

**CS FOR SENATE BILL NO. 125(FIN)**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE SENATE FINANCE COMMITTEE

Offered: 5/8/03

Referred: Rules

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 36.30.005 is amended by adding a new subsection to read:

7 (d) Notwithstanding the provisions of AS 36.30.627, the University of Alaska  
8 is not required to arbitrate construction contract claims unless the university  
9 specifically agrees to the arbitration.

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

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

1 not [SHALL BE MADE NO] more than 90 days after receipt [BY THE  
 2 PROCUREMENT OFFICER] of all necessary information from the contractor. If  
 3 [FAILURE OF] the contractor fails to furnish necessary information requested by  
 4 [TO] the procurement officer, the procurement officer shall proceed to decide  
 5 [CONSTITUTES A WAIVER OF] the claim and may, in the procurement officer's  
 6 discretion, deny all or part of the claim because of the failure to furnish necessary  
 7 information. During an appeal under this chapter, the contractor may not rely  
 8 on or introduce information that the contractor has failed to furnish to the  
 9 procurement officer in support of the claim. Before issuing the decision, the  
 10 procurement officer shall review the facts relating to the claim [CONTROVERSY]  
 11 and obtain necessary assistance from legal, fiscal, and other advisors.

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

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

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

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

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

5 (2) a reference to the pertinent contract provisions;

6 (3) a statement of the agreed upon and disputed facts;

7 (4) **findings of fact about the claim;**

8 **(5) a determination of any amount payable;**

9 **(6) a** statement of reasons supporting the decision; and

10 **(7) a** [(5)] statement substantially as follows:

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

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

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

20 \* **Sec. 6.** AS 36.30 is amended by adding new sections to read:

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

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

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

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

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

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

4 **Sec. 36.30.629. Subpoenas and discovery.** In appeals under AS 36.30.627,  
 5 the arbitrator or hearing officer may

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

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

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

12 \* **Sec. 7.** AS 36.30.630 is amended to read:

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

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

24 \* **Sec. 8.** AS 36.30 is amended by adding a new section to read:

25 **Sec. 36.30.631. Attorney fees, costs, and offers of judgment.** (a) An  
 26 arbitrator in the arbitration of a construction contract claim under AS 36.30.627(a)(1)  
 27 and a hearing officer for the hearing of a construction contract claim conducted under  
 28 AS 36.30.627(a)(2) shall award the prevailing party attorney fees and costs incurred in  
 29 the arbitration or hearing. The award shall be made as provided by Rules 68, 79, and  
 30 82 of the Alaska Rules of Civil Procedure.

31 (b) Either party to an arbitration of a construction contract claim conducted

1 under AS 36.30.627 or a hearing of a construction contract claim conducted under  
 2 AS 36.30.630(a) may serve on the adverse party an offer to allow a final decision to be  
 3 entered in complete satisfaction of the claim. The offer shall be made, accepted, or  
 4 rejected as provided for an offer of judgment under Rule 68 of the Alaska Rules of  
 5 Civil Procedure. Acceptance or rejection of the offer has the same consequences as  
 6 acceptance or rejection of an offer of judgment made in a civil action under Rule 68 of  
 7 the Alaska Rules of Civil Procedure.

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

9 **Sec. 36.30.632. Delegation.** The commissioner of administration and the  
 10 commissioner of transportation and public facilities may delegate responsibilities  
 11 under AS 36.30.590 - 36.30.630 [AS 36.30.590 AND 36.30.630] to the head of the  
 12 contracting agency.

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

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

23 \* **Sec. 11.** AS 36.30.687(d) is amended to read:

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

27 \* **Sec. 12.** AS 36.30.695 is amended to read:

28 **Sec. 36.30.695. Other rules of procedure.** The commissioner may adopt by  
 29 regulation additional rules of procedure providing for the expeditious arbitration,  
 30 hearing, and other administrative review of all contract claims [OR  
 31 CONTROVERSIES], both before the contracting agency and through an appeal heard

1 de novo.

2 \* **Sec. 13.** AS 36.30.695 is amended by adding new subsections to read:

3 (b) Except as provided by (c) of this section, an arbitrator shall issue a final  
4 decision, and a hearing officer shall issue a recommended decision, within the  
5 following time limits after the date the record on the claim is closed:

6 (1) 30 calendar days for a claim of less than \$100,000;

7 (2) 45 calendar days for a claim of \$100,000 or more but less than  
8 \$1,000,000; or

9 (3) 60 calendar days for a claim of \$1,000,000 or more.

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

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

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

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

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

29 \* **Sec. 14.** AS 36.30.870 is amended by adding a new subsection to read:

30 (c) The commissioner of administration shall adopt regulations establishing  
31 the procedures for arbitration under AS 36.30.627(a), including establishing the

1 qualifications for arbitrators and the method for appointing neutral arbitrators to  
2 conduct arbitrations

3 \* **Sec. 15.** AS 36.30.990 is amended by adding a new paragraph to read:

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

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

7 APPLICABILITY. Sections 1 - 16 and 18 of this Act apply to a contract if the  
8 contract is entered into on or after the effective date of secs. 1 - 16 and 18 of this Act.

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

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

15 \* **Sec. 18.** The uncodified law of the State of Alaska is amended by adding a new section to  
16 read:

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

- 19 (1) AS 36.30.620(f);
- 20 (2) AS 36.30.623;
- 21 (3) AS 36.30.625(a);
- 22 (4) AS 36.30.625(c);
- 23 (5) AS 36.30.687(a); and
- 24 (6) AS 36.30.750(b).

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

- 26 (1) AS 36.30.750(a); and
- 27 (2) AS 36.30.750(b).

28 \* **Sec. 19.** Section 17 of this Act takes effect immediately under AS 01.10.070(c).