

**SENATE BILL NO. 125**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

**BY SENATOR COWDERY**

**Introduced: 3/7/03**

**Referred: Transportation, State Affairs**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to protests of state contract awards, to claims on state contracts and to**  
2 **hearings under the State Procurement Code; making conforming amendments in the**  
3 **State Procurement Code; and providing for an effective date."**

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 \* **Section 1.** AS 36.30.040(a) is amended to read:

6 (a) **Except as provided in AS 36.30.627(b), the** [THE] commissioner shall  
7 adopt regulations governing the procurement, management, and control of supplies,  
8 services, professional services, and construction by agencies. The commissioner may  
9 audit and monitor the implementation of the regulations and the requirements of this  
10 chapter with respect to using agencies.

11 \* **Sec. 2.** AS 36.30.620(b) is amended to read:

12 (b) If a **claim** [CONTROVERSY] asserted [BY A CONTRACTOR]  
13 concerning a contract awarded under this chapter cannot be resolved by agreement, the  
14 procurement officer shall, after receiving a written request by the contractor for a

1 decision, issue a written decision. The **procurement officer shall make the** decision  
 2 **not** [SHALL BE MADE NO] more than 90 days after receipt [BY THE  
 3 PROCUREMENT OFFICER] of all necessary information from the contractor.  
 4 Failure of the contractor to furnish **additional** [NECESSARY] information **required**  
 5 **by** [TO] the procurement officer **by the date required shall result in a decision**  
 6 **being made without the information, and the contractor may not use the**  
 7 **information to support the claim during** [CONSTITUTES A WAIVER OF] the  
 8 claim **or appeal process**. Before issuing the decision the procurement officer shall  
 9 review the facts relating to the **claim** [CONTROVERSY] and obtain necessary  
 10 assistance from legal, fiscal, and other advisors.

11 \* **Sec. 3.** AS 36.30.620(c) is amended to read:

12 (c) The time for issuing a decision under (b) of this section may be extended  
 13 for good cause by the commissioner of administration, or for a **claim**  
 14 [CONTROVERSY] involving a construction contract or procurement for the state  
 15 equipment fleet, the commissioner of transportation and public facilities, if the **claim**  
 16 [CONTROVERSY] concerns an amount in excess of \$50,000. **The contractor shall**  
 17 **be provided with an opportunity to comment on the request for an extension. If**  
 18 **the extension is granted, the** [THE] procurement officer shall notify the contractor in  
 19 writing that the time for the issuance of a decision has been extended and of the date  
 20 by which a decision shall be issued.

21 \* **Sec. 4.** AS 36.30.620(d) is amended to read:

22 (d) The procurement officer shall furnish a copy of the decision to the  
 23 contractor by certified mail or other method that provides evidence of receipt. The  
 24 decision must include [A]

- 25 (1) **a** description of the **claim** [CONTROVERSY];
- 26 (2) **a** reference to the pertinent contract provisions;
- 27 (3) **a** statement of the agreed upon and disputed facts;
- 28 (4) **findings of fact about the claim;**
- 29 **(5) a determination of any amount payable;**
- 30 **(6) a** statement of reasons supporting the decision; and
- 31 **(7) [(5)] a** statement substantially as follows:

1 "This is the final decision of the procurement  
 2 officer. This decision may be appealed to the  
 3 commissioner of (administration/transportation and  
 4 public facilities). If you appeal, you must file a written  
 5 notice of appeal with the commissioner within 14 days  
 6 after you receive this decision."

7 \* **Sec. 5.** AS 36.30.620(e) is amended to read:

8 (e) If **the procurement officer does not issue** a **written** decision [IS NOT  
 9 MADE] by the date it is due, the contractor may proceed as if the procurement officer  
 10 had issued a decision adverse to the contractor.

