SB

341

(FILE 1)

Signature
SB 341

Commonwealth Electric Company

7811 Spring Street • Anchorage, Alaska 99502 • 907/349-8577

February 19, 1986

The Honorable
Patrick Rodey
Chairman
Judiciary Committee
The Senate of Alaska

Re: SB341 "The Procurement Bill"

Dear Senator Rodey,

I would like to take this opportunity to thank you and the members of your committee for providing the opportunity for me to offer my comments on the so called "Procurement Bill", SB341, on Saturday, February 15, 1986. In response to my testimony you requested that I provide you with some written comment on how I would like to see the definition of an "Alaskan Contractor" written for the application of the Alaska Bidders Preference section of the law. In response to that request I submit for your consideration the following definition as I would like to see it, of an Alaskan Contractor.

> An Alaskan Contractor for the purposes of the establishment of qualifications under the Alaska Bidders Preference statute shall mean an Individual, Partnership, Corporation, or Joint Venture, properly licensed and registered to transact business in the State of Alaska; who upon submittal of verifiable documentation demonstrates to the contracting agency involved that it has an established place of business within the State of Alaska. An established business shall be defined as a place of business or headquarters location within the State of Alaska, managed and staffed by persons hired in or transferred to Alaska, for the purpose of operating a business or the Alaska Division of a business established outside of the State of Alaska. For the purpose of qualification under the Bidders Preference statute, the business or Alaska operation must demonstrate that it has been established for a minimum of xxx days prior to the time set for opening of the bids on the project in question. A joint venture of two or more firms must meet the same qualification requirements by either qualifing each entity of the joint venture or meeting the above criteria itself.

I feel very strongly that the State of Alaska should do everything in it's power to attract business and industry into the Alaska Marketplace. I believe that it is our constitutional right to travel and to do business anyplace in the entire United States and that we should set no limits on

who can or can not do business in Alaska. However I believe just as strongly that any business entity that is desiring to receive preferential treatment under the Alaska Bidders Preference statute, should be willing to demonstrate a committment to the State of Alaska and it's people by establishing within the state, and becoming involved in the growth and improvement of our quality of life here in Alaska. We must convince business and industry that Alaska is a good place to do business not just a good place to make a profit. We must convince business and industry that local hire and local procurement of materials are good ideas.

Thank you and your committee for the time you have given me on this matter.

Sincerely,

William J. Bernier Jr.

William J. Bernier Jr.
Division Manager

WJB/dkm

QUESTIONS FOR BARBARA MORSE-QUINN

1. ASHA is a state agency, is it not?

Dixon, 6/9/83 AG's opinion

2. ASHA is required to conform to the state Administrative Procedure Act requirements, is it not?

Dixon

3. How much of ASHA's funding for construction of a building is state versus federal funds?

90:10 State/Federal

4. Aren't you (ASHA) supporting other legislation which would authorize ASHA to undertake lease financing transactions to finance state buildings? e.g., court building?

Yes, HB 519. Governor's bill.

5. AS 18.55.110 has been interpreted by the Department of Law to exempt ASHA from state law requirements in instances where federal policy or procedure conflict with state law and ASHA's failure to follow the federal directive would jeopardize its funding, has it not?

AG' 6/9/83 opinion

PROCUREMENT TECHNICAL ADVISORY COMMITTEE MEETING

DECEMBER 18, 1985

ATTENDANCE:

DEPT.	NAME	PHONE	ADDRESS
GOVERNOR	Mike Nizich	465-3616	MS/0101
X ADMINISTRATION	Bob Link	465-2250	MS/0200
	Marsha Hubbard	465-2200	MS/0200
	Gary Bader	465-2277	MS/0200
COMMERCE	Royce Lowe	465-2508	Box D Juneau 99811
C&RA	Roger Foisy	465-4708	Box BC Juneau 99811
CORRECTIONS	Carol A. Taplin	465-3376	Box T Juneau 99811
EDUCATION	Steve Hole	465-2800	810 West 10th Juneau 99810
DEC	Bill Publicover	465-2676	P.O. Box O JNU MS/1800
FISH & GAME	Beverly Reaume	465-4120	MS/1100
	Earnest Greek	465-4120	MS/1100
HEALTH & SOCIAL	Joanne Clark	465-3082	MS/0600
	Karen Perdue	465-3030	MS/0600
LABOR	John Stark	465-2720	MS/0700 P.O. 1149 Jun. 99801
X LAW	Dick Pegues	465-3672	MS/0300
	Jim Baldwin	465-3600	MS/0300
MILITARY AFFAIRS	Jerry Bowen	249-1375 249-1179	3601 C St.#620 Anch 99503
NATURAL RESOURCES	Chris Rutz	465-2421	Box M Jnu 99811
PUBLIC SAFETY	Sid LaMonica	465-4328	Pouch N 99811 MS/1200

REVENUE	Ervin B. Jones	465-2313	Pouch SA MS0400
TRANSPORTATION	Daniel F. [illegible]lick	465-3911	Pouch Z MS2500
	Loren Rasmussen	465-3911	Pouch Z MS2500
UNIVERSITY	Barbara Peters	474-7468/814C Gruening Bld Fbks 99775-5640	
	Fred King	474-5033/3356 College Road Fbks 99701	

COMPETITIVE SEALED BIDDING SUBCOMMITTEE

co-chair: Lauren Rasmussen (465-2960) & Bob Link (465-2250)
staff: Pat Montgomery (DOA/465-2250)

GOVERNOR	Vern Jones	MS/0101	465-3616
ADMINISTRATION	Bob Link	MS/0210	465-2250
	Mark Obrien	MS/0210	465-2250
COMMERCE	Did not submit name		
C&RA	Roger Foisy	MS/2100	465-4708
CORRECTIONS	did not submit name		
EDUCATION	did not submit name		
DEC	Did not submit name		
FISH & GAME	Earnie Greek	MS1100	465-4120
	Beverly Reaume	MS1100	465-4120
HEALTH & SOCIAL	Gary Horton	MS0600	465-3082
	Joe Betit	MS0600	465-3082
	Newton Chase	MS0600	465-3037
LABOR	John Stark	MS700	465-2200
LAW	Did not submit name		
MILITARY AFFAIRS	Did not submit name		
NATURAL RESOURCES	Chris Rutz	Box M Jnu 99811	465-2421
PUBLIC SAFETY	Sid LaMonica	Box N MS/1200	465-4328
REVENUE	Ervin B. Jones	Box SA-MS0400	465-2313
TRANSPORTATION	Daniel F. Malick	Box Z-MS2500	465-3911
	Loren Rasmussen	Box Z-MS2500	465-2951
UNIVERSITY	Barbara Peters	814C Gruening Bld Fairbanks 99775-5640	474-7468
	Fred King	3356 College Road Fairbanks 99701	474-5033

OTHER PROCUREMENT METHODS SUBCOMMITTEE

co-chairs: Dick Pegues (465-3672) & Joanne Clark (465-3082)

GOVERNOR	Vern Jones	MS/0101	465-3616
ADMINISTRATION	Bob Schofield	MS/0210	465-2250
	Judy Burke	MS/0210	465-2277
	Gard Bader	MS/0210	465-2277
COMMERCE	Royce Lowe	Box D MS/0800	465-2508
C&RA	Roger Foisy	Box BC MS/2100	465-4708
CORRECTIONS	Al Szepanski	Box T MS/2000	465-3376
EDUCATION	Pat Young	Box F MS/0500	465-2814
	Steve Messing		465-2852
DEC	Did not submit name		
FISH & GAME	Jerry White	MS1100	465-4130
	Beverly Reaume	MS1100	465-4120
HEALTH & SOCIAL	Joanne Clark	MS0600	465-3082
	Deborah Smith	MS0600	464-3370
	David Bruce	MS0600	465-3090
LABOR	John Stark	MS700	465-2200
LAW	Dick Pegues	MS0300	465-3672
	Bob Meiners	MS0300	465-3672
	Tom Judson	MS0300	465-3672
MILITARY AFFAIRS	Jerry Bowen	3601 C St.#620	249-1375
		Anchorange 99503	249-1179
NATURAL RESOURCES	Chris Rutz	Box M Jnu 99811	465-2421
PUBLIC SAFETY	Sid LaMonica	Box N MS/1200	465-4328
REVENUE	Ervin B. Jones	Box SA-MS0400	465-2313
TRANSPORTATION	Daniel F. Malick	Box Z-MS2500	465-3911
	Loren Rasmussen	Box Z-MS2500	465-2951
UNIVERSITY	Barbara Peters	814C Gruening Bld Fbks 99775-5640	474-7468
	Fred King	3356 College Road Fbks 99701	474-5033

COMPETITIVE SEALED PROPOSAL SUBCOMMITTEE

co-chairs: Daniel F. Malick (465-3911) & Earnie Greek (465-4120)
staff: Department of Transportation TBA

GOVERNOR	Vern Jones	MS/0101	465-3616
ADMINISTRATION	Bob Saviors	MS/0210	465-2250
	Judy Burke	MS/0210	465-2277
	Gary Bader	MS/0210	465-2277
COMMERCE	did not submit name		
C&RA	Roger Foisy	MS/2100	465-4708
CORRECTIONS	Chuck Fry	MS/2000	465-3376
EDUCATION	Steve Hole	810 W. 10th St. Juneau, AK	465-2800
DEC	Bill Publicover		465-2676
FISH & GAME	Earnie Greek	MS1100	465-4120
	Beverly Reaume	MS1100	465-4120
HEALTH & SOCIAL	Joanne Clark	MS0600	465-3082
	Joe Betit	MS0600	465-3082
	Newton Chase	MS0600	465-3037
	Frank Hickey	MS0600	465-2102
LABOR	John Stark	MS0700	465-2200
LAW	Dick Pegues	MS0300	465-3672
	Bob Meiners	MS0300	465-3672
	Tom Judson	MS0300	465-3672
MILITARY AFFAIRS	Did not submit a name		
NATURAL RESOURCES	Chris Rutz	Box M Jnu 99811	465-2421
PUBLIC SAFETY	Sid LaMonica	Box N, MS/1200	465-4328
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	Loren Rasmussen	Pouch Z-MS2500	465-2951
UNIVERSITY	Barbara Peters	814C Gruening Bld Fairbanks 99775-5640	474-7468
	Fred King	3356 College Road Fairbanks 99701	474-5033

SEC.36.30.170 (d)
Page 13-line 20
When the lowest responsible and responsive bid exceeds available funds by less than 5% the bidder may be offered the opportunity to reduce their bid price to equal available funding,all other terms and conditions remainion the same as the original invitation to bid.

SEC.36.30.300(a)
Page 17-line 26-27
...the authority to make the determination required by this section may be delegated to the Commissioner of the Department of Transportation and Public Facilities and the _____ of the University of Alaska [NOT BE DELEGATED]

In order of preference

1) 36.30.540.(4) & (5) delete entirely

2) 36.30.540.(4).a list of procurements made under this section [CHAPTER]...
36.30.540.(5) a list of procurements made under this section [CHAPTER]...

3) 36.30.540.(4).a list of procurements made under this section,AS 36.30.190,and by competitive sealed bids under this chapter...

36.30.540.(5) a list of procurements made under this section,AS 36.30.190,and by competitive sealed bids under this chapter...

Patrick M. Rodey
Senator

Alaska State Legislature

Senate

1024 W. 6th Avenue, Suite 305
Anchorage, Alaska 99501
(907) 276-6731

During Session
Room [illegible]
Juneau, Alaska 99811
(907) 465-3717

March 6, 1986

Ms. Marsha Trump
Office of Senator Ted Stevens
U.S. Senate
Senate Hart Office Building
Room 522
Washington, D.C. 20510

Re: Status of ASHA under Alaska SB 341

Dear Ms. Trump:

Pursuant to our telephone conversation of earlier today, enclosed please find the following: a copy of SB 341 clipped at the relevant sections; the Alaska Supreme Court decision in ASHA v. Dixon, 496 P.2d 649 (1972); and a June 9,1983 Attorney General's opinion construing AS 18.55.110 to exempt ASHA from the requirements of Alaska law if compliance would jeopardize its federal funding.

I hope these documents are responsive to your concerns. If I can be of any further assistance to you, please do not hesitate to call me.

Very truly yours,

Suzanne S. La Pierre
Senate Judiciary Counsel

Tam

① add a severance provision

② As an amendment to Article 5 perhaps:

A written determination supporting an agency's decision ~~to award a contract~~ shall be issued in all cases in which a contract is awarded to a person not residing or maintaining a place of business within the state, when the supplies, services, professional services or construction which are the subject of the contract could have been obtained from sources within the state.

③ 36.30.890. add on a last sentence.

To the extent that any of the Alaska State Housing Authority's duties under this chapter conflict with its responsibilities under AS 18.55.110, the provisions of AS 18.55.110 shall control.

~~④ 36.30.130 (f)~~

~~a person who "negligently"?~~

As an amendment

(5) 36.30.~~120~~ 130 (b). The state is liable for damages under this section only to the extent it fails to conform substantially to the notice requirements of this section.

(6) ~~36.30.170~~

~~(b)~~

- ~~delete (f) renumber~~

- ~~delete (d)~~

This language is analagous to AS 22.20.037 relating to court system personnel rules, which provides:

(a) Judicial employees shall be employed subject to classification and wage plans based on the merit principle and adopted to the special needs of the judiciary, as determined by the administrative director of courts. Except as otherwise provided by law, all employees of the Alaska court system and the Judicial Council are subject to the general state laws regarding leave, retirement and travel."

A separate page containing these proposed amendments is attached.

KF/kl

Memorandum

Alaska Court System

TO: Arthur H. Snowden, II
Administrative Director

DATE : March 6, 1986

FROM: Karla L. Forsythe
Staff Counsel

SUBJECT: SB 341 - State Procurement Practices

I have reviewed the latest work draft (dated February 26, 1986) of SB 341.

As you know, I worked closely with court system purchasing staff over the past two years to develop comprehensive procurement guidelines for the court system based on the Model Procurement Code. Although the guidelines reflect the Code's competitive principles, they have been drafted to accommodate the specific needs of the judiciary as a separate branch of government.

I am concerned that passage of SB 341 would require revision of the guidelines we worked so hard to develop. This concern is based upon two provisions of SB 341. Section 1 (2) (page 1, line 14) states that one of the purposes of the act is to make as consistent as possible the procurement practices among the branches of state government. Additionally, under proposed section 36.30.030 (page 5, lines 16-20) the court system is required to adopt its own procedures which must be substantially equivalent to the procedures described in SB 341.

Court system guidelines do not deviate in spirit or concept from the proposed legislation. However, many details have been drafted with the needs of the judiciary in mind, and therefore differ from the proposed bill. I am concerned that court system procedures will be challenged on the grounds that they are not "substantially equivalent" or "as consistent as possible" with executive branch practices.

Tam - incorporate these amendments

I suggest the following amendments:

1. Change section 1, paragraph (2) to provide that one of the purposes of the act is to:

   "establish consistent procurement principles for all branches of state government".

2. Change proposed section 36.30.030 to provide:

   The administrative director shall adopt procedures to govern the procurement of supplies, services, professional services, and construction by the judicial branch. Procedures must be based on the competitive principles established under this act, and shall be adapted to the special needs of the judiciary as determined by the administrative director of courts.

March 3, 1986

The Honorable Pat Rodey
Senator
Alaska State Senate
P.O. Box V
Juneau, AK 99811

Re: SB 341

Dear Senator Rodey:

I would like to thank you, as Chairman of the Senate Judiciary Committee, and the other committee members for receiving our comments on the State Procurement Code. As the written transcripts of last week's testimony will not be available for the committee's review before this week's action on the bill, I wanted to reiterate our request for exemption from this legislation. The bill, as proposed, will substantially impact the Alaska State Housing Authority (ASHA) in the following areas:

1. Increase the duration of vacancies between tenant occupancy to insure new State procedures are being followed;

2. Create a corresponding increase in waiting lists for public housing, as tenants will not be moved into vacated units as rapidly as they now are;

3. Reduce federal funds to ASHA based on intricate funding formulas that consider vacant unit turnover and occupancy levels;

4. Require increased personnel in management, maintenance and accounting for which the federal government will not pay;

5. Jeopardize ASHA's status as a "public housing authority" for continued receipt of federal funds at a time of federal cutbacks. These funds will revert to Seattle, Portland or San Francisco rather than stay in Alaska.

Committee members are urged to read the attached letter from the Legislature's own auditors in regard to ASHA wherein the separate status of this agency is noted. To maintain ASHA other than as a separate legal entity of the State will cause jeopardy to federal housing funds and severely limit our abilities to leverage monies.

TELEPHONE (907) 562-2813 BOX 100080 ANCHORAGE, ALASKA 99510

Application of the exemption afforded by ASHA's present enabling legislation (AS 18.55.110) has been significantly narrowed by opinion of the Attorney General dated June 9, 1983. Under this opinion, ASHA would be required to get a case-by-case exemption for each procurement made under any one of the several HUD-funded housing programs administered by ASHA. Unless HUD policies, when in conflict with state law, are recognized as controlling, ASHA's ability to provide housing services within the state will be limited to the state funding available through the Department of Community and Regional Affairs or other state-supported housing programs. We also fear that, absent specific exemption under SB 341, the already limited application of AS 18.55.10 will become unavailable under the doctrine of repeal by implication since the Procurement Bill specifically gives precedence to federal law and regulation only.

We think that the responsible public policy position in this matter is to exempt ASHA from this bill.

Sincerely,

ALASKA STATE HOUSING AUTHORITY

Barbara Morse-Quinn

Barbara Morse-Quinn
Executive Director

BMQ/smr

Enclosure

cc: Senate Judiciary Committee Members
ASHA Board Members

STATE OF ALASKA

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

AUDIT DIVISION
POUCH W
JUNEAU, ALASKA 99811-3300

RECEIVED
ASHA

FEB 28 '86

February 25, 1986

Route
Route
Route
File

Mr. Wayne I. Tucker
Office of Inspector General
Western Regional Office
P.O. Box 5400
Albuquerque, NM 87115

Dear Mr. Tucker:

In your February 14, 1986 letter, you inquired about the audit coverage of certain federal funds expended by the Alaska Department of Commerce and Economic Development (DCED). Specifically, your concerns centered around Alaska State Housing Authority (ASHA) which is an independent, quasi-corporation that is related to DCED only in an administrative way as specified by State statute. Because of this operational separation, we exclude ASHA from our State Department audit of DCED.

A public accounting firm audits ASHA of which you have received a copy of their 1984 combined financial statements. The auditor's opinion references a scope exclusion which includes, "and certain federally subsidized activities." This exclusion relates to federally subsidized Department of Housing and Urban Development (HUD) programs referenced in Note 1 to the financial statements.

The HUD programs are audited by the same public accounting firm (Coopers and Lybrand) but are done so on a two-year cycle. The last audit report we received by this office was for the two years ended 3/31/84, and entitled "Examination of Financial Statements and Supplementary Data of: Annual Contribution Contracts, Preliminary Loan Contract, Section 8, S-014E."

If you haven't received a copy of this report, I would suggest you contact Mr. Paul Harris of ASHA. Furthermore, you may consider contacting HUD directly regarding federal compliance audit coverage of ASHA.

If we can be of further assistance, feel free to contact me.

Sincerely,

Merle R. Jonson
Deputy Legislative Auditor
Division of Legislative Audit

cc: Paul Harris, ASHA

MEMORANDUM

State of Alaska

RECEIVED
ASHA
JUN 13 '83

TO: The Honorable Jim Robison
Commissioner
Department of Labor

DATE: June 9, 1983

FILE NO: 366-625-83

TELEPHONE NO: 465-3600

SUBJECT: Applicability of Title 36 to ASHA (AS 18.55.110)

Route
Route
Route
File

FROM: Norman C. Gorsuch
Attorney General

By: Jonathan B. Rubini
Assistant Attorney General
Government Affairs - Juneau

You have asked whether AS 18.55.110 generally exempts the Alaska State Housing Authority (ASHA) from the prevailing wage requirements of the Little-Davis Bacon Act, AS 36.05. And, if AS 18.55.110 provides only a partial exemption, you also ask whether Title 36 applies to the proposal to construct 40 units of senior citizen housing in Fairbanks.

I

We have previously opined that ASHA is a "state agency" within the ambit of Title 36. 1981 Inf. Op. Att'y Gen. (Sept. 22; J66-473-81). See also Alaska State Housing Authority v. Dixon, 496 P.2d 649 (Alaska 1972). As you note, the prior opinion did not address AS 18.55.110, which provides:

> COOPERATION WITH AND AID OF FEDERAL GOVERNMENT. The authority may do all things necessary or desirable to cooperate with or act as agent for the federal government, or to secure financial aid for housing projects for veterans of World War II and other citizens of the state, provided that those projects may not be undertaken unless an acute shortage of housing exists. With respect to those projects, the authority may not be subject to limitations, restrictions or requirements of other laws, except those relating to land acquisition, prescribing or limiting the procedure or action to be taken in the development or administration of any buildings, property, public works, undertakings or projects of municipal or public corporations or agencies of the state.

It is our view that AS 18.55.110 should not be interpreted in so broad a fashion as to render state law inapplicable in almost any instance where federal funds are applied toward the development of a project. Though not explicitly addresssing the scope of AS 18.55.110, the Dixon court stated that there is "no express exclusion of ASHA from the APA." 496 P.2d at 651. Consequently, interpreting AS 18.55.110 to provide a general exemption is not easily reconcilable with the analytic framework in Dixon. Furthermore, basic tenets of statutory construction require an interpretation of AS 18.55.110 which harmonizes AS 18.55.110 and Title 36. We note, in this regard, that the definitional scope of the Little Davis-Bacon Act, set out at AS 36.95.010, was amended as recently as 1978, presumably with knowledge that ASHA had been consistently viewed as a "state agency."

Rather than providing a broad exemption simply because a project receives federal assistance, we believe the more probable legislative intent was to provide an explicit statutory exemption in instances where the application of state law would jeopardize the receipt of federal assistance. (An analagous statutory exemption is established under AS 35.15.040.) By the statute's own terms, the focus of the exemption is "to secure [federal] financial aid for housing projects." If the receipt of federal assistance is not substantially impaired by the application of state law, there would seem to be no basis for the exemption. In many instances, state or local law can apply concurrently with federal law. The restricted interpretation of AS 18.55.110 is therefore consistent with the general rule that federal law need be exclusive only where the application of other law would thwart the objectives of federal law. See U.S. Const. art. IV.

Clearly, AS 18.55.110 provides an exemption whenever federal law requires the preemption of state or local laws. The more difficult inquiry is whether the exemption extends to those instances where the federal preemption is not legally mandated, but where ASHA is notified that federal funding would nonetheless be jeopardized were state or local law applicable. We believe that the absence of an explicit statutory or regulatory basis requiring the exemption of state or local law does not necessarily preclude the applicability of AS 18.55.110. To impose the statutory exemption only where a preemption of state or local law is explicit would belie the plain legislative intent to promote the receipt of federal funds. Indeed, to read the exemption to apply only where federal funds preempts state or local law, the constitutional prerequisite would render AS 18.55.110 superfluous. Consequently, we interpret AS 18.55.110 as exempting the

application of state or local law when a federal funding entity, properly exercising its discretion, notifies ASHA in writing that the receipt of federal funds would be jeopardized were state or local law deemed applicable. Moreover, to assure the coordinated implementation of state law, we would suggest that ASHA provide a written report, which includes the rationale and evidentiary basis for invocation of the statutory exemption, to the state agency responsible for the enforcement or implementation of the state law in dispute.

II

Since we interpret AS 18.55.110 to provide only a limited exemption, we next address whether Title 36 wage stipulations should apply to the Fairbanks facility.

The proposed project budget, which did not include the cost of Title 36 wages, estimated that the cost to provide the 40 units of elderly housing in Fairbanks would be $4,492,010. Of that amount, four million dollars is to be obtained through a grant from the Department of Community and Regional Affairs (DCRA) 1/, and the balance from federal funds provided by the United States Department of Housing and Urban Development (HUD). In addition to the limited federal assistance available to pay the construction costs, the completed project qualifies for a substantial operation subsidy from HUD. (HUD's rent subsidy program subsidizes over a 40-year period the difference between a fixed percentage of an eligible tenant's income and the fair market rental value.)

We are advised by the area office of HUD that their current program to promote the development and operation of senior citizen facilities does not impose an absolute ceiling on project costs. We are further advised that HUD does not assert that the federal prevailing wage requirements preempt state law. Typically, state prevailing wage requirements can supplant federal minimum wages on projects funded in part with federal money. See 1980 Inf. Op. Atty Gen. (August 21; J66-544-80) (citation of relevant Solicitor of Labor opinion letters).

In the immediate context, however, a novel question is raised due to the fact that different types of wage inde are

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1/ The DCRA grant is the maximum grant allowed by state regulation, 19 AAC 85.092(5).

respectively employed by HUD and the state. HUD proposes use of a "residential construction" wage index on the Fairbanks project, while the state has only a single, "commercial construction" wage index. While estimates vary, the estimated cost of applying Title 36 to the Fairbanks project is between $300,000 -- $500,000. By letter of May 11, 1983, as supplemented by letter of May 16, 1983, copies of which are attached, HUD advised ASHA that it will not participate in any projects, including the Fairbanks project, where "excessive" state prevailing wage rates apply. "Excessive," here, refers at the least to instances where the federal minimum wage is determined by reference to an applicable "residential construction" rate, while Title 36 wage rates reference a "commercial construction" index. All three projects planned for construction during the 1983 construction season -- Fairbanks, Wasilla, Sitka -- present comparable discrepancies between federal and state prevailing wage indexes.

The letters of May 11 and 16 indicate that HUD views the imposition of state prevailing wages established under a "commercial construction" index as excessive where a federal "residental construction" index has been developed. 2/ Since the letters provide the requisite written notification that the receipt of federal funds would be jeopardized were Title 36 prevailing wage requirements applicable, ASHA may assert the exemption established under AS 18.55.110. 3/

2/ We note, though, that HUD's asserted authority to decline participation in an otherwise qualified project solely due to the application of what are viewed as "excessive" state prevailing wages is not beyond question. We have not been directed to any specific statutory or regulatory authority to inform the determination of what constitutes an "excessive" state prevailing wage. Typically, HUD participation is limited to those projects which satisfy defined cost limitations. The general rule in Alaska is that the eligible project cannot exceed $92,200/unit. However, since the Fairbanks facility exceeds the $92,200 limitation, even without the Title 36 wages, we believe that the state would be in a difficult posture were it to argue that HUD acted unreasonably in determining not to participate in the Fairbanks project due to the application of "excessive" state prevailing wages.

3/ The discussion in this opinion assumes that HUD's use of a "residential" wage index on the Fairbanks facility is proper. Whether it is appropriate to employ a "residential" wage index

Our final observation is that the question of whether Title 36 wage rates apply to housing projects which are jointly funded by both the state and HUD raises a myriad of complex legal and policy concerns. Unfortunately, as long as there remains a broad discrepancy between the prevailing wage rates established by the different scales, and as long as the HUD program does not impose articulable cost limitations, there can be no clear and decisive legal resolution. Ultimately, it is a policy decision whether to insist that Title 36 applies, and to risk the denial of federal assistance. We do note, though, that were the state to establish a "residential construction" wage rate, the prospect of continued conflict would be substantially diminished.

If we can be of further assistance, feel free to call.

JBR/jb

cc: Richard Lyon, Commissioner
Department of Commerce and Economic Development

Kevin Bruce
Special Assistant
Office of the Governor

Julia Tucker
General Counsel, ASHA

Susan Olsen
Area Counsel, HUD

Bob Landau
Assistant Attorney General
Anchorage

3/ (continued)

to a four-story facility with an elevator built to commercial specifications, as we are advised is descriptive of the Fairbanks facility, is beyond the scope of this opinion. ASHA, of course, may pursue whatever administrative or judicial avenues are available to raise this issue. If ASHA were to pursue a review of the wage determination, during the pendency of the review, it would be impossible to assess whether the exemption afforded under AS 18.55.110 is applicable.

Offered: 2/4/86
Referred Rules

Original sponsors: Sturgulewski and Rodey

IN THE SENATE BY THE FINANCE COMMITTEE

CS FOR SENATE BILL NO. 204 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to contracts for architectural, engineering, and land surveying services; and providing for an effective date."

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

* Section 1. AS 36.90 is amended by adding a new section to read:

Sec. 36.90.100. COMPLIANCE OF CONTRACTS WITH PROFESSIONAL REGISTRATION REQUIREMENTS. The state or a political subdivision of the state may not award a contract for architectural, engineering, or land surveying services to

(1) an individual who is not registered under AS 08.48 to perform the architectural, engineering, or land surveying services required by the contract;

(2) a partnership that is not qualified under AS 08.48.251 to provide the architectural, engineering, or land surveying services required by the contract; or

(3) a corporation that is not authorized under AS 08.48.241 to offer the architectural, engineering, or land surveying services required by the contract.

* Sec. 2. AS 36.98 is amended by adding a new section to read:

Sec. 36.98.043. ARCHITECTURAL, ENGINEERING, AND LAND SURVEYING CONTRACTS. (a) Notwithstanding the provisions of AS 36.98.010(3) and 36.98.040, a state agency shall negotiate a contract with the most qualified and suitable firm or person of demonstrated competence for architectural, engineering, or land surveying services. The state

agency shall award a contract for those services at fair and reasonable compensation as determined by the state agency, after consideration of the estimated value of the services to be rendered, and the scope, complexity, and professional nature of the services.

(b) If negotiations with the most qualified and suitable firm or person under (a) of this section are not successful, the state agency shall negotiate a contract with other qualified persons or firms of demonstrated competence, in order of public ranking. The state agency may reject all or part of a proposal.

(c) This section does not apply to contracts awarded in a situation of public necessity if the person responsible for execution of the contract on behalf of the state agency certifies in writing that a situation of public necessity exists.

(d) Notwithstanding the other provisions of this section, a state agency may include price as a factor in selecting architectural, engineering, and land surveying services when, in the judgment of the state agency, the services required are repetitious in nature and the scope, nature, and amount of services required are ~~sufficiently~~ measurably defined by measurable and objective standards to reasonably enable firms and individuals making proposals to compete with a clear understanding and interpretation of the services required. In order to include price as a factor in selection, the state agency shall involve in the evaluation of the proposals at least one person who is registered in the state to perform the architectural, engineering, or land surveying services that are the primary services to be provided by the contract.

(e) This section does not apply to a contract that incorporates both design and construction services.

* Sec. 3. This Act applies to requests for bids or proposals for architectural, engineering, and land surveying services issued after the

effective date of this Act.

* Sec. 4. This Act takes effect immediately in accordance with AS 01.-- 10.070(c).

CS FOR SENATE BILL NO. 341 (JUDICIARY)

WORK DRAFT (COOK 2-27-86)

AMENDMENTS

Those submitting:

Department of Administration
Department of Community and Regional Affairs
Department of Fish and Game
Department of Health and Social Services
Department of Labor
Department of Natural Resources
Department of Transportation and Public Facilities

Department of Administration comments
CSSB-341 (Cook 2/27/86)

SEC.36.30.050.(d)
Page 7-line 20
...list and the department shall furnish names of Alaskan vendors on a rotating basis from the list in response to each request.

SEC.36.30.110.(a)
Page 10-line 6
...received,purchase description,and a description of all contractual terms and conditions applicable to the procurement.

SEC.36.30.230.
Page 18-line 6
[CONTRACT IS AWARDED]notice of intent to award is issued.

SEC.36.30.320.(e)
Page 21-line 15
Notices shall be [MAILED] provided to those active prospective contractors on the appropriate list maintained under AS 36.30.050 designated by the commissioner.

SEC.36.30.540.(4)&(5)
Page 29-line 7
(4)a list of procurements made under this chapter,except those made under 36.30.320,from out-of-state sources during the previous two fiscal years together with the total number of procurement contracts entered into during that period with out-of-state contractors and the total value of these contracts;and
(5) a list of procurements made under this chapter,except those made under 36.30.320,from in-state sources during the previous two fiscal years together with the total number of procurement contracts entered into during that period with in-state contractors and the total value of these contracts.

DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS

CSSB 341 PROCUREMENT BILL
AMENDMENTS

Page 51, Line 5-11,
Delete all material.
Renumber subsections.

Page 52, Lines 26-29,
Page 53, Lines 1-3,
Delete all material and insert:

"(10) "GRANT" An agreement between a State agency and an entity which is typically not organized for profit (e.g., municipal corporation, non-profit corporation, tribal organization organized under the Indian Reorganization Act, traditional councils) and which typically represents a public interest group (e.g. community, region). The agreement provides for the performance of a public purpose which is primarily for the direct benefit to the people which the grant recipient represents. The State gains only indirectly through the benefit derived by the community or region.

In certain cases, State grants may be made to individuals and entities organized for profit. Further, grants may be made for purposes which result in some private benefit to an individual or entity. However, those types of grants will also have a significant public purpose as defined by law or legislative intent."

Page 72, Lines 20-21,
Delete all material after the word "allocation".

Page 78, Lines 6-8,
Delete all material.

Page 87, Lines 20-29,
Delete all material.

DEPARTMENT Fish and Game

CSSB341 PROCUREMENT BILL

AMENDMENTS

Section 36.30.050
Page 7
Lines 13, 14, 15

Section 36.30.050. LIST OF CONTRACTORS. (c) The lists [may] shall be used by the chief procurement officer or an agency when issuing invitations to bid or requests for proposals under this chapter. The lists may be used by the Legislative Council, the court system, and the Alaska Railroad Corporation.

(d) The lists [shall] may be used [in providing notice of intent] to make a small procurement [. A procurement officer who intends to make a procurement] under AS 36.30.320. [shall request names from the appropriate list and the department shall furnish names on a rotating basis from the list in response to each request.]

Section 36.30.100
Page 9
Lines 26, 27

Section 36.30.100. GENERAL POLICY. (a) Except as otherwise provided in this chapter, or unless specifically exempted by law, an agency contract shall be awarded by competitive sealed bidding.

(b) Competitive sealed bidding is not required

(1) when the commissioner determines in writing that food, clothing, or medical supplies, or materials for use in laboratory or medical studies may be purchased otherwise to the best advantage of the state;

(2) when rates are fixed by law or ordinance;

(3) for the purchase of products or services manufactured or provided by an employment program;

(4) for the purchase of products or services provided by the correctional industries program established under AS 33.32;

(5) for professional services; [or]

(6) for concessions operated on state property [.] ;

(7) for aircraft charters involving hazardous flying conditions where safety of agency personnel is involved; or

(8) for purchases of less than $5,000 as defined under AS 36.30.320.

Section 36.30.130
Page 12
Lines 25, 26

Section 36.30.130. PUBLIC NOTICE OF INVITATION TO BID. (a) The procurement officer shall give adequate public notice of the invitation to bid at least 21 days before the date for the opening of bids. If a determination is made in writing that a shorter notice period is necessary for a particular bid, the 21-day period may be shortened. The determination shall be made by the chief procurement officer for bids for supplies, services, or professional services. The determination shall be made by the commissioner of transportation and public facilities for bids for construction or acquisition of property for the state equipment fleet. Notice shall be published in the Alaska Administrative Journal. The time and manner of notice must be in accordance with regulations adopted by the commissioner of administration. When practicable, notice may include

Section 36.30.170
Page 15
Line 19, 20, 21

(d) The provisions of (b) and (c) of this section do not apply to construction contracts for highways and public works [if the construction contracts exceeds $5,000.] in excess of $5,000 or other procurements specified under this chapter in excess of $50,000.

Section 36.30.240
Page 18
Line 18

Sec. 36.30.240. DISCUSSION WITH RESPONSIBLE OFFERORS AND REVISIONS TO PROPOSALS. As provided in the request for proposals, and under regulations adopted by the commissioner, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors reasonably susceptible of being selected for award shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may at the discretion of the procurement officer be permitted after submissions and

before the award of the contract for the purpose of obtaining best and final offers. In conducting discussions, the procurement officer may not disclose information derived from proposals submitted by competing offerors.

Section 36.30.655
Page 39
Line 22, 23, 24

Section 36.30.655. LIST OF PERSONS DEBARRED OR SUSPENDED. The commissioner shall maintain a list of all persons debarred or suspended from consideration for award of contracts [.] and shall provide lists of those names to the agencies on a monthly basis.

Section 36.30.930
Page 51
Line 5

Sec. 36.30.290. CIVIL AND CRIMINAL PENALTIES. The following penalties apply to violations of this chapter:

(1) a person who knowingly or intentionally contracts for or purchases supplies, equipment for the state fleet, services, professional services, or construction in a manner contrary to the requirements of this chapter or the regulations adopted under this chapter is personally liable for the recovery of all state money paid plus 20 percent of that amount, legal interest from the date of payment, and all costs and damages arising out of the violation;

AS 36.30.005(b)

Line 18 Control over construction of State owned facilities and the State equipment fleet...

DEPARTMENT Health & Social Services

CSSB341 PROCUREMENT BILL

AMENDMENTS

Page 3

Sec. 36.30.005(d) - new section

Line 11(a) - (4) Nothing in this section diminishes the authority established in existing statute for any agency to establish facility or equipment standards, to regulate construction or acquisition, as otherwise prescribed.

Sec. 18.20.130. Definitions. In AS 18.20.010 — 18.20.130

(1) "hospital" means an institution or establishment, public or private, devoted primarily to providing diagnosis, treatment, or care over a continuous period of 24 hours each day for two or more nonrelated individuals suffering from illness, physical or mental disease, injury or deformity, or any other condition for which medical or surgical services would be appropriate;

(2) "governmental unit" means the state, a municipality, or other political subdivision, or a department, division, board or other agency of any of them;

(3) "department" means the Department of Health and Social Services. (§ 40-6-1 ACLA 1949; am § 2 ch 112 SLA 1957; am § 2 ch 63 SLA 1964; am § 6 ch 104 SLA 1971; am § 1 ch 72 SLA 1978)

Effect of amendments. — The 1978 amendment rewrote paragraph (1).

Article 2. Alaska Hospital and Medical Facilities Survey and Construction Act.

Section	Section
140. Purpose	180. Approval of applications
141. Department functions	190. Inspection of projects
150. Duties of department	200. Acceptance of grants
160. Priority of projects	210. Definitions
170. Application for construction projects	220. Short title

Collateral references. — 40 Am. Jur. 2d, Hospital and Asylums, §§ 3, 4.

41 C.J.S., Hospitals, § 5.

Depreciation of property by the erection of a hospital by a municipality as a "taking" or "damaging" within the constitutional provision. 4 ALR 1012.

Power of municipal corporation to provide hospital. 25 ALR 612.

Hospital as within tax exemption provision not specifically naming hospitals. 144 ALR 1483.

Licensing and regulation of nursing or rest homes. 97 ALR2d 1187.

Validity and construction of zoning regulations expressly referring to hospitals, sanitariums, nursing homes. 27 ALR3d 1022.

Validity and construction of statute requiring establishment of "need" as precondition to operation of hospital or other facilities for the care of sick people. 61 ALR3d 278.

Housing facilities for former patients of mental hospital as violating zoning restrictions. 100 ALR3d 876.

Sec. 18.20.140. Purpose. The purpose of AS 18.20.140 — 18.20.220 is to make an inventory of existing hospitals and medical facilities, community mental health centers and facilities for the mentally retarded, to survey the need for construction of hospitals and medical facilities, community mental health centers and facilities for the mentally retarded, and to develop a program and plan of construction for each. (§ 2 ch 87 SLA 1955; am § 3 ch 63 SLA 1964)

NOTES TO DECISIONS

The moneys used to construct the Ketchikan hospital were spent for a public purpose. Lien v. City of Ketchikan, Sup. Ct. Op. No. 146 (File No. 275), 383 P.2d 721 (1963).

And that purpose does not become nonpublic when the hospital is turned over to a charitable, nonprofit corporation for operation, rather than being operated by the city itself. The public purpose remains unchanged. Lien v. City of Ketchikan, Sup. Ct. Op. No. 146 (File No. 275), 383 P.2d 721 (1963).

As public purpose depends on character of use. — The test of whether a public purpose is being served does not depend on the religious or nonreligious nature of the agency that will operate the leased property, but upon the character of the use to which the property will be put. Lien v. City of Ketchikan, Sup. Ct. Op. No. 146 (File No. 275), 383 P.2d 721 (1963).

