. Therefore, there is reason to further scrutinize this. Chair McGuire noted that when someone says that a particular process will only be used when special needs arise, she becomes nervous because it sounds very subjective. Thus, she suggested that a best value procurement policy outline what special needs mean and include that as part of the bid.

MR. TITUS remarked that Chair McGuire's suggestion is excellent. He clarified that he had not meant to imply that [best value procurement] isn't precedent setting. He agreed that this is the first time that [best value procurement] has been used for construction procurement.

ADJOURNMENT

There being no further business before the committee, the Joint Committee on Administrative Regulation Review meeting was adjourned at 4:29 p.m.