11 \* **Sec. 6.** AS 36.30.625 is amended by adding new subsections to read:

12 (d) Notwithstanding (a) of the section, AS 36.30.630, and 36.30.670, if the  
 13 amount of a construction contract claim is less than \$250,000, an appeal from an  
 14 original procurement officer's decision on the claim shall be resolved as follows:

15 (1) by arbitration under AS 36.30.627 if the claimant requests  
 16 arbitration in its appeal;

17 (2) by a hearing officer in a non-arbitration proceeding under  
 18 AS 36.30.627 if the claimant does not request arbitration in its appeal;

19 (e) Notwithstanding (a) of the section, AS 36.30.630, and 36.30.670, if the  
 20 amount of a construction contract claim is \$250,000 or more, an appeal from an  
 21 original procurement officer's decision on the claim shall be resolved as follows:

22 (1) by arbitration if the agency and the contractor agree to handle the  
 23 appeal by arbitration under AS 36.30.627;

24 (2) by a hearing officer in a non-arbitration proceeding under  
 25 AS 36.30.627 if the agency and the contractor do not agree to handle the appeal by  
 26 arbitration under AS 36.30.627.

27 (f) The provisions of (d) and (e) of this section may not be interpreted to  
 28 prevent a contractor or the agency from using a dispute resolution process other than  
 29 the arbitration or non-arbitration proceeding allowed under (d) and (e) of this section if  
 30 both the contractor and the agency agree to the use of another dispute resolution  
 31 process.

1 \* **Sec. 7.** AS 36.30 is amended by adding new sections to read:

2 **Sec. 36.30.627. Arbitration and non-arbitration proceedings in certain**  
 3 **contract construction claim appeals.** (a) This section governs an appeal under  
 4 AS 36.30.625(d) or (e). If there is a conflict between this section and another  
 5 provision of AS 36.30.550 - 36.30.699, this section controls.

6 (b) An appeal under this section shall be handled as provided by the  
 7 commissioner of transportation and public facilities by regulation, including the  
 8 selection of a presiding officer, except that the agency and the contractor may change  
 9 the procedures by mutual assent.

10 (c) The claimant bears the burden of proving the claim.

11 (d) The agency and the contractor may be represented by an attorney in an  
 12 appeal under this section.

13 (e) When an appeal is held under this section, the claimant may not raise a  
 14 factual issue or theory of recovery unless the issue or theory was presented to and  
 15 decided by the procurement officer in the procurement officer's original decision  
 16 under AS 36.30.620(b), except that a claimant may increase the contractor's  
 17 calculation of damages if the increase arises out of the same operative facts on which  
 18 the original claim was based.

19 (f) The venue for an appeal under this section is the judicial district in this  
 20 state where the office of the agency that entered into the contract is located, or at  
 21 another location in the state that is acceptable to the agency and the contractor.

22 (g) If the agency or the contractor fails to appear at a proceeding under this  
 23 section, the presiding officer may proceed in the absence of the agency or contractor.

24 (h) After the conclusion of the hearing, an arbitrator shall issue a final  
 25 decision, and a hearing officer shall issue a recommended decision, within

26 (1) 30 calendar days for a claim less than \$100,000;

27 (2) 45 calendar days for a claim of \$100,000 or more, but not  
 28 exceeding \$1,000,000; or

29 (3) 60 calendar days for a claim of more than \$1,000,000.

30 (i) If the presiding officer demonstrates good cause for an extension of time  
 31 allowed under (l) of this section, the commissioner of transportation and public

1 facilities may grant the presiding officer an extension of time to issue the decision.

2 (j) Unless an extension is granted under (i) of this section, if a presiding  
3 officer fails to issue a decision by the deadline under (h) of this section, the  
4 commissioner of transportation and public facilities may not use the presiding officer  
5 for a proceeding under this section for one year after issuance of the decision.

6 (k) A decision of a presiding officer under this section must be in writing and  
7 based on the contract, the evidence presented to the presiding officer, and applicable  
8 law. The decision of the presiding officer must contain a finding identifying any  
9 money due to the contractor or the agency.

10 (l) A hearing officer shall deliver a copy of the hearing officer's recommended  
11 decision to the commissioner of transportation and public facilities. An arbitrator shall  
12 deliver a copy of the arbitrator's final decision to each of the following at the same  
13 time:

14 (1) the commissioner of transportation and public facilities;

15 (2) the contractor; and

16 (3) the director for the administrative region of the Department of  
17 Transportation and Public Facilities where the construction was located.