Sec. 18.20.141. Department functions. The department shall be the sole agency for the administration of the plan as required by the federal act. The department shall develop and administer any programs necessary for compliance with the federal act. (§ 4 ch 63 SLA 1964)

Sec. 18.20.150. Duties of department. The department shall

(1) for each of the following groups of facilities: Group 1. Hospitals and medical facilities; Group 2. Community mental health centers; Group 3. Facilities for the mentally retarded;

(A) make a statewide inventory of existing public, nonprofit and proprietary facilities;

(B) survey the need for construction of these facilities;

(C) on the basis of the inventory and survey, develop a program for the construction of public and other nonprofit facilities for each of these groups which will, in conjunction with existing facilities, afford the necessary physical facilities for furnishing adequate facility services to all residents of the state;

(2) prepare and submit to the surgeon general a state plan, including the hospital and medical facilities, community mental health centers and facilities for the mentally retarded construction program developed under (1) of this section. The plan will provide for the establishment, administration, and operation of hospital and medical facilities, community mental health centers and facilities for the mentally retarded, and construction activities in accordance with the requirements of the federal act and the regulations promulgated under it; before the submission of the plan to the surgeon general, the department shall give adequate publicity to a general description of the provisions proposed to be included, and hold a public hearing where persons or organizations with a legitimate interest in the plan may express their views. After approval of the plan by the surgeon general, the department shall publish a brief summary of the provisions in at least one newspaper of general circulation in the state, and shall make copies of the plan available upon request to interested persons, and from time to time but not less often than annually, the commissioner shall review the construction program and submit to the surgeon gen-

eral any modifications which he finds necessary, and which are not inconsistent with the requirements of the federal act;

(3) provide for adequate facilities to furnish needed services for persons unable to pay for them in accordance with regulations prescribed under the federal act;

(4) submit any reports that the surgeon general considers necessary for compliance with the federal act;

(5) do all things on behalf of the state necessary to obtain benefits under the federal act. (§ 4 ch 87 SLA 1955; am § 5 ch 63 SLA 1964)

Sec. 18.20.160. Priority of projects. The state plan shall set out the relative need for the projects included in the construction program determined in accordance with the regulations prescribed under the federal act, and provide for the construction, maintenance and operation to the extent financial resources permit, in the order of the relative need. (§ 5 ch 87 SLA 1955)

Sec. 18.20.170. Application for construction projects. The state, a political subdivision of the state, or a public or other nonprofit agency requesting federal funds for a health facility construction project shall apply to the department. The application shall conform to federal and state requirements. (§ 6 ch 87 SLA 1955; am § 6 ch 63 SLA 1964)

Opinions of attorney general. — The expenditure of state money in the construction of a hospital operated by a religious nonprofit group under the terms and conditions imposed by the federal government under the Hill-Burton Act is a public purpose and not prohibited by the constitution or laws of the state. 1959 Op. Att'y Gen., No. 19.

Sec. 18.20.180. Approval of applications. The commissioner of the department shall give every applicant an opportunity for a fair hearing. If, after giving reasonable opportunity for development and presentation of applications in the order of relative need, the commissioner of the department finds that a project application complies with the requirements of AS 18.20.170 and conforms with the state plan, he shall approve and recommend the application and forward it to the surgeon general. (§ 7 ch 87 SLA 1955)

Sec. 18.20.190. Inspection of projects. The commissioner of the department shall inspect each construction project approved by the surgeon general from time to time. If the commissioner finds that work has been performed upon the project or purchases have been made in accordance with the approved plans and specifications, he shall certify to the surgeon general that this is the fact and that payment of an installment of federal funds is due the applicant. (§ 8 ch 87 SLA 1955)

Sec. 18.20.200. Acceptance of grants. The department may accept on behalf of the state and may deposit separate and apart from

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Burton Act is a public
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public money and funds, a grant from the federal government, or gift or contribution from any source made to assist in meeting the cost of carrying out the purposes of AS 18.20.140 — 18.20.220. Federal funds received and not expended for these purposes shall be repaid to the United States. (§ 9 ch 87 SLA 1955)

Sec. 18.20.210. Definitions. In AS 18.20.140 — 18.20.220

(1) "department" means the Department of Health and Social Services;

(2) "federal act" means Title VI of the Public Health Service Act (42 U.S.C. 291 et seq.) concerning hospitals and medical facilities and the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963 (P.L. 88-164) concerning facilities for the mentally retarded and community mental health centers, both as now or hereafter amended;

(3) "hospital" includes a public health center and general, tuberculosis, mental, chronic disease, and other type of hospital, and related facilities, including laboratory, outpatient department, nurses' homes, and training facilities, and central services facilities operated in connection with a hospital, but does not include a hospital furnishing primarily domiciliary care;

(4) "medical facilities" means diagnostic and treatment centers, rehabilitation facilities and nursing homes as those terms are defined in the federal act and other medical facilities for which federal aid may be authorized under the federal act;

(5) "nonprofit hospital" and "nonprofit medical facility" means a hospital or medical facility owned and operated by a nonprofit corporation or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of a private shareholder or individual;

(6) "public health center" means a publicly owned facility providing public health services, including related facilities such as laboratory, clinic, and administrative offices operated in connection with the public health center;

(7) "surgeon general" means the Surgeon General of the Public Health Service or any other federal agency designated to administer the federal act;

(8) "community mental health center" means a facility providing services for the prevention or diagnosis of mental illness, or care and treatment of mentally ill patients, or rehabilitation of such persons, which services are provided principally for persons residing in a particular community or communities in or near which the facility is situated;

(9) "facility for the mentally retarded" means a facility specially designed for the diagnosis, treatment, education, training, or custodial care of the mentally retarded, including facilities for training specialists and sheltered workshops for the mentally retarded, but only if such workshops are part of facilities which provide or will provide comprehensive services for the mentally retarded;

(10) "nonprofit facility for the mentally retarded" and "nonprofit community mental health center" mean, respectively, a facility for the mentally retarded and a community mental health center which is owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual; and the term nonprofit private agency or organization means an agency or organization which is such a corporation or association or which is owned and operated by one or more of such corporations or associations. (§ 3 ch 87 SLA 1955; am §§ 7 — 9 ch 63 SLA 1964; am § 6 ch 104 SLA 1971)

Opinions of attorney general. — A nursing home is considered a hospital for the purpose of the licensing provisions. 1963 Op. Att'y Gen., No. 7.

Sec. 18.20.220. Short title. AS 18.20.140 — 18.20.220 may be cited as the Alaska Hospital and Medical Facilities Survey and Construction Act. (§ 1 ch 87 SLA 1955)

Article 3. Payment of Hospital Charges.

Section	Section
230. Leaving general hospital without arranging for payment	250. Receipt of services without intent to pay a misdemeanor
240. Posting of law required	260. Definitions

Collateral references. — 40 Am. Jur. 2d, Hospitals and Asylums, §§ 6, 12, 13.
41 C.J.S., Hospitals, §§ 6, 7.
Liability of incompetent's estate for care and maintenance furnished by public institution or hospital before incompetent's acquisition of any estate or property. 33 ALR2d 1257.

Sec. 18.20.230. Leaving general hospital without arranging for payment. Departure of a patient from a general hospital without making or offering to make arrangements with hospital officials or office personnel to pay at a later date for the services rendered or items furnished is evidence of intent not to pay. (§ 3 ch 40 SLA 1960)

Sec. 18.20.240. Posting of law required. Every hospital shall post a printed copy of AS 18.20.230 — 18.20.260 in a conspicuous place in each room occupied by patients and in the lobby of the hospital. No person may be convicted for a violation of AS 18.20.230 — 18.20.260 unless it appears to the satisfaction of the court that the provisions of this section have been substantially complied with by the hospital. (§ 4 ch 40 SLA 1960)

Sec. 18.20.250. Receipt of services without intent to pay a misdemeanor. A person who requests and receives hospital care including board, room, surgical care, medical care, or related services or drugs or

DEPARTMENT Health & Social Services

CSSB341 PROCUREMENT BILL

AMENDMENTS

p. 7 Sec. 36.30.050

(d) The lists may [SHALL] be used in providing notice of intent to make a small procurement. A procurement officer who intends to make a procurement under AS 36.30.320 may [SHALL] request names from the appropriate list and the department shall furnish names on a rotating basis from the list in response to each request.

AS 36.080(d) - new section

Line 11-a The department shall have the sole responsibility for construction or procurement or any related services related to leased property or structures including those referenced in AS 36.30.005(b).

DEPARTMENT Health & Social Services

CSSB341 PROCUREMENT BILL

AMENDMENTS

Page 17

Sec. 36.30.220(a)

Line 21 chapter shall establish a maximum overhead rate.

Line 23 ...posals, the agency must include its [STANDARD] overhead rate within its

DEPARTMENT Health & Social Services

CSSB341 PROCUREMENT BILL

AMENDMENTS

Page 52

AS 36.30.990 (10)

Line 28 ...gram authorized by law or regulation;

DEPARTMENT Health & Social Services

CSSB341 PROCUREMENT BILL

AMENDMENTS

pp. 71-72 Sec. 40. AS 37.05.316 is amended to read:

Sec. 37.05.316 GRANTS TO NAMED RECIPIENTS. When an amount is appropriated or allocated to a department as a grant for a named recipient which is not a municipality, the department to which the appropriation or allocation is made shall promptly notify the named recipient of the availability of the grant and request the named recipient to submit a proposal to provide the goods or services specified in the appropriation act, or both, for which the appropriation or allocation is made. At the same time, the department may issue a request for proposals from other qualified persons to provide the same goods or services, or both, in the same area. The department shall grant to [CONTRACT WITH] the named recipient unless the Office of the Governor, with due regard for any local expertise or experience among those making proposals, determines that an award of the grant [CONTRACT] to a different party would better serve the public interest. If the grant [CONTRACT] is awarded to another party than that named by the legislature, the basis of that action shall be stated in writing at the time the grant is issued and a copy of the written statement shall be sent to the Legislative Budget and Audit Committee. A grant [CONTRACT] shall be executed within 60 days after the effective date of the appropriation or allocation. [THE PURCHASE OF THE GOODS OR SERVICES, OR BOTH, SHALL BE IN ACCORDANCE WITH AS 36.30.100(B) [AS 37.05.230(1)(B)].]

DEPARTMENT LABOR

CSSB341 PROCUREMENT BILL

AMENDMENTS

No ammendments required or requested.

Prepared By Christopher Rutz
Div of Management
465-2424

DEPARTMENT of NATURAL RESOURCES

CSSB341 PROCUREMENT BILL

AMENDMENTS

Sec 36.30.050 (d) page 7 line 17

"The lists (shall) may be used in providing notice of intent to make small procurements."

Sec 36.30.050 (d) page 7 line 19

"... procurement under AS 36.30.240 (shall) may request names from the appropriate list."

Sec 36.30.130 (a) page 12 line 21

"Notice (shall) may be published in the Alaska Administrative Journal."

Sec 36.30.130 (b) page 13 line 3-4

"The State, employees, or agents of the State, are not liable for damages caused by failure to comply with this section."

Sec 36.30.210 (b) page 17 line 10-11

"The request must provide a description of the factors that will be considered by the procurement officer when evaluating the proposals received, including the relative importance of (price and other) those factors."

Sec 36.30.210 (d) page 17 line 17-18

("(d) The provisions of AS 36.30.115(b)-(e) apply to competitive sealed proposals.")

Sec 36.30.250 (a) page 18 line 25-27

"... the most advantageous to the state taking into consideration (price and) the evaluation factors set in the request for proposals."

Sec 36.30.255 (b) page 19 line 2-7

(" (b) In determining whether a proposal is advantageous to the state, the procurement officer shall take into account, in accordance with regulations of the commissioner, whether the offeror qualifies as an Alaskan bidder under AS 36.30.170 (b) or is offering the services of an employment program as defined in AS 36.30.100 (c).")

Prepared By Christopher Rutz
Div of Management
465-2424

DEPARTMENT of NATURAL RESOURCES

CSSB341 PROCUREMENT BILL

AMENDMENTS

Sec 36.30.300 (a) page 19 line 24-29

"A contract may be awarded under this section only when the (chief procurement officer or for construction contracts or procurements for the state equipment fleet, the commissioner of transportation and public facilities) using agency determines in writing that there is only one source for the required supplies, services, professional services, or construction, and the chief procurement officer or, for construction contracts or procurements for the state equipment fleet, the commissioner of transportation and public facilities, concurs with the determination."

Sec 36.30.300 (a) page 20 line 3-4

"the authority to (make) approve the determination required by this subsection may (not be delegated) only be delegated to a designee of the chief procurement officer, or commissioner of transportation and public facilities, acting in the chief procurement officer's or commissioner's absence, or to the commissioner of the using agency when the value of the supplies, services, or construction is less than $5000 or professional services is less than $25,000."

Sec 36.30.365 page 22 line 14

"At least (10) 5 days before the formal award....."

Sec 36.30.510 page 27 line 27

" ....for each contract awarded under competitive sealed proposals over $2500. "

Sec 36.30.520 (a) page 28 line 9

" .... a record listing all sole source procurement contracts over $2500 made under AS 36.30.300 and emergency procurements over $2500 made under AS 36.30.310."

Sec 36.30.565 page 30 line 14

" ... protests shall be filed within (10) 5 days after notice of intent to award..."

Sec 36.30.930 (1) page 51 line 5

"... a person who knowingly or intentionally contracts for or purchases.."

DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES

CSSB341 PROCUREMENT BILL

AMENDMENTS

WORK DRAFT, Cook, 2/27/86

Section 36.30.115, Page Number 10, Line 12.

After (a) delete [Within 24 hours] and insert Immediately,

And if this is not an acceptable alternative then we propose this amendment,

After (a) Within, delete [24] and insert 72.

DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES

CSSB341 PROCUREMENT BILL

AMENDMENTS

WORK DRAFT, Cook, 2/27/86

Section 36.30.170, Page Number 15, Lines 19 - 21.

Delete the complete (d) which states as follows:

[(d) The provisions of (b) and (c) of this section do not apply to construction contracts for highways and public works if the construction contract exceeds $5,000.]

DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES

CSSB341 PROCUREMENT BILL

AMENDMENTS

WORK DRAFT, Cook, 2/27/86

Section 36.30.210, Page Number 16, Lines 26.

After license and, delete [within 24 hours] and insert immediately.

And if this is not an acceptable alternative than we propose this amendment,

After within, delete [24] and insert 72.

DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES

CSSB341 PROCUREMENT BILL

AMENDMENTS

WORK DRAFT, Cook, 2/27/86

Section 36.30.115, Page Number 10, Line 29.

After by the, delete [procurement officer] and insert Department.

DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES

CSSB341 PROCUREMENT BILL

AMENDMENTS

WORK DRAFT, Cook, 2/27/86

Section 36.30.115, Page Number 10, Line 25.

After by the, delete [state] and insert bidder.

DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES

CSSB341 PROCUREMENT BILL

AMENDMENTS

WORK DRAFT, Cook, 2/27/86

Section 36.30.115, Page Number 10, Line 13.

After of bids, delete [each] and insert the apparent low.

DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES

CSSB341 PROCUREMENT BILL

AMENDMENTS

WORK DRAFT, Cook, 2/27/86

Section 36.30.610, Page Number 35, Line 22.

Delete the _____ (under line).

U.S. Department of Housing and Urban Development
Anchorage Office, Region X
701 "C" Street, Box 64
Anchorage, Alaska 99513

RECEIVED
ASHA
JAN 24 '86

JAN 24 1986

Barbara Morse-Quinn, Executive Director
Alaska State Housing Authority
Post Office Box 100080
Anchorage, Alaska 99510-0080

EX cc
DEK cc
Ea, Dept
EX Sec
Board

Dear Ms. Morse-Quinn:

Subject: Relationship of Alaska State Housing Authority and the U. S. Department of Housing and Urban Development

This is in response to your letter dated January 17, 1986, requesting our comments on the relationship of Alaska State Housing Authority (ASHA) and U. S. Department of Housing and Urban Development (HUD).

The relationship is a contractual one which is defined by the terms of the Annual Contributions Contract. Under that document a public housing authority (PHA) is provided federal funds for the specific purpose of providing and operating housing for families of lower income. The funding is designated for specific projects and may only be used in accordance with the HUD-approved development program, contract terms, and HUD regulations and policies. Should the funding approved by HUD for a particular project not be made available to the PHA, it would be necessary for the federal government to provide additional funding in order for HUD to meet its contractual responsibilities to the PHA. For this reason, HUD cannot approve any arrangement whereby the PHA does not have total access to and control of, the funds supplied by HUD. As a small example of this, HUD requires the PHA to invest the funds provided in order to earn interest. The amount of funding provided has been calculated on the basis that a certain amount of interest will have been received by the PHA. Any attempt to make HUD funds provided to ASHA restricted as to access or control or subject to legislative approval would be strongly opposed by HUD. In this regard, I have been advised by our Headquarters' office that the Department has already taken such a position with another state when it recently advised the governor of that state that remedial legislation must be enacted to eliminate legislative control over HUD funds.

I am not in a position to discuss how HUD's legislation compares with that of other federal agencies. It is my impression, however, that HUD may have more authority, than other agencies, to become directly responsible

for the activities usually undertaken by a state agency using federal funds. For example, the default provisions of the statute and Annual Contributions Contract provide that title and/or possession be given to the Secretary, at the Secretary's discretion, should the PHA fail to observe the terms of the contract. In any case, HUD funds are specifically designated for an identifiable project to be developed or managed by a named PHA and are not considered generalized housing funds earmarked particular to be used in a state.

For additional comments, I refer you to the Regional Counsel's letter dated October 17, 1985, which speaks to the relationship between AHA and HUD. Finally, we do believe the Attorney General's Opinion of June 9, 1983, interpreting AS 18.55.110 may have direct relevance to the issues you raised.

I hope this is of some assistance to you. Please keep us fully informed of your discussions on this matter and feel free to contact Susan Olsen, Chief Counsel, at 271-4683 for additional comments.

Sincerely,

Michael P. Kulick
Manager

U.S. Department of Housing and Urban Development
Anchorage Office, Region X
701 "C" Street, Box 64
Anchorage, Alaska 99513

FMG

RECEIVED
ASHA
JAN 24 '86

Route EX Bus
Route DEX cc
Route All Dept's
File EX Sec
1 Hm- 3 extra

JAN 24 1986

Barbara Morse-Quinn, Executive Director
Alaska State Housing Authority
Post Office Box 100080
Anchorage, Alaska 99510-0080

Dear Ms. Morse-Quinn:

Subject: Senate Bill 8001 : Now SB 341
Proposed State Procurement Act

In response to your inquiry of December 13, 1985, we have reviewed the above-referenced bill from the perspective of its impact on Alaska State Housing Authority (ASHA) and U. S. Department of Housing and Urban Development (HUD) programs and operations. We find that, overall, as written, it may be viewed as burdensome and restrictive from a practical standpoint, and as undesirable to HUD in terms of foreseeable increased costs, time delays, and lack of adequate protections for federally-funded housing projects. We do not find the proposed act to be of particular value to either ASHA or HUD, inasmuch as we firmly believe that there are adequate and appropriate safeguards currently in place to meet any concerns the state may have with regard to fairness, economy, and control. This is accomplished by way of ASHA regulations and HUD's regulations and policies, and the requirements of the Annual Contributions Contract between HUD and ASHA.

While it is difficult to analyze the full impact, on an agency or federally-funded program, of a law for which regulations have not yet been written, we offer the following comments on the bill, along with responses to your comments to Senator Faiks.

As to the delegability of professional services authority, as well as the authority to procure supplies and other services (as referenced in your first two pages of comments), we think that the only logical interpretation of AS 36.30.015(b) is that such authority is delegable. However, there is no requirement that the authority be delegated, and, clearly, the adoption of regulations is not delegable, nor is there any requirement that the individual departments or agencies participate in the formulation of the regulations. While ASHA presently has the power under AS 18.55.100 to adopt its own regulations, the proposed legislation would apparently remove this power,

and we see this as a significant deficiency of the law from a practical and policy standpoint. We think that any applicable regulations should be written in accordance with HUD requirements. Additionally, as you are aware, HUD is particularly concerned with contracting for construction and has developed extensive "boiler-plate" provisions which are required to be utilized in any such contracts. We see great possibilities for conflict should the authority not be delegated to ASHA and should the regulations not comport with HUD's requirements.

We agree that most matters covered in your numbered paragraphs (2) and (3) are covered by HUD regulations, procedures, or other requirements which variously are less, or more, restrictive than that proposed by the state bill. This is true, of course, about most of the sections of the legislation. In HUD's view, a few of the areas which would raise immediate and strong conflict are: Section 36.30.080, which could involve the administration of federal funds for lease purposes through the state treasury; Section 36.30.170, which provides for an Alaska bidder preference; Section 36.30.270, which requires the approval of the Department of Law to alter any contract terms, rather than HUD's counsel; and Section 36.30.015, which requires the attorney general's approval of any contract for legal services. As an additional note, it appears that use of the consolidated supply program would be seriously curtailed or delayed in that already selected competitive bid suppliers would have to resubmit to the state's competitive bid process.

The extensive bid documentation required in Section 36.30.110, as discussed in your paragraph (5), does appear to be cumbersome and bound to cause delays. Further, we think the requirements for Alaska business licenses, as applied to subcontractors in supply contracts, is unduly restrictive and burdensome. HUD policy expects procurement procedures to be as broad and competitive as possible. As mentioned earlier, the provision for Alaska bidder preference is totally unacceptable for federally-funded ASHA projects. This raises questions also about the acceptability of Section 36.30.050, which requires every agency's use of a centrally maintained list of contractors.

Regarding your paragraph (6), HUD requires acceptable bid security of five percent. We would undoubtedly find that the ten percent requirement would be unacceptably excessive and would not be willing to approve these extra costs to a project.

Section 36.30.200(b), as referenced in your paragraph (8), appears to be unduly burdensome in that written determinations must be obtained from the chief procurement officer or the commissioner of transportation and public facilities prior to ASHA's ability to enter a contract by other means than a competitive bid (except where emergency or small procurement standards are met). Under the proposed legislation, authority for these determinations is not delegable.

We agree that ASHA's current regulations regarding emergency conditions are more narrowly defined than the proposed language, and, therefore, less apt to present grounds for disputes, either before or after a procurement action is taken [reference your paragraph (9)].

As to your paragraphs (10) and (11), we do not believe that either Section 36.30.370 or Section 36.30.380 conflicts with HUD regulations. However, to require an agency to review and analyze the capability of a proposed contractor's accounting system is, we think, excessively burdensome.

As you point out in your paragraph (12), HUD's policies, procedures and contract provisions, as well as its regulations, do govern the distribution and administration of federal monies designated for public housing projects. Section 36.30.890 of the proposed bill, therefore, provides only a limited exemption to ASHA. Limited exemption could jeopardize ASHA's receipt of HUD funds in an instance of conflict with the state procurement statute. We note the relevance of the Alaska Attorney General's opinion of June 9, 1983, on the applicability of Title 36 to ASHA, wherein he discusses AS 18.55.110 as follows:

> . . . We believe the more probable legislative intent was to provide an explicit statutory exemption in instances where the application of state law would jeopardize the receipt of federal assistance. . . . By the statute's own terms, the focus of the exemption is 'to secure [federal] financial aid for housing projects.' . . . . Consequently, we interpret AS 18.55.110 as exempting the application of state or local law when a federal funding entity, properly exercising its discretion, notifies ASHA in writing that the receipt of federal funds would be jeopardized were State or local law deemed applicable.

It seems to us that this opinion may be an instructive and persuasive rationale for exempting ASHA from the proposed procurement statute. We tend to agree with you that an acceptable alternative to what we view as a basis for recurring interpretive, managerial, and legal problems under the proposed law, would be to include ASHA as an exempt agency along with the railroad, the legislature, and the court system. If ASHA is not made exempt, then, at a minimum, we would want to see added the terms "policy or other requirement" to the existing terms "federal statute or regulation" in AS 36.30.890.

Thank you for this opportunity to comment.

Sincerely,

Michael P. Kulick
Manager

U.S. Department of Housing and Urban Development
Anchorage Office, Region X
701 "C" Street, Box 64
Anchorage, Alaska 99513

RECEIVED
ASHA
JAN 31 '86

JAN 31 1986

Route EX cc
Route DEX cc
Route All Dept Heads cc
File EX Sec
Board

Barbara Morse-Quinn, Executive Director
Alaska State Housing Authority
Post Office Box 100080
Anchorage, Alaska 99510-0080

Dear Ms. Morse-Quinn:

Subject: Senate Bill 8001
Proposed State Procurement Act

It has just come to our attention that Senate Bill 8001 does provide for an amendment to AS 18.55.100 by adding, "(d) The authority's power to contract, lease, rent, construct, acquire, procure and provide for services under this section is governed by AS 36.30."

We think the only logical application of this subsection with respect to leasing and renting is where Alaska State Housing Authority is procuring a lease for itself, equipment rentals, or similar transactions.

We do not recall any aspect of Senate Bill 8001 which would apply to the leasing of space to tenants. Inasmuch as Alaska State Housing Authority's tenant leasing policies and practices are subject to the U. S. Department of Housing and Urban Development's regulations and other requirements, we would find objectionable any application of Senate Bill 8001 in this regard.

Sincerely,

Michael P. Kulick
Manager

ALASKA STATE HOUSING AUTHORITY

INTER OFFICE MEMORANDUM

DATE January 31 19 86

FROM: Dick Pryor, Contracts and Budgeting Officer

TO: Barbara Morse-Quinn, Executive Director

SUBJECT Procurement Bill Study Group

The study group as appointed by your memorandum of January 23, 1986 has reviewed State Bill 341. This bill would enact a State Procurement Code. As written, Senate Bill 341 would require the Alaska State Housing Authority to fully comply with the statute and the subsequent regulations developed by the Department of Administration.

Our review of the bill brings us to the same conclusions as expressed by the U.S. Department of Housing and Urban Development (HUD) in their letter to ASHA of January 24, 1986 (copy attached).

ASHA was established by the state to meet the federal requirements of a public housing authority for the purposes of applying for and receiving HUD funding for public low- and moderate-income housing. This funding is provided under the terms and conditions of a federal contract called an Annual Contributions Contract (ACC). This contract requires our compliance with HUD federal statutes, regulations and policies, or other requirements HUD may so determine are necessary. ASHA is subject to an annual HUD audit and periodic management review by HUD. Our contracting and procurement process must comply with federal law, HUD policy, and the provisions of the ACC contract. This process is reviewed extensively by federal officials. Each individual contract we let must be approved by HUD.

The imposing of another governmental system on ASHA would make our procurement and contracting process exessively cumbersome and costly to administer. Were this bill to pass in its present form, HUD funding of these projects would be seriously jeopardized. In addition, we would expect that the assets of the Authority would be reduced by an amount equal to the cost of developing a procurement office and redevelopment of our accounting system.

It is the recommendation of the study group that ASHA be exempted from the state procurement code. To our knowledge, ASHA is the only authority or state entity that receives and expends federal funding directly. ASHA is governed by extensive federal statutes, regulations, policy, and contract provisions in the expenditures of these funds. ASHA, as a federally recognized public housing authority, receives the funds by entering into

ALASKA STATE HOUSING AUTHORITY

INTER OFFICE MEMORANDUM

DATE January 31 19 86

FROM: Dick Pryor

TO: Barbara Morse-Quinn

SUBJECT: Procurement Bill Study Group

contracts directly with the federal government. Budgets are submitted and approved annually by HUD. The apparent control of this federal funding by the State as proposed by this bill and the subsequent regulations that would be promulgated will affect our continued funding under our contracts with HUD. Therefore, our sectional comments are as follows:

Section 36.30.990(1) should be changed to include the Alaska State Housing Authority as an exempt agency along with the Alaska Railroad Corporation. Section 10 of the bill relating to AS 18.55.100 must be deleted.

In the event ASHA is not exempted from the bill, Section 36.30.890 must be changed to include "federal policy and other requirements" in addition to the existing terms "federal statutes and regulations". Also Section 36.30.015 must include the authority to delegate for contracting for services and professional services. If ASHA is not to be exempt from Senate Bill 341, we propose to receive full delegation for all our procurement and contracting activities.

In the further event that ASHA is not exempt from the bill and the above changes to the bill in Sections 36.30.890 and 36.30.015 are not made, ASHA's ability to effectively expend federal funds will be severely affected. The ability to operate the federally-funded low- and moderate-income housing statewide would be jeopardized. We anticipate HUD officials would enter into a legal dialogue with ASHA and state officials to resolve these matters to their satisfaction.

If no changes to the bill are made the following sections would cause serious problems in our ability to operate as a Public Housing Authority (PHA) under federal law:

1. Section 36.36.015. As written the inability of DOA to delegate authority to contract for technical services and professional services would be very cumbersome for ASHA.

2. Section 36.30.040. Most of the things mentioned in this section are governed by HUD policy and handbooks for the housing programs and would present conflicts not exempted by Section 36.30.890.

ALASKA STATE HOUSING AUTHORITY

INTER OFFICE MEMORANDUM

DATE January 31 19 86

FROM: Dick Pryor

TO: Barbara Morse-Quinn

SUBJECT: Procurement Bill Study Group

3. Section 36.30.110. The requirement for a contractor at the time of bidding to submit names and Alaska Business Licenses is considered by HUD to be unduly restrictive on the bidding process.

4. Section 36.30.120. HUD policy is to require a 5% bid bond for all contracts. Anything higher is considered excessive and would not be allowed by HUD.

5. Section 36.30.160(b). An allowance for correction of mistakes in bid after bid opening is an unacceptable practice and should not be permitted for any reason.

6. Section 36.30.170. The Alaska bidder preference is unacceptable to HUD.

7. Section 36.30.200(b). The requirement to obtain written determinations from DOA or DOT/PF for entering into a contract by means other than competitive bid is considered by HUD to be unduly burdensome for ASHA in administering HUD approved and funded programs.

8. Section 36.30.270. The requirement for review by the Department of Law of contracts rather than by HUD's legal counsel is unacceptable to HUD, and review by both is burdensome and time consuming if their reviews conflict.

9. Section 36.30.430 and .460. The same comment as in 9 above apply regarding the Alaska Department of Law review.

10. Section 36.30.735(b). The reference to the Alaska State Housing Authority should be deleted and replaced by a more general term referring to all public authorities. Alaska State Housing Authority does not engage in any of the activities governed by the existing statute (44.65.060) which has been incorporated in this section.

11. Section 36.30.890. ASHA must comply with extensive policy, handbooks, contract provisions, and other requirements of HUD that are in conflict with this procurement code. The provision for only federal statute or regulations to prevail is

ALASKA STATE HOUSING AUTHORITY

INTER OFFICE MEMORANDUM

DATE January 31 19 86

FROM: Dick Pryor

TO: Barbara Morse-Quinn

SUBJECT Procurement Bill Study Group

not sufficient for the continued operation of ASHA on HUD directives.

12. Section 10. Delete entire section. This section is directly in conflict with the HUD requirements set out in comment (11) above.

Enclosed with this report is a copy of HUD's comments on the proposed procurement code and copies of same of HUD's policy handbooks as examples of the current requirements we must meet. Also enclosed is a summary of our procurement activity for the past years.

Dick Pryor
Contracts and Budgeting Officer

DP/laj

Encls.

ALASKA STATE HOUSING AUTHORITY
ANALYSIS OF PURCHASES*
January 1985 to January 1986

Month	No. of Invoices	Amount**
January 1986	1418	$1,134,071
December 1985	1688	632,310
November 1985	1452	534,836
October 1985	1718	1,240,746
September 1985	1750	589,509
August 1985	1940	892,378
July 1985	1350	536,249
June 1985	1506	1,272,783
May 1985	1726	1,020,969
April 1985	1056	1,737,736
March 1985	1250	907,694
February 1985	1291	1,014,430
January 1985	1613	1,478,645
Average for month	1520	$ 999,412

*Source: Comptroller, Alaska State Housing Authority
** Federally Assisted Housing Funds

January 31, 1986

The Honorable Loren Lounsbury
Commissioner
Department of Commerce and Economic
Development
P.O. Box D
Juneau, AK 99811

ATTENTION: Becky Bear

Re: SB 341

Dear Commissioner Lounsbury:

The Alaska State Housing Authority (ASHA) has been asked by your office to comment on SB 341. We appreciate your forwarding our remarks to their intended recipients. I, and members of the staff, are available for legislative testimony if it is requested or an appearance seems warranted.

The level of our procurement activities for the past twelve months averages nearly $1,000,000 per month, with approximately 1520 invoices per month being processed. Procurement is presently performed substantially as conceived by the legislation, but is directly governed by our compliance with AS 36; ASHA's purchasing regulations (3 AAC 95.010 et seq.); the published policies, procedures, handbooks, regulations and rules of the U.S. Department of Housing and Urban Development (HUD); and the specific provisions of our Annual Contributions Contract agreements executed by and between HUD and ASHA. Given the existing level of our activitity and our current contractual agreements with the federal government, we are seeking exemptions from this legislation, similar to those given to the Alaska Railroad Corporation.

Although our existing regulations have served ASHA well for several years, our regulations would become outdated by the passage of this bill. Should ASHA succeed in being exempted from this legislation, we would propose to review and update our regulations to make them as compatible as possible with each of the final provisions of the new state law. This task would be accomplished in coordination with HUD Counsel and the Office of the Attorney General. In the case of conflict, we may expect that federal authority over our procedures would prevail.

TELEPHONE (907) 562-2813 BOX 100080 ANCHORAGE, ALASKA 99510

I have attached comments from HUD officials outlining certain areas of concern, a copy of the pertinent sections of our contracts with them, a statistical analysis of our present level of procurement, and a staff sectional analysis. Due to an immediate deadline for comment these remarks are being telecopied, while backup information on HUD's published policies is arriving under separate cover.

For your information, we have been asked to coordinate directly with the Department of Administration and the Department of Transportation and Public Facilities in providing them with materials on our existing procedures. It is my understanding that they are reviewing all agencies' regulations and public policies for future regulation drafting efforts.

Thank you for providing us with this opportunity to comment. Please contact me if you are in need of additional information on this subject.

Sincerely,

ALASKA STATE HOUSING AUTHORITY

Barbara Morse-Quinn
Executive Director

BMQ/smr

Enclosures:

1) HUD Correspondence, January 24, 1986 (2 letters)
2) ASHA Staff Sectional Analysis
3) Analysis of Purchases 1/85-1/86
4) Correspondence to Senator Faiks, December 13, 1985
5) Annual Contributions Contract, SF-210
6) ASHA Purchasing Regulations (3 AAC 95-010 et seq.)
7) HUD Publications
   - °Notice CPD 79-31
   - °Transmittal 7460-8
   - °Transmittal 7585.1 REV-2 CHG-1
   - °Transmittal 7485.1 REV-2

cc: ASHA Board Members

February 5, 1986

Mr. Loren Rasmussen
Department of Transportation
and Public Facilities
Division of Standards
and Technical Services
P.O. Box Z
Juneau, Alaska 99811

Re: SB 341

Dear Mr. Rasmussen:

The information in this package is forwarded in response to your recent telephone request to Preston Johnson, Director, Housing Development and Construction, for the Alaska State Housing Authority (ASHA). We are still waiting for the following federal publications governing our present procurement practices:

HUD Notice CPD 79.31
HUD Transmittal 7460-8
HUD Transmittal 7585.1 Rev-2 CH6-2
HUD Transmittal 7485.1 Rev-2

We have been told they will arrive within the next two weeks, and we will forward them to you, under separate cover, as soon as they are received.

With this letter, please find three letters from the U.S. Department of Housing and Urban Development (HUD) regarding their general oversight of this agency. Also, please find a copy of our existing purchasing regulations, a copy of HUD Form 52663 governing our contracts with HUD, ASHA staff sectional analysis of SB 341, and some related correspondence.

I hope this information is of use to you. Please be advised that we are not in a position, at this time, to endorse any proposed regulations implementing this bill. As you will see, we have serious concerns about being placed in a position of conflict with the policies of our federal funding source.

We would appreciate being informed of any comments you have with regard to our position and would like to receive directly and

review any draft regulations you promulgate. Thank you for contacting us. We will look forward to hearing from you again as your work progresses.

Sincerely,

ALASKA STATE HOUSING AUTHORITY

Barbara Morse-Quinn
Executive Director

BMQ:mrm

Enclosures

cc: ASHA Board Members
Commissioner Richard Knapp

PART 9.
ALASKA STATE HOUSING AUTHORITY

Chapter
95. Procurement
(3 AAC 95.110 - 3 AAC 95.320)
96. Acquisition of Real Property and Improvements
(3 AAC 96.010 - 3 AAC 96.250)
97. Disposition of Real Property
(3 AAC 97.010 - 3 AAC 97.330)
98. Public Housing
(3 AAC 98.010 - 3 AAC 98.190)

CHAPTER 95.
PROCUREMENT

Article
1. Procurement by Competitive Solicitation
(3 AAC 95.010 - 3 AAC 95.135)
2. Procurement by Negotiation
(3 AAC 95.140 - 3 AAC 95.205)
3. Procurement Protests
(3 AAC 95.210 - 3 AAC 95.255)
4. Miscellaneous
(3 AAC 95.260 - 3 AAC 95.320)

ARTICLE 1.
PROCUREMENT BY COMPETITIVE SOLICITATION

Section
15. Contract Award by Competitive Solicitation
25. Competitive Sealed Bidding Defined
35. Competitive Sealed Proposal Defined
45. Invitation to Bid and Request for Proposals Defined
55. Public Notice
65. Submission of Bids and Proposals
75. Late Bids and Proposals
85. Receipt of Bids and Proposals
95. Modification and Withdrawal of Bids and Proposals
105. Opening of Bids and Proposals
115. Rejection of Bids and Proposals
125. Responsibility of Bidders and Offerors
135. Award

3 AAC 95.015. CONTRACT AWARD BY COMPETITIVE SOLICITATION. (a) ASHA will award all contracts for supplies, materials, equipment, services, construct[illegible] and the leasing of real property by competitive sealed b[illegible]g or by competitive sealed proposal under 3AAC 95.015--[illegible]95.135, except as provided in 3AAC 95.145--3AAC 95.205.

(b) ASHA will, in its discretion, award a contract by competitive sealed proposal if the executive director makes a determination in writing that the use of competitive sealed bidding is not practicable or in the best interest of ASHA due to the nature of the procurement. (Eff. 11/26/81, Register 80)

3 AAC 95.025. COMPETITIVE SEALED BIDDING DEFINED. Competitive sealed bidding is a method of procurement which involves but is not limited to

(1) public solicitation of bids through an invitation to bid;

(2) public opening of bids; and

(3) contract award, if any, to the lowest responsive and responsible bidder. (Eff. 11/26/81, Register 80)

3 AAC 95.035. COMPETITIVE SEALED PROPOSAL DEFINED. Competitive sealed proposal is a method of procurement which involves but is not limited to

(1) public solicitation of proposals through a Request for Proposals;

(2) public opening of proposals;

(3) negotiations and discussions with responsible offerors whose proposals have been determined in writing by the executive director or his designee to be reasonably susceptible of being selected for award; and

(4) a contract award, if any, to the responsible offeror whose proposal is most advantageous to ASHA. (Eff. 11/26/81, Register 81)

3AAC 95.045. INVITATION TO BID AND REQUEST FOR PROPOSALS DEFINED. (a) ASHA will solicit bids through the use of an invitation to bid.

(b) ASHA will solicit proposals through the use of a request for proposals.

(c) An invitation to bid and a request for proposals will contain the following information:

(1) the date of the invitation to bid or request for proposal;

(2) the closing time for the submission of bids or proposals;

(3) the place for the submission of bids or proposals;

(4) the time and place for the opening of the bids or proposals;

(5) the place where bid or proposal forms or other relevant information regarding the bid or proposal may be obtained;

(6) a general description of the scope of work and services required or a general description of the type, quality and quantity of the items to be purchased; and

(7) bid or proposal guarantee requirements.
(Eff. 11/26/81, Register 80)

3AAC 05.055. PUBLIC NOTICE. (a) At least 20 days before the last day set for the submission of bids or proposals, or 10 days if it is anticipated by ASHA that the contract will not exceed $25,000, the invitation to bid or request for proposals will be:

(1) published in a newspaper of general circulation in the state;

(2) posted in a public building or ASHA office nearest the municipality, community or area in which the construction will be located or the goods or services will be utilized;

(3) posted in ASHA's central office in Anchorage, Alaska; and

(4) delivered to an office of the Associated General Contractors if the bid or proposal is for construction.

(b) ASHA will, in its discretion, also notify prospective bidders or proposers by any other method including but not limited to

(1) mailing or sending the invitation to bid or request for proposals to prospective bidders or proposers selected by ASHA; and

(2) publishing the invitation to bid or request for proposals in a trade journal.

(c) Failure by a prospective bidder or offeror to receive actual notice of an invitation to bid or request for proposals does not invalidate any bidding or proposal procedure.
(Eff. 11/26/81, Register 80)

3AAC 05.065. SUBMISSION OF BIDS AND PROPOSALS. (a) Bids and proposals must be submitted in sealed envelopes. The outside of an envelope must identify the contents as either a bid or proposal and must set out the date and time of the bid or proposal opening.

(b) Bids and proposals must be submitted so as to be received in the office designated in the invitation to bid or request for proposals no later than the closing time for submission of bids or proposals. (Eff. 11/26/81, Register 80)

3AAC 95.075. LATE BIDS AND PROPOSALS. (a) A bid or proposal received at the office designated in the invitation to bid or request for proposals after the closing time for the submission of bids or proposals, is a late bid or proposal and will not be considered.

(b) Late bids or proposals will be retained by ASHA. (Eff. 11/26/81, Register 80)

3AAC 95.085. RECEIPT OF BIDS AND PROPOSALS. (a) Bids and proposals will be date and time stamped or marked upon receipt by ASHA. Bids bids and proposals received before the time set for opening will be kept unopened, except that unidentified bids and proposals may be opened by ASHA solely for the purpose of identification.

(b) Bids and proposals opened by mistake or for identification purposes will be immediately resealed in their envelopes. The person responsible for such an opening will write on or attach to the envelope an explanation of the opening, the date and time opened, and his name and position.

(c) Before bid or proposal opening, information concerning the identity and the number of bids or proposals received will be made available only to ASHA employees who have a need for such information within their scope of work, unless otherwise directed in writing by the executive director. (Eff. 11/26/81, Register 80)

3AAC 95.095. MODIFICATION AND WITHDRAWAL OF BIDS AND PROPOSALS. (a) Modified bids and proposals may be submitted at any time before the closing time for submission of bids or proposals. Modified bids and proposals must be submitted in sealed envelopes. The outside of the envelope must identify the contents as a modified bid or proposal and must set out the date and time of the bid or proposal opening.

