

CS FOR SENATE BILL NO. 125(TRA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE SENATE TRANSPORTATION COMMITTEE

Offered: 4/30/03

Referred: State Affairs

Sponsor(s): SENATOR COWDERY

A BILL

FOR AN ACT ENTITLED

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

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

6 * **Section 1.** AS 36.30.620(b) is amended to read:

7 (b) If a **claim** [CONTROVERSY] asserted [BY A CONTRACTOR]
8 concerning a contract awarded under this chapter cannot be resolved by agreement, the
9 procurement officer shall, after receiving a written request by the contractor for a
10 decision, issue a written decision. The **procurement officer shall make the** decision
11 **not** [SHALL BE MADE NO] more than 90 days after receipt [BY THE
12 PROCUREMENT OFFICER] of all necessary information from the contractor. **If**
13 [FAILURE OF] the contractor **fails** to furnish necessary information **requested by**
14 [TO] the procurement officer, **the procurement officer shall proceed to decide**

1 [CONSTITUTES A WAIVER OF] the claim **and may, in the procurement officer's**
 2 **discretion, deny all or part of the claim because of the failure to furnish necessary**
 3 **information. During an appeal under this chapter, the contractor may not rely**
 4 **on or introduce information that the contractor has failed to furnish to the**
 5 **procurement officer in support of the claim.** Before issuing the decision, the
 6 procurement officer shall review the facts relating to the **claim** [CONTROVERSY]
 7 and obtain necessary assistance from legal, fiscal, and other advisors.

8 * **Sec. 2.** AS 36.30.620(c) is amended to read:

9 (c) **Upon the written request of the procurement officer, the** [THE] time
 10 for issuing a decision under (b) of this section may be extended for **up to 60**
 11 **additional days** [GOOD CAUSE] by the commissioner [OF ADMINISTRATION,
 12 OR FOR A CONTROVERSY INVOLVING A CONSTRUCTION CONTRACT OR
 13 PROCUREMENT FOR THE STATE EQUIPMENT FLEET, THE
 14 COMMISSIONER OF TRANSPORTATION AND PUBLIC FACILITIES,] if the
 15 **claim** [CONTROVERSY] concerns an amount in excess of \$50,000. **Upon the**
 16 **written request of the procurement officer showing that good cause exists for a**
 17 **second extension, the commissioner may extend the time for issuing a decision**
 18 **under (b) of this section up to 90 additional days after the first extension. The**
 19 **contractor shall be provided with an opportunity to oppose or otherwise respond**
 20 **to the request for a second extension. If a second extension is granted, the**
 21 **commissioner** [THE PROCUREMENT OFFICER] shall notify the contractor **and**
 22 **the procurement officer** in writing that the time for the issuance of a decision has
 23 been extended and of the date by which a decision shall be issued. **In this subsection,**
 24 **"commissioner" means the commissioner of administration or, for a claim**
 25 **involving a construction contract or procurement for the state equipment fleet,**
 26 **the commissioner of transportation and public facilities.**

27 * **Sec. 3.** AS 36.30.620(d) is amended to read:

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

31 (1) **a** description of the **claim** [CONTROVERSY];

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

7 "This is the final decision of the procurement officer. This decision
 8 may be appealed to the commissioner of (administration/transportation
 9 and public facilities). If you appeal, you must file a written notice of
 10 appeal with the commissioner within 14 days after you receive this
 11 decision."

12 * **Sec. 4.** AS 36.30.620(e) is amended to read:

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

16 * **Sec. 5.** AS 36.30 is amended by adding new sections to read:

17 **Sec. 36.30.627. Construction contract claim appeals.** (a) An appeal from a
 18 decision of the procurement officer of a claim involving a construction contract shall
 19 be resolved by

20 (1) binding and final arbitration under AS 09.43.010 - 09.43.180
 21 (Uniform Arbitration Act) if the claim is

22 (A) less than \$250,000 and the contractor requests arbitration
 23 of the claim; or

24 (B) \$250,000 or more and both the agency and the contractor
 25 agree to arbitration of the claim; or

26 (2) a hearing under AS 36.30.630 if the claim is not handled by
 27 arbitration under (1) of this subsection.

28 (b) In this section, a claim includes all issues, causes of action, and
 29 controversies arising from a construction contract for which a contractor or the
 30 contracting agency asserts compensation is due.

31 **Sec. 36.30.629. Subpoenas and discovery.** In appeals under AS 36.30.627,

1 the arbitrator or hearing officer may

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

4 (2) allow the taking of depositions for discovery or to perpetuate
5 testimony; and

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

8 * **Sec. 6.** AS 36.30.630 is amended to read:

9 **Sec. 36.30.630. Hearing on a contract claim [CONTROVERSY].** (a)
10 Except as provided in (b) of this section, a hearing shall be conducted according to
11 AS 36.30.670 and regulations adopted by the commissioner of administration on a
12 contract claim [CONTROVERSY] appealed to the commissioner of administration or
13 the commissioner of transportation and public facilities or referred to either
14 commissioner under AS 36.30.620(f).

15 (b) **Except as provided in AS 36.30.627(a)(1), within** [WITHIN] 15 days
16 after receipt of an appeal on a contract claim [CONTROVERSY] the commissioner of
17 administration or the commissioner of transportation and public facilities, as
18 appropriate, may adopt the decision of the procurement officer as the final decision
19 without a hearing.