18 (m) In its decision, the presiding officer shall compare the finding of any  
19 money due to the contractor or the agency with the finding of any money due to the  
20 contractor or the agency in the original procurement officer's decision.

21 (n) Costs and fees in a proceeding under this section shall be awarded as  
22 follows:

23 (1) the agency and the contractor shall share equally the cost of the  
24 services of the presiding officer in the appeal under this section; and

25 (2) if the claimant is awarded

26 (A) more money than the other party offered, then the other  
27 party shall pay the claimant a percentage, not to exceed 100 percent, of the  
28 claimant's attorney fees and costs, excluding the presiding officer's fees; the  
29 percentage shall be calculated by

30 (i) determining the difference between the claimant's  
31 offer and the other party's offer;

1 (ii) subtracting the other party's offer from the amount  
2 awarded to the claimant; and

3 (iii) determining what percentage the amount calculated  
4 in (i) of this paragraph is of the amount calculated in (ii) of this  
5 subparagraph;

6 (B) less money than the other party offered, then the claimant  
7 shall pay the other party a percentage, not to exceed 100 percent, of the other  
8 party's attorney fees and costs, excluding the presiding officer's fees; the  
9 percentage shall be calculated by

10 (i) determining the difference between the other party's  
11 offer and zero;

12 (ii) subtracting the amount awarded to the claimant  
13 from the other party's offer; and

14 (iii) determining what percentage the amount reached in  
15 (ii) of this paragraph is of the amount reached in (i) of this  
16 subparagraph;

17 (3) the same amount as the other party offered, then the claimant and  
18 the other party pay their own attorney fees and costs, excluding the presiding officer's  
19 fees.

20 (o) Subject to appropriation, any money awarded by an arbitrator's decision  
21 shall be paid within 45 days after the date that the arbitrator's decision is delivered to  
22 the parties unless the arbitrator's decision is rejected or appealed under (p) of this  
23 section. Subject to appropriation, any money awarded by a hearing officer's  
24 recommended decision that is approved by the commissioner of transportation and  
25 public facilities shall be paid within 45 days after the date that the commissioner's  
26 decision is delivered to the contractor and the agency, unless the commissioner's  
27 decision is appealed under AS 36.30.685.

28 (p) A final decision by an arbitrator under this section resolves the claim for  
29 the contractor and the agency and may not be rejected or appealed to the state courts  
30 or another judicial or nonjudicial body, except as provided in AS 09.43.120 -  
31 09.43.170.

1 (q) In this section,

2 (1) "agency" means the Department of Transportation and Public  
3 Facilities or a contracting agency to whom the responsibility for handling the  
4 controversy is delegated by the department under AS 36.30.632;

5 (2) "non-arbitration proceeding" means a proceeding on an appeal  
6 under AS 36.30.625(d) that is not an arbitration proceeding;

7 (3) "presiding officer" means the arbitrator in an arbitration or a  
8 hearing officer in an appellate proceeding.

9 **Sec. 36.30.629. Subpoenas and discovery.** The commissioner of  
10 administration and the commissioner of transportation and public facilities may

11 (1) issue subpoenas, including subpoenas duces tecum, to compel the  
12 attendance of witnesses and the production of documents;

13 (2) allow the taking of depositions for discovery or to perpetuate  
14 testimony;

15 (3) refer a subpoena or subpoena duces tecum to the superior court for  
16 enforcement and the imposition of appropriate sanctions.

17 \* **Sec. 8.** AS 36.30.630 is amended to read:

18 **Sec. 36.30.630. Hearing on a contract claim [CONTROVERSY].** (a)  
19 Except as provided in AS 36.30.625(d) and (e), 36.30.627, and (b) of this section, a  
20 hearing shall be conducted according to AS 36.30.670 and regulations adopted by the  
21 commissioner of administration on a contract claim [CONTROVERSY] appealed to  
22 the commissioner of administration or the commissioner of transportation and public  
23 facilities or referred to either commissioner under AS 36.30.620(f).