(b) Bids and proposals may be withdrawn at any time before the closing time for submission of bids or proposals by written notice received at the place for the submission of bids or proposals. (Eff. 11/26/81, Register 80)

3AAC 95.105. OPENING OF BIDS AND PROPOSALS. (a) Bids and proposals received before the time set for opening will be opened in public at the time and place stated in the invitation to bid or request for proposals. The names of the bidders or offerors and the total amounts bid or proposed will be read aloud to the persons present.

(b) Examination of bids and proposals by the public will be permitted if it does not interfere unduly with the conduct of ASHA business. Original bids and proposals may be examined by

the public only under the immediate supervison of the executive director or his designee and under conditions which preclude the possibility of a substitution, addition, deletion, or alteration of a bid or proposal. (Eff. 11/26/81, Register 80)

3AAC 95.115. REJECTION OF BIDS AND PROPOSALS. ASHA may reject a bid or proposal for any reason not disallowed by law including, but not limited to, the following:

(1) the bid or proposal fails to conform to the requirements of the invitation to bid or request for proposals or is otherwise non-responsive;

(2) the bidder or offeror is not responsible;

(3) the bidder or offeror has failed to satisfactorily perform on a previous contract with ASHA or a governmental entity;

(4) the bidder or offeror has unpaid taxes, fees, fines, or other charges due ASHA or a governmental entity;

(5) the bidder or offeror is currently disbarred or ineligible from bidding on ASHA, federal, state, or other governmental entity contracts;

(6) the bid or proposal is late;

(7) the bid or proposal is unsigned;

(8) the bid or proposal is unreasonable as to price;

(9) the bid or proposal contains an ambiguity or uncertainty as to any term or condition; or

(10) the executive director determines in writing that acceptance of the bid or proposal is not in the best interest of ASHA. (Eff. 11/26/81, Register 80)

3AAC 95.125. RESPONSIBILITY OF BIDDERS AND OFFERORS. (a) ASHA will, in its discretion, make a reasonable inquiry to determine the responsibility of a bidder or offeror. The failure of a bidder or offeror to promptly supply information in connection with such an inquiry is grounds for a determination of non-responsibility with respect to the bidder or offeror.

(b) In determining the responsibility of a bidder or offeror, ASHA will, in its discretion, consider the following factors:

(1) the ability, capacity and skill of the bidder or offeror to perform the contract;

(2) the ability and capacity of the bidder or offeror to perform the contract within the time specified without delay or interference;

(3) the character, integrity, reputation, judgment, experience, fitness and efficiency of the bidder or offeror;

(4) the quality of the performance of the bidder or offeror on previous contracts;

(5) the previous and existing compliance by the bidder or offeror with laws, ordinances, or regulations effecting or relating to the contact; and

(6) the sufficiency of the financial resources and ability of the bidder or offeror to perform the contract.

(c) If the lowest responsive bidder is determined to be not responsible, ASHA will, before contract award

(1) notify the bidder of the evidence reflecting upon the bidder's nonresponsibility; and

(2) afford the bidder an opportunity to rebut the evidence and to present relevant evidence as to his responsibility.

(d) If a contract award is made to a bidder other than the lowest responsive bidder, a full and complete written statement of the reasons for the award will be made by the executive director and delivered to the unsuccessful lowest responsive bidder. (Eff. 11/26/81, Register 80)

3AAC 95.135. AWARD. (a) Unless all bids are rejected, ASHA will make contract award in a writing by the executive director to the lowest responsive and responsible bidder.

(b) Unless all proposals are rejected, ASHA will make contract award in a writing by the executive director to the responsible offeror whose proposal is determined in writing by the executive director to be the most advantageous to ASHA, considering price and the evaluation factors set out in the request for proposals or other proposal documents.

(c) ASHA will, in its discretion, issue a notice of tentative award to all bidders or offerors before contract award. The notice of tentative award will set out the name of the bidder or offeror to whom ASHA anticipates making a contract award and the anticipated contract amount. The notice of tentative award will not constitute an acceptance or rejection of a bid or proposal or a contract award by ASHA.

(d) If two or more bids otherwise acceptable for contract award under 3AAC 95.015--3AAC 95.135 are tied, ASHA will make contract award to the tied bidder whose bid is determined in writing by the executive director to be in the best interest of ASHA. (Eff. 11/26/81, Register 80)

ARTICLE 2.
PROCUREMENT BY NEGOTIATION

Section
145. Negotiated Contracts
155. Small Procurement Contracts
165. Professional Services Contracts
175. Governmental Contracts
185. Emergency Contracts
195. No-competition Contracts
205. Negotiations After Unsuccessful Bidding

3AAC 95.145. NEGOTIATED CONTRACTS. ASHA will, in its discretion, award the contracts described in 3AAC 95.145-3AAC 95.205 through direct negotiation, without competitive sealed solicitations. (Eff. 11/26/81, Register 80)

3AAC 95.155. SMALL PROCUREMENT CONTRACTS. ASHA will, in its discretion, award a contract for a small procurement in an amount not greater than $5,000 through direct negotiation. (Eff. 11/26/81, Register 80)

3AAC 95.165. PROFESSIONAL SERVICES CONTRACT. ASHA will, in its discretion, award a contract for professional or technical services, including, but not limited to, a contract with an accountant, appraiser, architect, attorney, consultant, contract manager, draftsman, engineer, financial advisor, or physician, through direct negotiation. (Eff. 11/26/81, Register 80)

3AAC 95.175. GOVERNMENTAL CONTRACTS. ASHA will, in its discretion, award a contract between ASHA and one or more governmental entities or a contract for the procurement of goods or services through a consolidated supply contract or program of a governmental entity through direct negotiation.
(Eff. 11/26/81, Register 80)

3AAC 95.185. EMERGENCY CONTRACTS. In an emergency, ASHA will, in its discretion, award a contract by direct negotiation. An emergency exists if ASHA or the public could be seriously or materially injured, financially or otherwise, if the property or services contracted for are not furnished by a certain time and they could not be contracted for by that time by means of competitive sealed solicitations. The executive director shall cause to be made a written record of the facts constituting the emergency and shall determine in writing that an emergency exists before an award is made under this section. This section applies irrespective of whether the emergency could or should have been foreseen. (Eff. 11/26/81, Register 80)

3AAC 95.195. NO COMPETITION CONTRACTS. ASHA will, in its discretion, award a contract through direct negotiation if there is no competition. There is no competition if

(1) the rates or charges are set by law;

(2) there is only one source of procurement within the State of Alaska and the contract amount is under $50,000; or

(3) there in only one source of procurement within the borough where the goods or services are to be utilized and the contract amount is under $10,000. (Eff. 11/26/81, Register 80)

3AAC 95.205. NEGOTIATION AFTER UNSUCCESSFUL BIDDING. (a) ASHA will, in its discretion, award a contract through direct negotiation if an invitation to bid has been issued under 3AAC 95.010--3AAC 95.135 and all bids are rejected or no bids are received.

(b) If all bids are rejected, ASHA will give each responsible bidder a reasonable opportunity to negotiate before a contract award is made under this section. Contract award under this section is not, however, limited to bidders on the original solicitation.

(c) Contract award under this section must be at

(1) a negotiated price lower than the lowest rejected bid by a responsible and responsive bidder under the original solicitation; and

(2) the lowest negotiated price offered by a responsible and responsive offeror. (Eff. 11/26/81, Register 80)

ARTICLE 3.

PROCUREMENT PROTESTS

Section
215. Right to Protest
225. Form of Protest
235. Time for Filing
245. Stay of Procurement
255. Decision

3AAC 95.215. RIGHT TO PROTEST. An actual or prospective bidder or offeror who is aggrieved in connection with the solicitation or award of a contract by ASHA may file a protest with the executive director. (Eff. 11/26/81, Register 80)

3AAC 95.225. FORM OF PROTEST. A protest under 3AAC 95.215 must be in writing and must set out or contain the following:

(1) the name of the party making the protest;

(2) the identity of the solicitation or contract being protested;

(3) the date the party making the protest first knew of the facts giving rise to the protest;

(4) the basis and nature of the protest;

(5) the facts supporting the protest and other relevant information;

(6) copies of all documents, affidavits, correspondence, and other materials relevant to the protest; and

(7) a statement of the relief requested. (Eff. 11/26/81, Register 80)

3AAC 95.235. TIME FOR FILING. A protest under 3AAC 95.215 must be filed with the executive director at ASHA's central office within the earlier of

(1) two business days after the party making the protest knew or should have known of the facts giving rise to the protest; or

(2) two business days after the party making the protest receives a notice of tentative award. (Eff. 11/26/81, Register 80)

3AAC 95.245. STAY OF PROCUREMENT. If a protest has been filed in accordance with 3AAC 95.215--3AAC 95.235 before contract award, ASHA will not make a contract award unless the executive director determines in writing that

(1) the items to be procured are urgently required;

(2) delivery or performance will be unduly delayed by failure to make award promptly; or

(3) a prompt award will be otherwise in the best interest of ASHA. (Eff. 11/26/81, Register 80)

3AAC 95.255. DECISION. (a) The executive director will issue a written decision on a protest which has been filed in accordance with 3AAC 95.215--3AAC 95.255. The decision will state the reasons for the action taken. The decision will be based on

(1) the information and materials submitted to the executive director by the party making the protest under 3AAC 95.225; and

(2) the information and materials available to ASHA staff.

(b) A copy of the decision under this section will be mailed or otherwise furnished to the party making the protest.

(c) The decision under this section is the final action that will be taken by ASHA on the protest. (Eff. 11/26/81, Register 80)

ARTICLE 4.
MISCELLANEOUS

Section
265. Federal Assistance
275. Definitions

3AAC 95.265. FEDERAL ASSISTANCE. If federal funds or other federal assistance are involved in any procurement by ASHA, this chapter will govern except to the extent that it is superseded by federal regulations or provisions. (Eff. 11/26/81, Register 80)

3AAC 95.275. DEFINITIONS. Unless the context indicates otherwise, in 3AAC 95.010--3AAC 95.265

(1) "ASHA" means the Alaska State Housing Authority;

(2) "ASHA's central office" means the executive offices of the Alaska State Housing Authority located in Anchorage, Alaska;

(3) "executive director" means the executive director of the Alaska State Housing Authority;

(4) "governmental entity" means a department, office, agency, commissioner, board, bureau, administration, division, authority or other organizational unit of a branch of federal, state, county, borough, municipal or other local government and specifically includes public corporate authorities, the University of Alaska, school districts, and Regional Housing Authorities;

(5) "HUD" means the United States Department of Housing and Urban Development. (Eff. 11/26/81, Register 80)

Method of Payment	First Installment (a)	Second Installment (b)	Third Installment (c)	Total (d)
32. Total Estimated Additional Funds Required to End of Requested Quarter by Installment (Line 31 plus any overpayment or minus any underpayment on Line 30 divided into three installments)				
33. Less Any Overpayment or Plus Any Underpayment from Line 30.				
34. Requested Installment Payments (Sum of Lines 32 and 33)				

I Certify that (1) housing assistance payments have been or will be made only in accordance with Housing Assistance Payments Contracts or Housing Voucher Contracts in the form prescribed by HUD and in accordance with HUD regulations and requirements; (2) units have been inspected by the PHA in accordance with HUD regulations and requirements; and (3) this requisition for annual contributions has been examined by me and to the best of my knowledge and belief is true, correct and complete.

Name of Public Housing Agency	Signature and Title of Authorized Official (and Date)

Signature and Title of Authorized HUD Approving Official (and Date)

Regional Accounting Division Use Only	Month Payment Is For	Amount Paid	Amount Offset	Date Certified for Payment	Certified by: (Initials)
Signature of Person Prevalidating Requisition (and Date)					
Total ►					

Requisition for Partial Payment of Annual Contributions

U.S. Department of Housing and Urban Development
Section 8 and Section 23
Housing Assistance Payments Program

Note: See instructions in appropriate program handbooks

OMB No. 2502-0348 (exp. 10/31/36)

1. Program Type (Mark one)	2. Date of Requisition	3. For Quarter Ending:	4. No. of Months in 1st FY	5. Project No.
☐ Section 23 ☐ Section 8				

6. Public Housing Agency (Name and Address)	7. Depositary Bank (Name and Address)

8. PHA Annual Contributions Contract No.	9. Depositary Bank Account No.

10. Housing Program Type (Mark one)

☐ (a) New Construction ☐ (b) Substantial Rehabilitation ☐ (c) Moderate Rehabilitation ☐ (d) Existing Housing Certificates ☐ (e) Housing Vouchers

11. PHA Fiscal Year Ending Date (Mark one box and complete year)

☐ (a) March 31, ☐ (b) June 30, ☐ (c) September 30, ☐ (d) December 31, 19: ☐☐

12. Number of Units Under Lease to Eligible Families as of Date of Requisition	13. Average Monthly Housing Assistance Payment Per Unit as of Date of Requisition	14. Estimated Number of Units to be Under Lease at End of Requested Quarter	15. Unit Months Under Lease Year to Date	16. Average Monthly Housing Assistance Payment Per Unit Year to Date

	Estimate of Required Annual Contributions (a)	Total Cost Incurred and Fees Earned Year to Date (b) MM DD YY	Estimated Additional Cost and Fees Earned to End of Requested Quarter (c)	Cumulative Funds Required (d)
17. Preliminary Administrative and General Expense				
18. Carry Over of Preliminary Administrative and General Expense Approved in Previous Fiscal Year				
19. Preliminary Non-Expendable Equipment Expense				
20. Carry Over of Preliminary Non-Expendable Equipment Expense Approved in Previous Fiscal Year				
21. Estimated Housing Assistance Payments (Account 4715)				
22. Estimated Ongoing Administrative Fee				
23. Estimated Hard-to-House Fee (Existing Housing Certificates and Housing Vouchers Only)				
24. Total Independent Public Accountant Audit Costs (Section 8 Only)				
25. Total Allowance Approved for Security and Utility Deposits (Section 23 Only)				
Amount of Requisition 26. Total Costs Incurred to Date (Sum of Lines 17 through 25)				
27. Total Funds Required to End of Requested Quarter (Sum of Lines 17 through 25)				
28. Payments Received to Date				
29. Payments Previously Approved for Fiscal Year to Date				
30. Over or Underpayment to Date (Difference of Line 28 and Line 26. Do not use brackets)				
31. Partial Payment Requirement During Requested Quarter (Line 27 minus Line 29)				

(OVER)

Sec. 36. [illegible] CONTRACT AWARD AFTER BID

DGA - Geddes - DBA Assoc; late Processing

586.2763

The definition of "Alaska bidder" continues to follow standards that are not effective if it is the intent to promote and foster resident hire and businesses of Alaska. A stronger definition, which in our opinion would pass scrutinty, might be:

1) holds a current Alaska business license;

2) submits a bid (or a response to a request for proposals) for goods, services, or construction under the name appearing on the person's or firm's current Alaska business license; — technical amend

3) has maintained a place of business within the state staffed by the bidder or a direct employee of the bidder for a period of six months immediately preceding the date of the bid;

4) is incorporated as a domestic corporation of Alaska, or is a sole proprietership or partnership whose principal(s) are bonafide residents of Alaska;

5) derives at least 50 percent of income within the state of Alaska;

6) if a joint venture, is composed entirely of ventures that qualify under (1)-(5) of this subsection.

Please note that these provisions should also apply to request for proposals which was omitted in the current draft of the bill.

The purpose of the proposed act might also contain a provision for Alaska bidders.

(6.1) foster and promote resident hire and Alaska businesses providing goods and services to the state;

(1) HB 50 – 1090 – 2 components [5% AK; 5% small business – fed'l law]

(2) perception of fairness / opportunity to participate
- means of evaluating RFPs
- tighten up language
- fp evaluation

Sec. 3[illegible].320. SMALL PROCUREMENTS

The limit of $5,000 per aggregate dollar amount that defines a small procurement is low for many cases of professional services contracting. That amount has been in place for several years now. If for no other reason than inflation, it should be raised to $6,000. However, for reasons of mere practicality and efficiency, an amount of $10,000 would be more realistic.

Item (b) delineates that professional services contracts of up to $25,000 may be awarded under regulations adopted by the commissioner and that not more than $25,000 in contracts per person (firm) may be awarded by an agency within a 12 month period.

The 12 month period would be better stated as "state fiscal year" (July 1-June 30). More importantly, however, the dollar limit per agency, per year just doesn't fit many contractual situations where a firm, within a fiscal year, performs many bonafide separate and different services for a department or agency which exceed the limit in total.

We would recommend that item b(2) be removed in its entirety. Item (d) would appear to provide the protection the state is seeking, along with the fact that a departmental commissioner must also sign the contract.

Sec. 36.30.210. REQUEST FOR PROPOSALS

The use of the RFP process in the selection of consultants for professional services contracts, such as data processing systems analysis and programming is, by and large, an expensive, time consuming exercise in presenting an appearance of propriety to the selection process. There are many reasons for this.

a) The description of services desired is often so vague that it is difficult or impossible for a vendor to respond or for any reasonable evaluation criteria to be established by the state.

b) Evaluation factors are usually so vague or generic that the evaluation process can be biased for almost any reason so long as a "reasonable basis" can be stated for that evaluation. A "reasonable basis" can always be found. In other words, evaluation criteria is rarely objective, it is almost always subjective.

c) In some cases, a demonstrated and specific knowledge and experience level is not merely needed, it is imperative. When that occurs, a restricted RFP process can be used or a "sole source" award granted. However, in the many cases where generic experience, such as "systems analysis and programming on state data center compatible computer systems and software" is needed, the evaluation of the quality and depth of that experience becomes highly subjective.

That subjectivity is then entrusted to an evaluation team for assignment of points. However, in most cases the team members are hardly qualified to make such an evaluation and fall back on the "glossy" resumes' or other material included in a vendors proposal. Occassionally, a single team member who is qualified makes the evaluation for the team at large. Whoever took that team member to lunch last, or perhaps uses even potentially more dangerous forms of persuasion, may then prevail.

d) The single specific objective evaluation criteria is cost. But it has been absolutely amazing the low weighting factor that is assigned to it and also the lack of any intelligent means by which a point assignment is given to cost. As an example: Cost has a 25% weighting factor. 10 points are assigned to cost. There are 4 proposals and three have responsive costs. One is eliminated because it is an obvious "low-ball" offering.

Vendor 'A' proposes $85,000
Vendor 'B' proposes $57,000
Vendor 'C' proposes $72,000

A typical state evaluation might give vendor 'B'-10 points; 'C'-9 points; and, 'A'-8 points. A more fair evaluation would be to mathmatically give vendor 'B'-10 points; 'C'-7.9 points; and, 'A'-6.7 points.

e) As stated in item a, above, the description of services desired must be more specific in RFPs. If it is not, then several things result:

1. A vendor doesn't know what the state wants and the proposal becomes a costly guess.

2. A vendor may easily have proposed at a significantly lower cost if the factors were known. This could make a sizable cost savings to the state and certainly be more fair to vendors in general.

3. Evaluation of cost cannot be made objectively. It is forced to be made on a subjective and relative basis.

SB 341 could be stronger and more specific regarding Request for Proposal procurements. Suggested wording might be:

a) ....must contain the date by which the proposal must be received, and must contain a specific description of the supplies, construction services, or professional services to be provided under contract,.....

b) A request for proposals must contain, that information necessary for an offeror to submit a proposal, and upon which an objective evaluation of proposals may be made.

c) A request for proposals must contain references to any information or material that cannot be reasonably included with the request. No agency may withhold from review by a prospective offeror any information or material not of a proprietary or confidential nature, regardless of whether referenced in the request for proposal.

make appear in reflective

d) A request for proposals must contain the factors and their relative importance by which proposals received will be evaluated. Such factors must be realistically objective and based on the specific description of supplies, construction services, or professional services included in the request for proposals. Price shall be not less than 40 percent of total evaluation criteria and be evaluated as follows:

1. The price must be judged as realistic and not a deliberate attempt at undercutting.

2. The responsible and responsive low price offeror shall receive the maximum price evaluation point assignment.

3. All other responsible and responsive offerors shall receive a mathmatically proportionate price evaluation point assignment by dividing the low price by the offerors price and multiplying the result by the maximum price evaluation point assignment.

ALASKA STATE HOUSING AUTHORITY
ANALYSIS OF STATE V. OTHER FUNDING

ASHA FISCAL YEAR ENDING 3-31	DCRA CONSTRUCTION FUNDING	CONSTRUCTION EXPENDITURES	HOUSING MANAGEMENT EXPENDITURES	TOTAL ASHA EXPENDITURES
1985	$ 850,000	$ 5,744,000	$15,434,000	$21,178,000
1984	4,950,000	4,300,000	12,330,000	16,630,000
1983	2,630,000	3,200,000	10,990,000	14,190,000
1982	50,000	294,000	11,515,000	11,809,000
1981	50,000	-0-	6,796,000	6,796,000
	8,530,000	13,538,000	$57,065,000	70,603,000

DCRA Construction Grants Approved but not yet received:	10,743,462	Subsidies receivable under current HUD contracts:	$ 59,650,000
Total DCRA Funds	$19,273,462	Total anticipated funds	$ 130,253,000

Note: Construction expenditures exceed DCRA grants because HUD partially funds construction, and ASHA General Fund has donated toward construction costs.

NUMBER	LOCATION	PROJECT NAME	0	1	2	3	4	5	UNITS
1-1	Fairbanks	Birch Park	0	7	40	24	4	0	75
1-2	Juneau	Cedar Park	0	4	28	14	4	0	50
1-3	Anchorage	Willow Park	0	14	84	44	8	0	150
1-5	Sitka	Paxton Manor	0	4	6	10	4	0	24
1-6	Anchorage	Loussac Manor	0	0	10	42	8	2	62
1-7	Petersburg	Vista View	0	0	4	6	2	0	12
1-8	Juneau	Cedar Park Annex	0	6	0	12	7	0	25
1-9	Ketchikan	Schoenbar Park	0	8	2	12	2	0	24
1-10	Kodiak	Pacific Terrace	0	8	14	12	6	0	40
1-11	Anchorage	Fairmount	9	32	8	20	12	7	88
1-12	Valdez	Valdez Arms	0	2	4	6	2	0	14
1-13	Wrangell	Etolin Heights	0	4	4	12	0	0	20
1-16	Cordova	Eyak Manor	0	0	4	12	0	0	16
1-18	Bethel	Bethel Heights	0	0	117	0	0	1 shop	118
1-19	Nome	Beringvue	0	0	8	24	0	1 shop	33
1-30	Fairbanks	Spruce Park	0	20	18	30	8	4	80
1-32	Juneau	Geneva Woods	0	0	3	14	6	2	25
1-33	Ketchikan	Sea View Terrace	0	50	0	0	0	0	50
1-40	Juneau	Mt. View Apts.	0	42	0	0	0	0	42
1-41	Anchorage	Park View Manor	0	0	32	18	0	0	50
1-42	Anchorage	Acquisition	0	0	80	19	0	0	99
1-43	Juneau	Mt. View Annex	0	20	0	0	0	0	20
1-44	Wasilla	Williwa Manor	0	18	0	0	0	0	18
1-45	Sitka	Elderly Housing	0	20	0	0	0	0	20
1-46	Fairbanks	Southall Manor	0	40	0	0	0	0	40
			9	299	466	331	73	(2)15	1195
		PROJECTS UNDER TURNKEY III							
M818	Bethel		0	0	38	0	0	0	38
M819	Nome		0	0	2	12	0	0	14
			0	0	40	12	0	0	52
		UNDER PLANNING							
1-47	Anchorage	Chugach View I	0	120	0	0	0	0	120
1-48	Wasilla	Wasilla Phase II	0	14	0	0	0	0	14
			0	134	0	0	0	0	134
		PROJECTS UNDER SECTION 8 MANAGEMENT							
AK06-E102-002	Anchorage	Chugach View	0	120	0	0	0	0	120
011	Anchorage	Ptarmigan Park	0	0	10	7	0	0	17
008	Cordova	Sunset View	0	22	0	0	0	0	22
005	Fairbanks	Golden Towers	0	96	0	0	0	0	96
010	Seward	Glacier View	0	30	0	0	0	0	30
			0	268	10	7	0	0	285
M000-008	Wrangell	Addtl. Assistance	0	0	24	8	0	0	32
Sec. 8	Anchorage	Existing	14	166	482	303	44	0	1009
Sec. 8	Fairbanks	Existing	21	12	66	26	5	0	130
Sec. 8	Juneau	Existing	0	30	20	11	1	0	62
Sec. 8	Kenai/Soldotna	Existing	10	46	122	51	7	0	236
Sec. 8	Ketchikan	Existing	2	3	8	7	7	2	29
Sec. 8	Mat-Su	Existing	5	15	42	13	0	0	75
			52	242	720	400	63	2	1541
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MEMORANDUM State of Alaska

TO: Hon. Dick Lyon
Commissioner
Department of Commerce & Economic Development

DATE: May 3, 1983

FILE NO: 366-576-83

TELEPHONE NO: 465-3600

SUBJECT: University of Alaska banking authority

FROM:
Norman C. Gorsuch
Attorney General

By: Jonathan B. Rubini
Assistant Attorney General

You have asked whether the University of Alaska enjoys the requisite authority to issue revenue bonds to finance the construction of student housing.

The university is established as a corporate entity under art. VII, sec. 2 of the Alaska Constitution, but remains subject to executive and legislative control. See University of Alaska v. National Aircraft Leasing, Ltd., 536 P.2d 121 (Alaska 1975). See also 1977 Att'y Gen. Op. No. 9 (Feb. 28). The powers of the university are set forth in AS 14.40.040, which provides:

> GENERAL POWERS OF THE UNIVERSITY. There is created and established a corporation to be called the University of Alaska. It may in that name
> (1) sue and be sued;
> (2) receive and hold real and personal property;
> (3) contract and be contracted with;
> (4) adopt, use and later a corporate seal;
> (5) do and have done all matters necessary for the purpose of any function set forth in this chapter.

Paragraph (5) recognizes that the university has those implied or incidental powers necessary to accomplish the purposes for which the university was formed. See Am. Jur. 2d. Colleges and Universities, § 5 (1976). We think it doubtful that a court would construe AS 14.40.040(5) to authorize the university to issue bonds. See 1963 Inf. Att'y Gen. Op. (April 11). That the proposed financing plan includes a moral obligation of the state (the university's covenant to seek an appropriation were rental rates insufficient to satisfy debt service obligations) further

buttresses our conclusion that explicit legislative authorization is required. We add, in this regard, that in the two preceding instances where the university issued revenue bonds, specific legislative authorization was obtained. E.g., Ch. 93, SLA 1974.

In sum, we suggest that the university seek explicit legislative authorization before issuing revenue bonds to finance the construction of student housing.

JBR/jb

cc: Kevin Bruce
Special Assistant
Office of the Governor

Burt Wagnon
Executive Director
AIDA

U.S. Department of Housing and Urban Development
PUBLIC AND INDIAN HOUSING

Special Attention of: Public Housing Agencies; Indian Housing Authorities; Regional Administrators; Directors, Offices of Regional Public Housing; Field Office Managers; Housing Management Division Directors; Chiefs, Assisted Housing Management Branches; Directors, Offices of Indian Programs

Transmittal Handbook No: 7585.1 REV-2 CHG-1

Issued: December 31, 1984

1. This Transmits

Chapter 3 of the Public Housing Comprehensive Improvement Assistance Program Handbook 7485.1 REV-2, dated December 31, 1984.

2. Explanation of Material Transmitted:

a. Requirement for a viability review on each project being considered for funding in a fiscal year, excluding emergency modernization.

b. Requirement that the Preliminary Application cover a rolling five years, rather than a fixed five-year period, with annual updates.

c. Requirement for PHA certification with the Preliminary Application that if a project is proposed for special purpose modernization, the project has only energy needs; or where a project has non-energy needs as well, the PHA agrees that if the project is approved for special purpose modernization, its next funding request for the project will be for comprehensive modernization.

d. Requirement that projects, excluding emergency modernization, be ranked on the basis of cost benefits, including both a cost benefit ratio and improved habitability.

e. Provision that the second or subsequent stage of comprehensive modernization is not subject to cost benefit ranking.

Distribution: W-3-1, W-2(H), W-3(H), R-1, R-2, R-3, R-3-1(H), R-3-2, R-3-3, R-6, R-6-1, R-6-2, R-7, R-7-1, R-7-2, R-8, R-8-1, R-9, R-9-1, 138-2, 138-7

f. Clarification that the State notification requirements under Executive Order 12372 do not apply to Indian Housing Authorities.

3. Filing Instructions:

Remove:	Insert:
Handbook 7485.1 REV-2 Pages i and ii, dated 12/83	Handbook 7485.1 REV-2, CHG-1 Page i, dated 12/84 Page ii, dated 12/83
Chapter 3, dated 12/83	Chapter 3, dated 12/84

for Thomas Sherman
Assistant Secretary for Public and Indian Housing

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CHAPTER 3. APPLICATION DEVELOPMENT AND SUBMISSION

3-1. INTRODUCTION. This Chapter sets forth the application process and provides instructions to both PHAs and Regional and Field Offices on the Preliminary Application, the Joint Review and the Final Application. Also see Appendix 4 for a flow chart on application processing. A Sample Modernization Processing Control Log for Field Office use is attached as Appendix 5.

3-2. FUND ASSIGNMENT. On the basis of an assignment plan approved by the Under Secretary, the Assistant Secretary for Public and Indian Housing assigns modernization funds to the Regional Offices on Form HUD-185, Regional Fund and Contract Authority Assignment, for subassignment to the Field Offices on Form HUD-185.1, Regional Fund and Contract Authority Subassignment. Regional Offices shall subassign funds to the Field Offices no later than after the final funding decisions. Assigned and subassigned modernization funds are designated by specific amounts of contract, loan and budget authority. The Field Office is responsible for controlling the obligation of contract, loan and budget authority to ensure that none of the three amounts is exceeded. See paragraphs 4-3 and 4-4.

3-3. NOTIFICATION OF MODERNIZATION FUND AVAILABILITY. When modernization funds become available, the Department shall notify in writing all PHAs as to the amount of available modernization funds, the requirements and time frame for submission of the Preliminary Application, and other pertinent information.

3-4. INFORMAL CONSULTATION. Before preparation of the Preliminary Application, the PHA should contact the Field Office to discuss its modernization needs and obtain information on HUD policies and procedures. See paragraph 3-12d for up-front funding of planning costs for financially distressed PHAs.

3-5. PHA SUBMISSION OF PRELIMINARY APPLICATION.

a. Content. The Preliminary Application includes the following:

(1) Form HUD-52824, Preliminary Application, which contains the five-year funding request plan as defined in paragraph 1-3h and the certifications at the bottom of the form, including those on tenant/homebuyer and

local official consultation. The five years covered by the plan shall be a rolling five years, i.e., if submitted in Federal Fiscal Year (FFY) 1985, covering FFYs 1985-1989, and annually updated in subsequent FFYs. Complete instructions for preparation of the form are contained in Appendix 6. The PHA shall separately identify emergency needs.

(2) Brief explanation of the priority order of the projects for which modernization funding is requested in the current FFY.

(3) Brief explanation of how the proposed modernization will impact upon the conditions which result in projects receiving preferential consideration under Groups 1 and 2 (see paragraph 3-6d).

(4) If a project is proposed for special purpose modernization, certification that the project has only energy needs; or where the project has non-energy needs as well, the PHA agrees that if the project is approved for special purpose modernization, its next funding request for the project will be for comprehensive modernization.

b. Preparation.

(1) Consultation with Tenants/Homebuyers. The PHA shall consult with tenants/homebuyers regarding its intent to submit a Preliminary Application.

(2) Consultation with Local Officials. The PHA shall consult with appropriate local officials regarding whether the proposed comprehensive or special purpose modernization is financially feasible and will result in long-term physical and social viability at the project. Where such a determination cannot be made, the PHA shall consider alternatives to improvements of all existing units, such as changes in project density, basic design, unit distribution, or household type (elderly/non-elderly), as well as demolition or disposition under 24 CFR Part 970. The PHA shall include the selected alternatives in the Preliminary Application. The PHA also shall request comment on how the proposed modernization of the

projects may be coordinated with any local plans for neighborhood revitalization and expenditure of funds, such as Community Development Block Grant (CDBG) funds.

c. Submission. Within the established time frame, the PHA shall submit to the Field Office, Attention: Chief, Assisted Housing Management (AHM) Branch, the Preliminary Application in an original and three copies (or any lesser number of copies as specified by the Field Office). The PHA also shall send a copy of the Preliminary Application to the appropriate local officials.

3-6. HUD REVIEW AND ACTION ON PRELIMINARY APPLICATION.

a. Field Office Eligibility Review. After the Preliminary Application has been logged in, the Housing Management Officer (HMO) shall check the application for all required information before routing it to the Maintenance Engineer and other AHM staff, as appropriate. Field Office eligibility review shall determine if the applications meet all the following basic eligibility requirements.

(1) PHA Modernization Capability. The PHA has at least minimal modernization capability to carry out its proposed modernization. The Field Office shall consider the PHA's modernization pipeline of previously approved, but unobligated funds and whether the PHA can administer any additional funds.

(2) Project Viability. The project can be modernized within a reasonable time and at a reasonable cost and, after modernization (and any other publicly or privately assisted improvements), will be physically and socially viable for continued operation as public housing, for at least the 20-year period of annual contribution payments. This review is not applicable where only emergency modernization is proposed. See subparagraph b.

(3) Work Item Eligibility and Need. Based on the general description of the major work items in the Preliminary Application and the Field Office's knowledge of the project's conditions, the work items appear to be eligible and needed.

b. Project Viability Review. The Field Office shall conduct a viability review on each project being considered for funding in the current FFY. The Field Office shall maintain files on this review for subsequent reporting through the Regional Office to Headquarters. The viability review consists of Steps 1 and 2 conducted during Preliminary Application review and Step 3 conducted during the Joint Review.

(1) Step 1. Determine whether any of the following gross indicators are present for the project:

(a) Vacancies of 15 percent or more of the units available for occupancy in a project;

(b) Estimated modernization costs for physical improvements for any project exceeding 40 percent of the total published prototype cost limit for construction of similar units in the area; or

(c) Serious locational or structural conditions which indicate that the long-term viability of the project is questionable.

NOTE: If none of these gross indicators are present, the viability review is complete; continue preliminary processing and do not proceed to Step 2. If any of these gross indicators are present, proceed to Step 2.

(2) Step 2. To assess the extent and severity of the project's problems identified in Step 1, examine and rate the magnitude of the following problems as "severe," "moderate," "mild," or "none":

(a) Major problems as to physical condition, as indicated by such factors as unit uninhabitability, density, faulty construction, inappropriateness of design for current use, structural deficiencies and major physical site flaws (e.g., erosion, flooding);

(b) Major problems as to location (neighborhood), as indicated by such factors as concentration of assisted housing, physical deterioration of

neighborhood, industrial or commercial development which jeopardizes the suitability of the site for residential use, and adverse environmental condition (e.g., air pollution); and

(c) Other factors that tend to show that the project is unsuitable for housing purposes, such as tenant dissatisfaction as evidenced by vacant units (high number, long duration) or a high incidence of transfer requests, lack of marketability, crime and vandalism, or other specifically identified conditions.

NOTE: If there are severe problems in one or more of the three areas described above, or moderate problems in two or more of these areas, continue the viability review and proceed to step 3. Otherwise, the viability review is complete; continue preliminary processing and do not proceed to Step 3.

(3) Step 3. Step 3 of this review is an in-depth analysis in which pertinent information may not be readily available at the Field Office. Therefore, the Field Office may carry out this step during the Joint Review. The Field Office shall consider the following factors and determine whether:

(a) The problems identified in Step 2 will be overcome by the proposed modernization and other efforts in the neighborhood;

(b) The proposed modernization will correct those physical deficiencies of the project that currently render it obsolete as to physical condition;

(c) After the proposed modernization, the project will be suitable for operation as public housing, in accordance with applicable program standards, for a period of at least 20 years;

(d) The proposal is a financially feasible program of modernization, as defined in paragraph 1-3f;

(e) There is a demonstrated willingness and ability on the part of the PHA and local government to correct any management or operational problems necessary to ensure the long-term viability of the project;

(f) If the project received substantial modernization funding in the past which has failed to resolve problems at the project, this proposal will overcome the factors that led to the failure of the previous modernization efforts; and

(g) There is a realistic potential for the elimination or modification of neighborhood or environmental conditions that jeopardize the long-term viability of the project or for the alteration of the project to cope effectively with such conditions. (Federal, State, local or private actions or commitment of funds that have been specifically committed for such neighborhood improvements will be considered in evaluating this factor.)

NOTE: See paragraphs 3-14, b, c, d and e and 3-15 for further processing instructions.

c. Determination of Eligibility. After the eligibility review, the Field Office shall determine which projects are eligible for batching under subparagraph d. The AHM Branch shall not batch or recommend for Joint Review any application which is ineligible under subparagraphs a(1) and (3).

d. Field Office Batching. The Field Office shall batch the eligible projects into three groups. A PHA proposing all types of modernization may have projects included in each group. For batching purposes, the Field Office may extract emergency work items from comprehensive modernization proposals.

(1) Group 1. Projects having emergency conditions that pose an immediate threat (i.e., must be corrected within one year of funding approval) to tenant health or safety and proposed for assistance under emergency or homeownership modernization;

(2) Group 2. Projects (a) having conditions which threaten tenant health or safety or having a significant number (10 percent or more) of vacant or substandard units, and (b) located at PHAs which have demonstrated a capability of carrying out the proposed modernization activities, and proposed for assistance under comprehensive, homeownership or special purpose modernization. Preferences or priorities may be established within Group 2 in a given FFY due to special factors such as appropriations legislation; and

(3) Group 3. Other projects not meeting the criteria in subparagraphs d(1) and (2) and proposed for assistance under comprehensive, homeownership or special purpose modernization.

e. State Notification.

(1) Under paragraph 1-7, where the State has established a review process and has selected the CIAP to review, the Field Office shall provide the State with an opportunity to comment on all Preliminary Applications proposing comprehensive modernization and determined to be eligible under subparagraph c and meeting the threshold levels of 50 or more units in urban areas or 25 or more units in nonurban areas. Preliminary Applications proposing emergency, special purpose or homeownership modernization and from Indian Housing Authorities are excluded from the State notification requirements.

(2) The Field Office shall prepare one Standard Form (SF) 424, Federal Assistance, Section I only, for each covered Preliminary Application. The Field Office shall batch and forward copies of the covered Preliminary Applications and SF 424's to the State single point of contact (SPOC) for review. The comment period begins on the day after the Preliminary Applications are mailed. The comment period is 60 days, plus an additional 5 days for mailing for a total of 65 days.

(3) The Field Office shall submit the State comments, if any, to the Regional Office with its preliminary funding recommendations under paragraph 3-14c. Following Regional Office preliminary funding decisions under paragraph 3-14d, in response to an official State process recommendation (comments submitted by a State, but not

as an official State process recommendation, need not be addressed), the Regional Office must either:

(a) Accept the recommendation;

(b) Reach a mutually agreeable solution with the parties preparing the recommendation; or

(c) Provide the State SPOC with a written explanation for not accepting the recommendation or reaching a mutually agreeable solution, i.e., nonaccommodation. If there is a nonaccommodation, including not funding PHAs/projects prioritized by the State, the Regional Office shall require the Field Office to wait 15 days after sending an explanation of the nonacommodation to the State SPOC before requesting any Final Applications from PHAs.

f. Field Office Technical Review. After batching, the Field Office shall review each eligible project within Groups 2 and 3 on the following factors. If the fiscal audit is overdue and initiation of the audit is within the PHA's control, the Field Office shall suspend further processing until the PHA has initiated the audit.