20 * **Sec. 7.** AS 36.30 is amended by adding a new section to read:

21 **Sec. 36.30.631. Attorney fees, costs, and offers of judgment.** (a) An
22 arbitrator in the arbitration of a construction contract claim under AS 36.30.627(a)(1)
23 and a hearing officer for the hearing of a construction contract claim conducted under
24 AS 36.30.627(a)(2) shall award the prevailing party attorney fees and costs incurred in
25 the arbitration or hearing. The award shall be made as provided by Rules 68, 79, and
26 82 of the Alaska Rules of Civil Procedure.

27 (b) Either party to an arbitration of a construction contract claim conducted
28 under AS 36.30.627 or a hearing of a construction contract claim conducted under
29 AS 36.30.630(a) may serve on the adverse party an offer to allow a final decision to be
30 entered in complete satisfaction of the claim. The offer shall be made, accepted, or
31 rejected as provided for an offer of judgment under Rule 68 of the Alaska Rules of

1 Civil Procedure. Acceptance or rejection of the offer has the same consequences as
 2 acceptance or rejection of an offer of judgment made in a civil action under Rule 68 of
 3 the Alaska Rules of Civil Procedure.

4 * **Sec. 8.** AS 36.30.632 is amended to read:

5 **Sec. 36.30.632. Delegation.** The commissioner of administration and the
 6 commissioner of transportation and public facilities may delegate responsibilities
 7 under AS 36.30.590 - 36.30.630 [AS 36.30.590 AND 36.30.630] to the head of the
 8 contracting agency.

9 * **Sec. 9.** AS 36.30.680 is amended to read:

10 **Sec. 36.30.680. Final decision by the commissioner.** A decision by the
 11 commissioner of administration or the commissioner of transportation and public
 12 facilities after a hearing under this chapter is final. A decision shall be sent within 20
 13 days after the hearing to all parties by personal service or certified mail, except that a
 14 decision by the commissioner of transportation and public facilities involving
 15 procurement of construction shall be sent to all parties by personal service or
 16 certified mail within 45 [90] days after receipt by the commissioner of
 17 transportation and public facilities of the hearing officer's decision [TO ALL
 18 PARTIES BY PERSONAL SERVICE OR CERTIFIED MAIL].

19 * **Sec. 10.** 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. 11.** 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 arbitration,
 26 hearing, and other administrative review of all contract claims [OR
 27 CONTROVERSIES], both before the contracting agency and through an appeal heard
 28 de novo.

29 * **Sec. 12.** AS 36.30.695 is amended by adding new subsections to read:

30 (b) Except as provided by (c) of this section, an arbitrator shall issue a final
 31 decision, and a hearing officer shall issue a recommended decision, within the

1 following time limits after the date the record on the claim is closed:

2 (1) 30 calendar days for a claim of less than \$100,000;

3 (2) 45 calendar days for a claim of \$100,000 or more but less than
4 \$1,000,000; or

5 (3) 60 calendar days for a claim of \$1,000,000 or more.

6 (c) The commissioner of administration or the commissioner of transportation
7 and public facilities may, for good cause shown, grant an arbitrator or a hearing officer
8 additional time to issue a decision.

9 (d) If an arbitrator or hearing officer fails to issue a decision within the time
10 allowed for a decision under (b) or (c) of this section, the arbitrator or hearing officer
11 is disqualified from acting as an arbitrator or hearing officer in another proceeding
12 under this chapter for one year after the decision is issued.

13 (e) The venue for an arbitration or hearing under this chapter is the judicial
14 district where the office of the contracting agency is located, unless the agency and the
15 contractor agree on another location.

16 (f) If a party fails to appear at a proceeding under this chapter, the arbitrator or
17 hearing officer may proceed in the party's absence.

18 (g) Subject to appropriation, any money awarded by an arbitrator's decision
19 shall be paid within 45 days after the date that the arbitrator's decision is final. Subject
20 to appropriation, any money awarded by a hearing officer's recommended decision
21 that is approved by the commissioner of transportation and public facilities shall be
22 paid within 45 days after the date that the commissioner's decision is delivered to the
23 contractor and the agency, unless the commissioner's decision is appealed under
24 AS 36.30.685.

25 * **Sec. 13.** AS 36.30.870 is amended by adding a new subsection to read:

26 (c) The commissioner of administration shall adopt regulations establishing
27 the procedures for arbitration under AS 36.30.627(a), including establishing the
28 qualifications for arbitrators and the method for appointing neutral arbitrators to
29 conduct arbitrations

30 * **Sec. 14.** AS 36.30.990 is amended by adding a new paragraph to read:

31 (24) "hearing" does not include a hearing in an arbitration.

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

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

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

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

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

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

- 15 (1) AS 36.30.620(f);
- 16 (2) AS 36.30.623;
- 17 (3) AS 36.30.625(a);
- 18 (4) AS 36.30.625(c);
- 19 (5) AS 36.30.687(a); and
- 20 (6) AS 36.30.750(b).

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

- 22 (1) AS 36.30.750(a); and
- 23 (2) AS 36.30.750(b).

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