24 (b) **Except as provided in AS 36.30.625(d) and (e), within** [WITHIN] 15  
25 days after receipt of an appeal on a contract claim [CONTROVERSY] the  
26 commissioner of administration or the commissioner of transportation and public  
27 facilities, as appropriate, may adopt the decision of the procurement officer as the final  
28 decision without a hearing.

29 \* **Sec. 9.** AS 36.30.632 is amended to read:

30 **Sec. 36.30.632. Delegation.** The commissioner of administration and the  
31 commissioner of transportation and public facilities may delegate responsibilities

1 under AS 36.30.590 - 36.30.630 [AS 36.30.590 AND 36.30.630] to the head of the  
2 contracting agency.

3 \* **Sec. 10.** AS 36.30.680 is amended to read:

4 **Sec. 36.30.680. Final decision by the commissioner.** A decision by the  
5 commissioner of administration or the commissioner of transportation and public  
6 facilities after a hearing under this chapter, except for an arbitration proceeding  
7 under AS 36.30.327, is final. A decision shall be sent within 20 days after the hearing  
8 to all parties by personal service or certified mail, except that a decision by the  
9 commissioner of transportation and public facilities involving procurement of  
10 construction shall be sent within 45 [90] days after receipt by the commissioner of  
11 administration or the commissioner of transportation and public facilities of the  
12 hearing officer's decision to all parties by personal service or certified mail.

13 \* **Sec. 11.** AS 36.30.685(a) is amended to read:

14 (a) A final decision of the commissioner of administration, [OR] the  
15 commissioner of transportation and public facilities, or an arbitrator under  
16 AS 36.30.610, 36.30.627, 36.30.635(a), 36.30.650, or 36.30.680 [AS 36.30.610,  
17 36.30.635(a), 36.30.650, OR 36.30.680] may be appealed to the superior court in  
18 accordance with the Alaska Rules of Appellate Procedure.

19 \* **Sec. 12.** AS 36.30.687(d) is amended to read:

20 (d) A person who in a matter relating to a procurement or a contract  
21 [CONTROVERSY OR] claim under this chapter makes a misrepresentation to the  
22 state through a trick, scheme, or device is guilty of a class C felony.

23 \* **Sec. 13.** AS 36.30.695 is amended to read:

24 **Sec. 36.30.695. Other rules of procedure.** The commissioner may adopt by  
25 regulation additional rules of procedure providing for the expeditious administrative  
26 review of all contract claims [OR CONTROVERSIES], both before the contracting  
27 agency and through an appeal heard de novo.

28 \* **Sec. 14.** AS 36.30.699 is amended by adding a new paragraph to read:

29 (2) "original procurement officer's decision" means the decision that is  
30 issued by a procurement officer under AS 36.30.620(b) and on which the  
31 commissioner of transportation and public facilities has not taken any action under

1 AS 36.30.630(b).

2 \* **Sec. 15.** The uncodified law of the State of Alaska is amended by adding a new section to  
3 read:

4 APPLICABILITY. This Act applies to a contract if the contract is entered into on or  
5 after the effective date of this Act.

6 \* **Sec. 16.** The uncodified law of the State of Alaska is amended by adding a new section to  
7 read:

8 TRANSITION: REGULATIONS. The commissioner of transportation and public  
9 facilities may immediately proceed to adopt regulations necessary to implement this Act. The  
10 regulations take effect under AS 44.62 (Administrative Procedure Act), but not before the  
11 effective date of the other sections of this Act.

12 \* **Sec. 17.** The uncodified law of the State of Alaska is amended by adding a new section to  
13 read:

14 REVISOR'S INSTRUCTIONS. (a) The revisor of statutes shall substitute "claim" for  
15 "controversy" in

16 (1) AS 36.30.620(f);

17 (2) AS 36.30.623;

18 (3) AS 36.30.625(a);

19 (4) AS 36.30.625(c);

20 (5) AS 36.30.687(a); and

21 (6) AS 36.30.750(b).

22 (b) The revisor of statutes shall substitute "claims" for "controversies" in

23 (1) AS 36.30.750(a); and

24 (2) AS 36.30.750(b).

25 \* **Sec. 18.** Section 16 of this Act takes effect immediately, under AS 01.10.070(c).