(1) Extent and urgency of need;

(2) Extent to which both physical and management needs are effectively addressed;

(3) Prospects for long-term physical and social viability after modernization, as evidenced by Steps 1 and 2 of the viability review (see subparagraph b);

(4) Financial feasibility of proposed modernization (see paragraph 2-1e);

(5) Reasonableness of estimated costs;

(6) Degree of cost benefits (see paragraph 3-14a);

(7) PHA's management capability, as defined in paragraph 1-3;

(8) PHA's modernization capability, as defined in paragraph 1-3; and

(9) Local government and tenant/homebuyer support for proposed modernization.

g. FH&EO Review. During technical review, the AHM Branch shall transmit a listing of PHAs submitting Preliminary Applications to the Fair Housing and Equal Opportunity (FH&EO) Division. The AHM Branch shall request that the FH&EO Division provide information on any PHA listed with respect to outstanding findings of nonconformance with civil rights and equal opportunity requirements or apparent noncompliance with civil rights laws, actions necessary to obtain conformance and/or compliance, and other pertinent information, if any. Where appropriate, the FH&EO Division shall return the listing to the AHM Branch with a "no comment" noted.

h. Field Office Recommendations. After technical review, the Field Office shall prepare its recommendations for Joint Review. The Field Office shall prepare three lists, one for each group of eligible projects, and a fourth list of projects in the second or subsequent stage of a two-or multi-stage comprehensive modernization. For each project in Group 1, the Field Office shall prepare a brief narrative justifying the emergency work items. For each project in Groups 2 and 3, the Field Office shall prepare a brief narrative justifying each project's inclusion in the group. The Field Office shall list the projects within Groups 2 and 3 in priority order. For projects in the second or subsequent stage of comprehensive modernization, the Field Office shall prepare a brief narrative on the implementation status of previously approved stages and a recommendation regarding current year funding. The Field Office also shall identify any PHAs identified by FH&EO as being in nonconformance or noncompliance and projects required to complete Step 3 of the viability review, including the results of Steps 1 and 2 for such projects. The Field Office shall forward to the Regional Office the four lists and related narratives.

i. Regional Office Selections. The Regional Office shall review the lists and related narratives submitted by all Field Offices under its jurisdiction and select PHAs/projects and types of modernization for Joint Review. In making its selections, the Regional Office shall give preference to projects in Groups 1 and 2, as well as to projects in the second or subsequent stage of comprehensive modernization where there has been satisfactory progress on previously approved stages. The Regional Office shall notify in writing the Field Offices of its selections and give appropriate guidance on projects required to complete Step 3 of the viability review.

j. Funding Targets. Although the Regional Office is responsible for funding decisions, the Regional Office may establish funding targets for Field Offices based on its knowledge of the needs and conditions within the Region. Where established, these targets may increase or decrease throughout processing as the Regional Office makes the preliminary and final funding decisions.

k. Letter to PHA. After the Regional Office selections for Joint Review, the HMO shall prepare a letter to the PHA for the signature of the Field Office Manager, advising whether the PHA will be considered for funding in the current FFY, as follows:

(1) Where the PHA will be considered for funding in the current FFY, the letter shall: confirm the date of the Joint Review, if already scheduled, indicate an intent to schedule the Joint Review as soon as possible, or state that the requirement for the Joint Review is being waived under paragraph 3-7; state which project(s) for which type(s) of modernization will be reviewed and request that the PHA contact the Field Office if the PHA disagrees with the defined scope of the Joint Review; outline required PHA activities to prepare for the Joint Review; indicate whether the project(s) is subject to Step 3 of the viability review; and list outstanding monitoring findings or issues which must be resolved if the PHA is subsequently invited to submit a Final Application.

(2) Where the PHA will not be considered for funding in the current FFY, the letter shall state the reasons, such as the relatively low priority of its physical improvement needs. Where the reason is lack of management or modernization capability, the letter shall state the specific deficiencies and what actions the PHA will have to take or what level of management or modernization capability the PHA will have to achieve by a specified time to be considered for funding in a subsequent FFY. In addition to these reasons, if a project had questionable viability and failed Steps 1 and 2 of the viability review, the Field Office shall alert the PHA to the fact that if the same application is submitted and selected in the future for a Joint Review, it will be subjected to Step 3 of the viability review. The Field Office may informally discuss the preliminary viability review findings with the PHA in order to suggest constructive alternatives for future Preliminary Application submissions.

3-7. SCHEDULING AND WAIVER OF JOINT REVIEWS.

a. Scheduling. The Modernization Coordinator is responsible for coordinating the scheduling of the Joint Reviews and for notifying the FH&EO Division and the Community Planning and Development (CPD) Division of the general time frame of the Joint Review period. The HMO shall check with the Modernization Coordinator before contacting the PHA about a tentative date or establishing a firm date for the Joint Review.

b. Waiver. The Regional Office may waive the requirement for a Joint Review only where special purpose, emergency or homeownership modernization is involved if the Field Office has current knowledge of the specialized need(s) and proposed physical improvement(s). The Regional Office may not waive the requirement for a Joint Review where comprehensive modernization, including the second or subsequent stage, is involved.

3-8. PHA PREPARATION FOR JOINT REVIEW. The PHA shall prepare for the Joint Review by taking the following actions:

a. Reach agreement with the Field Office on the specific project(s) to be covered during the Joint Review.

b. Consult with tenants/homebuyers as required in Chapter 5.

c. Complete a detailed comprehensive assessment of the total physical and management improvement needs of the project(s) for which the PHA is requesting comprehensive modernization and of the specialized needs of the project(s) for which the PHA is requesting special purpose, emergency or homeownership modernization in the current FFY, as follows:

(1) Form HUD-52821, Project Profile, providing pertinent management information on each project for which comprehensive modernization is requested in the current FFY. This form is not required for projects proposed for special purpose, emergency or homeownership modernization. A sample Form HUD-52821 is attached as Appendix 9. The form provides instructions on which items may be omitted for a project where the PHA has 100 or less units in management. The Project Profile assists the PHA in assessing and analyzing its management operations at each project, identifying management problems, and formulating the management improvements which require identification on Form HUD-52825, Comprehensive Assessment/Program Budget.

(2) Part II of Form HUD-52825, Comprehensive Assessment/ Program Budget. Complete instructions for preparation of the form are contained in Appendix 10. For projects to be comprehensively modernized, the comprehensive assessment includes both physical and management needs assessment, as follows:

(a) Physical Needs Assessment. This includes an identification of the project's current physical condition and the physical improvements necessary to meet the mandatory standards, set forth in the Public Housing Modernization Standards Handbook 7485.2 RFV-1. The PHA that lacks the in-house capability to perform the assessment should contact the Field Office. In such cases, the Field Office may advise the PHA, unless approved for planning funds, to hire an outside architect/engineer, subject to reimbursement only if the comprehensive modernization is approved, or that the Field Office will perform the assessment for the PHA during the Joint Review. The Field Office may encourage small PHAs to group together for hiring outside assistance.

(b) Management Needs Assessment. This includes an identification of all current management improvement needs, as assessed against the management areas set forth in paragraph 2-2b. Many management deficiencies require little or no additional funds to correct. Regardless of whether modernization funds are required for correction, the PHA shall include any management items identified on the Project Profile or by the PHA as problems or for which the PHA is requesting funding for correction. For designated Financially Troubled PHAs, management improvement needs shall be consistent with those identified in their Financial Workout Plans.

d. Conduct an energy audit on each project proposed for comprehensive, special purpose or homeownership modernization. Guidelines for identifying cost-effective energy consevation measures and for conducting energy audits are set forth in the HUD Workbook (HUD-PDR-700(3)). If an acceptable energy audit is not conducted, the Field Office shall not recommend the project for further processing.

e. Review the other points to be covered during the Joint Review as set forth in paragraph 3-11.

3-9. FIELD OFFICE PREPARATION FOR JOINT REVIEW.

a. Notification to FH&EO and CPD. When the Joint Review has been firmly scheduled, the HMO shall notify the FH&EO and CPD Divisions of the proposed date and invite their participation. If the FH&EO and CPD Divisions are unable to participate in the Joint Review, they may inform the AHM staff in writing of their specific concerns.

b. AHM Branch Participation. Where any comprehensive modernization is proposed, the HMO and the Maintenance Engineer shall represent the Field Office on the Joint Review. Based upon PHA size and prior knowledge of PHA management problems, other AHM staff, as appropriate, shall participate. In all cases, the HMO shall serve as the team leader of the Field Office representatives.

c. Review of Files. In preparing for the Joint Review, the Field Office representatives shall review the PHA's file(s), with special attention to open findings from the latest fiscal audit, management review, occupancy audit, engineering survey and utilities review. Field Office representatives should be thoroughly familiar with the status of all previously approved modernization programs and the overall operation of the PHA.

d. Confirmation with PHA. Before the Joint Review, the HMO shall check with the PHA to confirm that the PHA is ready for the Joint Review, i.e., has taken all of the actions required in paragraph 3-8. If the PHA is not ready, the HMO shall cancel the Joint Review and provide a revised date by which time the PHA must be ready.

3-10. PURPOSE, CONDUCT AND DURATION OF JOINT REVIEW.

a. Purpose. The purpose of the on-site Joint Review is to discuss the proposed modernization program, as set forth in the Preliminary Application and the comprehensive assessment, and reach tentative agreement on PHA needs.

b. Initial Meeting. The Field Office and the PHA representatives should meet briefly to discuss the prearranged agreements concerning the scope of the Joint Review, PHA staff availability and other logistical matters. They also should review the documents prepared by the PHA under paragraph 3-8c and discuss how the proposed management improvements, if any, relate to the proposed physical improvements, the appropriateness of work items and project priorities, and the degree of cost benefits.

c. Duration. The duration of the Joint Review will vary in time, depending upon factors, such as PHA size and management capability, type and complexity of the proposed modernization program, Field Office knowledge of and familiarity with the PHA's operations and management practices, status of any previously approved modernization programs, and extent to which the findings of the Joint Review would duplicate the open findings of a fiscal audit, management review, occupancy audit, engineering survey or utilities review conducted within the preceding 12 months.

d. Close-Out Meeting. The Field Office and the PHA representatives should meet to discuss HUD's preliminary findings and recommendations on the proposed modernization program. The close-out meeting shall include specific treatment of previously approved modernization programs not completed within the prescribed time frames (see paragraph 7-2) and an agreed upon schedule for completion and fiscal closeout. Where appropriate, the Field Office representatives also may meet with the PHA Board of Commissioners.

3-11. JOINT REVIEW COVERAGE. The Joint Review shall include an on-site inspection of the property and resolution of the following points. The Field Office shall document the Joint Review by using the Joint Review Checklist in Appendix 11. The Field Office may modify the Checklist, by adding additional information, where appropriate.

a. Based on the detailed comprehensive assessment(s) undertaken in paragraph 3-8c, specific physical improvement needs to be addressed in the modernization program, including cost estimates, proposed implementation schedule, method of accomplishment (contract or force account), and method of PHA inspection of the physical work. In addition, the PHA's determination of whether the proposed comprehensive or special purpose modernization is financially feasible and will result in long-term physical and social viability at the project, as well as the PHA's estimated cost benefits, shall be reviewed. The need for and the appropriateness of the physical work items shall be reviewed against the Modernization Standards, the energy audit and the individual needs of each project (see paragraph 2-1). The use of force account labor shall be considered only on an exception basis, where appropriate to the scope and type of physical improvements and the PHA's capacity to serve as its own main contractor and to maintain an adequate level of routine maintenance during force account activity. The availability of operating funds or reserves to fund proposed work shall be reviewed.

b. Based on the detailed comprehensive assessment(s) undertaken in paragraph 3-8c, the thoroughness of the PHA's diagnosis in identifying management problems, causes and solutions,

and specific management improvement needs, including those which require no funding, to be addressed in the modernization program, and the proposed implementation schedule and cost estimates for completing proposed management improvements. The need for and the appropriateness of the management work items shall be reviewed against the criteria set forth in paragraph 2-2. Although the PHA is not required to prepare the detailed comprehensive assessment of management improvement needs for projects proposed for special purpose, emergency or homeownership modernization, the Field Office may discuss such needs with the PHA during the Joint Review and subsequently require the PHA to address those needs in the Final Application.

c. PHA need for the technical services of an architect/engineer and/or a management consultant in further planning, designing and implementing all or part of the proposed physical and management improvements. See paragraph 2-6a(2) regarding incurring architectural/engineering fees for detailed design work before program approval.

d. PHA plan for organizing and staffing the modernization program, including PHA need for a full-time modernization coordinator or contract administrator/construction manager, assignment of regular PHA staff, and hiring of additional personnel (see paragraph 7-3).

e. PHA performance in administering previously approved modernization programs, if applicable (see paragraph 7-2).

f. PHA need for additional modernization funds to complete previously approved modernization programs (see paragraph 3-13).

g. PHA compliance with requirements for consultation with local officials and tenants/homebuyers under paragraph 3-5b and Chapter 5 and local support for the proposed modernization. If it is questionable whether a project has local support or, once modernized, will have long-term physical and social viability, the Field Office shall require the PHA to consult more thoroughly with local officials, including obtaining a letter of support from local officials before the preliminary funding decisions.

h. PHA compliance with civil rights statutes, executive orders and regulations, as applicable, under paragraph 6-1.

i. PHA plans to provide minority and women's business or Indian enterprise opportunity under paragraph 6-2.

j. Applicability of environmental and historic preservation requirements under paragraph 6-3.

k. PHA compliance with flood insurance requirements under paragraph 6-4.

l. PHA compliance with requirements to eliminate immediate lead-based paint hazards under paragraph 6-5.

m. PHA compliance with requirements to provide accessibility for the physically handicapped under paragraph 6-6.

n. PHA compliance with requirements to conduct an energy audit and undertake cost-effective energy conservation measures under paragraph 6-7.

o. Step 3 of the project viability review, if applicable, under paragraph 3-6b.

3-12. COMPREHENSIVE MODERNIZATION APPROACH.

a. Reserved.

b. Up-Front Funding of Planning Costs. Where a financially distressed PHA requests up-front funding of planning costs, as defined in paragraph 2-6, for comprehensive modernization, the Regional Office may approve such costs as a separate Modernization Project. Such approval does not constitute a separate funding stage and may occur in a different FFY from when the comprehensive modernization is approved. When the comprehensive will be approved in the same FFY, the Regional Office shall expedite approval of the planning costs early in the processing cycle. The Final Application shall be limited to Form HUD-52825 covering only the planning costs to be funded and the Board Resolution. When approving planning costs as a separate Modernization Project, the Regional Office shall indicate the estimated total funding that will be required

for the project and its intent to approve that amount, subject to the availability of future funds, satisfactory completion of the planning, PHA submission of the Final Application as set forth in paragraph 3-16, and PHA compliance with HUD regulatory and statutory requirements.

c. Treatment of Scattered Site Projects. Since a scattered site project is composed of single dwelling units which are unrelated geographically, structurally or socially and which are grouped together solely for accounting purposes, the Regional Office may consider comprehensive modernization for selected units within a scattered site project, provided that all physical and management improvement needs for those units are addressed.

d. Treatment of Contiguous Projects. Two or more separate, but contiguous, projects may be funded together for comprehensive modernization.

3-13. ADDITIONAL FUNDS FOR PREVIOUSLY APPROVED COMPREHENSIVE MODERNIZATION. Under the following circumstances, the Regional Office may approve additional funds for projects previously approved for comprehensive modernization. However, this flexibility may not be used to circumvent the statutory requirements for the PHA to undertake a thorough assessment of its physical and management improvement needs and for the Field Office to review those assessments and fund modernization in a comprehensive manner.

a. Comprehensive Modernization in Progress. For one-stage or second of two-stage comprehensive modernization in progress, the Regional Office may approve additional funds to ensure that the project meets the Modernization Standards or will have long-term viability. This includes funding for new work items which were inadvertently omitted or for previously approved work items which were funded inadequately, provided that:

(1) the work items are necessary to meet the Modernization Standards or for long-term viability;

(2) funding is not available from PHA operating funds or reserves or other sources;

(3) the work items can be completed within the originally approved implementation period for the project; and

(4) there is documentation, subject to post-review by Headquarters, in Field Office files as to the reason for approval and that all the above conditions have been met.

b. Comprehensive Modernization Completed. Until a replacement reserve is implemented under Section 14(d)(4)(C) of the Act, the Regional Office may approve emergency or special purpose modernization for a project where comprehensive modernization has been completed.

3-14. PRELIMINARY FUNDING DECISIONS.

a. Field Office Determinations. After Joint Review, the Field Office shall determine the cost benefit of the proposed modernization, excluding emergency, for a project. This determination is necessary to establish the priority order of funding based upon a ranking by cost benefits. Cost benefits are composed of a cost benefit ratio and improved habitability, as follows:

(1) Cost Benefit Ratio. The cost benefit ratio is the total estimated annual savings of all proposed physical and management improvements divided by the total cost of such improvements. The estimated annual savings may accrue from either reduction in expenses (e.g., lower insurance or maintenance costs) or increases in income (e.g., renting formerly vacant units). In the following example, Project X has a higher cost benefit ratio than Project Y:

	Project X	Project Y
$\frac{\text{Estimated Annual Savings}}{\text{Total Modernization Cost}}$	$\frac{\$\ 10{,}000}{100{,}000} = .1$	$\frac{\$\ 10{,}000}{200{,}000} = .05$

(2) Improved Habitability. Improved habitability includes those factors for which actual dollar savings are difficult to identify. To ensure that the cost benefits for improved habitability are adequately considered, the Field Office shall score each project within Groups 2 and 3 as to whether the proposed modernization will result in the following

factors. Each factor shall be scored as to high (.03), medium (.02) or low (.01). The scores for each factor are then added to produce an overall improved habitability score for the project, as the following example illustrates:

Prevention of unit turnover and vacancies	.02
Improved security and reduced vandalism	.01
Increased efficiency of PHA management/ maintenance staff and systems, e.g., have or will develop management information and financial, accounting and reporting systems which allow for budgeting and tracking of operating costs by project	.03
Contribution to City's overall effort to improve neighborhood; improved relations with community, e.g., use of local or Minority Business Enterprise (MBE) contractors*	.01
Improved quality of life for tenants	.02
Project improved habitability score	.09

(3) Project Ranking. The Field Office shall add the cost benefit ratio and the improved habitability score for each project for a total project score. The Field Office shall then rank each of the projects within Groups 2 and 3 based on the total project scores, with the highest score ranked first. In the event that projects are ranked equally, further priority shall be given to projects with large family units.

(4) Projects Not Subject to Ranking. It is HUD's intent to fund the second or subsequent stages of two- or multi-stage comprehensive modernization approved in prior FFYs to permit the PHA to complete the modernization of the project. Therefore, the second or subsequent stage is not subject to cost benefit ranking. The entire comprehensive modernization will be ranked only once, at the first stage.

*To achieve consideration under this factor by demonstrating the use of minority contractors, the PHA must provide evidence to the satisfaction of HUD that it has exceeded the goal of awarding 20 percent of previously approved modernization funds to MBE contractors during the past year.

b. Field Office Recommendations. After ranking by cost benefits, the Field Office shall forward its recommendations for preliminary funding decisions to the Regional Office, as well as any State comments under paragraph 3-6e. The recommendations shall consist of the following:

(1) List of projects in Group 1, in no priority order, with a brief justification of the emergency work;

(2) List of projects in Group 2, in priority order of total scores, showing the scores for both the cost benefit ratio and improved habitability, as well as the total score, for each project. Also, a brief justification for each project's inclusion in Group 2;

(3) List of projects in Group 3, with the same information as set forth in subparagraph c(2);

(4) List of projects in the second or subsequent stage of two- or multi-stage comprehensive modernization, with a brief statement on the implementation progress of previously approved stages and a funding recommendation.

(5) Identification of any PHA identified by FH&EO as being in nonconformance or noncompliance; and

(6) Results of Step 3 of the viability review for any project and conclusions regarding project viability.

c. Regional Office Decisions. The Regional Office shall familiarize itself with the proposed modernization to the maximum extent possible. At a minimum, the Regional Office shall meet with each Field Office to review its funding and project viability recommendations. After the Regional Office has thoroughly analyzed all Field Office recommendations and decided that projects within Groups 1 and 2 are properly classified, the Regional Office shall make the preliminary funding decisions, based upon Regional ranking of the projects and taking into account those projects not subject to ranking.

(1) Viability Review. The Regional Office shall review all results of Step 3 of the viability review for any project and the Field Office's conclusions regarding project viability. If, after review, the Regional Office wishes

to change the viability determination of any project as made by the Field Office (e.g., from viable to nonviable or vice versa), the Regional Office must document its reasons. The Regional Office shall not rank or approve for further processing any project which it determines to have any negative factors from Step 3 of the viability review. Such projects are considered to be nonviable and, therefore, ineligible for modernization funding, except those affected by paragraph 3-15b(4). See paragraph 3-15b(4) regarding required consultation with Headquarters where the Regional Office wishes to approve nonviable projects for modernization.

(2) Notification to Field Offices. The Regional Office shall notify in writing the Field Offices of its preliminary funding decisions, i.e., which PHAs are invited to submit Final Applications, and its viability determinations.

3-15. FIELD OFFICE LETTER REPORT. After the preliminary funding decisions, the HMD shall prepare a Letter Report to each PHA for the signature of the Field Office Manager in consultation with other AHM staff, inviting the PHA to submit a Final Application or informing the PHA of the reasons why it is not being invited to submit a Final Application.

a. Where the PHA is being invited to submit a Final Application, Letter Report shall include the following:

(1) Identify projects, types of modernization and funding amounts which may be approved for modernization funding in the current FFY, subject to PHA submission of an approvable Final Application and availability of funds.

(2) For each project, identify any required revisions to the comprehensive assessment, prepared for the Joint Review, including the addition, modification or deletion of specific physical and management work items; and identify those physical work items, if any, that exceed the Modernization Standards and, therefore, must be individually justified.

(3) Provide other advice and guidance on preparation of the Final Application, such as understandings reached on the organization and staffing of the modernization program, the method of accomplishment and the project implementation schedule.

(4) Address any PHA request to proceed with procurement of architectural/engineering services for work which is likely to get funded in the current or a subsequent FFY (see paragraph 2-6a).

(5) Specify actions, if any, recommended by the Regional FH&EO Compliance Division that must be taken within a specified time to correct any outstanding HUD findings of non-compliance with civil rights statutes, executive orders and regulations. Where modernization funds are not required to correct any outstanding findings, specify any actions that must be taken to demonstrate good faith effort before approval of the modernization funds.

(6) Specify the submission date of the Final Application.

b. Where the PHA is not being invited to submit a Final Application, the Letter Report shall include the following:

(1) An explanation of the reason for the decision.

(2) For a project determined to be nonviable, suggestions for alternatives for the future of the project. These may include, but are not limited to:

(a) The submission of a revised modernization proposal in the next FFY;

(b) Emergency modernization only;

(c) Reconfiguration;

(d) Partial demolition; or

(e) Disposition of the entire project.

(3) For a project determined to be nonviable, inform the PHA that it may request reconsideration of the proposal if:

(a) Relocation is infeasible because of the lack of other decent, safe, sanitary and affordable housing, including other

public housing units or units in the private market affordable with Section 8 or voucher assistance; and

(b) No other financially feasible program of modernization available as an alternative would overcome or deal more successfully with the problem identified in the viability review.

(4) If a PHA does request reconsideration on the grounds set forth in subparagraph b(3) and the Regional Office wishes to approve, the Regional Office shall request Headquarters approval to fund, with appropriate justification. If approved by Headquarters, the Regional Office shall reconsider the project for funding in the current or subsequent FFY.

3-16. PHA SUBMISSION OF FINAL APPLICATION. Following the advice and guidance contained in the Field Office Letter Report, the PHA shall prepare and submit the following documents in an original and three copies (or any lesser number of copies as specified by the Field Office) to the Field Office, Attention: Chief, AHM Branch. These documents constitute the Final Application:

a. For each project, an identification of and an estimate of the total costs of replacement of the equipment, systems or structural elements which would normally be replaced (assuming routine and timely maintenance is performed) over the remaining period of the ACC or during the 30-year period beginning on the date of submission of the Final Application, whichever period is longer. This estimate shall include an estimate of such costs accrued for the period which ends upon the date on which the Final Application is made and an estimate of the costs which will accrue during each 12-month period subsequent to the Final Application. The estimate should be based on current costs without taking inflation into account.

b. A comprehensive assessment of physical and management improvement needs and a plan for making the improvements and replacements and for meeting the needs which include:

(1) Form HUD-52825, Comprehensive Assessment/Program Budget (Parts I-II). Complete instructions for the preparation of Form HUD-52825 are contained in Appendix 10. A completed sample of the form is attached as Appendix 10 and may be used as a guide in preparation.

(2) Form HUD-52823, Project Financial Forecast. Complete instructions for the preparation of Form HUD-52823 are contained in Appendix 12 along with a sample of the form.

c. Modernization Organization and Staffing Plan, stating the proposed organization, staffing and inspection of the modernization program and including the following:

(1) Whether a separate modernization unit has been or will be established within the PHA and the proposed duration of the unit; if so, the relationship of the unit to the existing PHA organizational structure.

(2) The staffing of the modernization unit or function; number, titles and salaries of technical and non-technical PHA personnel to be assigned full-time or part-time to modernization, and additional personnel to be hired; designation of a modernization coordinator or contract administrator/construction manager, if necessary; and lines of authority.

(3) Plans for periodic inspections by an architect/engineer, independent contractor or PHA staff to ensure work quality and progress.

d. PHA Report, on compliance by the local governing body with the terms of the Cooperation Agreement, or as embodied by Article VIII of the Tribal Ordinance as applicable for certain IHAs, and any additional services or facilities that the PHA plans to request from the local governing body.

e. Resolution by the PHA Board of Commissioners. Where necessary, the PHA may delay submission of the Resolution until the final funding decisions are made. The Resolution shall approve the Final Application and certify that:

(1) The PHA will comply with all HUD policies, procedures and requirements for the modernization, including implementation of the modernization in a timely, efficient and economical manner;

(2) The estimated costs of the modernization program cannot be funded from current operating funds or reserves;

(3) The proposed physical work meets the mandatory standards or, if exceeds the mandatory standards, is necessary or highly desirable for long-term viability at the project;

(4) The PHA has complied with tenant/homebuyer consultation requirements under Chapter 15;

(5) The PHA shall comply with applicable civil rights requirements under paragraph 6-1 and 24 CFR 968.9a;

(6) The PHA has adopted the goal of awarding at least 20 percent of the dollar value of the total of the modernization contracts, to minority business enterprises under paragraph 6-2 and 24 CFR 968.9b;

(7) The PHA has complied with applicable environmental requirements under paragraph 6-3;

(8) The PHA has furnished a copy of the flood insurance policy to HUD or determined that flood insurance is not required under paragraph 6-4;

(9) The PHA has complied with applicable requirements for lead-based poisoning prevention under paragraph 6-5;

(10) The PHA has complied with applicable requirements for the physically handicapped under paragraph 6-6; and

(11) Where the proposed modernization involves the temporary or permanent rehousing of tenants, the PHA will ensure nondiscrimination in the selection of tenants to be rehoused, determination of which tenants require temporary and permanent rehousing, assignments of tenants within the PHA and provision of assistance to tenants being rehoused.

f. Special Provisions For Excepted Categories.

(1) Special Purpose Modernization. For a project under special purpose modernization, the PHA shall limit the items required in subparagraph b(1) to only those special purpose work items.

(2) Emergency Modernization. For a project under emergency modernization, the PHA shall omit from the Final Application the items required in subparagraphs a, b(2), c and d and limit the items required in subparagraph b(1) to only those emergency work items.

(3) Homeownership Modernization. For a project under homeownership modernization, the PHA shall omit from the Final Application the items required in subparagraphs a and b(2) and limit the items required in subparagraph b(1) to only those homeownership work items. The PHA shall include in the Final Application a listing of the units to be included in the modernization program and the estimated cost attributed to each home.

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U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
COMMUNITY PLANNING AND DEVELOPMENT

NOTICE CPD 79 - 31

October 1979
Expires March 1980

TO: All Regional Administrators, Regional Directors for CPD, Area Managers, CPD Division Directors, and CDBG Entitlement Recipients

SUBJECT: Revised Attachment O of OMB Circular A-102

This Notice transmits a revised Attachment O, Procurement Standards, of OMB Circular A-102, Uniform Requirements for Grants-In-Aid to State and Local Governments. The revision was published in the Federal Register, Vol. 44, No. 159, page 47874, on August 15, 1979.

A copy of this Notice is being provided directly to entitlement recipients, but not to discretionary grant recipients. Therefore, Area Offices are requested to send a copy of the revised Attachment O to each locality with an active Small Cities program. Additional copies of this Notice are being provided to Area Offices for this purpose and for staff use.

Robert C. Embry, Jr.
Assistant Secretary for
Community Planning and
Development

CCC:DISTRIBUTION: W-3-1, R-1, R-2, R-3-1, R-5, R-5-1, R-5-2, 023, 023-2, 023-3

U.S. Department of Housing and Urban Development

PUBLIC AND INDIAN HOUSING

Special Attention of: Public Housing Agencies/Indian Housing Authorities; Regional Administrators; Directors, Offices of Regional Housing; Field Office Managers; Housing Management Division Directors; Chiefs, Assisted Housing Management Branches; Directors, Offices of Indian Housing

Transmittal Handbook No.: 7485.1 REV-2

Issued: December 23, 1983

1. This Transmits

The Public Housing Comprehensive Improvement Assistance Program Handbook 7485.1 REV-2, dated 12/83.

2. Explanation of Material Transmitted:

This Handbook contains the policies and procedures for the Public Housing Comprehensive Improvement Assistance Program (CIAP), for use by HUD Regional and Field Offices, Public Housing Agencies (PHAs), including Indian Housing Authorities, and others involved in the modernization of public housing. These procedures may not be modified without the prior written approval of the Assistant Secretary for Public and Indian Housing. This Handbook incorporates policy clarifications and procedural revisions which the Department has found necessary after additional experience in administering the CIAP. The significant changes are:

a. Provision of definition for term "simple payback period."

b. Deletion of reference to inapplicability of OMB Circular No. A-95 and inclusion of reference to applicability of Executive Order 12372 on intergovernmental review of Federal programs.

c. Provision of instructions on how to calculate prototype cost limitation.

d. Consideration of ongoing maintenance and operating costs in approval of premature replacements.

e. Clarification of requirement for energy audit before approval of homeownership modernization and eligibility of energy audits and energy conservation measures without charge to homebuyer families.

f. Allowance of reimbursement of architectural/engineering fees incurred before program approval if such fees are reasonable and approvable and if PHA is subsequently funded.

: Distribution: W-3-1, W-2(H), W-3(H), R-1, R-2, R-3, R-3-1(H), R-3-2, R-3-3, R-6, R-6-1, R-6-2, R-7, R-7-1, R-7-2, R-8, R-8-1, 138-2, 138-7

g. Provision for Regional Office review and approval during application processing.

h. Allowance of comprehensive modernization of selected units within scattered site projects.

i. Guidance on when additional funds may be approved for projects previously approved for comprehensive modernization.

j. Revision of environmental review requirements to conform with 24 CFR Part 50, published as an interim rule on December 15, 1982.

k. Establishment of time frame for execution of Annual Contributions Contract (ACC) amendment.

l. Clarification that flood insurance coverage is required for each affected building within a project.

m. Clarification of requirement that PHA obtain a builder's risk policy either directly or through the contractor.

n. Establishment of requirement for a project implementation schedule and provision of national norms for key implementation steps.

o. Waiver of competitive negotiation process for architectural/engineering contracts under $5,000.

p. Requirement for previous participation clearance only for construction contracts over $50,000.

q. Allowance of HUD review of preliminary, not final, plans and specifications, where appropriate.

r. Allowance of bid periods of less than 30 days, where appropriate and where permitted by State law.

s. Requirement for HUD Labor Relations staff sign-off on contract settlement documents.

t. Provision of instructions on the temporary remittance of excess modernization funds.

u. Establishment of interim reporting system for HUD Regional and Field Offices on modernization approved after Fiscal Year 1974.

v. Instructions on budget revisions when there are funds left over from completed modernization programs.

w. Revision of instructions to Form HUD-5079B, Modernization List - Part II, to use original, not current, Minimum Loan Interest Rate when adding or deleting projects or recapturing funds.

x. Allowance of advertising costs under Development Account 1410.19 as eligible modernization cost.

3. Applicability of Issuance:

This Handbook applies to modernization approved under the CIAP in Federal Fiscal Year (FFY) 1984 and thereafter and to the implementation of modernization approved before FFY 1984.

4. Cancellation:

Public Housing Comprehensive Improvement Assistance Program Handbook 7485.1 REV-1, dated May 21, 1982.

5. Flow Chart:

Appendix 4, Flow Chart on Application Processing, is incorrect since it depicts Field, not Regional, Office approval authority. Appendix 4 will be revised when the Department field reorganization is complete.

6. Forms Alert:

Revised Part II of Form HUD-5079B, Modernization List, is now being printed and will be distributed to all Regional and Field Offices. Existing stocks of Form HUD-5079 shall not be destroyed since Part I of the Form, dated 4-82, is still in effect.

Assistant Secretary for Public and Indian Housing

Handbook **7485.1 REV-2**

U.S. Department of Housing and Urban Development
Washington, D.C. 20410

Program Participants and Departmental Staff

December 1983

Public Housing Comprehensive Improvement Assistance Program

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APPENDICES

32. Form HUD-53001, Actual Modernization Cost Certificate (For Modernization Programs Approved After Modernization as a Separate Project was Implemented)

7485.1 REV-2

LIST OF REPORTING REQUIREMENTS

I. Public Use Forms/Reports

Form/Report Number	Title	OMB Clearance Number
None	Evidence of Tenant Consultation	2502-0218
None	Evidence of Homebuyer Consultation	2502-0218
None	Evidence of Local Official Consultation	2502-0218
HUD-52824	Preliminary Application	2502-0208
HUD-52821	Project Profile	2502-0208
None	Replacement Reserves Estimate	2502-0208
HUD-52825	Comprehensive Assessment/Program Budget	2502-0208
HUD-52823	Project Financial Forecast	2502-0208
None	Modernization Organization and Staffing Plan	2502-0208
None	PHA Report on Local Compliance with Cooperation Agreement	2502-0208
None	Listing of Participating Homeownership Units/Costs	2502-0208
None	Survey Instrument: Physical Needs Assessment	2502-0217
None	Certificates of Insurance	2502-0216
HUD-5402	Requisition for Funds	2502-0188
None	Bidding Control Record	2502-0157
HUD-5371	Request for Acceptance of Subcontractor	2502-0157
None	Register of Change Orders and Time Extensions	2502-0157
None	Disputes and Claims Records/Findings for Liquidated Damages/PHA Contract Report	2502-0157
HUD-5372	Construction Progress Schedule	2502-0157
HUD-51000a	Schedule of Amounts for Contract Payments	2502-0157
HUD-51000b	Continuation Sheet	2502-0157
HUD-52826	Schedule/Report of Modernization Expenditures	2502-0219
None	Narrative Report on Management Improvements	2502-0219
HUD-53001	Actual Modernization Cost Certificate	2502-0219
None	Request for Proposal for Professional Services Relating to Management Improvements	2502-0219
None	Project Implementation Schedule	Being requested
HUD-52990	Modernization Program Budget	2502-0164
HUD-52994	Modernization Work Program	2502-0164
HUD-52995	Modernization Quarterly Progress Report	2502-0164
HUD-52993	Statement of Modernization Cost (Development)	2502-0164

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Form/Report Number	Title	OMB Clearance Number
HUD-51001	Periodical Estimate for Partial Payment	2505-0024
HUD-51002	Schedule of Change Orders	2502-0024
HUD-51003	Schedule of Materials Stored	2502-0024
HUD-51004	Summary of Materials Stored	2502-0024
HUD-2530	Previous Participation Certificate	2502-0118
HUD-51915	Agreement Between Owner and Architect	Being requested
HUD-5369	Instructions to Bidders	Being requested
HUD-5370	General Conditions	Being requested
HUD-9009	General Certificate	At OMB
HUD-51999	General Depositary Agreement	At OMB
HUD-52250	Permanent Note	Being requested
HUD-274	Designation of Depositary for Direct Deposit of Loan and/or Grant	At OMB
HUD-53008	Modernization Project Amendment to Consolidated Annual Contributions Contract for Modernization of Section 23 Leased Housing Bond-Financed Projects	Being requested
HUD-53009	Modernization Project Amendment to Consolidated Annual Contributions Contract	Being requested

II. Internal Forms/Reports

Form/Report Number	Title	HUD Clearance Number
None	Field Office Summary Report on All Modernization Approved After FFY 1974	HI00503R
None	Field Office Exception Report on All Modernization Approved After FFY 1974	HI00503R
None	Regional Office Summary Report on All Modernization Approved After FFY 1974	HI00503R

None	Field Office Summary Report on All Modernization Approved Before July 1, 1974	HI-00399R
None	Regional Office Summary Report on All Modernization Approved Before July 1, 1974	HI-00399R

CHAPTER 1. INTRODUCTION

1-1. PURPOSE. Section 14 of the United States Housing Act of 1937, as amended by the Housing and Community Development Act of 1980, substituted for the existing Public Housing Modernization Program a new Comprehensive Improvement Assistance Program (CIAP), beginning in Federal Fiscal Year (FFY) 1981. Under the CIAP, the Department of Housing and Urban Development (HUD) provides financial assistance to Public Housing Agencies (PHAs), including Indian Housing Authorities (IHAs), to improve the physical condition and upgrade the management and operation of existing public housing projects to assure that such projects continue to be available to serve low-income families. This Handbook provides instructions, guidelines and processing procedures for use by HUD Field and Regional Offices, PHAs and other participants involved in the comprehensive improvement of public housing projects. The CIAP Regulation, 24 CFR Part 868, is attached as Appendix 1.

1-2. APPLICABILITY.

a. This Handbook applies to PHA-owned low-income public housing projects, including conveyed Lanham Act and Public Works Administration (PWA) projects, and to Section 23 Leased Housing Bond-Financed projects for which PHAs request assistance under the CIAP after FFY 1980. This Handbook also applies to the implementation of modernization programs which were approved before FFY 1984.

b. This Handbook does not apply to projects under the Section 23 Leased Housing Non Bond-Financed Program, the Section 10(c) Leased Housing Program, and the Section 23 and Section 8 Housing Assistance Payments Programs.

1-3. DEFINITIONS. The following definitions are used throughout this Handbook:

a. Act means the United States Housing Act of 1937, as amended (42 U.S.C. 1437 et seq.).

b. Annual Contributions Contract (ACC) means a contract under the Act between HUD and the PHA, containing the terms and conditions under which the Secretary makes loans and annual contributions to assist PHAs in providing decent, safe and sanitary housing for low-income families and provides modernization funds to PHAs to improve existing public housing projects.

c. Comprehensive modernization means a modernization program for a project which provides for all needed physical and management improvements. Under the CIAP, all modernization programs are comprehensive modernization, except those defined as special purpose, emergency or homeownership.

d. Emergency modernization means a modernization program for a project that is limited to physical work items of an emergency nature, affecting the life, health and safety of tenants or related to fire safety. Under emergency modernization, management improvements are not eligible modernization costs.

e. Field Office means the HUD Office with which the PHA normally transacts its low-income housing business.

f. Financial feasibility means that the cost (excluding the cost of management improvements) of a modernization program does not exceed the prototype cost of a new project.

g. Financially distressed PHA means a PHA that has an operating reserve level of 20 percent or less of its authorized maximum or other level as determined by HUD, as shown on the latest year-end financial statement.

h. Five-year plan means the PHA's initial comprehensive assessment of the modernization funds to be requested over a five-year period to meet the total physical and management improvement needs of its projects, including any special purpose and homeownership needs, as well as any emergency needs in the current year. The plan is submitted as part of the Preliminary Application and provides for gross estimates of the total needs of the project(s) for which Comprehensive Modernization is requested and for gross estimates of the specialized needs of the project(s) for which special purpose, emergency or homeownership modernization is requested.

i. Force account labor means labor employed directly by the PHA on either a permanent or a temporary basis.

j. Homebuyer Agreement means a Mutual Help and Occupancy Agreement or a Turnkey III Homebuyer's Ownership Opportunity Agreement.

k. Homeownership modernization means a modernization program for a project that is under the Turnkey III Homeownership Opportunities Program or the Mutual Help Homeownership Opportunities Program. Under homeownership modernization, limited physical

improvements are eligible modernization costs, but management improvements are not eligible modernization costs. See paragraph 2-3.

l. Lack of management capability means that the PHA has inadequate management practices, as determined by the Field Office on the basis of regular monitoring and performance of on-site reviews, audits and surveys, as set forth in HUD Handbook 7460.7, Field Office Monitoring of PHA Administration of the Low-Income Public Housing Program, and that the PHA has not taken appropriate corrective action. Management practices which are to be considered include, but are not limited to: management, financial and accounting controls; tenant selection and eviction; occupancy levels; rent collection; and maintenance. See paragraph 2-2b.

m. Lack of modernization capability means that the PHA has previously approved, but unobligated, modernization funds that are over three years old and that the Field Office has determined that the failure to obligate such funds is due to reasons within the PHA's control. "Unobligated" means the PHA has not awarded contracts or started force account work for use of the funds. "Funds that are over three years old" mean funds approved in a FFY which is three or more FFYs before the current FFY. For example, if the PHA is applying for FFY 1984 funds, then "funds that are over three years old" are those from FFY 1980 and prior FFYs. "Reasons within the PHA's control" mean that the PHA did not take every feasible action toward completion and excludes lengthy delays outside of the PHA's control, such as litigation, environmental reviews, strikes, and other reasons determined to be valid by the Field Office.

n. Major repairs mean work items that are usually not recurrent, are substantial in scope, involve expenditures that would otherwise materially distort the level trend of maintenance expense, and may include replacement of structural elements and nonexpendable equipment due to normal wear and tear by items of substantially the same kind.

o. Modernization funds mean funds derived from an allocation of annual contributions contract authority under Section 5(c) of the Act for the purpose of financing physical and management improvements under an approved modernization program.

p. Modernization program means a PHA's program for carrying out modernization, as set forth in the proposed or approved Final Application for modernization funds.

q. Modernization Project means the improvement of one or more existing public housing projects. This is in contrast to the term "project" which means a development project with a unique project number.

r. Simple payback period means the number of years required to accumulate net annual savings equal to the cost of the work item. It is calculated by dividing the cost of the work item by the estimated net annual savings resulting from the work item, taking into account changes in operating and maintenance costs, but not interest and inflation. It is used to determine the eligibility of energy conservation work items which must have a 15-year or less simple payback period to be eligible for funding.

s. Special purpose modernization means a modernization program for a project that is limited to eligible energy conservation work items which will not be adversely affected by any subsequent comprehensive modernization. For such projects, management improvements are not eligible modernization costs. Special purpose modernization also means the approval of additional contract or budget authority to meet increased interest costs or to effect the transfer of modernization funds between projects with modernization programs approved before July 1, 1978.

t. Work item means any separately identifiable unit of work constituting a part of a modernization program.

1-4. GENERAL LEGISLATIVE AND FINANCIAL PROVISIONS.

a. Legislative Provisions. The Act was amended in 1974 to provide that a low-income project, for which HUD may enter into an ACC, may include "the improvement" of low-income housing. Therefore, HUD may enter into a separate commitment to finance the cost of improvement, which includes modernization, over a separate ACC term, without regard to the number of years elapsed under the maximum ACC term for payment of the original development debt. The term for payment of the debt service annual contributions to retire the modernization debt may extend beyond the period for amortization of the original development debt, so long as the term for the separate Modernization Project does not itself exceed the statutory maximum of forty annual contributions.

b. Twenty-Year Amortization Period. Each separate Modernization Project shall include all of the PHA's projects that are approved for modernization at the same time and that are

under the same consolidated ACC and shall have a maximum contribution period of twenty years, regardless of the number of years that have elapsed under the original ACC terms of the projects involved. Each project included under the Modernization Project shall be subject to the ACC and HUD requirements for public housing operation for a period of twenty years from the time the first annual contribution is payable on the modernization debt (subject to sale of homeownership units in accordance with the terms of the ACC). The period of amortization of the modernization debt of the Modernization Project will not affect the term for payment of annual contributions to amortize the original development debt. Where a project is under ACC after expiration of the original term because of its inclusion in a Modernization Project, HUD may approve payment of operating subsidy for the project under the applicable regulation.

1-5. USE OF COMMUNITY DEVELOPMENT BLOCK GRANTS.

a. Rehabilitation as an Eligible Activity. The eligible uses of Community Development Block Grant (CDBG) funds under Title I of the Housing and Community Development Act of 1974, as amended, are set forth in 24 CFR Part 570, Subpart C, and include, but are not limited to, the physical rehabilitation of publicly-owned, low-income housing.

b. Use of CDBG Funds. Interested PHAs should contact the unit of general local government submitting a final statement or application, regarding the possibility of including modernization activities in the CDBG program. PHAs shall inform the Field Office Assisted Housing Management (AHM) Branch of proposed modernization for which CDBG funds have been requested. The AHM Branch shall consult periodically with the Field Office Community Planning and Development (CPD) Division so that it is informed of when modernization activities have been specified in annual CDBG final statements. Such information may not be available for units of general local government receiving CDBG funds from the States.

c. Coordination of Funds. PHAs that are receiving modernization funds and CDBG funds for the same project shall enter the CDBG funds on Form HUD-52825, Comprehensive Assessment/Program Budget, as "Operating Funds Provided by PHA" - CDBG, to ensure appropriate coordination of funds and avoid duplication of work items.

1-6. INAPPLICABILITY OF SECTION 213 OF HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974. The requirements of Section 213 of the Housing and Community Development (HCD) Act of 1974, as amended (24 U.S.C.

1439), for review of applications by units of general local government do not apply to Preliminary and Final Applications for modernization of existing public housing projects. See paragraph 3-5b(2) for required PHA consultation with local officials.

1-7. APPLICABILITY OF EXECUTIVE ORDER 12372. The requirements of Executive Order (E.O.) 12372 on Intergovernmental Review of Federal Programs apply to applications for modernization of existing public housing projects, including Indian projects. If a State selects the CIAP to review, the Field Office must provide the State with an opportunity to comment on the PHAs' Preliminary Applications under HUD's implementing regulation, 24 CFR Part 52, and outstanding implementing instructions. See paragraph 3-6d.

CHAPTER 2. ELIGIBLE COSTS

2-1. PHYSICAL IMPROVEMENT COSTS.

a. Long-Term Viability. No physical improvements, other than those necessary to correct clear emergencies, shall be approved unless the judgment has been made that the project, after modernization, will have long-term physical and social viability.

b. Modernization Standards. Projects rehabilitated under the CIAP shall comply with the mandatory physical standards set forth in the Public Housing Modernization Standards Handbook 7485.2 REV-1. To the extent feasible, projects approved for rehabilitation before the CIAP (before FFY 1981) shall comply with the Modernization Standards. The Modernization Standards provide design, construction and environmental criteria for uniformly evaluating the physical condition and energy efficiency of existing public housing projects and determining what rehabilitation is necessary. The Modernization Standards apply energy conservation opportunities and devices where determined to be eligible (15-year or less simple payback period) in a specific project by an energy audit conducted using HUD Workbook (HUD-PDR-700(3)), State standards or other HUD-approved methods. Energy audits are required by 24 CFR Part 865, Subpart C (see paragraph 6-7).

c. Premature Replacement. Premature replacement of serviceable building components, systems, equipment or materials is not approvable under the CIAP, except under special circumstances where energy conservation opportunities make it eligible (15-year or less simple payback) and where ongoing maintenance and operating costs will not be adversely affected. However, before approving the premature replacement of relatively new or functional items, the Regional and Field Offices shall exercise judgment regarding whether it is in the best interest of the Department and the PHA. Therefore, compliance with the Modernization Standards will occur over a period of time as needed replacements are made.

d. Work Exceeding Standards. The Modernization Standards may only be exceeded when necessary or highly desirable for the long-term physical and social viability of the individual project, including site and building security. Work exceeding the standards is project specific and not applicable to all projects. Such work responds to differences in climate, location, building type, resident use and concerns, and

management/maintenance systems. Work exceeding the standards may not be justified on the basis of competition with other assisted or subsidized housing for tenants. Where such work is proposed, the PHA shall discuss the work items with the Field Office at the Joint Review and provide written justification for each work item with its Final Application.

e. Cost Exceeding Prototype. The Regional Office shall not approve a modernization program where CIAP funds or operating funds or reserves will be used to pay any cost (excluding the cost of the management improvements) which exceeds the total published prototype cost limit for construction of similar units in the area. The PHA may use funds from other sources, e.g., CDBG funds or unused Section 8 administrative fees. See Handbook 7420.7, paragraph 8-4b(3), regarding Section 8 administrative fees. The prototype cost limit is used to indicate when a modernization program may not be financially feasible and Headquarters review is warranted. It raises questions regarding the long-term viability of the project (i.e., whether the improvements can be sustained) and whether sufficient efforts have been made to reduce costs.

(1) Calculation. To calculate the prototype cost limit, the Field Office shall obtain the most recent public housing prototype figures published in the Federal Register for the type and size of units that will be in the project after modernization, i.e., following any conversion of unit sizes or demolition of units. The Field Office shall not adjust the published prototype for inflation or other reasons. The following example illustrates how to calculate the prototype cost limit for a walkup project in the Northeast:

Number of Bedrooms	Number of Units after Modernization		Unit Cost		Total Cost
0-BR	20	x	$26,250	=	$ 525,000
1-BR	20	x	$31,350	=	$ 627,000
2-BR	30	x	$34,700	=	$1,041,000
3-BR	10	x	$41,400	=	$ 414,000
					$2,607,000*

*The Field Office shall then compare the total prototype cost limit to the total modernization cost, excluding management improvements.

(2) Averaging Not Allowed. If the project contains dissimilar types of structures, e.g., a mid-rise with several low-rises, the Field Office shall separately calculate the prototype cost limit for each type of structure. The Field Office shall not average the modernization cost for dissimilar structures so that the less costly modernization on one type of structure disproportionately carries the more costly modernization on the other type of structure.

(3) Family High-Rises. To calculate the prototype cost limit for family high-rises where there are no published prototype figures for larger bedroom size units, the Field Office shall add 20 percent to the two-bedroom prototype figure for elevator structure for each additional bedroom. The following example illustrates how to calculate the prototype cost limit for a 250-unit family high-rise project:

Number of Bedrooms	Number of Units after Modernization		Unit Cost		Total Cost
1-BR	50	x	$21,000	=	$1,050,000
2-BR	50	x	$25,000	=	$1,250,000
3-BR	50	x	(1.20 x $25,000)* $30,000	=	$1,500,000
4-BR	50	x	(1.40 x $25,000)* $35,000	=	$1,750,000
5-BR	50	x	(1.60 x $25,000)* $40,000	=	$2,000,000
					$7,550,000

*Where 25,000 is the prototype cost limit for a two-bedroom unit.

(4) Submission to Region and Headquarters. If the total modernization cost, excluding management improvements, exceeds the calculated prototype cost limit for a project or structure type and the Field Office supports the modernization program, the Field Office shall submit its recommendation for approval, fully justified, to the Regional Office. If the Regional Office recommends approval, the Regional Office shall forward both the Field Office's and its recommendations to Headquarters for consideration.

2-2. MANAGEMENT IMPROVEMENT COSTS.

a. Eligibility. Management improvements that are project specific or PHA-wide in nature are eligible modernization costs under

the CIAP, subject to the following conditions:

(1) The management improvements are necessary to correct identified management problems and to sustain the physical improvements at the project to be comprehensively modernized.

(2) The management improvements require additional funds for implementation and the funds are not available from other sources.

(3) The combined costs for management improvements and planning under paragraph 2-6 shall not exceed 10 percent of the approved physical improvement costs for a PHA in a particular FFY, unless specifically approved by HUD Headquarters. Under paragraph 2-6, planning costs shall not exceed five percent of the funds available to the Field Office in a particular FFY.

(4) Management improvement costs shall be fundable only for the implementation period of the physical improvements. In rare cases, the Field Office may approve a longer period, up to a maximum of five years, where it is clearly shown to be necessary to complete the initial installation and demonstrate that the management work item will bring about needed management improvements.

(5) Where an approved modernization program includes management improvements which involve ongoing costs, such as security guards, HUD will not be obligated to provide continued funding or additional operating subsidy after the end of the implementation period of the management improvements. The PHA shall be responsible for finding other funding sources, reducing its ongoing management costs, or terminating the management activities.

b. Eligible Management Areas. Subject to the conditions set forth in subparagraph a, management improvements may involve or upgrade the following areas:

(1) Management, financial and accounting control systems of the PHA which are related to the project to be modernized;

(2) Adequacy and qualifications of personnel employed by the PHA in the management and operation of the project to be modernized for each category of employment; and

(3) Adequacy and efficacy of the following for the project to be modernized:

(a) Tenant Programs and Services. The PHA must be able to secure and coordinate the provision of appropriate social services from local government or other public and private entities.

(b) Tenant and Project Security. The PHA must be able to provide adequate security for the tenants and adequate protection against vandalism to the property, including securing adequate police services, providing necessary project surveillance and control of access, and excluding individuals who would jeopardize or evict those who are jeopardizing tenant security.

(c) Tenant Selection and Eviction. The PHA must be able to select and assign tenants in accordance with HUD requirements and sound management practices. The PHA also must be able to carry out timely evictions of disruptive tenants.

(d) Occupancy. The PHA must be able to maintain a 97 percent occupancy rate for the project after completion of the physical improvements. Where this occupancy target is clearly unrealistic, the PHA must set interim occupancy goals in a marketing plan to achieve 97 percent occupancy within a specified period. The PHA must be able to prepare vacated units for reoccupancy within a reasonable time period to achieve its occupancy goals.

(e) Rent Collection. The PHA must be able to collect the rents at the project and carry out timely evictions for nonpayment of rent. Where the PHA's Tenant Accounts Receivable (TAR) for tenants in possession as a percentage of the total monthly charges at the project exceeds 10 percent, the PHA must provide a plan to reduce the TAR to 10 percent within an acceptable period.

(f) Maintenance. The PHA must be able to provide adequate maintenance for the project after completion of the physical improvements, including timely response to routine and emergency maintenance requests and conduct of a preventive maintenance program for all of the major systems at the project.

c. Examples of Ineligible Management Improvements. Examples of ineligible management improvements include, but are not limited to:

(1) Hiring of additional staff or use of existing staff to directly provide social services to the tenants of the project to be modernized.

(2) Funding of ongoing operating expenses of tenant organizations. However, tenants organizations may be contracted with to carry out eligible physical and management improvements. Appropriate payment for these activities is an eligible cost.

d. Many management improvements require little or no additional funds to implement. Although eligible for modernization funding under comprehensive modernization, management improvements shall not be financed with modernization funds unless justified by the PHA and approved by the Regional Office. See paragraph 2-7 for guidance on administrative costs.

e. Where management improvements involve planning costs (i.e., costs incurred before modernization program approval), such costs shall be charged in accordance with paragraph 2-6d. Where management improvements involve administrative costs (i.e., costs to be incurred after modernization program approval), such costs shall be charged in accordance with paragraph 2-7d.

2-3. HOMEOWNERSHIP PROJECTS. Eligible physical improvements are limited to work items which are not the responsibility of the homebuyer families and which are related to health and safety, accessibility for the physically handicapped, correction of development deficiencies, energy audits and cost-effective energy conservation. The correction of development deficiencies, conduct of energy audits and undertaking of cost-effective energy conservation measures with modernization funds shall not increase the purchase price and amortization period for homebuyer families; however, other eligible physical improvements shall increase the purchase price and amortization period. Major repairs or replacements, additions, items which are the responsibility of the homebuyer families, and management improvements are not eligible modernization costs. See paragraphs 4-12 and 5-2 regarding special instructions for homeownership projects.

2-4. CORRECTION OF DEVELOPMENT DEFICIENCIES.

a. Definitions.

(1) Development deficiencies are deficiencies in a project that relate to errors or inadequacies in the design or construction of a project which become known before Field Office approval of the Actual Development Cost Certificate (ADCC). Design deficiencies result from the use of plans and specifications that fail to meet HUD and other applicable design standards in effect at the time of project approval (e.g., Contract of Sale, Notice to Proceed, etc.). Construction deficiencies result from the use of improper construction methods or materials, poor workmanship, or failure to complete the project in accordance with HUD-approved plans.

(2) Development funds, as used in this paragraph, are funds remaining in the Development Cost Budget, funds remaining in the ACC in excess of the Development Cost Budget, recaptured development funds released in 1976 and subsequent fiscal years, or development amendment funds.

b. Management Concurrence in Actual Development Cost Certificate. The Chief, Mortgage Credit Branch, shall send the ADCC and all supporting documents to the Chief, Assisted Housing Management (AHM) Branch, for review and concurrence.

c. Responsibility for Correction.

(1) Before Management Concurrence in ADCC. Before AHM Branch concurrence in an ADCC, the correction of any development deficiencies shall be financed from development funds, as defined in subparagraph a(2). If there are insufficient funds in the Development Cost Budget or ACC, that budget may be amended with available development funds, subject to limitations placed on the use of recaptured and amendment funds. See the Public Housing Development Handbook 7417.1 REV-1. Where there are no remaining or inadequate development funds, the Field Office Manager may submit a documented request to use modernization funds to correct development deficiencies, through the Regional Office, to the Assistant Secretary for Public and Indian Housing, Attention: Director, Office of Public Housing. The request shall describe the deficiencies, their causes, the amount of modernization

funds required for correction, and efforts by the Field Office and PHA to secure correction or indemnification from the architect or contractor, as appropriate. The request also shall state there are no remaining or inadequate development funds for correction.

(2) After Management Concurrence in ADCC. After AHM Branch concurrence in an ADCC, the correction of any subsequently identified deficiencies may be financed from modernization funds without Headquarters approval. Such deficiencies will be considered to be latent defects that could not reasonably have been foreseen by the Field Office at the time the ADCC was reviewed.

(3) Where ADCC Already Approved. If the AHM Branch identifies any development deficiencies in a project with an ADCC already approved before April 22, 1981, the AHM Branch shall follow the procedures set forth in subparagraph c(1).

2-5. TENANT MOVING COSTS.

a. Rehousing. When it is necessary to move tenants at the project being modernized, either temporarily or permanently, to accommodate the modernization, the PHA shall provide temporary or permanent housing at comparable cost for affected tenants on a nondiscriminatory basis. When it is necessary to house tenants in units other than public housing, rents paid by the PHA shall not exceed Section 8 Existing Fair Market Rents, except as may be approved by the Field Office. When a public housing unit of suitable size and location becomes available, the tenant must agree to move into the unit or assistance shall terminate.

b. Moving Costs. The PHA shall pay for the actual costs of moving the affected tenants to other units, as well as back to the modernized project or units, where necessary. The PHA also shall pay for the actual incidental costs incurred by tenants, such as new utility deposits or telephone installations. Tenant moving costs are eligible modernization costs and shall be charged to development account 1495.1 (see paragraph 2-8).

2-6. PLANNING COSTS. Planning costs are costs incurred before modernization program approval.

a. Reimbursement.

(1) Application Development. Planning costs necessary for developing the Preliminary or Final Applications, including preparing the detailed comprehensive assessment of physical and management improvement needs and conducting the energy audit for the Joint Review, are eligible modernization costs. These costs may be reimbursed after Final Application approval where the Regional and Field Offices determine that the PHA does not have the staff or financial resources to assume these additional responsibilities or costs. If the PHA incurs planning costs without prior Regional Office approval, the PHA does so with the full understanding that the costs may not be reimbursed upon modernization program approval.

(2) Design Work. Eligible planning costs may include architectural/engineering fees for detailed design work and preparation of the construction and bid documents. The PHA may wish to incur such costs to expedite implementation of its modernization program. To minimize the risk that these costs will not be reimbursed upon modernization program approval, the PHA should consult with the Field Office on its modernization plan, the likelihood of subsequent funding, the amount of the fees, and the scope of the architect's/engineer's work before executing the architectural/engineering contract. See paragraph 3-11c. These planning costs will be reimbursed if the fees and scope of work are reasonable and approvable and if the PHA is subsequently funded for construction. In procuring architectural/engineering sevices, the PHA shall follow the selection process in paragraph 8-2 and the HUD review requirements in paragraph 8-6 where certification is not allowed.

b. Limitations. To maximize the use of modernization funds for needed improvements, the Regional Office shall not approve more than 10 percent of the physical improvement costs for a PHA in a particular FFY for combined management improvement and planning costs. Planning costs shall not exceed five percent of the funds available to the Field Office in a particular FFY.

c. Upfront Funding. Financially distressed PHAs, as defined in paragraph 1-3, may request and receive approval from the Regional Office for upfront funding of planning costs as a separate Modernization Project, where developing the Preliminary and/or Final Applications would otherwise present an undue financial hardship. Where planning costs are funded, the 10 percent limitation shall apply to the estimated total physical improvement costs for the affected project(s). If, upon subsequent approval of the total physical improvement costs, the previously approved planning costs exceed the 10 percent limitation, the PHA shall reimburse HUD for the excess amount. See paragraph 3-12c.

d. Charging Planning Costs. Where approved by the Field Office, planning costs shall be charged to the appropriate development accounts, as set forth in Appendix 2. Planning costs related to management improvements shall not be charged to development account, Management Improvements (Account 1408).

2-7. ADMINISTRATIVE COSTS. Administrative costs necessary for the additional design and implementation of the physical and management improvements (i.e., costs to be incurred after modernization program approval) and that are reasonable when compared with similar costs in the same area are eligible modernization costs, as follows:

a. Salaries. The salaries of non-technical and technical personnel assigned full-time or part-time to modernization are eligible costs only where the scope and volume of the planning work are beyond that which could be reasonably expected to be accomplished by such personnel in the performance of their normal duties. Any proration of salaries must be justified by the PHA, authorized by the Field Office and reflected by an appropriate revision to the PHA's operating budget.

b. Employee Benefit Contributions. PHA contributions to employee benefit plans on behalf of non-technical and technical PHA personnel are eligible costs in proportion to the amount of salary charged to the modernization program. The cost of terminating an employee hired on a temporary basis to work on modernization is an eligible cost (e.g., the expense of unemployment compensation where required by State law). The PHA shall estimate the extent of these costs and request a sufficient amount of modernization funds to cover such costs.

c. Tenant Employment. Qualified tenants may be hired to carry out any required function, where appropriate.

d. Charging Administrative Costs.

(1) All administrative costs relating to physical improvements shall be charged to the following appropriate development accounts: Non-Technical Salaries (Account 1410.1); Technical Salaries (Account 1410.2); Employee Benefit Contributions (Account 1410.9); Architectural and Engineering Fees (Account 1430.1); Consultant Fees (Account 1430.2); and other accounts set forth in Appendix 2.

(2) All administrative costs relating to management improvements shall be charged to the development account, Management Improvements (Account 1408), regardless of whether the costs involve non-technical or technical salaries, employee benefit contributions or consultant fees.

(3) Where PHA personnel assigned to the modernization program work on both physical and management improvements, their salaries shall be prorated, for budgeting purposes, between the physical and the management improvements. For example, if the PHA Modernization Coordinator will spend 60 percent of his/her time on physical improvements and 40 percent on management improvements, then the salary of the PHA Modernization Coordinator shall be charged 60 percent to either Non-Technical Salaries (Account 1410.1) or Technical Salaries (Account 1410.2), as appropriate, and 40 percent to Management Improvements (Account 1408). During implementation, the program shall be revised to reflect costs directly charged. Documentation such as time records shall be available to substantiate these direct charges.

2-8. USE OF DEVELOPMENT ACCOUNTS. For work to be financed with modernization funds, the PHA shall enter the appropriate development account number that relates to an individual work item on Form HUD-52825, Comprehensive Assessment/Program Budget. Development accounts that may be used in the CIAP are listed in Appendix 2. Development accounts that may not be used in the CIAP and, therefore, represent ineligible modernization costs are listed in Appendix 3.

2-9. LIMITATIONS ON USE OF PRE-FFY 1981 FUNDS. Modernization funds approved before FFY 1981 may not be used to finance management

improvements, unless the PHA meets the substance of the requirements set forth in paragraph 3-16. However, such funds may be used to finance previously ineligible costs, such as legal expenses related to carrying out modernization and exterior painting necessary to preserve the structures, where approved by the Field Office.

CHAPTER 3. APPLICATION DEVELOPMENT AND SUBMISSION

3-1. INTRODUCTION. This Chapter sets forth the application process and provides instructions to both PHAs and Regional and Field Offices on the Preliminary Application, the Joint Review and the Final Application. Also see Appendix 4 for a flow chart on application processing. A Sample Modernization Processing Control Log for Field Office use is attached as Appendix 5.

3-2. FUND ASSIGNMENT. On the basis of an assignment plan approved by the Under Secretary, the Assistant Secretary for Public and Indian Housing assigns modernization funds to the Regional Offices on Form HUD-185, Regional Fund and Contract Authority Assignment, for subassignment to the Field Offices on Form HUD-185.1, Regional Fund and Contract Authority Subassignment. Assigned and subassigned modernization funds are designated by specific amounts of contract, loan and budget authority. The Field Office is responsible for controlling the obligation of contract, loan and budget authority to ensure that none of the three amounts is exceeded. See paragraphs 4-3 and 4-4.

3-3. NOTIFICATION OF MODERNIZATION FUND AVAILABILITY. When modernization funds become available, the Department shall notify in writing all PHAs as to the amount of available modernization funds, the requirements and time frame for submission of the Preliminary Application, and other pertinent information.

3-4. INFORMAL CONSULTATION. Before preparation of the Preliminary Application, the PHA should contact the Field Office to discuss its modernization needs and obtain information on HUD policies and procedures. See paragraph 3-12d for up-front funding of planning costs for financially distressed PHAs.

3-5. PHA SUBMISSION OF PRELIMINARY APPLICATION.

a. Content. The Preliminary Application includes the following:

(1) Form HUD-52824, Preliminary Application, which contains the five-year funding request plan (the original or annual update), as defined in paragraph 1-3, and the certifications at the bottom of the form, including those on tenant/homebuyer and local official consultation. Complete instructions for preparation of the form are contained in Appendix 6. The PHA shall separately identify emergency and energy conservation needs.

(2) Brief explanation of the priority order of the projects for which modernization funding is requested in the current Federal Fiscal Year (FFY).

(3) Brief explanation of how the proposed modernization will impact upon the conditions which result in projects receiving preferential consideration under Groups 1 and 2 (see paragraph 3-6c).

b. Preparation.

(1) Consultation with Tenants/Homebuyers. The PHA shall consult with tenants/homebuyers regarding its intent to submit a Preliminary Application.

(2) Consultation with Local Officials. The PHA shall consult with appropriate local officials regarding whether the proposed comprehensive or special purpose modernization is financially feasible and will result in long-term physical and social viability at the project. Where such a determination cannot be made, the PHA shall consider alternatives to improvements of all existing units, such as changes in project density, basic design, unit distribution, or household type (elderly/non-elderly), as well as demolition or disposition under 24 CFR Part 870. The PHA shall include the selected alternatives in the Preliminary Application. The PHA also shall request comment on how the proposed modernization of the projects may be coordinated with any local plans for neighborhood revitalization and expenditure of funds, such as Community Development Block Grant (CDBG) funds.

c. Submission. Within the established time frame, the PHA shall submit to the Field Office, Attention: Chief, Assisted Housing Management (AHM) Branch, the Preliminary Application in an original and three copies (or any lesser number of copies as specified by the Field Office). The PHA also shall send a copy of the Preliminary Application to the appropriate local officials.

3-6. HUD REVIEW AND ACTION ON PRELIMINARY APPLICATION.

a. Field Office Eligibility Review. After the Preliminary Application has been logged in, the Housing Management Officer (HMO) shall check the application to determine if all required information has been included before routing it to the Maintenance Engineer and other AHM staff, as

appropriate. Field Office eligibility review shall determine if the applications meet all the following basic eligibility requirements.

(1) PHA Modernization Capability. The PHA has at least minimal modernization capability to carry out its proposed modernization. The Field office shall consider the PHA's modernization pipeline of previously approved, but unobligated funds and whether the PHA can administer any additional funds.

(2) Project Viability. The project, after modernization, will have long-term physical and social viability. This test is not applicable where only emergency modernization is proposed.

(3) Work Item Eligibility and Need. Based on the general description of the major work items in the Preliminary Application and the Field Office's knowledge of the project's conditions, the work items appear to be eligible and needed.

b. Determination of Eligibility. After the eligibility review, the Field Office shall determine which projects are eligible for batching under subparagraph c. The AHM Branch shall not batch or recommend for Joint Review any application which is ineligible.

c. Field Office Batching. The Field Office shall batch the eligible projects into the following three groups. A PHA proposing all types of modernization may have projects included in each group. For batching purposes, the Field Office may extract emergency or energy conservation work items from comprehensive modernization proposals.

(1) Group 1. Projects having emergency conditions that pose an immediate threat (i.e., must be corrected within one year of funding approval) to tenant health or safety and proposed for assistance under emergency or homeownership modernization;

(2) Group 2. Projects having conditions which threaten tenant health or safety or having a significant number (10 percent or more) of vacant or substandard units and proposed for assistance under comprehensive, special purpose or homeownership modernization; and

(3) Group 3. Other projects not meeting the criteria in subparagraphs c(1) and (2) and proposed for assistance under comprehensive, special purpose or homeownership modernization.

d. State Notification.

(1) Under paragraph 1-7, where the State has established a review process and has selected the CIAP to review, the Field Office shall provide the State with an opportunity to comment on all Preliminary Applications proposing comprehensive modernization and determined to be eligible under subparagraph b and meeting the threshold levels of 50 or more units in urban areas or 25 or more units in nonurban areas. Preliminary Applications proposing emergency, special purpose or homeownership modernization are excluded from the State notification requirements.

(2) The Field Office shall prepare one Standard Form (SF) 424, Federal Assistance, Section I only, for each covered Preliminary Application. The Field Office shall batch and forward copies of the covered Preliminary Applications and SF 424's to the State single point of contact (SPOC) for review. The comment period begins on the day after the Preliminary Applications are mailed. The comment period is 60 days, plus an additional 5 days for mailing for a total of 65 days.

(3) The Field Office shall submit the State comments, if any, to the Regional Office with its preliminary funding recommendations under paragraph 3-14c. Following Regional Office preliminary funding decisions under paragraph 3-14d, in response to an official State process recommendation (comments submitted by a State, but not as an official State process recommendation, need not be addressed), the Regional Office must either:

(a) Accept the recommendation;

(b) Reach a mutually agreeable solution with the parties preparing the recommendation; or

(c) Provide the State SPOC with a written explanation for not accepting the recommendation or reaching a mutually agreeable solution, i.e., nonaccommodation. If there is

a nonaccommodation, including not funding PHAs/projects prioritized by the State, the Regional Office shall require the Field Office to wait 15 days after sending an explanation of the nonacommodation to the State SPOC before requesting any Final Applications from PHAs.

e. Field Office Technical Review. After batching, the Field Office shall review each eligible project within Groups 2 and 3 on the following factors:

(1) Extent and urgency of need;

(2) Prospects for long-term physical and social viability after modernization;

(3) Financial feasibility of proposed modernization (see paragraph 2-1e);

(4) Reasonableness of estimated costs;

(5) Degree of cost benefits (see paragraph 3-14a);

(6) PHA's management capability, as defined in paragraph 1-3;

(7) PHA's modernization capability, as defined in paragraph 1-3; and

(8) Local government and tenant/homebuyer support for proposed modernization.

f. FH&EO Review. During technical review, the AHM Branch shall transmit a listing of PHAs submitting Preliminary Applications to the Fair Housing and Equal Opportunity (FH&EO) Division. The AHM Branch shall request that the FH&EO Division provide information on any PHA listed with respect to outstanding findings of nonconformance with civil rights and equal opportunity requirements or apparent noncompliance with civil rights laws, actions necessary to obtain conformance and/or compliance, and other pertinent information, if any. Where appropriate, the FH&EO Division shall return the listing to the AHM Branch with a "no comment" noted.

g. Field Office Recommendations. After technical review, the Field Office shall prepare its recommendations for Joint Review. The Field Office shall prepare three lists, one for

each group of eligible projects. For each project in Group 1, the Field Office shall prepare a brief narrative, justifying each project's inclusion in the group and providing its evaluation of each project against factors (1), (4) and (7) in subparagraph e. For each project in Groups 2 and 3, the Field Office shall prepare a brief narrative, justifying each project's inclusion in the group and providing its evaluation of each project against factors (1) through (8) in subparagraph e. If requested by the Regional Office, the Field Office shall list the projects within Groups 2 and 3 in priority order. The Field Office also shall indicate any PHA identified by FH&EO as being in noncomformance or noncompliance and any project which is the second or subsequent stage of a two- or multi-stage comprehensive modernization. The Field Office shall forward to the Regional Office the three lists and related narratives.

h. Regional Office Selections. The Regional Office shall review the lists and related narratives submitted by all Field Offices under its jurisdiction and select PHAs/projects and types of modernization for Joint Review. In making its selections, the Regional Office shall give preference to projects in Groups 1 and 2. The Regional Office shall notify in writing the Field Offices of its selections.

i. Funding Targets. Although the Regional Office is responsible for funding decisions, the Regional Office may establish funding targets for Field Offices based on its knowledge of the needs and conditions within the Region. Where established, these targets may increase or decrease throughout processing as the Regional Office makes the preliminary and final funding decisions.

j. Letter to PHA. After the Regional Office selections for Joint Review, the HMO shall prepare a letter to the PHA for the signature of the Field Office Manager, advising whether the PHA will be considered for funding in the current FFY, as follows:

(1) Where the PHA will be considered for funding in the current FFY, the letter shall: confirm the date of the Joint Review, if already scheduled, indicate an intent to schedule the Joint Review as soon as possible, or state that the requirement for the Joint Review is being waived under paragraph 3-7; state which project(s) for which type(s) of modernization will be reviewed and request that the PHA contact the Field Office if the PHA disagrees with the defined scope of the Joint Review;

outline required PHA activities to prepare for the Joint Review; and list outstanding monitoring findings or issues which must be resolved if the PHA is subsequently invited to submit a Final Application.

(2) Where the PHA will not be considered for funding in the current FFY, the letter shall state the reasons, such as the relatively low priority of its physical improvement needs. Where the reason is lack of management or modernization capability, the letter shall state the specific deficiencies and what actions the PHA will have to take or what level of management or modernization capability the PHA will have to achieve by a specified time to be considered for funding in a subsequent FFY.

3-7. SCHEDULING AND WAIVER OF JOINT REVIEWS.

a. Scheduling. The Modernization Coordinator is responsible for coordinating the scheduling of the Joint Reviews. The HMO shall check with the Modernization Coordinator before contacting the PHA about a tentative date or establishing a firm date for the Joint Review.

b. Waiver. The Regional Office may waive the requirement for a Joint Review only where special purpose, emergency or homeownership modernization is involved if the Field Office has current knowledge of the specialized need(s) and proposed physical improvement(s). The Regional Office may not waive the requirement for a Joint Review where comprehensive modernization, including the second or subsequent stage, is involved.

3-8. PHA PREPARATION FOR JOINT REVIEW. The PHA shall prepare for the Joint Review by taking the following actions:

a. Reach agreement with the Field Office on the specific project(s) to be covered during the Joint Review.

b. Consult with tenants/homebuyers as required in Chapter 5.

c. Complete a detailed comprehensive assessment of the total physical and management improvement needs of the project(s) for which the PHA is requesting comprehensive modernization and of the specialized needs of the project(s) for which the PHA is requesting special purpose, emergency or homeownership modernization in the current FFY, as follows:

(1) Form HUD-52821, Project Profile, providing pertinent management information on each project for which comprehensive modernization is requested in the current FFY. This form is not required for projects proposed for special purpose, emergency or homeownership modernization. A sample Form HUD-52821 is attached as Appendix 9. The form provides instructions on which items may be omitted for a project where the PHA has 100 or less units in management. The Project Profile assists the PHA in assessing and analyzing its management operations at each project, identifying management problems, and formulating the management improvements which require identification on Form HUD-52825, Comprehensive Assessment/Program Budget.

(2) Part II of Form HUD-52825, Comprehensive Assessment/ Program Budget. Complete instructions for preparation of the form are contained in Appendix 10. For projects to be comprehensively modernized, the comprehensive assessment includes both physical and management needs assessment, as follows:

(a) Physical Needs Assessment. This includes an identification of the project's current physical condition and the physical improvements necessary to meet the mandatory standards, set forth in the Public Housing Modernization Standards Handbook 7485.2 REV-1. The PHA that lacks the in-house capability to perform the assessment should contact the Field Office. In such cases, the Field Office may advise the PHA to hire an outside architect/ engineer, subject to reimbursement only if the comprehensive modernization is approved, or that the Field Office will perform the assessment for the PHA during the Joint Review. The Field Office may encourage small PHAs to group together for purposes of hiring outside assistance.

(b) Management Needs Assessment. This includes an identification of all current management improvement needs, as assessed against the management areas set forth in paragraph 2-2b. Many management deficiencies require little or no additional funds to correct. Regardless of whether modernization funds are required for correction, the PHA shall include any management items identified on the Project Profile or by the PHA as problems or for which the PHA is requesting funding

for correction. For designated Financially Troubled PHAs, management improvement needs shall be consistent with those identified in their Financial Workout Plans.

d. Conduct an energy audit on each project proposed for comprehensive, special purpose or homeownership modernization. Guidelines for identifying cost-effective energy consevation measures and for conducting energy audits are set forth in the HUD Workbook (HUD-PDR-700(3)). If an acceptable energy audit is not conducted, the Field Office shall not recommend the project for further processing.

e. Review the other points to be covered during the Joint Review as set forth in paragraph 3-11.

3-9. FIELD OFFICE PREPARATION FOR JOINT REVIEW.

a. Notification to FH&EO. As soon as the Joint Review has been firmly scheduled, the HMO shall notify the FH&EO Division of the proposed date and invite its participation. Where the FH&EO Division is unable to participate in the Joint Review, it may inform the AHM staff in writing of its specific concerns.

b. AHM Branch Participation. In all cases where comprehensive modernization is proposed, the HMO and the Maintenance Engineer shall represent the Field Office on the Joint Review. Based upon PHA size and prior knowledge of PHA management problems, other AHM staff, as appropriate, shall participate in the Joint Review. In all cases, the HMO shall serve as the team leader of the Field Office representatives.

c. Review of Files. In preparing for the Joint Review, the Field Office representatives shall review the PHA's file(s), with special attention to open findings from the latest fiscal audit, management review, occupancy audit, engineering survey and utilities review. If the fiscal audit is overdue, the Field Office shall suspend further processing until the PHA has initiated the audit. Field Office representatives should be thoroughly familiar with the status of all previously approved modernization programs and the overall operation of the PHA.

d. Confirmation with PHA. Before the Joint Review, the HMO shall check with the PHA to confirm that the PHA is ready

for the Joint Review, i.e., has taken all of the actions required in paragraph 3-8. If the PHA is not ready, the HMO shall cancel the Joint Review and provide a revised date by which time the PHA must be ready.

3-10. PURPOSE, CONDUCT AND DURATION OF JOINT REVIEW.

a. Purpose. The purpose of the on-site Joint Review is to discuss the proposed modernization program, as set forth in the Preliminary Application and the comprehensive assessment, and reach tentative agreement on PHA needs.

b. Initial Meeting. The Field Office and the PHA representatives should meet briefly to discuss the prearranged agreements concerning the scope of the Joint Review, PHA staff availability and other logistical matters. They also should review the documents prepared by the PHA under paragraph 3-8c and discuss how the proposed management improvements, if any, relate to the proposed physical improvements, the appropriateness of work items and project priorities, and the degree of cost benefits.

c. Duration. The duration of the Joint Review will vary in time, depending upon factors, such as PHA size and management capability, type and complexity of the proposed modernization program, Field Office knowledge of and familiarity with the PHA's operations and management practices, status of any previously approved modernization programs, and extent to which the findings of the Joint Review would duplicate the open findings of a fiscal audit, management review, occupancy audit, engineering survey or utilities review conducted within the preceding 12 months.

d. Close-Out Meeting. The Field Office and the PHA representatives should meet to discuss HUD's preliminary findings and recommendations on the proposed modernization program, including whether one-stage or two-stage comprehensive modernization under paragraph 3-12 is appropriate for each project reviewed. The close-out meeting shall include specific treatment of previously approved modernization programs not completed within the prescribed time frames (see paragraph 7-2) and an agreed upon schedule for completion and fiscal closeout. Where appropriate, the Field Office representatives also may meet with the PHA Board of Commissioners.

3-11. JOINT REVIEW COVERAGE. The Joint Review shall include an on-site inspection of the property and resolution of the

following points. The Field Office shall document the Joint Review by using the Joint Review Checklist in Appendix 11. The Field Office may modify the Checklist, by adding additional information, where appropriate.

a. Based on the detailed comprehensive assessment(s) undertaken in paragraph 3-8c, specific physical improvement needs to be addressed in the modernization program, including cost estimates, proposed implementation schedule, method of accomplishment (contract or force account), and method of PHA inspection of the physical work. In addition, the PHA's determination of whether the proposed comprehensive or special purpose modernization is financially feasible and will result in long-term physical and social viability at the project, as well as the PHA's estimated cost benefits, shall be reviewed. The need for and the appropriateness of the physical work items shall be reviewed against the Modernization Standards, the energy audit and the individual needs of each project (see paragraph 2-1). The use of force account labor shall be considered only on an exception basis, where appropriate to the scope and type of physical improvements and the PHA's capacity to serve as its own main contractor and to maintain an adequate level of routine maintenance during force account activity.

b. Based on the detailed comprehensive assessment(s) undertaken in paragraph 3-8c, the thoroughness of the PHA's diagnosis in identifying management problems, causes and solutions, and specific management improvement needs, including those which require no funding, to be addressed in the modernization program, and the proposed implementation schedule and cost estimates for completing proposed management improvements. The need for and the appropriateness of the management work items shall be reviewed against the criteria set forth in paragraph 2-2. Although the PHA is not required to prepare the detailed comprehensive assessment of management improvement needs for projects proposed for special purpose, emergency or homeownership modernization, the Field Office may discuss such needs with the PHA during the Joint Review and subsequently require the PHA to address those needs in the Final Application.

c. PHA need for the technical services of an architect/engineer and/or a management consultant in further planning, designing and implementing all or part of the proposed physical and management improvements. See paragraph 2-6a(2) regarding incurring architectural/engineering fees for detailed design work before program approval.

d. PHA plan for organizing and staffing the modernization program, including PHA need for a full-time modernization coordinator or contract administrator/construction manager, assignment of regular PHA staff, and hiring of additional personnel (see paragraph 7-3).

e. PHA performance in administering previously approved modernization programs, if applicable (see paragraph 7-2).

f. PHA need for additional modernization funds to complete previously approved modernization programs (see paragraph 3-13).

g. PHA compliance with requirements for consultation with local officials and tenants/homebuyers under paragraph 3-5b and Chapter 5 and local support for the proposed modernization. If it is questionable whether a project has local support or, once modernized, will have long-term physical and social viability, the Field Office shall require the PHA to consult more thoroughly with local officials, including obtaining a letter of support from local officials before the preliminary funding decisions.

h. PHA compliance with civil rights statutes, executive orders and regulations, as applicable, under paragraph 6-1.

i. PHA plans to provide minority and women's business or Indian enterprise opportunity under paragraph 6-2.

j. Applicability of environmental and historic preservation requirements under paragraph 6-3.

k. PHA compliance with flood insurance requirements under paragraph 6-4.

l. PHA compliance with requirements to eliminate immediate lead-based paint hazards under paragraph 6-5.

m. PHA compliance with requirements to provide accessibility for the physically handicapped under paragraph 6-6.

n. PHA compliance with requirements to conduct an energy audit and undertake cost-effective energy conservation measures under paragraph 6-7.

3-12. COMPREHENSIVE MODERNIZATION APPROACH. After the Joint Review, the Regional and Field Offices shall consider one- or two-stage

funding. The proposed comprehensive modernization of a project shall be funded in one stage, unless the Regional and Field Offices determine, based upon the criteria set forth in subparagraph b, that it shall be funded in two stages.

a. One-Stage Funding. In general, comprehensive modernization will be funded in one stage. Under one-stage funding, the total amount of modernization funds for all required physical and management improvements at the project shall be approved at one time, out of funds for a single FFY, under one Final Application.

b. Two-Stage Funding. On an exception basis, comprehensive modernization will be funded in two stages. Under two-stage funding, the total amount of the modernization funds for all required physical and management improvements at the project shall be approved at two different times under two different Modernization Projects.

(1) Mandatory. Where the Regional Office determines that the PHA lacks modernization capability, as defined in paragraph 1-3, the Regional Office shall fund comprehensive modernization in two stages. At the first stage, approval is limited to funds for architectural/engineering work and a portion of the management improvements, where appropriate.

(2) Optional. Where the Regional Office determines that the PHA lacks management capability, as defined in paragraph 1-3, or that the magnitude of the total funds required for the comprehensive modernization is such that one-stage funding is precluded by the Regional Office's allocation, the Regional Office may fund comprehensive modernization in two stages. At the first stage, approval may include funds for architectural/engineering work and a portion of the physical and management improvements.

(3) First Stage. The first stage shall be approved out of funds for a single FFY, under one Final Application. The Final Application shall address all required physical and management improvements at the project by PHA submission of a separate Part II of Form HUD-52825. This separate Part II of Form HUD-52825 is submitted in addition to Form HUD-52825 (Parts I-II) which shall pertain only to work items to be funded at the first stage. When approving the first stage, the Regional Office shall indicate the approximate balance of the

modernization funds to be approved for the project at the second stage and its intent to approve that balance, subject to the availability of future funds, satisfactory progress by the PHA in obligating the first stage funds, PHA submission of additional documents as set forth in subparagraph b(4), and PHA compliance with HUD regulatory and statutory requirements.

(4) Second Stage. Where the PHA is requesting funding for the second stage of a two-stage Comprehensive Modernization at a project, the Regional Office shall determine whether the PHA has made satisfactory progress in obligating the first stage funds. If not, the Field Office shall not approve the second stage for funding at this time. The PHA submission for the second stage is limited only to the items set forth in paragraphs 3-16b(1), c, and e and an update of other items as deemed necessary by the Regional and Field Offices. Form HUD-52825 shall pertain only to work items to be funded at the second stage.

c. Multi-Stage Funding. Where the magnitude of the total funds required for the comprehensive modernization is such that two-stage funding is precluded by the Regional Office's allocation, the Regional Office may submit its recommendation for approval to Headquarters for consideration. The recommendation should be forwarded to Headquarters before fund reservation for the first stage.

d. Up-Front Funding of Planning Costs. Where a financially distressed PHA requests up-front funding of planning costs, as defined in paragraph 2-6, for comprehensive modernization, the Regional Office may approve such costs as a separate Modernization Project. Such approval does not constitute a separate funding stage and may occur in a different FFY from when the comprehensive modernization is approved. The Final Application shall be limited to Form HUD-52825 covering only the planning costs to be funded and the Board Resolution. When approving planning costs as a separate Modernization Project, the Regional Office shall indicate the estimated total funding that will be required for the project and its intent to approve that amount, subject to the availability of future funds, satisfactory completion of the planning, PHA submission of the Final Application as set forth in paragraph 3-16, and PHA compliance with HUD regulatory and statutory requirements.

e. Treatment of Scattered Site Projects. Since a scattered site project is composed of single dwelling units which are unrelated geographically, structurally or socially and which are grouped together solely for accounting purposes, the Regional Office may consider comprehensive modernization for selected units within a scattered site project, provided that all physical and management improvement needs for those units are addressed.

f. Treatment of Contiguous Projects. Two or more separate, but contiguous, projects may be funded together for comprehensive modernization.

3-13. ADDITIONAL FUNDS FOR PREVIOUSLY APPROVED COMPREHENSIVE MODERNIZATION. Under the following circumstances, the Regional Office may approve additional funds for projects previously approved for comprehensive modernization. However, this flexibility may not be used to circumvent the statutory requirements for the PHA to undertake a thorough assessment of its physical and management improvement needs and for the Field Office to review those assessments and fund modernization in a comprehensive manner.

a. Comprehensive Modernization in Progress. For one-stage or second of two-stage comprehensive modernization in progress, the Regional Office may approve additional funds to ensure that the project meets the Modernization Standards or will have long-term viability. This includes funding for new work items which were inadvertently omitted or for previously approved work items which were funded inadequately, provided that:

(1) the work items are necessary to meet the Modernization Standards or for long-term viability;

(2) funding is not available from PHA operating funds or reserves or other sources;

(3) the work items can be completed within the originally approved implementation period for the project; and

(4) there is documentation, subject to post-review by Headquarters, in Field Office files as to the reason for approval and that all the above conditions have been met.

b. Comprehensive Modernization Completed. Until the replacement reserve is implemented, the Regional Office

may approve emergency or special purpose modernization for a project where comprehensive modernization has been completed.

3-14. PRELIMINARY FUNDING DECISIONS.

a. Cost Benefits.

(1) It is recognized that it may be difficult to accurately determine cost benefits for any type of modernization. However, it is easier to determine the long-term cost benefits for special purpose modernization and energy conservation work under comprehensive and homeownership modernization due to the relatively hard data available for energy items. This determination is more difficult for non-energy conservation work under comprehensive and homeownership modernization.

(2) In determining the cost benefits for these types of modernization, the Field and Regional Offices shall consider the long-term cost benefits from improved habitability that will result from the non-energy physical improvements and the management improvements. Cost benefits from improved habitability may occur, for example, through prevention of unit turnover and vacancies, replacement of non-serviceable systems, equipment or materials, use of more durable materials, reduction in insurance or maintenance costs, improved security and reduced vandalism or increased efficiency of personnel and management systems. The Field and Regional Offices shall make every effort to ensure that these long-term cost benefits are identified and included for purposes of evaluation.

(3) It is HUD's intent to follow through and fund the second or subsequent stages of two- or multi-stage comprehensive modernization to permit the PHA to complete the modernization of the project, subject to cost benefit ranking. However, where the second or subsequent stage does not rank high enough to be funded, the second stage should be ranked as if the entire application (i.e., all stages) were being considered for funding.

b. Field Office Ranking. After all Joint Reviews have been conducted, the Field Office shall again batch all projects proposed for modernization into the three groups set forth in paragraph 3-6c. After batching, the Field Office shall rank each project within Groups 2 and 3 by its ability to

effect cost benefits. In the event that projects are ranked equally, further priority shall be given to projects with large family units.

c. Field Office Recommendations. After ranking, the Field Office shall forward its recommendations for preliminary funding decisions to the Regional Office, as well as any State comments under paragraph 3-6d. The recommendations shall consist of three lists, one for each group of projects. For Group 1, the projects shall be listed in no priority order. For Group 2, the projects shall be listed in priority order with the project having the highest cost benefits being ranked as priority 1. For Group 3, the projects shall be similarly listed in priority order. The Field Office shall indicate any PHA still identified by FH&EO as being in nonconformance or noncompliance and any project which is the second or subsequent stage of a two- or multi-stage comprehensive modernization.

d. Regional Office Decisions. The Regional Office shall familiarize itself with the proposed modernization to the maximum extent possible. At a minimum, the Regional Office shall meet with each Field Office to review its funding recommendations. After the Regional Office has thoroughly analyzed all Field Office recommendations and decided which projects receive preferential treatment in either Group 1 or Group 2, it shall make the preliminary funding decisions, based upon the ranking of the projects by cost benefits. The Regional Office shall notify in writing the Field Offices of its preliminary funding decisions, i.e., which PHAs are invited to submit Final Applications.

3-15. FIELD OFFICE LETTER REPORT. After the preliminary funding decisions, the HMO shall prepare a Letter Report to each PHA for the signature of the Field Office Manager in consultation with other AHM staff, inviting the PHA to submit a Final Application or informing the PHA of the reasons why it is not being invited to submit a Final Application. Where the PHA is being invited to submit a Final Application, the Letter Report shall include the following:

a. Identify projects, types of modernization and funding amounts which may be approved for modernization funding in the current FFY, subject to PHA submission of an approvable Final Application and availability of funds.

b. For each project, identify any required revisons to the comprehensive assessment, prepared for the Joint Review, including the addition, modification or deletion of specific

physical and management work items; and identify those physical work items, if any, that exceed the Modernization Standards and, therefore, must be individually justified.

c. Provide other advice and guidance on preparation of the Final Application, such as understandings reached on the organization and staffing of the modernization program, the method of accomplishment and the project implementation schedule.

d. Address any PHA request to proceed with procurement of architectural/engineering services for work which is likely to get funded in the current or a subsequent FFY (see paragraph 2-6a).

e. Specify actions, if any, recommended by the Regional FH&EO Compliance Division that must be taken within a specified time to correct any outstanding HUD findings of non-compliance with civil rights statutes, executive orders and regulations.

f. Specify the submission date of the Final Application.

3-16. PHA SUBMISSION OF FINAL APPLICATION. Following the advice and guidance contained in the Field Office Letter Report, the PHA shall prepare and submit the following documents in an original and three copies (or any lesser number of copies as specified by the Field Office) to the Field Office, Attention: Chief, AHM Branch. These documents constitute the Final Application:

a. For each project, an identification of and an estimate of the total costs of replacement of the equipment, systems or structural elements which would normally be replaced (assuming routine and timely maintenance is performed) over the remaining period of the ACC or during the 30-year period beginning on the date of submission of the Final Application, whichever period is longer. This estimate shall include an estimate of such costs accrued for the period which ends upon the date on which the Final Application is made and an estimate of the costs which will accrue during each 12-month period subsequent to the Final Application. The estimate should be based on current costs without taking inflation into account.

b. A comprehensive assessment of physical and management improvement needs and a plan for making the improvements and replacements and for meeting the needs which include:

(1) Form HUD-52825, Comprehensive Assessment/Program Budget (Parts I-II). Complete instructions for the preparation of Form HUD-52825 are contained in Appendix 10. A completed sample of the form is attached as Appendix 10 and may be used as a guide in preparation.

(2) Form HUD-52823, Project Financial Forecast. Complete instructions for the preparation of Form HUD-52823 are contained in Appendix 12 along with a sample of the form.

c. Modernization Organization and Staffing Plan, stating the proposed organization, staffing and inspection of the modernization program and including the following:

(1) Whether a separate modernization unit has been or will be established within the PHA and the proposed duration of the unit; if so, the relationship of the unit to the existing organizational structure of the PHA.

(2) The staffing of the modernization unit or function; number, titles and salaries of technical and non-technical PHA personnel to be assigned full-time or part-time to modernization, and additional personnel to be hired; designation of a modernization coordinator or contract administrator/construction manager, if necessary and lines of authority.

(3) Plans for periodic inspections by an architect/engineer, independent contractor or PHA staff to ensure work quality and progress.

d. PHA Report, on compliance by the local governing body with the terms of the Cooperation Agreement, or as embodied by Article VIII of the Tribal Ordinance as applicable for certain IHAs, and any additional services or facilities that the PHA plans to request from the local governing body.

e. Resolution by the PHA Board of Commissioners. Where necessary, the PHA may delay submission of the Resolution up to the time when the final funding decisions are made. The Resolution shall approve the Final Application and certify that:

(1) The PHA will comply with all policies, procedures and requirements prescribed by HUD for the modernization, including implementation of the modernization in a timely, efficient and economical manner;

(2) The estimated costs of the modernization program cannot be funded from current operating funds or reserves;

(3) The proposed physical work meets the Modernization Standards or, if exceeds the Modernization Standards, is essential for long-term physical and social viability at the project;

(4) The PHA has complied with tenant/homebuyer consultation requirements under Chapter 5;

(5) The PHA shall comply with applicable civil rights requirements under paragraph 6-1 and 24 CFR 868.9a;

(6) The PHA has adopted the goal of awarding at least 20 percent of the dollar value of the total of the modernization contracts, to minority business enterprises under paragraph 6-2 and 24 CFR 868.9b;

(7) The PHA has complied with applicable environmental requirements under paragraph 6-3;

(8) The PHA has furnished a copy of the flood insurance policy to HUD or determined that flood insurance is not required under paragraph 6-4;

(9) The PHA has complied with applicable requirements for lead-based poisoning prevention under paragraph 6-5;

(10) The PHA has complied with applicable requirements for the physically handicapped under paragraph 6-6; and

(11) Where the proposed modernization involves the temporary or permanent rehousing of tenants, the PHA will ensure nondiscrimination in the selection of tenants to be rehoused, determination of which tenants require temporary and permanent rehousing, assignments of tenants within the PHA and provision of assistance to tenants being rehoused.

f. Special Provisions For Excepted Categories.

(1) Special Purpose Modernization. For a project under special purpose modernization, the PHA shall limit the items required in subparagraph b(1) to only those special purpose work items.

(2) Emergency Modernization. For a project under emergency modernization, the PHA shall omit from the Final Application the items required in subparagraphs a, b(2), c and d and limit the items required in subparagraph b(1) to only those emergency work items.

(3) Homeownership Modernization. For a project under homeownership modernization, the PHA shall omit from the Final Application the items required in subparagraphs a and b(2) and limit the items required in subparagraph b(1) to only those homeownership work items. The PHA shall include in the Final Application a listing of the units to be included in the modernization program and the estimated cost attributed to each home.

CHAPTER 4. FINAL APPLICATION REVIEW AND APPROVAL

4-1. TECHNICAL REVIEW.

a. Routing. After the Final Application has been logged in, the Housing Management Officer (HMO) shall check the application to determine that all required documents are included. The HMO shall simultaneously route copies of the Final Application to the Fair Housing and Equal Opportunity (FH&EO) Division, the Maintenance Engineer, the Financial Management Specialist (FMS), and the Occupancy Specialist, as appropriate, and shall establish a deadline for completion of the technical review. If technical reviews are not completed within the time frame, the review responses shall be marked "no comment."

b. Technical Review. Each specialist shall review the Final Application from the standpoint of his/her functional responsibilities, while taking into consideration the requirements of the Field Office Letter Report, and shall evaluate whether or not the proposed modernization is financially feasible and will result in the project's long-term physical and social viability.

(1) General Management. The HMO shall evaluate the PHA's capability to implement and complete the proposed program, the adequacy of the PHA's plan to organize and staff the modernization function and to meet all identified management improvement needs, and the eligibility of and need for all proposed work items. The HMO shall evaluate the adequacy of the PHA's plan to meet any identified management improvement needs relating to tenant and community services, including employment, and of the PHA's arrangements for the operation of any proposed community space. The HMO shall conduct the appropriate environmental review, where required under paragraph 4-2.

(2) Maintenance. The Maintenance Engineer shall evaluate the eligibility, need and cost benefits of proposed physical work items, the reasonableness of the time frames for completion of the physical work items, the accuracy of the cost estimates, the feasibility of the proposed method of accomplishment (contract or force account), the adequacy of the PHA's plan for inspection of the physical work, and the financial feasibility of the proposed modernization. The Maintenance Engineer shall ensure that the energy audit is of acceptable quality and that eligible energy conservation

opportunities, identified by the audit, have been included in the Final Application. The Maintenance Engineer shall evaluate the PHA's justification for any physical work items exceeding the Modernization Standards (see paragraph 2-1d) and review any maintenance-related management improvement work items.

(3) Financial Management. The FMS shall determine if current operating funds or reserves are available to fund proposed work items and if there are any duplicative items in the PHA's operating budget and proposed modernization budget. The FMS shall review Form HUD-52823, Project Financial Forecast, and any financial and accounting-related management improvement work items.

(4) Occupancy. The Occupancy Specialist shall review any proposed changes in project density, unit distribution and household type served, the adequacy of the PHA's plan, if any, for rehousing residents, and any occupancy-related management improvement work items.

(5) Equal Opportunity. The FH&EO Division shall evaluate PHA compliance with Section 3 of the HUD Act of 1968 and Title VI of the Civil Rights Act of 1964, as applicable. Where a finding of noncompliance is outstanding, the FH&EO Division shall consult the Regional FH&EO Compliance staff regarding the adequacy of the PHA's proposed corrective action or shall refer the matter to that Compliance staff for resolution.

c. Collation of Technical Review Comments. The HMO shall collate the technical review comments. Reviewers shall meet to reconcile any differences of opinion among individual reviewers. The Chief, AHM Branch, shall resolve any unreconciled differences among reviewers. The Field Office Manager shall resolve any unreconciled differences among Housing Management and other organizational units.

d. Revisions. If the technical reviewers agree that revisions to the budget or other documents within the Final Application package are required, the HMO shall contact the PHA to discuss the required revisions. If the revisions are extensive, it may be necessary to meet with the PHA. The HMO shall advise the PHA that the Final Application will not be processed for approval until the major revisions have been incorporated into the application and resubmitted

to the Field Office. If the PHA cannot make the required revisions within the required time frame, the AHM staff shall not consider the PHA for funding.

4-2. ENVIRONMENTAL REVIEW. The HMO shall determine whether the PHA is in compliance with the environmental requirements set forth in paragraph 6-3. In addition, the HMO shall conduct the appropriate environmental review required under HUD regulations (24 CFR Part 50, Procedures for Protection and Enhancement of Environmental Quality), implementing the National Environmental Policy Act (NEPA) of 1969. These review requirements are summarized below:

a. An environmental assessment is required for all modernization programs involving up to 2,500 units except where all of the following criteria are satisfied:

(1) Does not increase the number of dwelling units per acre by more than 20 percent. Any increase will generally occur where larger size units are converted into smaller size units.

(2) Does not change land uses from residential to nonresidential or vice versa. The conversion of dwelling units to community, management or maintenance space or new construction of such space does not change the basic residential nature of the land use.

(3) Does not cost 75 percent or more of the replacement cost of the project after modernization.

(4) Does not involve the demolition of a building, or parts of a building, containing dwelling units.

b. Where an environmental assessment is required, the HMO shall complete Form HUD-4128, Environmental Assessment for Subdivision and Multifamily Projects, which must be signed by the Director, Housing Management Division, before approval of the Final Application. Where more than 200 units are involved, the Field Office Environmental Clearance Officer must also sign the Form HUD-4128. Where less than 200 units are involved, a copy is sent to the Environmental Clearance Officer for informational purposes.

c. Where an environmental assessment is not required under subparagraph a, the HMO shall complete Form HUD-4128.1, Compliance and LAC Conditions Record, which must be signed

by the Chief, AHM Branch. The HMO shall mark "N/A" those parts that are not applicable to modernization.

d. An Environmental Impact Statement (EIS) must be prepared for modernization programs where called for as a result of the environmental assessment. An EIS also must be prepared for modernization programs involving over 2,500 units, unless it is determined, as a result of an environmental assessment or in preparing a draft EIS, that the program will not have a significant impact on the human environment; in that case, the HMO shall contact the Field Office Environmental Clearance Officer for procedures.

4-3. FINANCIAL CONTROLS.

a. General. Before Federal Fiscal Year (FFY) 1977, HUD used two financial controls: annual contributions contract authority (contract authority) and loan authority (capital funds). The Department of Housing and Urban Development - Independent Agencies Appropriations Act, 1976, P.L. 94-116, established a third control which is budget authority. Beginning in FFY 1977, and each FFY thereafter, all assigned modernization funds are subject to these three controls.

b. Contract Authority. Contract authority is the statutory authority which pledges the full faith of the Congress to appropriate funds to pay annual contributions committed by HUD in contracts with PHAs. A portion of the total contract authority provided by the Congress and apportioned each year to HUD by the Office of Management and Budget is allotted to the Assistant Secretary for Public and Indian Housing for commitment for modernization purposes that year. Contract authority committed is the amount of annual contributions pledged annually to meet the annual level debt service of the costs of modernization.

c. Loan Authority (Capital Funds).

(1) Loan authority represents the costs of modernization (Maximum Modernization Cost) that can be supported by available contract authority. In determining the total amount of loan authority available nationally in any given FFY, Headquarters considers the available contract authority, the estimated average Minimum Loan Interest Rate for the FFY, and the maximum number of

debt service annual contributions that will be paid on Modernization Projects.

(2) By using the estimated average Minimum Loan Interest Rate and the maximum number of debt service annual contributions, Headquarters obtains the amortization factor required to amortize the new modernization capital funds from the "Financial Compound Interest and Annuity Tables," Column entitled "Partial Payment," where the numbers at the right represent the number of debt service annual contributions. For example, if the Minimum Loan Interest Rate at the time of Headquarters fund assignment is estimated to average 8 percent for the entire FFY, and the number of debt service annual contributions is 20, the amortization factor is .1018522088. If the contract authority available nationally is $77,500,000, Headquarters computes the amount of loan authority available nationally by dividing the contract authority ($77,500,000) by the amortization factor which is rounded to five digits to the right of the decimal (.10185) to arrive at $760,922,926 of available loan authority. This formula is illustrated below:

(Loan Authority) = (Contract Authority) - (Amortization Factor)

d. Budget Authority. Budget authority is the total amount of annual contributions that will be paid by HUD under the ACC. For modernization, the budget authority available nationally is determined by multiplying the contract authority amount by the number of debt service annual contributions. For example, if the contract authority amount is $77,500,000 and the number of debt service annual contributions is 20, the amount of budget authority available nationally is $1,550,000,000. Budget authority is sometimes referred to as "run-out cost." This formula is illustrated below:

(Budget Authority) = (Contract Authority) x (Number of Debt Service Annual Contributions)

4-4. CALCULATION OF CONTRACT AND BUDGET AUTHORITY. Before modernization programs for individual PHAs are approved by the Regional Office, the FMS shall determine for each Modernization Project the amounts of contract and budget authority required to amortize the proposed amount of loan authority.

a. Determination of Contract Authority Amount. The FMS shall compute the amount of contract authority required to amortize the amount of loan authority proposed for a given Modernization Project by multiplying the amount of loan authority by the amortization factor. The amortization factor is obtained by using the applicable Minimum Loan Interest Rate and the number of debt service annual contributions.

(1) Minimum Loan Interest Rate. The Minimum Loan Interest Rate is furnished periodically by telegram, in accordance with the requirements of Section 4(a) of the Act and the U.S. Treasury Department.

(2) Number of Debt Service Annual Contributions. The number of debt service annual contributions is 20.

(3) Amortization Factor. The amortization factor is obtained from the "Financial Compound Interest and Annuity Tables," Column entitled "Partial Payment," where the numbers at the right represent the number of debt service annual contributions. For example, if the Minimum Loan Interest Rate at the time the Modernization List will be approved is 8 percent, and the number of debt service annual contributions for the Modernization Project is 20, the amortization factor is .1018522088. The amortization factor is rounded to five digits to the right of the decimal (.10185).

(4) Contract Authority. If the amount of loan authority proposed for a given Modernization Project with the circumstances stated in subparagraph a(3) is $500,100, the amount of contract authority required is computed by multiplying the loan authority ($500,100) by the amortization factor (.10185) to arrive at $50,936 of contract authority. Contract authority is always rounded up to the nearest dollar. This formula is illustrated below:

(Contract Authority) = (Loan Authority) x (Amortization Factor)

b. Determination of Budget Authority Amount. The FMS shall compute the amount of budget authority required to amortize the amount of loan authority proposed for a given Modernization Project by multiplying the amount of contract authority by the number of debt service annual contributions. For example, if the contract authority amount is $50,936 and the number of debt service annual contributions is 20, the

budget authority amount is $1,018,720. See formula in paragraph 4-3d.

c. Management of Modernization Funds. For proper management of modernization funds, the FMS shall maintain Form HUD-53003, Modernization Fund Ledger, attached as Appendix 13. The FMS shall use this ledger for recording financial information on each Modernization Project before Modernization List approval to assure that the Field Office's subassignment is not exceeded.

4-5. FINAL FUNDING DECISIONS.

a. Field Office Recommendations.

(1) Approval. The Field Office may recommend approval of the Final Application, with or without minor revisions, if the PHA has submitted any required major revisions to the Final Application. To the extent that the Final Applications have no changes or are substantially consistent in PHAs, projects, types of modernization, dollar amounts or work items from the Regional preliminary funding decisions, Regional review of the Final Applications is not required.

(2) Disapproval. Since the application process provides ample opportunity for the PHA to discuss its modernization needs with the Field Office and for the Field Office to convey program requirements and to specify the scope of work to the PHA, it is not anticipated that many PHAs will submit Final Applications that are completely unacceptable. If the Field Office believes that the Final Application does not meet the requirements of the Field Office Letter Report or is not reasonable in scope, the Field Office may recommend disapproval.

b. Regional Office Decisions. The Regional Office shall review the Field Office recommendations, including Forms HUD-52825, and notify the Field Offices in writing of its final funding decisions. The Regional Office shall not approve any PHA for funding unless the Board Resolution has been submitted to the Field Office and is acceptable to both the FH&EO Division and the AHM Branch. At this time, the Regional Office shall subassign all funds or make adjustments to funds previously subassigned.

4-6. PREPARATION OF PROGRAM APPROVAL DOCUMENTS. Immediately upon notification by the Regional Office of the final funding decisions, the HMO shall prepare or request the FMS to prepare the following program approval documents:

a. Form HUD-5079A, Modernization List (Part I). A completed sample Form HUD-5079 is attached as Appendix 14.

b. Form HUD-52540, Project Accounting Data. A completed sample Form HUD-52540 is attached as Appendix 15.

c. Form HUD-416.2 HUD Notification.

d. PHA Approval Letter. An approval letter to the PHA shall be prepared for the signature of the Field Office Manager or Regional Administrator. The letter shall state the amount of funds obligated by project under the Modernization Project, explain any minor revisions made to the budget, and indicate that the PHA will be receiving further instructions on the ACC amendment. The letter also shall state the extent to which the PHA is being allowed to certify under paragraph 7-1. Where the Field Office is approving the first stage of a two-stage comprehensive modernization, the approval letter shall state the approximate balance of the funds which will be approved for the project, subject to certain conditions. See paragraph 3-12d regarding the contents of the approval letter where the Field Office is approving planning costs as a separate Modernization Project. Subject to appropriate adaptation, the approval letter should contain the following language:

> Our review has indicated that the total modernization funds required for all currently needed physical and management improvements at project ____ is $ _____. Of this amount, we are approving $ _____ for the first stage of the two-stage comprehensive modernization at this project. While we cannot presently make any legal commitment of funds for subsequent Federal Fiscal Years, we will make a good faith effort to provide the modernization funding required for the second stage in a subsequent year. This good faith effort is dependent upon the availability of future funds, your satisfactory progress in obligating first stage funds, your submission of additional documents as set forth in paragraph 3-12b(4), and your compliance with HUD regulatory and statutory requirements. Your agency must not incur any liabilities in reliance on our approval of future funding.

4-7. PROGRAM APPROVAL AND FUND RESERVATION.

a. Assembly of Documents. The HMO shall assemble and route the following documents to the Field Office Manager for approval:

(1) Original and two copies of the PHA approval letter.

(2) Original of the Final Application.

(3) Original and six copies of Form HUD-5079A.

(4) Original and one copy of Form HUD-52540.

(5) Original and three copies of Form HUD-416.2.

b. Modernization List Approval. When funds are available, the Field Office Manager's signature on Form HUD-5079A represents the obligation of modernization funds for the PHA's Modernization Project.

c. Action. After approval, the Field Office Manager shall return the documents to the HMO who shall arrange for the immediate transmittal of one copy of Form HUD-5079A, one copy of the approval letter with original signature, and the original of Form HUD-52540 to the Regional Accounting Division (RAD) for program reservation purposes. The RAD will use the approval date on Form HUD-5079A as the reservation date and will notify the Field Office of program reservation. After notification by the RAD that funds are available, the HMO may transmit the HUD Notification (see paragraph 4-8). If funds are not available, the HUD Notification may not be transmitted.

4-8. TRANSMITTAL OF HUD NOTIFICATION.

a. Upon notification from the RAD, the HMO shall arrange for the immediate transmittal of one copy of Form HUD-416.2 to the Office of Legislation and Congressional Relations by facsimile machine. The HMO shall verify with the appropriate machine operator that the facsimile was sent and that receipt was confirmed, and shall note the actual date and time of transmission. The HMO shall arrange for copies of Form HUD-416.2 to be sent to the Regional and Field Office Public Affairs Officers.

b. The Field Office may announce a modernization program approval after five working days provided that the Office of

Legislation and Congressional Relations has not telephoned the Field Office to request that announcement be delayed.

4-9. DISTRIBUTION OF APPROVED DOCUMENTS. When modernization program approval can be announced, the HMO shall arrange for the following distribution of approved documents:

a. To the PHA, the original of the approval letter and one copy each of the approved Form HUD-52825 and Form HUD-5079A.

b. To the AHM Branch files, the original of the Final Application and one copy each of the approval letter, Form HUD-5079A, Form HUD-52540, and Form HUD-416.2 for records purposes.

c. To the Regional or Chief Counsel, the original of Form HUD-5079A for purposes of preparing the ACC amendment (see paragraph 4-10a). To expedite preparation of the ACC amendment, Form HUD-5079A may be sent to Counsel immediately after fund reservation.

d. To the Regional Project Financing Specialist, one copy of Form HUD-5079A for financing purposes

e. To Headquarters, Office of Finance and Accounting (OFA), Attention: Director, Assisted Housing Accounting Division, two copies of Form HUD-5079A for fund control purposes.

4-10. ANNUAL CONTRIBUTIONS CONTRACT AMENDMENT.

a. Preparation. After fund reservation, the HMO shall request Regional or Chief Counsel to prepare Form HUD-53009, Modernization Project Amendment to Consolidated ACC. A sample Form HUD-53009 for rental projects is attached as Appendix 16. All projects included in the Modernization Project must be under the same consolidated ACC. Lanham Act or PWA projects not under an ACC but included in the Modernization Project shall be placed under the ACC. Within 14 days of List approval, Counsel shall transmit the ACC amendment, Form HUD-9009, General Certificate, and a new Form HUD-52250, Permanent Note, to the PHA for completion and return, together with a copy of the resolution by the PHA Board of Commissioners authorizing execution of the ACC amendment. Counsel shall notify the HMO of the transmittal date of these documents to the PHA.

b. Execution. Within 30 days of receipt of the ACC amendment and other required documents, the PHA shall sign

the documents and return them to Counsel. Upon receipt of the PHA-signed ACC amendment and other required documents, Counsel shall forward the ACC amendment to the Field Office Manager for execution within seven days. See paragraph 4-13b for special instructions for Section 23 Leased Housing Bond-Financed projects.

c. Distribution of Legal Documents. After the Field Office Manager executes the ACC amendment, Counsel shall notify the HMO and arrange for the following distribution of documents:

(1) To the PHA, one executed copy of the ACC amendment.

(2) To Counsel's files, one copy of the executed ACC amendment, the Board resolution, and Form HUD-9009 for records purposes.

(3) To Headquarters, OFA, Attention: Director, Assisted Housing Accounting Division, the originals of the ACC amendment and the new Permanent Note for fund control and disbursement purposes.

4-11. ESTABLISHMENT OF MAXIMUM CONTRIBUTION PERIOD. Upon receipt of the ACC amendment, OFA will establish the Maximum Contribution Period for the Modernization Project. The Maximum Contribution Period begins on the first annual contributions date after the effective date of the ACC amendment and continues for twenty years, e.g., 1/15/81 - 1/14/01 or 4/15/82 - 4/14/02. OFA will notify the Field Office and the PHA of the Maximum Contribution Period for the Modernization Project on Form HUD-52422, Computation of Fixed Annual Contribution.

4-12. SPECIAL REQUIREMENTS FOR HOMEOWNERSHIP PROJECTS.

a. Promptly after HUD approval of the Final Application, each homebuyer family shall execute an amendment to its Homebuyer Agreement, reflecting an increase in the purchase price of its home and an extension of the amortization period in accordance with subparagraphs b and c, except where the modernization work is limited to the correction of development deficiencies, conduct of energy audits and undertaking of cost-effective energy conservation measures (see paragraph 2-3).

NOTE: Homebuyer agreements amended to reflect the cost of energy conservation work approved in FFYs 1980-83 shall be reamended to reduce the purchase price and

shorten the amortization period by the appropriate amount and time. This will permit equitable treatment of all homebuyer families, regardless of the FFY of approval.

b. For Turnkey III projects and for Mutual Help projects placed under ACC from March 9, 1976 or converted in accordance with 24 CFR 805.428:

(1) The amount of estimated modernization cost attributable to the home, as shown in the HUD-approved Final Application, shall be added to the homebuyer's purchase price as initially determined (under 24 CFR 804.113(a) or 804.115(b) for Turnkey III projects, or under 24 CFR 805.422(b) or (c) for Mutual Help projects).

(2) The period of the homebuyer's current purchase price schedule shall be extended by the same percentage as the percentage of increase in the homebuyer's purchase price. The new purchase price schedule shall:

(a) show monthly amortization of the new purchase price over a period commencing on the same day as the original purchase price schedule and terminating at the end of the extended period; and

(b) be computed on the basis of the same interest rate as used for the current purchase price schedule.

(3) If a modernization program is approved for a project after one or more earlier modernization programs for the same project, the total amount of modernization cost attributable to the home under the prior modernization program(s) shall be included as part of the homebuyer's initial purchase price in applying the foregoing provisions of subparagraphs (b)(1) and (2).

c. For Mutual Help projects placed under ACC before March 9, 1976, and not converted in accordance with 24 CFR 805.428 and for Turnkey III projects that do not have purchase price schedules:

(1) These projects do not involve purchase price schedules for amortization of the homebuyer's purchase price over a fixed period of time because the homebuyer's purchase price in these projects is based on the unamortized balance of the portion of the project's

development debt attributable to the home. Consequently, it is necessary to establish a separate schedule for the amortization of the estimated modernization cost attributable to the home, as shown by the HUD-approved Final Application.

(2) The PHA shall furnish to the homebuyer a schedule showing monthly amortization of the estimated modernization cost attributable to the home, at the Minimum Loan Interest Rate specified in the ACC for the Modernization Project, over a period commencing on the first day of the month after the date of original occupancy of the home by the homebuyer and terminating at the end of the period determined as follows:

(a) Divide the amount of the estimated modernization cost attributable to the home (including the total amount of modernization cost attributable to the home under prior modernization programs, if any) by the amount of the current HUD-approved estimated replacement cost of the home.

(b) Multiply this amount by 25, round the result to the next higher number and add that number to 25. This is the number of years to be used as the period for the modernization amortization schedule.

(c) The purchase price for the unit shall be the sum of (A) the balance of the debt attributable to the home and (B) the amount remaining on the modernization schedule at the time of settlement.

(3) The calculation provided in subparagraph c(2) shall apply retroactively to modernization programs approved from FFY 1980 funds. Therefore, the PHA shall recalculate the homebuyer's amortization schedule to reflect the provisions of subparagraph c(2).

d. See the Indian Housing Handbook 7440.1 for further instructions.

4-13. SPECIAL REQUIREMENTS FOR SECTION 23 LEASED HOUSING BOND-FINANCED PROJECTS.

a. Conditions. A Section 23 Leased Housing Bond-Financed project (BFP) is eligible for modernization (comprehensive, special purpose or emergency) only if the Field Office

determines that the project has met the following conditions:

(1) The BFP was financed by the issuance of bonds.

(2) Clear title to the BFP will be conveyed to or vested in the PHA at the end of the Section 23 lease term. The Lease Agreement and Trust Indenture must provide that title to the property will pass to the PHA at that time. Based on title evidence provided by the PHA, Regional or Chief Counsel shall determine whether the PHA is assured of obtaining good title under the legal arrangements for the project and whether there are any liens or encumbrances against the property junior to the bond indenture.

(3) Based upon a full review of the legal documentation for the BFP by the Counsel, there are no legal obstacles affecting the PHA's use of the property as low-income public housing during the 20-year amortization period of the modernization. This review would include any known pending or threatened litigation affecting the BFP.

(4) Based upon an on-site inspection of the BFP, the AHM Branch can certify that, after completion of the proposed modernization, the BFP will have a remaining useful life of at least 20 years and that it is in the financial interest of the Federal Government to improve the BFP.

(5) The BFP is covered by a Cooperation Agreement between the PHA and the local governing body during the 20-year amortization period of the modernization, assuring tax exemption and provision of municipal services as in the case of PHA-owned projects.

b. Processing. If the BFP meets the special conditions in subparagraph a and is, therefore, eligible for modernization funding, the application requirements are the same as for PHA-owned projects. However, the following special processing requirements shall apply:

(1) Separate Modernization Project. The BFP shall not be included in the Modernization Project for the PHA-owned projects. A separate Modernization Project shall be established for all of the PHA's BFPs to be modernized during any given FFY. A sample Form HUD-53008, Modernization Project Amendment to Consolidated ACC for Modernization of Section 23 Leased Housing

Bond-Financed Projects, is attached as Appendix 17. The first Modernization Project for BFPs for a PHA shall be 985, e.g., VA-30-985. The second Modernization Project for BFPs for the same PHA shall be 986, e.g., VA-30-986.

(2) Cooperation Agreement.

(a) During the 20-year term of the Modernization Project, the BFP must be covered by a Cooperation Agreement between the local government and the PHA providing for tax exemption and other local assistance as in the case of PHA-owned projects. Form HUD-53008 states that the individual projects are exempt from real and personal property taxes. Space is provided on Form HUD-53008 after item 16 for listing the applicable Cooperation Agreements. Form HUD-53008 shall not be executed until Counsel has determined that the BFP is covered by a Cooperation Agreement.

(b) A new Cooperation Agreement may not be needed if Counsel determines that the BFP is already covered by an existing Cooperation Agreement providing for the required tax exemption and local assistance. If Counsel proposes to rely on a previously executed Cooperation Agreement covering a stated number of units to be developed by the PHA, but not referring specifically to the BFP, Counsel shall determine whether there is adequate evidence that the BFP will be treated by the local government as within the coverage of the Cooperation Agreement. If there is any uncertainty as to whether the BFP is covered by the Cooperation Agreement, Counsel shall require that the existing Cooperation Agreement be amended to refer specifically to the BFP.

(c) If the BFP is not already covered by a sufficient Cooperation Agreement, the PHA shall enter into a Cooperation Agreement with the local government. In such case, the Cooperation Agreement shall specifically designate the BFP to which the exemption applies in a manner that clearly indicates the real property covered by the exemption (generally in the same manner used to designate properties for local tax billing). If any tax lien has been or may be attached to the property

before execution of the ACC amendment, but covering taxes for any period subsequent to execution of the ACC amendment, Counsel shall ensure (by specific provision in the Cooperation Agreement or otherwise) that the lien of and liability for the tax is released before execution of the ACC amendment.

(d) If the BFP is already exempt from real and personal property taxes under State law, or under a Cooperation Agreement that does not provide for Payments in Lieu of Taxes (PILOT), the Cooperation Agreement shall not include any provision for PILOT. If the BFP is already exempt from taxation under a Cooperation Agreement that provides for PILOT, the Cooperation Agreement may include provision for PILOT, but not to exceed the amounts required under Section 6(d) of the Act.

CHAPTER 5. TENANT/HOMEBUYER CONSULTATION REQUIREMENTS

5-1. TENANTS.

a. Before submission of the Preliminary Application, the PHA shall consult with tenants regarding its intent to submit an application for modernization fund . At least three weeks before the Joint Review, the PHA shall notify the tenants of the project to be modernized and the tenant organization, if any, of the proposed modernization program, afford tenants a reasonable opportunity to present their views on the proposed program and alternatives to it, and give full and serious consideration to tenant recommendations. The PHA notice shall include information on the PHA's ideas for modernization and the methods, including time limit, for tenants to present their views.

b. At least one day before the Joint Review starts, the PHA shall provide the tenants and the tenant organization, if any, with a copy of its brief written evaluation of tenant recommendations, indicating the reasons for PHA acceptance or rejection, consistent with HUD requirements and the PHA's own determination of efficiency, economy and need. During the Joint Review, the PHA shall provide HUD with a copy of tenant recommendations and the PHA's evaluation. After HUD approval of the modernization program, the PHA shall inform the tenants and the tenant organization, if any, of the approved work items.

c. The provisions of this paragraph do not apply where only work items of an emergency nature, affecting the life, health and safety of tenants, are proposed. However, the PHA shall inform tenants of approved emergency work items.

d. The PHA shall achieve tenant consultation by use of informational materials, meetings or other methods which it deems most effective.

5-2. HOMEBUYERS.

a. Before the Joint Review, the PHA shall discuss the modernization program with the homebuyer families of the project to be modernized and inform each homebuyer family that:

(1) to participate, it must be in substantial compliance with the terms of its Homebuyer Agreement;

(2) it will have an opportunity to express its views and preferences with respect to the modernization of its home;

(3) the purchase price and the amortization period will be increased as provided in paragraph 4-12;

(4) it will have an opportunity to participate in the final inspection of the work to determine completion in accordance with the requirements; and

(5) participation in the program is optional.

b. The PHA shall provide each homebuyer family with a copy of the PHA's evaluation of its recommendations, the tentative decisions reached on the modernization program to be submitted to the Field Office, the estimated cost of the proposed modernization program, and the maximum amount of this cost to be attributed to its home.

c. If the homebuyer family decides to participate in the modernization program with respect to any of the proposed work items, it must agree in writing that its Homebuyer Agreement will be amended upon approval of the Final Application to provide that, as a result of the amount of modernization cost attributed to its home, the purchase price and the amortization period will be increased in accordance with paragraph 4-12. The PHA shall retain copies of the signed agreements and the amended Homebuyer Agreements in its files for inspection by the Field Office.

d. Any homebuyer family may decline to participate without risk to its homebuyer status.

e. The provisions of subparagraphs a through d do not apply where the modernization work is limited to the correction of development deficiencies, conduct of energy audits and undertaking of cost-effective energy conservation measures (see paragraph 2-3).

CHAPTER 6. OTHER PROGRAM REQUIREMENTS

6-1. CIVIL RIGHTS COMPLIANCE.

a. The PHA shall comply with:

(1) In the case of Indian Housing Authorities (IHAs):

(a) Title II of the Civil Rights Act of 1968 (Indian Civil Rights Act) (25 U.S.C. 1301-1303) or Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4) and Title VIII of the Civil Rights Act of 1968, as amended, (42 U.S.C. 3601-3619), as applicable. The Indian Civil Rights Act is applicable (Title VI and Title VIII are inappplicable) to IHAs established by exercise of a tribe's powers of self-government. In the case of an IHA established under State law, the applicablity of the Indian Civil Rights Act (or of Title VI and Title VIII) will be determined by HUD on a case-by-case basis in accordance with 24 CFR 805.105;

(b) Section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)); and

(c) Executive Order 11246 (30 FR 12319) to the maximum extent consistent with, but not in derogation of compliance with, Section 7(b) of the Indian Self-Determination and Education Assistance Act.

(2) In the case of all other PHAs, Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, as amended, Executive Orders 11063 (27 FR 11527), 11246, 12432 and 12138 (Women's Business Enterprise), Section 3 of the Housing and Urban Development Act of 1968, as amended, (12 U.S.C. 1701u), HUD regulations (24 CFR Part 135) implementing Section 3, Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and all applicable regulations issued pursuant to these laws.

b. Except for modernization work of an emergency nature, affecting the life, health and safety of tenants, HUD will not approve a modernization program if:

(1) There is a pending civil rights suit against the PHA instituted by the Department of Justice;

(2) There are outstanding HUD findings of PHA noncompliance with civil rights statutes, executive orders, or regulations as a result of formal administrative proceedings, unless the PHA is implementing a HUD-approved tenant selection and assignment plan or compliance agreement designed to correct the area(s) of noncompliance; or

(3) There has been a deferral of the processing of applications from the PHA imposed by HUD under Title VI of the Civil Rights Act of 1964, the Attorney General's Guidelines (28 CFR 50.3) and the HUD Title VI regulations (24 CFR 1.8) and procedures (HUD Handbook 8040.1).

c. Section 3 of HUD Act of 1968. Under the provisions of Section 3 of the Housing and Urban Development Act of 1968, as amended, the PHA shall require that, to the greatest extent feasible, opportunities for training and employment be given to lower-income persons residing within the unit of local government or the metropolitan area (or non-metropolitan county), as determined by the Secretary, in which the project is located; and that contracts for work be awarded to business concerns which are located in or owned in substantial part by persons residing in the same metropolitan area (or non-metropolitan county) as the project, provided that the contract award complies with State and local law and Federal requirements. The PHA and its contractors on contracts over $500,000 and subcontractors on contracts over $50,000 where the main contract is over $500,000 shall comply with the regulations implementing Section 3, as set forth in 24 CFR Part 135. The PHA shall develop an affirmative action plan for the use of Section 3 businesses. Within 15 days of the award of any contract covered by Section 3, the PHA shall advise the Field Office of the steps which have been and will be taken to comply with the requirements of 24 CFR Part 135.

d. Affirmative Action Program Under Executive Order 11246.

(1) PHA Contract Administration. Under Executive Order 11246, as amended, the PHA shall advise all construction-related contractors with contracts over $10,000 to document affirmative actions taken to ensure equal opportunity in employment. This documentation is subject to review by the Regional Office of the Department of Labor. As a part of normal contract administration, the PHA is responsible for determining

compliance with the equal opportunity clause or written affirmative action requirements and for reviewing contractor performance to insure that these responsibilities are met. The PHA shall take the following action:

(a) Carry out sanctions against a contractor or subcontractor and furnish information, as required by the Department of Labor.

(b) Maintain an affirmative action file to keep written reports detailing its efforts, with dates, to meet the commitments under Executive Order 11246, as amended.

(c) Assure that all PHA construction contracts over $10,000 are subject to Executive Order 11246, as amended, and include appropriate provisions.

(2) Responsibilities of Contactors and Subcontractors. All contractors and subcontractors on modernization are required to take affirmative action to comply with the equal employment opportunity provisions of Executive Order 11246, as amended.

6-2. MINORITY AND WOMEN'S BUSINESS OR INDIAN ENTERPRISE OPPORTUNITY.

a. MBE Goal. Under Executive Orders 11625 (36 FR 1967) and 12432, the PHA, as part of its affirmative action program, shall provide every feasible opportunity for minority business enterprises (MBEs) to participate in bidding for modernization work. The PHA shall establish through board resolution, the goal of awarding at least 20 percent of the dollar value of the total of the contracts with construction contractors, architects/engineers, consultants (for both physical and management improvements) and purchases under the HUD Consolidated Supply Program. Where the main construction contract is awarded to an MBE, the PHA shall count the entire dollar amount of the contract toward the MBE goal. Where the main construction contract is not awarded to an MBE, but one or more of the subcontracts is awarded to an MBE, the PHA shall count the dollar value of such subcontract(s) toward the MBE goal. The PHA shall not double count the dollar value of the main construction contract and any of its subcontracts. Satisfactory progress by the PHA in meeting this goal will be a factor in determining PHA modernization funding in future fiscal years.

The Office of Management and Budget has not yet approved the specific reporting requirements for this goal. However, the PHA may voluntarily wish to submit progress reports.

b. Definitions.

(1) MBE means a business that is owned and controlled by one or more socially and economically disadvantaged persons. Such persons include, but are not limited to, Blacks, American Indians or Alaskan Natives, Hispanics and Asians or Pacific Islanders.

(2) Owned and controlled by one or more socially and economically disavantaged persons means that a socially and ecomically disavantaged person(s), or a for-profit business or nonprofit organization controlled by such persons(s), possess at least 51 percent of the ownership of the business, and its management and daily business operation are controlled by such persons.

(3) The following are definitions of persons specifically included under subparagraph b(1) when they are citizens or lawful residents of the United States:

(a) Black. A person having origin in any of the black racial groups of Africa, but not of Hispanic origin.

(b) American Indian or Alaskan Native. A person having origin in any of the original people of North America, and who maintains cultural identification through tribal affiliation or community recognition.

(c) Hispanic. A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

(d) Asian or Pacific Islander. A person having origin in any of the original people of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Island. This area includes, for example, China, India, Japan, Korea, the Philippine Islands and Samoa.

c. Bid or Solicitation Process. To ensure that MBEs are aware of modernization bid opportunities, the PHA may wish to adopt the following suggested techniques, in addition to its existing procedures, for publicizing upcoming Invitations for Bid or Requests for Proposals (see Chapter 9):

(1) Timely advertisement in media with a largely minority audience;

(2) Solicitation of bids or requests for proposals directly from MBEs;

(3) Posting of signs around the project and in the PHA management office and local stores;

(4) Notification of community organizations, public or private institutions, and local minority business organizations and trade associations; and

(5) Notification of the tenant organization, if any.

d. Women's Business Enterprises. Under Executive Order 12138, both PHAs and IHAs shall take appropriate affirmative action to assist women's business enterprises.

e. Indian Enterprises. In accordance with the Indian Determination and Education Assistance Act and the Indian Housing regulation (24 CFR Part 805), IHAs shall, to the greatest extent feasible, give preference in the award of modernization contracts during any FFY to Indian organizations and Indian-owned economic enterprises, as defined in 24 CFR 805.106(a).

6-3. ENVIRONMENT. The PHA's Final Application is subject to all applicable requirements under the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4332 et seq.), as set forth in HUD regulation 24 CFR Part 50. Specific attention is directed to 24 CFR 50.4 pertaining to overlaying environmental laws, Executive Orders and HUD standards. The Field Office shall document compliance with these requirements on Forms HUD-4128 and 4128.1, as appropriate (see paragraph 4-2).

6-4. FLOOD INSURANCE. The PHA shall comply with regulations and requirements under the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001 et seq.). The PHA shall certify that the project to be modernized is not located in an identified special flood hazard area, or if the project is located in such an area, the PHA shall furnish either a copy of the flood insurance policy obtained by the PHA to cover the project or a certification that the special flood hazard area has been identified for less than one year and that the community in which the project is located is not participating in the National Flood Insurance Program. A project located in a special flood hazard area of a community that has been formally notified of the area for more than one

year, but has not yet entered the National Flood Insurance Program, is not eligible for modernization funding until the community enters the program.

a. If a project is located in an identified special flood hazard area and the community is participating in the National Flood Insurance Program, the PHA shall obtain flood insurance coverage for each affected building in an amount equal to its replacement cost after the proposed modernization (less estimated land cost) or to the maximum limit of coverage made available with respect to that particular type of property under the National Flood Insurance Act of 1968, whichever is less. For each affected building in Lanham or PWA projects, the PHA shall obtain flood insurance coverage in an amount equal to its full insurable value after the proposed modernization (less estimated land cost) or to the maximum limit of coverage made available with respect to that particular type of property under the National Flood Insurance Act of 1968, whichever is less. The PHA shall continue to carry the required flood insurance after completion of the modernization. Flood insurance premiums are not eligible modernization costs.

b. If the proposed modernization program involves new construction or substantial improvements of an existing structure, as defined in 44 CFR Part 60, the PHA shall comply with the requirements on elevation and flood proofing.

6-5. LEAD-BASED PAINT POISONING PREVENTION. The PHA shall comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4801 et seq.) and HUD implementing regulations (24 CFR Part 35). The PHA shall inspect the project to be modernized to determine if immediate lead-based paint hazards exist and include in the Final Application treatment necessary to eliminate any hazards.

6-6. ACCESSIBILITY FOR PHYSICALLY HANDICAPPED. The PHA shall comply with the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151) and HUD implementing regulations (24 CFR Part 40). Modernization that involves work which is related to the standards in 24 CFR 40.4 (e.g., entrances, exits, common areas or portions of dwelling units) shall allow accessibility by handicapped persons. To determine whether accessible units are needed at the project to be comprehensively modernized, the PHA shall assess, on a PHA-wide basis, the needs of current tenants and applicants on the waiting list.

a. If the PHA and the Field Office determine that there is no need for accessible dwelling units or that the need is

being or will be met through other means, e.g., new construction, Section 8 or modernization of another project, the PHA shall submit supporting documentation to the Field Office. If the Field Office agrees that the project's intended use is not for housing of handicapped persons, no further action is required. Entrances, exits and common areas altered in the course of the modernization remain subject to accessibility requirements.

b. If the PHA and the Field Office determine that the alteration required to achieve accessibility is not structurally feasible, the PHA shall submit supporting documentation to the Field Office. If the Field Office agrees that accessibility is not structurally feasible, no further action is required.

c. If the PHA and the Field Office determine that the alteration required to achieve accessibility, when added to other work required, would result in the modernization cost (excluding the cost of management improvements) exceeding the prototype cost for a new project, the PHA shall submit supporting documentation to the Field Office. After Field Office review, the Field Office shall submit a request to Headquarters for a waiver under paragraph 2-1e or the 24 CFR Part 40 requirement for accessibility, as set forth in 24 CFR Part 41.

6-7. ENERGY CONSERVATION. The PHA shall conduct an energy audit and undertake cost-effective energy conservation measures under 24 CFR Part 865, Subpart C, before HUD approval of comprehensive, special purpose or homeownership modernization for a project. The cost of performing an energy audit is an eligible modernization cost.

6-8. WAGE RATES. Before bid advertisement, the PHA shall consult with the Field Office Maintenance Engineer on the correct wage rates to apply. The Maintenance Engineer, in turn, shall consult with the Field or Regional Labor Relations staff concerning the advice given to the PHA. The PHA shall request the wage rates from the Field Office Labor Relations staff or the Regional Office where the labor relations function has been regionalized. In providing the wage rates, the Field or Regional Labor Relation staff, as appropriate, shall make the final decision on the correct wage rates.

a. HUD-Determined Wage Rates.

(1) Legislative Provisions. Under Section 12 of the Act, the PHA and its contractors shall pay not less than

the wages prevailing in the locality, as determined or adopted (subsequent to a determination under applicable State, tribal or local law) by the Secretary, to all laborers and mechanics employed by the PHA or its contractors in carrying our major repairs as defined in paragraph 1-3.

(2) PHA Request. At least 45 days before bid advertisement for contract labor or before start of work for force account labor, the PHA shall request a current schedule of HUD-determine wage rates. See paragraph 9-2e(5) for contract wage requirements and the Labor Standards Handbook 1344.1 for labor standards compliance procedures.

b. Davis-Bacon Wage Rates.

(1) Legislative Provisions. Under Section 12 of the Act, the PHA and its contractors shall pay not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor, under the Davis-Bacon Act (40 U.S.C. 276a-276a-5), to all laborers and mechanics employed by the PHA or its contractors in carrying out modernization work or contracts over $2,000, except work classified as major repairs.

(2) PHA Request. At least 45 days before bid advertisement for contract labor or before start of work for force account labor, the PHA shall prepare and submit Standard Form 308, Request for Wage Determination. See paragraph 9-14 for contractor payroll requirements. Also see Handbook 1344.1 for labor standards compliance procedures.

c. Single Construction Contracts.

(1) Each construction contract shall contain only a single wage rate determination. If there is a substantial amount of work in each category (major repairs and non-major repairs), separate contracts should be awarded for each category.

(2) If both categories of work are included in a single construction contract, the major portion of the work (i.e., 80 percent or more) shall dictate which wage rate applies to all of the work. In no case shall the lesser portion of the mixed work exceed 20 percent of the total contract cost.

d. Work Hours and Safety Standards. The PHA and its contractors shall comply with the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), including overtime provisions, for all laborers and mechanics employed by the PHA or its contractors in carrying out modernization work or contracts, under either HUD-determined or Davis-Bacon wage rates.

e. Technical Wage Rates. The PHA and its construction shall pay HUD-determined prevailing wage rates to all architects, technical engineers, draftsmen and technicians employed in the modernization of a project.

6-9. INSURANCE.

a. Review of Existing Coverages.

(1) The PHA is required to have in effect: (a) workers' compensation insurance; (b) fire and extended coverage insurance; (c) comprehensive general liability insurance; (d) automobile liability insurance for both PHA-owned and non-owned automobiles; and (e) a fidelity bond. In many instances, the additional exposures created by the modernization activities can be insured by either an endorsement to the existing policy or a letter from the insurance broker/company, acknowledging that the existing policy as written is board enough to include the additional exposures.

(2) Following modernization program approval, the PHA shall notify the insurance broker/company in writing of the modernization activities and request written advice concerning what steps, if any, need to be taken to ensure proper covrage. The PHA's letter shall describe the modernization activities in sufficient detail to allow the insurance broker/company to decide what coverage would be adequate. This description shall include the type of work to be performed, the cost of the work, the nature of any structural alterations, and the involvement of PHA employees in the work. The PHA shall send a copy of any policy endorsement or written permission from the insurance broker/company to the Field Office for attachment to its existing policy.

b. Fire and Extended Coverage. In addition to the general requirements set forth in subparagraph a, the following special requirements apply to fire and extended coverage:

(1) Where the modernization work is to be performed by contract and is insured under the PHA's existing policy, the PHA shall notify the contractor of this coverage.

(2) If the existing policy cannot be endorsed to include the modernization activities because of substantial structural alterations, the PHA shall obtain a builder's risk policy on a "100% Completed Value" form either directly or through the contractor. This policy shall remain in effect through sustantial completion of the modernization work, at which time the coverage shall be transferred to the PHA's existing policy.

(3) To the extent that the modernization activities increase the value of the building(s), the PHA shall increase the amount of its existing coverage to reflect this higher, insurable value. Where a builder's risk policy was written, this amendment shall not be made until the builder's risk policy is cancelled.

c. Comprehensive General Liability. In addition to the general requirements set forth in subparagraph a, the PHA shall obtain an endorsement to the comprehensive general liability policy to include owners' and contractors' protective liability coverage to protect the PHA from any claims arising from the contractor's operations. Under no circumstances shall the PHA assume the liability of the contractor under a "Hold Harmless" or contractual liability clause.

d. Contractor Insurance.

(1) Evidence of Insurance. Where the modernization work is to be performed by contract, the PHA shall obtain from each contractor and subcontractor certificates of insurance, identifying the project number(s), the name and address of the insurance, and the effective date and the expiration date of the policy. The certificates of insurance also shall indicate that the insurance company shall give the PHA 30 days prior notice of any cancellation or nonrenewal in the contractor's policy.

(2) Noncompliance. The PHA shall monitor the insurance policies obtained by all contractors and subcontractors to ensure that the coverage required by the modernization contract is kept in force until the contractor's

work is accepted by the PHA. The PHA shall notify the contractor to stop work if the required insurance coverage is not in force at the time the work begins or if the coverage expires before the work is accepted. The PHA also shall notify the contractor that any such work stoppage is an infraction of the contract and that the contractor is liable for any losses or delays.

(3) Workers' Compensation. Each contractor or subcontractor shall carry workers' compensation insurance for all employees engaged under the modernization contract.

(4) Comprehensive General Liability. Each contractor shall carry comprehensive general liability insurance with bodily injury and property damage. The minimum amount of required coverage is $500,000 per occurrence. The policy shall cover all operations of the contractor in connection with the project, including use of all equipment, hoists, and vehicles on the project site.

(5) Automobile Liability. Each contractor shall carry automobile liability insurance. The minimum amounts of required coverage are $100,000/$300,000 for bodily injury and $50,000 for property damage.

CHAPTER 7. IMPLEMENTATION

7-1. PHA CERTIFICATIONS. Following ACC amendment, the PHA shall immediately start implementation of its approved modernization program. The PHA may execute architect's/engineer's contracts, invite bids, and issue change orders without prior Field Office approval where the PHA certifies in writing that all HUD requirements have been met. However, based on an assessment of PHA past performance in modernization and PHA technical capability, the Field Office may establish dollar thresholds for each activity over which the PHA shall submit documents for prior Field Office review and approval. See paragraphs 8-6, 9-4 and 9-16. HUD-established dollar thresholds for a PHA shall apply to all previously approved modernization and shall be revised periodically as a result of Field Office monitoring.

7-2. PROJECT IMPLEMENTATION SCHEDULE.

a. Requirement. Within 15 days after notification of Final Application approval, the PHA shall submit to the Field Office, Attention: Chief, Assisted Housing Management (AHM) Branch, its schedule for implementing the physical and management improvements at each project approved for modernization. In developing the Project Implementation Schedule, the PHA should consult with the Maintenance Engineer and consider the national norms, set forth in subparagraph c, in relation to its local situation.

b. Coverage. Each Project Implementation Schedule shall address the following key implementation steps:

(1) Architectural/Engineering Contract Award. If there is more than one architectural/engineering contract, this step addresses the award of the first contract for each project approved for modernization.

(2) Bid/RFP Advertisement. If there will be multiple contracts, this step addresses the advertisement of the first construction or management contract.

(3) Contract Award. If there will be multiple contracts, this step addresses the award of the last construction or management contract, i.e., when all funds will be obligated.

(4) Contract Completion. If there will be multiple contracts, this step addresses the completion of all

construction and management contracts, i.e., when all funds will be expended.

c. National Norms. The following table shows the national norms for the key implementation steps. Although these norms are not mandatory, the PHA is expected to perform within these norms unless satisfactory justification is provided to the Field Office for longer time frames. Variations from the national norms may be justified by differences in work scope and complexity, construction seasons, material or equipment supply, etc.

Key Implementation Steps	Emergency	Special Purpose	Homeownership
First A/E Contract Award	2 mos.	3 mos.	3 mos.
Bid/RFP Advertisement of First Contract	5 mos.	7-10 mos.	7-10 mos.
Award of All Contracts (All Funds Obligated)	7 mos.	9-12 mos.	9-12 mos.
Completion of All Contracts (All Funds Expended)	1 yr.	2 yrs.	2-3 yrs.

Key Implementation Steps	One-Stage Comprehensive	Two-Stage Comprehensive (First/Second)
First A/E Contract Award	3 mos.	3 mos./3 mos.
Bid/RFP Advertisement of First Contract	10-16 mos.	7-10 mos./10-16 mos.
Award of All Contracts (All Funds Obligated)	1-1 1/2 yrs.	9-12 mos./1-1 1/2 yrs.
Completion of All Contracts (All Funds Expended)	3 yrs.	2 yrs./3 yrs.

Note: Months/years are counted from the date of Final Application approval.

d. Multiple Contracts. Although not required, the PHA is encouraged to develop implementation schedules for each contract where a project will have multiple contracts.

e. Field Office Review and Approval. The Field Office shall review the PHA's Project Implementation Schedule and, within 10 days of receipt, either approve, with or without modification, or disapprove. Before modifying the schedule, the Field Office shall discuss any changes with the PHA and try to reach mutual agreement.

f. PHA Reporting. During implementation, the PHA shall report its progress against the Project Implementation Schedule in the "Comments" column of Form HUD-52826, Schedule/Report of Modernization Expenditures, submitted quarterly to the the Field Office (see paragraph 11-4).

g. Field Office Monitoring. During implementation, in conjunction with its regular monitoring, the Field Office shall monitor PHA progress against its Project Implementation Schedule. Where the PHA is having difficulty in adhering to its schedule, the Field Office shall promptly provide technical assistance, as required.

h. Revision. No revisions to the Project Implementation Schedule will be allowed. If the PHA misses a target date for one of the first three key implementation steps, the PHA shall provide a written explanation to the Field Office on how it plans to catch up so that it will meet the next target date. If the PHA misses the target date for the last key implementation step, the PHA shall provide a written explanation to the Field Office and a new target date for completion. Unless the PHA can provide a satisfactory explanation for missing the last target date, i.e., for reasons totally outside of the PHA's control, future funding will be adversely affected.

7-3. PHA STAFFING. During the Joint Review, the PHA and the Field Office shall agree on PHA need for additional staff to meet its proposed Project Implementation Schedule. It is essential that certain functions be performed to ensure modernization progress. However, filling the following positions may not be necessary if their functions are being performed satisfactorily.

a. Modernization Coordinator would be responsible for developing an overall plan and timetable for the implementation of approved modernization programs, including physical and management improvements. The Modernization Coordinator would establish internal administrative controls over key incoming and outgoing documents and PHA activities related to modernization. In addition, the Modernization Coordinator would be responsible for preparing Form

HUD-52826, Schedule/Report of Modernization Expenditures, and the narrative report on management improvements on a timely basis, and for coordinating the requisitions for funds to the Field Office. Ordinarily, the Modernization Coordinator would report directly to the PHA's Executive Director.

b. Contract Administrator/Construction Manager would be responsible for: procuring architectural/engineering services; overseeing the entire construction contract process, including preparing and issuing, subject to any required Field Office approval, all modernization contract documents, such as construction and bid documents, contract award, contract changes and time extensions, and contract settlement documents; resolving disputes and claims, subject to Field Office approval; and ensuring that target dates are met. The Contract Administrator/Construction Manager may report directly to the Modernization Coordinator or the Executive Director. Depending upon the size and complexity of the modernization construction contracts, the PHA may wish to assign these functions to two separate positions - that of Contract Administrator and that of Construction Manager.

c. Clerk-Of-The-Works would be responsible for reporting to the Contract Administrator/Construction Manager all significant events that take place on the construction site. Reports should cover compliance with the contract documents by the contractor, and any deviation therefrom, quality of workmanship, timeliness of delivery of materials and of performance, need for change orders and extensions of time, and any construction problems which may arise. Also included in the Clerk-of-the-Works duties are the preparation of progress reports and charts and keeping daily logs of personnel working on the project, visitors to the site, materials delivered, and any other information that the Contract Administrator/Construction Manager determines is necessary for the proper administration of the contract. A fulltime Clerk-of-the-Works is necessary only if the size of the construction project warrants it. Thus, depending upon the number of active modernization programs underway and their size, a PHA may have more than one Clerk reporting to the Contract Administrator/Construction Manager. If in the judgment of the Contract Administrator/Construction Manager, no Clerk is necessary, the functions of the Clerk as are appropriate may be performed by the architect/engineer.

CHAPTER 8. ARCHITECTS/ENGINEERS

8-1. DETERMINATION OF NEED. During the Joint Review, the PHA and the Field Office shall reach agreement upon the PHA's need for the professional services of an architect/enginer, taking into account PHA staff capabilities and the type and complexity of work. For example, professional services may include: development of design concepts; preparation of design and construction documents, work write-ups, and cost estimates; evaluation of construction bids; inspection of materials and workmanship during construction; notifying the contractor and the PHA of problems observed; and certification that construction is being performed in accordance with the construction contract.

8-2. SELECTION PROCESS.

a. Competitive negotiation. The PHA shall obtain professional services through the competitive negotiation process. The objective of this process is to allow the PHA to identify the two or three most highly qualified architects/engineers or architectural/engineering firms and then to negotiate a contract with the most highly qualified firm which will provide the required sevices at a fair and reasonable cost.

b. Applicability. The competitive negotiation process shall apply to all modernization-funded contracts except where:

(1) Waived by the Field Office, up to a maximum of $5,000. However, such waiver should be within the amount at which the PHA is allowed to certify under paragraph 8-5;

(2) FFY 1981 or subsequent year funds are being used to finance additional services under an existing contract in connection with the completion of an ongong modernization program at a particular project; or

(3) FFY 1980 or prior year funds are being used to finance a contract which has not yet been executed, but for which the PHA has initiated discussions with a particular architect/engineer before May 21, 1982.

c. Invitation. The PHA shall invite architects/engineers or firms to submit information on architectural/engineering services. The invitation shall include: the project(s) to be modernized; the general scope of the work; the extent of professional services requested; the submission deadline;

and the PHA contact person. The invitation shall request the architect/engineer, if interested, to respond with a letter of interest, demonstration of understanding of the modernization, evidence of firm's ability to perform the work, evidence that, where design work is involved, the architect/engineer is registered or licensed to perform the required services in the State where the project is located, profiles of firm's principals, staff and facilities, and a certified statement that the architect/engineer or firm is not debarred, suspended or otherwise prohibited from professional practice by any Federal, State or local agency. The invitation may be accomplished through: public announcement in local newspapers; direct requests to architects/engineers in the PHA's files, which the PHA or other PHAs have previously retained; use of a list of names or firms secured from local professional societies; and use of techniques set forth in paragraph 6-2c for minority architects/engineers.

d. Evaluation of Responses. The PHA shall evaluate all responses to the invitation and eliminate those that are obviously unqualified to provide the required services. The PHA shall select the two or three most highly qualified names or firms and rank them in a one-two-three order, according to qualifications and preference, in accordance with the following criteria:

(1) Professional and technical competence and experience;

(2) Capability to provide professional services in a timely manner;

(3) Knowledge of local building codes; and

(4) General response to the invitation.

e. Comprehensive Proposal. Once the architects/engineers or firms have been ranked, the PHA shall invite the first ranked firm to submit a written comprehensive proposal and shall arrange for any necessary meetings to allow for evaluation and modification of the original proposal, if necessary. If the PHA fails to reach agreement with the first ranked firm, the PHA shall follow the same procedure with the second and third ranked firms until it obtains agreement with the most qualified firm at a fair and reasonable cost. The agreement should cover the specific services to be pro-

vided, time and order of services, staffing requirements, areas of responsibility and liability, and fee structure, including amount and method of payment.

8-3. FORM OF AGREEMENT. When the PHA and the architect/engineer reach agreement, the agreement shall be placed in writing. The use of Form HUD-51915, Agreement Between Owner and Architect, revised July 1973, is not mandatory, but is more appropriate where modernization involves new construction. Where modernization does not involve new construction, the PHA may obtain appropriate forms from the American Institute of Architects, the Consulting Engineers Council, and other professional organizations. However, the Field Office will generally provide the PHA with Form HUD-51915, appropriately modified for modernization. If Form HUD-51915 is not used, the contract shall contain the provision that all drawings and specifications furnished by the architect shall become the property of the PHA upon their approval in writing by the PHA, or upon the prior termination of the architect's/engineer's services (see paragraph 9.13 of Form HUD-51915). Regardless of the form used, the contract shall require the architect/engineer to certify that all drawings and specifications accurately reflect HUD-approved work and meet the Modernization Standards or the intent of the Minimum Property Standards, whichever applies.

8-4. COMPENSATION. Architectural/engineering fees shall be consistent with those which prevail for similar projects and services in the area (see paragraph 6-8e).

a. Rehabilitation. Where the modernization does not require design services for new construction, the PHA shall use a lump sum fee or a fee of approximately 2-1/2 times direct personnel expense with a predetermined maximum consideration. If a lump sum fee is used, fees shall reflect the degree or nature of the services to be rendered.

b. New Construction. Where the modernization requires design services for new construction, the PHA shall use a percent of the estimated modernization cost, an hourly rate, per sheet fee or lump sum amount.

c. Considerations. In determining fees, consideration shall be given to: the scope of basic and additional services; type of project, size, and complexity of design; extent that previously completed architectural drawings are being used; extent that prefabricated or modular components are being used; extent that modernization work involves multiple

repetition of the same basic design or replacement of equipment; and number of construction contracts to be administered.

8-5. PHA CERTIFICATION. Upon selecting and reaching agreement with the architect/engineer, the PHA shall prepare and execute each contract without prior Field Office review and approval, unless the contract exceeds the dollar threshold that may have been established by the Field Office (see paragraphs 7-1 and 8-6). Where HUD approval is not required, the designated PHA official shall certify in writing to the following and send a copy of the certification to the Field Office:

a. The scope of the work is consistent with the PHA's assessment of its needs for professional services and with any agreements reached with the Field Office during or subsequent to the Joint Review;

b. The fee is appropriate to the work to be performed and does not exceed the approved budget amount; and

c. If applicable, the competitive negotiation process was used to obtain the professional services.

8-6. HUD-ESTABLISHED THRESHOLD. Based on an assessment of the PHA's past performance in preparing architect's/engineer's contracts and in-house technical capability, the Field Office may establish a dollar threshold over which the PHA shall submit architect's/engineer's contracts for prior Field Office review and approval. For modernization programs approved before FFY 1982, where the PHA has not yet submitted the architect's/engineer's contract for prior Field Office review and approval, the HUD-established threshold shall apply.

a. Criteria. In determining the appropriate dollar threshold for PHA submission, the Maintenance Engineer shall consider the following criteria:

(1) Past Performance in Preparing Contracts. In the past:

(a) The scope of the work was consistent with the PHA's assessment of its needs for professional services and with any agreements reached with the Field Office during or subsequent to the Joint Review; and

(b) The fee was appropriate to the work to be performed and did not exceed the approved budget amount.

(2) In-House Technical Capability. The PHA has experienced staff who are capable of reviewing proposed architect's/engineer's contracts.

b. Notification to PHA. After completing the assessment, the Maintenance Engineer shall prepare a letter for the signature of the Field Office Manager or designee, advising the PHA of the established dollar threshold over which architect's/engineer's contracts are required to be submitted for prior Field Office approval and the reasons.

8-7. HUD REVIEW AND APPROVAL.

a. Review and Approval. Where submitted by the PHA, the Field Office Maintenance Engineer shall promptly review the proposed architect's/engineer's contract. This review shall ascertain that the proposed scope of work is consistent with the PHA's assessment of its physical needs and staffing requirements and that the fee schedule is appropriate for the work to be performed. As needed, the Maintenance Engineer shall consult with other Field Office staff, such as Counsel, and may inform the PHA by telephone of any required changes or deficiencies. Within 15 calendar days of receipt of the proposed contract, the Maintenance Engineer shall prepare a letter to the PHA for the signature of the Director, Housing Management Division, or designee, advising the PHA of any required changes or authorizing the PHA to proceed with execution.

b. Monitoring. The Maintenance Engineer shall periodically review the PHA's invitation and evaluation of responses, through on-site review of PHA files, to ensure that the PHA is following the competitive negotiation process. The Maintenance Engineer also shall periodically review copies of executed contracts, including the PHA certification where prior Field Office approval was not required, and the PHA's in-house technical capability to determine whether there has been a change in capability which would warrant a higher or lower dollar threshold. If deficiencies are found, the Field Office monitoring letter (see paragraph 11-13a(3)) may require the PHA to submit proposed architect's/engineer's contracts over a reduced threshold to the Field Office for review and approval before execution.

8-8. ABANDONMENT OR TERMINATION. In the event of abandonment of the project or termination of the contract for any cause, under the respective sections of the contract, the terms of any settlement between the PHA and the architect shall be subject to Field

(2) In-House Technical Capability. The PHA has experienced staff who are capable of reviewing proposed architect's/engineer's contracts.

b. Notification to PHA. After completing the assessment, the Maintenance Engineer shall prepare a letter for the signature of the Field Office Manager or designee, advising the PHA of the established dollar threshold over which architect's/engineer's contracts are required to be submitted for prior Field Office approval and the reasons.

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b. Monitoring. The Maintenance Engineer shall periodically review the PHA's invitation and evaluation of responses, through on-site review of PHA files, to ensure that the PHA is following the competitive negotiation process. The Maintenance Engineer also shall periodically review copies of executed contracts, including the PHA certification where prior Field Office approval was not required, and the PHA's in-house technical capability to determine whether there has been a change in capability which would warrant a higher or lower dollar threshold. If deficiencies are found, the Field Office monitoring letter (see paragraph 11-13a(3)) may require the PHA to submit proposed architect's/engineer's contracts over a reduced threshold to the Field Office for review and approval before execution.

8-8. ABANDONMENT OR TERMINATION. In the event of abandonment of the project or termination of the contract for any cause, under the respective sections of the contract, the terms of any settlement between the PHA and the architect shall be subject to Field

Office approval. The PHA shall not disburse any monies to the architect after the giving of notice of abandonment or termination until the Field Office has approved the settlement agreement.

CHAPTER 9. CONTRACT ADMINISTRATION

Section 1. General

9-1. INTRODUCTION. This Chapter sets forth the requirements for modernization construction contracts and contracts for management improvements. To the maximum extent possible, the requirements of this Chapter shall apply to modernization programs approved before Federal Fiscal Year (FFY) 1982. A Sample Modernization Contract Status Control Log for Field Office use is attached as Appendix 19.

Section 2. Construction and Bid Documents

9-2. PHA PREPARATION. The PHA shall prepare the construction and bid documents as follows:

a. General. The PHA and its architect shall ensure that the construction and bid documents comply with State, tribal or local laws governing the public solicitation of bids. Any modifications required to comply with such laws should be discussed with Regional or Chief Counsel to ensure that such changes are not in conflict with Federal requirements.

b. Competitive Bidding. For each construction or equipment contract over $10,000, the PHA shall conduct formal advertising, except where equipment is to be purchased through the HUD Consolidated Supply Program. For each construction or equipment contract of $10,000 or less, the PHA shall follow the solicitation requirements set forth in the Procurement Handbook 7460.8.

c. Invitation for Bids. The invitation for bids shall be prepared in the form prescribed by the Field Office for public advertising and solicitation of bids. The bid holding period shall be specified.

d. Instructions to Bidders. Form HUD-5369, Instructions to Bidders, shall be used to inform interested contractors of the general bidding requirements, the responsibilities of each party, and the factors to be considered in determining the successful bidder.

(1) Bid Guaranty. For all construction and equipment contracts over $10,000, the bidder shall be required to submit with the bid a bid guaranty not less than 5 percent of the amount of the bid. The bid guaranty may be a certified check, bank draft,

U.S. Government Bonds at par value or a bid bond secured by a surety company. If the bid guaranty is not submitted with the bid, the PHA shall reject the bid. However, in an effort to promote minority and women's business, Headquarters will consider a PHA request for a waiver of the bid guaranty requirement, on a case-by-case basis, before bid advertisement, if the request is submitted through and supported by the Field and Regional Offices.

(2) Non-Collusive Affidavit. For all construction and equipment contracts over $10,000, the bidder shall be required to submit with the bid a non-collusive affidavit. If the affidavit is not submitted by the low bidder with the bid, the PHA shall require submission within 3 working days. If the affidavit is submitted after that date, the bid shall be considered non-responsive. No contract award shall be made without a properly executed non-collusive affidavit.

(3) Previous Participation Certificate. For all construction and equipment contracts over $50,000, except where equipment is to be purchased through the HUD Consolidated Supply Program, the bidder shall be required to submit with the bid Form HUD-2530, Previous Participation Certificate. If the Certificate is not submitted by the low bidder with the bid, the PHA shall require submission within 3 working days. If the Certificate is submitted after that date, the bid shall be considered non-responsive. No contract award shall be made without a properly executed Certificate.

(4) Performance And Payment Bond. For all construction or equipment contracts over $10,000, the contractor shall be required to furnish a performance and payment bond for 100 percent of the contract price or, as may be required by law, separate performance and payment bonds, each for 50 percent or more of the contract price, or a 20 percent cash escrow or a 25 percent letter of credit. To the extent permitted under State law, all three options shall be set forth in the bid documents.

(a) The surety must be a guaranty or surety company acceptable to the PHA. Individual sureties shall not be considered. U.S. Treasury Circular No. 570, published annually in the Federal Register,

lists companies approved to act as surety on bonds securing Government contracts, the maximum underwriting limits on each contract bonded, and the States in which each company is licensed to do business. Use of this Circular is mandatory. The PHA may obtain a free copy of this Circular by writing directly to the Audit Staff, Bureau of Government Financial Operations, U.S. Treasury Department, Washington, D.C. 20226.

(b) Section 911 of the HUD Act of 1970 authorizes the Small Business Administration to provide a 90 percent guarantee on contracts of $1,000,000 or below to any surety company that will provide bid or performance bonds and payment to the small construction contractor.

(5) Section 3 of HUD Act of 1968. Instructions to Bidders shall be modified to include the requirement that any contractor awarded a contract over $500,000 and any subcontractor awarded a contract over $50,000 shall comply with 24 CFR Part 135 implementing Section 3 (see paragraph 6-1c).

(6) Lead-Based Paint Prohibition. Instructions to Bidders shall be modified to include the requirement that any contractor awarded a contract for modernization shall comply with 24 CFR Part 35 prohibiting the use of lead-based paint.

e. Construction Contract. The construction contract shall be prepared in the form prescribed by the Field Office and shall include Form HUD-5370, General Conditions. In preparing the construction contract, consideration shall be given to the following:

(1) Changes. Any changes in the General Conditions shall be made by appropriate amendment written into the Special Conditions. Since some provisions of the General Conditions reflect Federal statutes, Executive Orders or established HUD policy and must be incorporated verbatim and without qualifications, proposed modifications should be discussed with the Regional or Chief Counsel before they are drafted. The PHA is responsible for recognizing a need for modification of the printed General Conditions and also for conforming the contract documents with State, tribal and local laws.

(2) Separate Construction Contracts. Main construction work should be performed under a single construction contract. The PHA may obtain separate bids for portions of the work where required by State law or in the best interest of the modernization of the project. Where separate bidding is used, it is most important that the scope of work under each contract be clearly defined without gaps or overlapping of work specified in related contracts and that the PHA have the capability to administer separate contracts.

(3) Project Completion Time. A realistic construction period should be determined for the contract. Such things as type of construction, project size and location, season and prospective weather conditions, and availability of skilled labor and materials should be considered.

(4) Liquidated Damages. A liquidated damage rate shall be established which will reasonably approximate the loss which might be sustained by the PHA through failure of the contractor to complete the project on time. This includes loss of rental income, increased administrative costs, interest and carrying charges, and other expenses related to the period of delay in modernization of the project. An unreasonably high rate of liquidated damages may discourage bidders, result in higher bids, and be construed as a penalty. An unreasonably low rate may encourage late completions.

(5) Wage Requirements. The Davis-Bacon wage rates determined by the Department of Labor and provided by the Regional or Field Office or the HUD-determined wage rates shall be incorporated in the Special Conditions without modification (see paragraph 6-8). All documentation should be prepared so as to permit inclusion of the wage rates as soon as they are received.

(6) Equipment. Equipment, such as ranges, water heaters and refrigerators, may be acquired through the HUD Consolidated Supply Program, through separate contracts, or included in the main construction contract. Use of either of the first two methods is recommended. If the main construction contract is to include the installation, but not the purchase, of dwelling equipment, the contract must include proper provision for

reception of the items and appropriate coordination clauses. If the equipment is purchased by methods other than the Consolidated Supply Program, the PHA should ensure that price and warranty are equivalent to that available through the Consolidated Supply Program.

(7) Demolition. Whenever feasible, demolition work should be included in the main construction contract. If this is not done, the standard bidding documents may be used with minor modifications for demolition work. Since there may be salvage value, the form of bid should allow for the possibility of a sum being deducted (equal to the salvage value) from the amount to be paid to the contractor.

9-3. PHA CERTIFICATION. The PHA shall invite bids without prior Field Office review and approval, unless the estimated contract exceeds the dollar threshold that may have been established by the Field Office (see paragraphs 7-1 and 9-4) or a "brand name" product is specified without an "or equal" clause. Where HUD approval is not required, the designated PHA official shall certify in writing to the following and send a copy of the certification to the Field Office:

a. The PHA has obtained the required certification from the architect/engineer (see paragraph 8-3);

b. The construction documents accurately reflect HUD-approved work and meet the Modernization Standards or the intent of the Minimum Property Standards, whichever applies; and

c. The bid documents are complete and include all mandatory provisions, including the correct wage rates.

9-4. HUD-ESTABLISHED THRESHOLD. Based on an assessment of the PHA's past performance in modernization contracting and in-house technical capability, the Field Office may establish a dollar threshold over which the PHA shall submit construction and bid documents for prior Field Office review and approval. For modernization programs approved before FFY 1982, where the PHA has not yet submitted the construction and bid documents for prior Field Office review and approval, the HUD-established threshold shall apply.

a. Criteria. In determining the appropriate dollar threshold for PHA submission, the Maintenance Engineer shall consider the following criteria:

(1) Past Performance in Modernization Contracting. In the past:

(a) Construction documents (working drawings and construction specifications) have accurately reflected HUD-approved work and have met the Modernization Standards which apply to modernization approved after FFY 1980 or the intent of the Minimum Property Standards which apply to modernization approved before FFY 1981;

(b) Bid documents have been complete and have included all mandatory provisions, including the correct wage rates; and

(c) Bid advertisement has been conducted in compliance with State, tribal or local laws and Federal requirements governing public solicitation of bids.

(2) In-House Technical Capability. The PHA has a staff architect/engineer who is capable of preparing the construction and bid documents or experienced staff who are capable of reviewing the documents prepared by an outside architect/engineer.

b. Notification to PHA. After completing the assessment, the Maintenance Engineer shall prepare a letter for the signature of the Field Office Manager or designee, advising the PHA of the established dollar threshold over which construction and bid documents are required to be submitted for prior Field Office approval and the reasons. Where prior Field Office approval is required, the letter shall indicate whether HUD review pertains to only the preliminary or to both the preliminary and final plans and specifications.

c. Submission. Where required, the PHA shall submit complete construction (working drawings and construction specifications) and bid documents for each proposed modernization contract to the Field Office, Attention: Chief, Assisted Housing Management (AHM) Branch, for review and approval before inviting bids.

9-5. HUD REVIEW AND APPROVAL.

a. Review. Where submitted by the PHA, the Maintenance Engineer shall promptly review the construction and bid documents to ensure that they have been completed in

accordance with prior approvals, meet the applicable standards, include all mandatory provisions, and are ready for issuance. As necessary, the Maintenance Engineer shall solicit technical advice from other Field Office specialists, such as the Labor Relations staff on the wage rates and the Fair Housing and Equal Opportunity (FH&EO) Division on requirements related to Executive Order 11246, as amended, and Section 3 of the HUD Act of 1968, as amended, including the appropriate Appendix A for Bid Condition Areas (see Handbook 8020.1, Chapter 5). The Maintenance Engineer also shall work with the PHA and its architect to reach agreement on any points in question.

b. Action. The Field Office review shall be completed and the PHA advised of the results within 15 calendar days of receipt of the construction and bid documents. When the documents are in proper order, the Maintenance Engineer shall prepare a letter to the PHA for the signature of the Director, Housing Management Division, or designee, indicating approval of the documents, with or without modification, authorizing the PHA to issue the Invitation for Bids, and transmitting the wage rates. Where appropriate, the Regional or Chief Counsel shall concur in the letter.

c. Monitoring. The Maintenance Engineer shall periodically review copies of the construction and bid documents, including the PHA certification where prior Field Office approval was not required, through on-site review of PHA files. The review shall determine whether the documents met the criteria set forth in paragraph 9-4a(1) and did not result from splitting bids to avoid prior HUD review and approval. The Maintenance Engineer also shall periodically review the PHA's in-house technical capability to determine whether there has been a change in capability which would warrant a higher or lower threshold. If deficiencies or evidence of abuse of the established threshold is found, the Field Office monitoring letter (see paragraph 11-13a(3)) may require the PHA to submit construction and bid documents for each proposed modernization contract over a reduced threshold to the Field Office for review and approval before inviting bids.

Section 3. Bid Advertisement and Contract Award

9-6. INVITATION FOR BIDS. Where prior Field Office approval is required, the PHA shall immediately publish an invitation for bids upon receipt of the Field Office approval letter, but only

if a copy of the wage rates is attached. Where prior Field Office approval is not required, the PHA shall publish the invitation immediately upon receipt of the Field Office letter transmitting the wage rates.

a. Bid Package. The PHA shall prepare a standard bid package. Each copy of the bid package shall be numbered sequentially for control purposes. A copy of the complete bid package shall be provided to each bidder whether or not bids are being invited for a single construction contract or separate trade (e.g., plumbing, electrical, mechanical) contracts. The standard bid package shall consist of the following:

(1) Cover sheet identifying the PHA, project number, job number, and general scope of work;

(2) PHA invitation for bids, including the day, time and place that bids will be opened;

(3) Form HUD-5369, Instructions to Bidders;

(4) Form HUD-5370, General Conditions, and Special Conditions;

(5) For contracts over $50,000, Form HUD-2530, Previous Participation Certificate, marked "Modernization," to be submitted to the PHA;

(6) Bound construction specifications;

(7) Bound working drawings;

(8) Correct wage rates;

(9) Bid form to be submitted to the PHA;

(10) Bid bond form to be submitted to the PHA;

(11) Non-collusive affidavit to be submitted to the PHA;

(12) Contract form; and

(13) Performance and payment bond form.

b. Publication. The PHA shall give full opportunity for open and competitive bidding by publishing the invitation for bids at least once a week for two consecutive weeks in local newspapers and trade journals. See paragraph 6-2c

regarding publicizing invitations for bids to Minority Business Enterprises (MBEs). The PHA also shall extend an invitation to contractors who have previously expressed an interest to participate in modernization to the PHA or the Field Office.

c. Bid Period. The PHA shall establish a deadline date for acceptance of bids which allows sufficient time for bidders to evaluate the bid package, estimate costs, and submit their bids to the PHA. The bid period is no longer required to be for 30 calendar days, where appropriate, but shall not be for less than 10 calendar days. In any event, the bid period shall be for at least the number of days required by State or local law. Furthermore, for projects being modernized under a single construction contract, the bid period should be at least 30 calendar days from the date of publication of the initial invitation for bids. However, if an addendum is issued within 7 calendar days of the deadline date, the bid opening shall be postponed for at least 7 calendar days from the date of the addendum.

d. Deposit. The PHA shall require a deposit in an amount that is based on local practice, but at least sufficient to offset the cost of reproducing a copy of the bid package. A deposit is not required for bid packages issued to a builder's exchange or similar building service organization. All deposit checks or drafts shall be made payable to the PHA.

e. Alternate Bids. The PHA should not request alternate bids for major project components (e.g., two different structural systems), "deductive alternatives" or a "base bid with add-ons" (not including alternate materials and equipment to the extent provided in the construction specifications), unless the relative advantage and comparative costs of the alternatives are difficult to determine without going to the competitive bidding process.

f. Addendum to Bid Package. The PHA shall issue changes to the standard bid package in the form of an addendum. The PHA shall not interpret the meaning of bid documents except by addendum. Each addendum shall be numbered sequentially and a copy provided to each bidder of record, to each place where bidding documents are on file and to the Field Office, only where the PHA is required to submit construction and bid documents before advertisement. The addendum also shall specify, if applicable, the revised deadline date for submission of bids.

g. Control Record. The PHA shall maintain, or authorize its architect to maintain, a record of all bidding documents. This record shall identify the following for each individual or firm that requested a bid package: the bid package control number; the name and address of the individual or firm; if applicable, the number of the addendum and date sent; the amount of deposit and the date received, including the return or forfeiture of the deposit; the date and time the bid was received; and the date the individual or firm was notified as to the successful low bidder.

9-7. BID OPENING AND EVALUATION.

a. Bid Opening. The PHA shall not open the bids until the date and time specified in the invitation for bids. Upon receipt of each bid (including late bids), the PHA shall mark the date and time on the envelope. The bids shall be opened in public and read aloud at the specified time and place. Any bids received after the date and time specified in the invitation for bids shall not be opened and shall be returned to the bidder with a letter indicating that the bid was not received by the specified deadline.

b. Bid Rejection or Withdrawal. After the public opening, the PHA may allow any bidder to withdraw a bid or may reject or disqualify the lowest bidder.

(1) Withdrawal. If a bidder seeks to withdraw a bid before the end of the bid holding period or the execution date of the contract, whichever is earlier, the PHA shall secure the following before approving or disapproving the withdrawal request: a notarized statement from the bidder indicating that an error was made with an explanation of how it occurred; a copy of the bidder's cost estimating worksheets or other evidence provided by the bidder in support of the withdrawal request; and a legal opinion prepared by the PHA's attorney indicating whether or not the bidder is bound by the bid.

(2) Rejection. The PHA shall reject any bid that is incomplete, e.g., where the bid guaranty is not submitted with the bid. (For the exceptions on the non-collusive affidavit and the Previous Participation Certificate, see paragraphs 9-2d(2) and (3), respectively.) If the PHA proposes to reject the lowest bidder for reasons other than an incomplete bid, the PHA shall notify the bidder of the reasons and provide the bidder an opportunity to submit supporting evidence, within a specified time, as to why the bid should not

be rejected. After the specified time, the PHA shall make a final decision.

(3) Bidder Notification. The PHA shall notify the bidder as to whether or not the withdrawal request has been approved or disapproved or whether or not the bid has been rejected. If appropriate, the PHA also shall return the bid guaranty to the bidder.

c. Rejection of All Bids. The PHA may decide, because of the high bids received or other justifiable causes, to reject all bids.

(1) Reasons for Rejection. The PHA and its architect shall review the bids received to determine the reason that the contract cannot be awarded. The purpose of this review is to ascertain that: the bid amount exceeds the approved budget amount; the bids are unreasonably high due to unusual circumstances affecting construction in the housing market area; the project is overdesigned; or the award cannot be made for other causes that are identified.

(2) Overdesign. If it is determined that the high bids are due to project overdesign, the PHA and its architect shall identify design modifications that would likely result in lower bids. Where required under paragraph 9-4, the PHA shall submit revised construction documents for prior Field Office review and approval. The PHA architect shall be held responsible for making any design modifications under the terms of the architect's contract.

(3) Invitation for Bids. Upon Field Office approval of the revised construction documents, where required, the PHA shall be authorized to issue a subsequent invitation for bids.

9-8. PHA SUBMISSION AND CERTIFICATION.

a. Requirement. After bid opening, the PHA shall:

(1) In all cases, clear the lowest responsible bidder with the Field Office for check against the HUD Consolidated List of Debarred, Suspended or Ineligible Contractors and Grantees;

(2) For contracts over $50,000, submit Form HUD-2530, prepared by the lowest responsible bidder, to the Field Office, Attention: Processing Control and Reports (PCR) Supervisor for previous participation review; and

(3) If the bid amount exceeds the approved budget amount or the PHA receives a single bid, submit the following documents to the Field Office, Attention: Chief, AHM Branch, for review and approval before awarding the contract.

(a) Bid tabulation, identifying the following for each bid received by the PHA: the name and address of the bidder; the amount of the bid; and the amount and type of bid guaranty.

(b) Bid, including a copy of the bid guaranty and non-collusive affidavit, that the PHA proposes to accept.

b. Award Without Prior Field Office Approval. Except as required in subparagraph a, the PHA may award the contract without prior Field Office approval if the designated PHA official has certified in writing that:

(1) The bid advertisement and contract award were conducted in compliance with State, tribal or local laws and Federal requirements, including 24 CFR 805.204, Indian preference in contracting for IHAs;

(2) The award does not exceed the approved budget amount and is not being made on the basis of a single bid;

(3) The award has been cleared with the Field Office to determine that the contractor is not on the HUD Consolidated List of Debarred, Suspended or Ineligible Contractors and Grantees; and

(4) The award has been cleared by the Field Office under the previous participation review process, where the contract exceeds $50,000.

9-9. HUD REVIEW AND APPROVAL.

a. Technical Review. Where submitted by the PHA, the Maintenance Engineer shall consult with the HMO regarding any required budget revisions and review contract award documents to determine that the proposed award is in

proper order. The Maintenance Engineer shall check the HUD Consolidated List of Debarred, Suspended or Ineligible Contractors and Grantees to ensure that the contractor is not on the List.

b. Previous Participation Review. Upon receipt of Form HUD-2530, PCR shall distribute Form HUD-2530 and Form HUD-2530-RC, Report Card, to appropriate Field Office staff for review and comment. Within 5 working days, PCR shall notify the Chief, AHM Branch, of any comments received on the Report Cards. See the Previous Participation Handbook 4065.1.

(1) If there are no adverse findings, PCR shall send Form HUD-2530 to the Field Office Manager for approval. After approval, PCR shall send the original of Form HUD-2530 to the Participation Control Officer in Headquarters and a copy to the AHM Branch. Either PCR or the AHM Branch shall promptly notify the PHA of approval.

(2) If there are adverse findings, PCR shall notify the Director, Housing Management Division. The Director, Housing Management Division, or designee, shall review and discuss the findings with appropriate Field Office staff, including the Regional or Chief Counsel. The Director, Housing Management Division, or designee, shall alert the Participation Control Officer in Headquarters that Form HUD-2530 will be transmitted and to provide information on when the bid holding period expires. The Director, Housing Management Division, or designee, shall immediately transmit Form HUD-2530 and related documents to the Participation Control Officer.

c. Action. The Field Office review shall be completed and the PHA advised of the results within 10 calendar days of receipt of the proposed contract award documents, unless Headquarters approval of Form HUD-2530 is required. When the contract award documents are in proper order, the Maintenance Engineer shall prepare a letter to the PHA for the signature of the Director, Housing Management Division, or designee, authorizing the PHA to award the contract and requiring the PHA to submit any budget revisions.

d. Monitoring. The Maintenance Engineer shall periodically evaluate the bids opened and the contracts awarded by

the PHA, including the PHA certification where prior Field Office approval was not required, through on-site review of PHA files. If deficiencies are found, the Field Office monitoring letter (see paragraph 11-13a(3)) may require the PHA to submit proposed contract award documents in all or specified instances to the Field Office for review and approval before contract award.

9-10. PHA CONTRACT AWARD. Upon receipt of the Field Office letter authorizing contract award or the Field Office approval under the previous participation review process, including the debarment check, the PHA shall contact the successful bidder (if separate trade contracts are to be executed, the PHA shall contact each successful bidder) to schedule a date for execution of the contract.

a. Contractor Notification. The PHA shall send a registered letter to the successful bidder indicating: the date, time, and place scheduled for PHA and contractor execution of the contract; the contractor must provide a performance and payment bond (or other assurance) in the amount identified in Form HUD-5369, Instructions to Bidders; and the bond shall bear the same date or a date after the date of execution of the contract and shall be accompanied by a properly executed power of attorney by the bonding company to its authorized agent.

b. Contract Execution. Before executing the contract, the PHA shall ensure that the performance and payment bond (or other assurance) meets the requirements of the Instructions to Bidders. The PHA shall prepare three original sets of the contract documents (i.e., construction contract, bound construction specifications, bound working drawings, and addenda). The PHA and contractor (including trade contractors if separate construction contracts are to be executed) shall sign the first and last page of the three sets of construction specifications, working drawings and any applicable addenda. If separate trade contracts are to be executed, each trade contractor also shall sign the first and last page of the applicable trade division of the construction specifications.

c. Distribution of Executed Documents. The PHA shall retain one original copy of the performance and payment bond (or other assurance), power of attorney, and a signed set of the contract documents for its files. The PHA shall send one copy to the Field Office, Attention: Chief, AHM Branch, and retain the contractor's copy for attachment to the PHA's notice to proceed.

d. Department of Labor Notification. Within 10 calendar days of contract award (including subcontracts) for each contract of $10,000 or more, the PHA shall send a notice of contract award to the Regional Office of Federal Contract Compliance Programs of the Department of Labor. This notification is required by Executive Order 11246, as amended, and shall include: the name, address, and telephone number of the contractor; the employer identification number; the dollar amount of the contract; the estimated construction start and completion dates; and the project number(s) and community in which the project(s) is located.

e. Preconstruction Conference. Where appropriate, the PHA shall schedule a date for a preconstruction conference to be held at the PHA. The conference date may be the same, or within 10 calendar days from the date of contract execution. The purpose of the preconstruction conference is to provide for the timely modernization of the project by eliminating any misunderstanding of HUD regulations and procedures, contract requirements, and responsibilities of the PHA, its architect, the contractor and the Field Office. In scheduling the preconstruction conference, the PHA shall consult with its architect, the contractor, and the Maintenance Engineer, if appropriate, to arrange a date that is acceptable to all parties.

f. Notice to Proceed. The PHA shall prepare two original copies of the notice to proceed to be issued to the contractor, together with the contractor's set of the executed contract documents. The notice to proceed is the official PHA order directing the contractor to start work on the project. The contractor shall be requested to sign the notice to proceed, designating receipt and acceptance, and return one signed original to the PHA.

Section 4. Contract Administration Responsibilities

9-11. PHA RESPONSIBILITIES. The PHA is responsible for enforcing the architect's contract and the construction contract and for ensuring retention of all contractual rights. PHA staff assigned these responsibilities shall be included in the Modernization Organization and Staffing Plan, required in paragraph 3-16c.

a. Contracting Officer. The PHA shall designate an employee as its contracting officer. The scope and limitation of the contracting officer's responsibility shall be identi-

fied in writing and copies shall be provided to its architect and the contractor.

b. Contract Administrator. The PHA shall designate a qualified professional to administer the contract. The PHA architect may be designated as the contract administrator.

c. Insurance. The PHA shall comply with the insurance requirements set forth in paragraph 6-9.

d. Reports. The PHA shall obtain the reports and construction documents required by the contract and the Field Office from its architect and the contractor. The PHA shall retain these reports and, as required, send a copy to the Field Office.

e. Inspections. See paragraphs 11-11 and 11-12.

f. Construction Progress Meetings. The PHA shall meet with its architect and the contractor on a regular basis to discuss the progress of modernization work, any problems or deficiencies noted during inspection visits, overdue reports and the construction schedule. The PHA shall prepare a written record of the items discussed at each meeting and place a copy in its construction file.

g. Correction of Deficiencies. Upon being notified by its architect or the Maintenance Engineer of construction deficiencies, the PHA shall promptly notify the contractor in writing of the deficiencies observed. This notification also shall advise the contractor that failure to make timely corrections would be an infraction of the contract and that the contractor is liable for any resulting losses or delays.

9-12. HUD RESPONSIBILITIES. The Field Office is responsible for ensuring that the PHA, in accordance with the terms of the ACC, is enforcing the architect's contract and the construction contract, including the construction documents. See paragraph 11-13 regarding inspections by the Field Office. The Field Office shall provide technical assistance and guidance to the PHA concerning contract administration and enforcement, reporting, interpretation of construction documents and other related matters.

Section 5. General Requirements

9-13. SUBCONTRACTORS. All contracts between the contractor and any subcontractors shall contain the equal opportunity employment requirements and the prevailing wage rate requirements.

a. Identification. Each general contractor shall prepare and submit Form HUD-5371, Request for Acceptance of Subcontractor, to the PHA for approval before executing any subcontract. A separate Form HUD-5371 and non-collusive affidavit shall be submitted for each subcontractor, including suppliers of special fabricated materials for which shop drawings are required.

b. PHA Review. Within 10 calendar days of receipt of Form HUD-5371, the PHA shall return the completed form to the general contractor indicating PHA approval or disapproval. The PHA shall not approve any subcontractor whose name appears on the HUD Consolidated List of Debarred, Suspended or Ineligible Contractors and Grantees. The PHA, in consultation with its architect, shall disapprove the use of a specific subcontractor only for justifiable cause. A copy of each completed Form HUD-5371 shall be sent to the: PHA contracting officer, whether approved or disapproved; and PHA architect, only if approved.

c. Stop work. The PHA shall notify the general contractor in writing to have a subcontractor stop work if such work is started before PHA approval of the subcontractor. The PHA also shall indicate that this is a violation of the contract and that the general contractor is liable for any losses or delays.

d. Field Office Monitoring. The Maintenance Engineer shall periodically evaluate the reasons for PHA disapproval of subcontractors through on-site review of PHA files. If deficiencies are found, the Field Office monitoring letter (see paragraph 11-13a(3)) may require the PHA to forward copies of each completed Form HUD-5371, where disapproved, to the Field Office.

9-14. CONTRACTOR PAYROLL. The contractor is responsible for paying the correct wage rates to all employees engaged in work under the contract and ensuring that any subcontractors also pay the correct wage rates (see paragraph 6-8). The contractor is no longer required to submit Form HUD-5282, Certificate from Contractor Appointing Officer or Employee to Supervise Payment of Employees.

a. Payroll Report. The contractor shall submit a certified payroll report and compliance statement to the PHA each week during the contract period, i.e., from execution of the contract to contract completion and acceptance by the PHA. A separate payroll report shall be submitted for the contractor and each subcontractor.

b. Payroll Forms. The contractor's report may be submitted on the Payroll Form (WH-347) and Statement of Compliance (WH-348). Such forms may be obtained from the Government Printing Office, Washington, D.C. 20402. The contractor may substitute computer generated forms, instead of the Payroll Form (WH-347), provided that all of the required information is included.

c. Retention. The PHA shall retain all payroll reports for three years from the date of contract completion and acceptance by the PHA.

9-15. AS-BUILT DRAWINGS. The general contractor is responsible for providing all necessary information to the PHA architect in order that the PHA architect may prepare the as-built drawings. The PHA architect shall provide the PHA with a copy of the as-built drawings for its file upon contract completion. These drawings shall include all significant deviations from the working drawings approved by the PHA or the Field Office.

9-16. CHANGE ORDERS.

a. Content. Changes in contract work shall be documented by a change order. A change order is a written agreement, executed by all parties to the contract, which describes the changes in work to be performed. Change orders shall be prepared in the form prescribed by the Field Office and shall include the following:

(1) a detailed description of the proposed change in work;

(2) a reference to the applicable working drawings and specifications;

(3) a fixed price (credit, debit, or no change) for the change in contract work;

(4) an estimate of any additional time required to complete the work;

(5) the contractor's itemized breakdown of the cost of materials and labor and an itemized breakdown for any applicable subcontractors; and

(6) the change indicated on the architectural drawings, if applicable.

b. PHA Register. The PHA shall maintain a separate change order register for each contract. This is required to provide a permanent record of all actions taken in connection with each contract. The register shall identify:

(1) the change order number;

(2) a brief description of the change;

(3) the cost of the proposed change;

(4) the date submitted to the Field Office, if applicable;

(5) any critical deadline dates that must be met by the Field Office;

(6) if applicable, the date of Field Office approval or disapproval and the action taken; and

(7) the amount of any additional time required by the contractor.

c. Certification. The PHA may order or agree to a change order without prior Field Office review and approval, unless the change order, when added to previously approved change orders, would exceed the latest HUD-approved budget amount or the dollar threshold that may have been established by the Field Office (see paragraph 7-1). Where HUD approval is not required, the designated PHA official shall certify in writing that:

(1) The proposed work is not included in the scope of the contract;

(2) The proposed work is necessary and economical;

(3) The proposed work is consistent with the Modernization Standards or the intent of the Minimum Property Standards, whichever applies;

(4) The proposed work cannot practicably be performed under a separate contract after completion of the contract;

(5) Any additional time required for the proposed work is reasonable; and

(6) Any additional costs can be approved within the latest approved budget and do not, when added to other change orders previously approved by the PHA, exceed the HUD-established threshold.

d. HUD-Established Threshold. Based on an assessment of the PHA's past performance and in-house technical capability, the Field Office may establish a dollar or percentage threshold over which the PHA shall submit change orders for prior Field Office review and approval. For modernization programs approved before FFY 1982, where contract work is not yet complete, the HUD-established threshold shall apply.

(1) Criteria. In determining the appropriate dollar or percentage threshold for PHA submission, the Maintenance Engineer shall consider the following criteria:

(a) Past Performance in Reviewing Change Orders. In the past:

1 Proposed work has not been included in the scope of the contract;

2 Proposed work was a necessity and in the PHA's interest;

3 Proposed work was consistent with the Modernization Standards or the intent of the Minimum Property Standards, whichever applies;

4 Proposed work could not practicably be performed under a separate contract after completion of the contract;

5 Any additional time required for the proposed work was reasonable; and

6 Any additional costs were approved within the latest approved budget.

(b) In-House Technical Capability. The PHA has a staff architect/engineer or experienced staff who are capable of reviewing and approving/disapproving change orders.

(2) Notification to PHA. After completing the assessment, the Maintenance Engineer shall prepare a letter for the signature of the Field Office Manager or designee, advising the PHA of the established dollar or percentage threshold over which change orders are required to be submitted for prior Field Office approval and the reasons.

e. Submission. Where required, except in an emergency endangering life or property, the PHA shall submit change orders to the Field Office, Attention: Chief, AHM Branch, for review and approval before ordering or agreeing to any changes in the contract work.

9-17. HUD REVIEW AND APPROVAL OF CHANGE ORDERS.

a. Review. Where submitted by the PHA, the Maintenance Engineer shall conduct a prompt review because changes often affect work progress. If the review indicates that the change is due to an act by the contractor contrary to, or failure to act in accordance with, the terms of the contract, or a mistake by the PHA architect in preparation of the construction documents not to be expected under professional standards or other laxity in carrying out the terms of the contract causing monetary damage to the PHA, the Maintenance Engineer shall consult the Regional or Chief Counsel for legal advice as to where responsibility lies. The Maintenance Engineer shall recommend action that is consistent with this legal advice. The Maintenance Engineer shall consult with the HMO regarding any required revisions to the program budget. To recommend approval, the Maintenance Engineer shall determine that the proposed change meets the criteria in paragraph 9-16c.

b. Action. The Field Office review shall be completed and the PHA advised of the results within 10 calendar days of receipt of the change order. If the change order is approvable, the Director, Housing Management Division, or designee, shall approve the change order. If the change order is not approvable, the Maintenance Engineer shall prepare a letter to the PHA for the signature of the Director, Housing Management Division, or designee, advising the PHA of the reasons for disapproval.

c. Monitoring. The Maintenance Engineer shall periodically review change orders approved by the PHA and the PHA register through on-site review of PHA files. If deficiencies are found, the Field Office monitoring letter (see paragraph 11-13a(3)) may require the PHA to submit proposed change orders over an established or reduced threshold to the Field Office for review and approval before issuance.

9-18 TIME EXTENSIONS. The contractor is responsible for completing the work within the time established in the contract. However, the PHA may authorize any time extensions without prior Field Office review and approval.

a. PHA Records. Upon contract completion, the PHA shall determine the number of calendar days and reasons for any delays beyond the date established in the contract. The PHA shall maintain a record of potential causes for delays which will be used as the basis for granting time extensions or for determining the amount of liquidated damages to be assessed against the contractor. The PHA shall maintain a record of the following:

(1) the daily temperature;

(2) the daily amount of precipitation;

(3) delays in obtaining labor and materials, including the duration and reason;

(4) labor disputes or strikes, including the duration, and the applicable construction trade;

(5) delays experienced by others in completing non-contract public improvements (whether on-site or off-site); and

(6) other causes for delays, such as fires, floods, vandalism or court orders.

b. Basis for Time Extensions. In order to be considered for approval by the PHA, requests for time extensions must meet the following criteria:

(1) the contractor must have submitted a written notice to the PHA within [illegible] calendar days of the start of any delay;

(2) the severity and extent of adverse weather could not have been reasonably foreseen by the contractor (normal seasonal levels of rain, snow, cold or heat should have been considered by the contractor) or the cause of the delay was beyond the contractor's control; and

(3) any additional cost attributable to the delay is being borne by the contractor.

c. Contractor Request. Immediately upon receipt of the contractor's notification of delay or request for time extension, the PHA shall send a letter of acknowledgement to the contractor. The letter shall indicate that: immediate consideration will be given to the contractor's request; or the actual delay in work is difficult to determine and consideration will be given to the contractor's request upon completion of work.

d. PHA Finding of Fact. The PHA shall review its records to ensure that the information provided by the contractor is accurate, to determine the cause of the delay and the extent that it was within the contractor's control, and to ascertain if the request meets the criteria established in subparagraph b. Based on its review, the PHA shall prepare a "finding of fact" with the assistance of its architect and attorney and, in order to approve, determine that:

(1) the contractor's request, as documented by the "finding of fact," meets the requirements of subparagraph b;

(2) the additional time requested by the contractor is reasonable based on the nature and duration of the delay; and

(3) if there is some question of the contractor's liability for the delay, the PHA "finding of fact" shall be reviewed in accordance with paragraph 9-19.

9-19. DISPUTES AND CLAIMS. The PHA shall promptly notify the Field Office of any problems or disputes experienced during modernization which could result in a claim by its architect or the contractor. This may include claims for extra costs due to delays, claims for time extensions or extra costs based on PHA actions, or claims resulting from contract changes.

a. PHA Records. It is imperative that the PHA maintain a complete written and dated record of any actions that may result in a dispute or claim for damages. This is required to protect the PHA interest during any litigation proceedings that may subsequently arise. In such instances, the PHA shall, at a minimum, maintain the following: a complete and detailed job record; a disputes and claims file, crossreferencing other pertinent files, for each dispute or claim; and any correspondence relating to the dispute, including written minutes of any meetings, which identify actions taken by the PHA, its architect or contractor, and decisions or agreements made concerning the dispute.

b. Contractor Notice. The contractor must submit a written notice of claim to the PHA within 10 calendar days from the date of the incident on which the claim is based. The contractor's initial notice must identify the nature and scope of the claim, including extra costs sought by the contractor. The contractor will subsequently be required to submit a detailed description and supporting evidence for the claim.

c. PHA Acknowledgement. Immediately upon receipt of the contractor's notice, the PHA shall date stamp the notice and shall send a letter to the contractor acknowledging receipt of the claim. The PHA's letter also shall indicate that: if the claim was filed within the 10-day period, the contractor is required to submit a detailed justification for the claim; or if the claim was not filed within the 10-day period, the contractor's claim is not eligible for consideration.

d. PHA Finding of Fact. The PHA shall review its records to ensure that the information provided by the contractor is accurate. Based on its review of the contractor's claim and its knowledge of the circumstances, the PHA shall prepare a "finding of fact" with the assistance of its architect and attorney and submit its recommendations for a determination by the Field Office.

e. Field Office Approval. The Maintenance Engineer, in conjunction with the Regional or Chief Counsel, shall review the PHA "finding of fact" and proposed disposition of the claim. In making this review, consideration shall be given to the contractor's claim and the PHA recommendations in light of the obligations of both parties under the contract. Upon completion of the review, the Maintenance Engineer shall prepare a letter for the

signature of the Director, Housing Management Division, or designee (with the concurrence of Counsel), instructing the PHA to promptly:

(1) notify the contractor of the PHA decision (as approved by the Field Office);

(2) if applicable, request the PHA architect to prepare a change order to reflect any modifications to the contract as a result of the decision; and

(3) notify the Field Office, if the Field Office decision is not acceptable to the PHA; or

(4) notify the Field Office, if the contractor does not accept the decision. If court action is taken, the PHA shall submit a copy of the contractor's assertions to the Field Office.

Section 6. Construction Requirements

9-20. CONSTRUCTION PROGRESS SCHEDULE.

a. Contractor Schedule. Where partial payments are necessary, the PHA shall require the contractor to prepare a construction progress schedule, for each project immediately after PHA issuance of the notice to proceed. The PHA may require use of Form HUD-5372, Construction Progress Schedule, or other appropriate form from various professional organizations. The information shall be realistic and consistent with the information provided by the contractor on the PHA-approved schedule of amounts for contract payments.

b. PHA Review and Approval. The PHA or its architect shall review the contractor's construction progress schedule to determine that the scheduled dates and amount of work to be completed are reasonable and consistent with the contract. If acceptable, the PHA architect shall sign the schedule and forward it to the PHA for approval. Upon approval by the PHA, the approved construction progress schedule shall be returned to the contractor.

c. Field Office Monitoring. The Maintenance Engineer shall periodically review PHA-approved construction progress schedules through on-site review of PHA files. If deficiencies are found, the Field Office monitoring letter (see paragraph 11-13a(3)) may require the PHA to forward copies of approved schedules to the Field Office.

9-21. SCHEDULE OF AMOUNTS FOR CONTRACT PAYMENTS.

a. Contractor Schedule. Where partial payments are necessary, the PHA shall require the contractor to prepare a schedule of amounts for contract payments immediately after execution of the contract. The PHA may use Form HUD-51000a, Schedule of Amounts for Contract Payments, or other appropriate form from various professional organizations.

b. PHA Review and Approval. The PHA and its architect shall review the schedule to determine that the scheduled work to be completed by the specified dates and the amount of payment for such work are reasonable. If acceptable, the PHA shall approve and return the approved schedule to the contractor. Field Office review is not required.

c. Field Office Monitoring. The Maintenance Engineer shall periodically review PHA-approved payment schedules through on-site review of PHA files. If deficiencies are found, the Field Office monitoring letter (see paragraph 11-13a(3)) may require the PHA to submit future payment schedules in all or specified instances to the Field Office for prior review and approval.

9-22. CONTRACT PAYMENTS. The PHA is responsible for making progress payments to the contractor based on the PHA-approved schedule of amounts for contract payments. Generally, progress payments for acceptable work and materials delivered and stored on the site are made at 30-day intervals. Field Office authorization of progress payments, based on the approved payment schedule, is not required.

a. Contractor Request for Payment. The contractor shall submit a request for payment for each project on Form HUD-51001, Periodical Estimate for Partial Payment, or other appropriate form from various professional organizations. The request shall be accompanied by the contractor's written designation of a certifying officer. In addition, the contractor shall submit the following HUD forms or other appropriate forms, if applicable, with each periodical estimate for partial payment: Form HUD-51002, Schedule of Change Orders; Form HUD-51003, Schedule of Materials Stored; and Form HUD-51004, Summary of Materials Stored.

b. PHA Review and Approval. The PHA shall review each contractor request and shall approve the advance if the following conditions have been met. If the contractor

requests payment for items which have not been acceptably completed, the PHA shall delete those items and adjust the payment accordingly.

(1) the contractor request is consistent with the PHA-approved schedule of amounts for contract payments;

(2) the request does not include the amount to be retained by the PHA under the contract;

(3) the work covered by the payment has been performed in accordance with the construction documents;

(4) the periodical estimate for partial payment has been properly executed and all applicable supporting documentation submitted; and

(5) the contractor has submitted all required reports, e.g., payroll reports.

c. Distribution of Documents. The PHA shall retain the original periodical estimate for partial payment and any applicable supporting documentation for its file and return a copy of the PHA-approved forms to the contractor.

9-23. SHOP DRAWINGS AND MATERIALS. Where appropriate to the particular type of modernization being undertaken, the contractor shall prepare and submit shop drawings and material samples in accordance with the agreements reached at the construction conference.

a. Contractor Submission. The contractor is responsible for preparing and submitting shop drawings to the PHA or its architect. The contractor's letter shall list the shop drawings being submitted and state whether the shop drawings deviate from the approved construction documents. Each shop drawing shall include: a descriptive title and drawing number; a brief description of the work involved; the project number and name; the contractor's and any subcontractor's name; and evidence of the contractor's approval.

b. PHA Architect's Approval. The PHA architect shall review the shop drawings to determine whether they are consistent with the construction documents. The architect shall require that any corrections be made before approval. Upon approval, the architect shall:

(1) sign and date each shop drawing and include the following statement: "This shop drawing is approved, but the contractor shall verify and shall be responsible for all related documents and job conditions on the work."

(2) send a letter to the contractor indicating that the shop drawing was approved and advising the contractor that:

(a) "This approval of the enclosed shop drawing is general and does not relieve the contractor of the responsibility for adherence to the contract, nor is the contractor relieved of the responsibility for any error which may exist;" and

(b) if applicable, "The modification shown on the enclosed shop drawing is approved in the interest of the PHA to effect an improvement for the project and is ordered with the understanding that it does not involve any change in the contract price or time; it is subject to all contract stipulations and covenants; and it is without prejudice to any and all rights of the PHA under the contract and bond."

c. Distribution of Documents. The PHA architect shall retain a copy of the approved shop drawing and forward a copy to the contractor and the PHA.

d. Samples. The contractor shall submit certificates, material samples, and test results to the PHA architect for approval. The PHA architect shall advise the contractor of the reasons for any disapproval and request that another sample be submitted. Approved samples and data shall be retained both at the PHA office and the project office for comparison during construction.

9-24. LIQUIDATED DAMAGES. The contractor is responsible for completing the project within the time established in the construction contract unless time extensions are authorized in accordance with paragraph 9-18. If the work is not completed by the contract date, the contractor shall be liable for liquidated damages resulting from such unexcused delays.

a. Finding of Fact. The PHA shall prepare a "finding of fact" under paragraph 9-18 and submit it to the Field

Office for review and approval. The PHA "finding of fact" shall identify the amount of liquidated damages to be assessed against the contractor and the basis used in determining the amount. Liquidated damages shall be assessed at the rate established in the contract and shall be withheld from any payment due the contractor.

b. Field Office Approval. The Maintenance Engineer, in consultation with the Field Counsel, shall review the PHA "finding of fact" to determine whether the contractor is responsible for the delay and the amount of damages established by the PHA is reasonable. Upon completing this review, the Maintenance Engineer shall prepare a letter for the signature of the Director, Housing Management Division, or designee, advising the PHA to: send a letter to the contractor identifying the amount of liquidated damages being assessed and the reasons; send a letter to the contractor's bonding company identifying the amount of liquidated damages being assessed on the contractor; and send copies of both letters to the Field Office.

Section 7. Contract Completion and Settlement

9-25. EARLY OCCUPANCY. The PHA may accept part of a project for occupancy before contract settlement where the following conditions are met:

a. The dwelling units to be accepted (except items approved for delayed completion) have been completed and are ready for occupancy;

b. The general contractor agrees to early occupancy and completion of items approved for delayed completion;

c. Early occupancy will not unduly inconvenience or represent a safety risk to tenants while the unfinished work is being completed;

d. The PHA has obtained occupancy permits from the responsible local agency for each unit to be accepted; and

e. The PHA has executed an occupancy agreement with the general contractor indicating that the PHA partially accepts specified work provided that the contractor accepts the responsibility to complete the project by the established completion date.

9-26. FINAL INSPECTION. The contractor shall provide prompt written notification to the PHA when all work is completed. A final project inspection shall be made when all work is completed. Until the final inspection has been made, the PHA shall not advance any of the retainage or make the final payment to the contractor.

a. Inspection Date. Upon receipt of the contractor's notification of the date when the work has been completed, the PHA shall conduct a final inspection within 10 calendar days. The PHA shall notify the Maintenance Engineer of the scheduled inspection date.

b. Inspection Participants. The final inspection shall be conducted by: a PHA representative; the PHA architect, where applicable; the Field Office Maintenance Engineer, where necessary; and a contractor representative.

c. Inspection Conference. The inspection team shall meet after completing the final inspection to determine whether: the work has been completed in accordance with the construction documents; there are any minor items of incomplete or unsatisfactory work (or seasonal work such as planting of shrubs and lawns) and reach agreement on the items to be included on the PHA's or its architect's final punch list; or there are any major deficiencies which must be corrected by the contractor so that another final inspection can be made before contract settlement.

9-27. SETTLEMENT DOCUMENTS. Following final inspection, the PHA shall notify the contractor to submit the following documentation to the PHA:

a. Where appropriate, a certificate of occupancy issued by the responsible local agency for each building;

b. One notarized original and two copies of the contractor's release and certification which indicates:

(1) the work was completed in accordance with the construction documents (including change orders), except any minor items identified on the PHA's or its architect's proposed certificate of completion;

(2) the total amount due the contractor and a separately stated amount for each unsettled claim against the PHA;

(3) the PHA is released of all claims, other than those stated in the contractor's release; and

(4) wages paid to laborers or mechanics were consistent with the wage rate requirements of the contract and there are no outstanding claims for unpaid wages.

c. Assignment of all guarantees and warranties to the PHA; and

d. "Final" periodical estimate for partial payment.

9-28. PHA SUBMISSION AND HUD APPROVAL.

a. PHA Submission. The PHA shall submit a copy of the following to the Field Office, Attention: Chief, AHM Branch, for approval: all settlement documents identified in paragraph 9-27; and the proposed certificate of completion.

b. Review by Maintenance Engineer. Upon receipt of the contract settlement documents, the Maintenance Engineer shall conduct a prompt review. To recommend approval, the Maintenance Engineer shall determine that: all work has been completed in accordance with the construction documents; the proposed certificate of completion is acceptable; and the amount to be withheld from the contractor is sufficient to complete any items on the PHA's or its architect's punch list, including seasonal work.

c. Review by Labor Relations Staff. After review, the Maintenance Engineer shall notify by form letter to the Labor Relations staff that the contract settlement documents are in and request sign off on the form letter if there are no problems. If there are problems, the Labor Relations staff shall indicate what they are and when they may be resolved.

d. Action. The Field Office review shall be completed and the PHA advised of the results within 10 calendar days of receipt of the contract settlement documents. If the documents are in order, the Maintenance Engineer shall forward the certificate of completion to the Director, Housing Management Division, or designee, for signature and shall promptly return the original to the PHA.

9-29. PAYMENT TO CONTRACTOR. Upon receipt of the approved certificate of completion, the PHA is authorized to make

payment to the contractor of the amounts approved by the Field Office.

a. Contract Payment. The PHA payment to the contractor shall be the amount specified in the certificate of completion and shall not include any amount to be retained for: warranty retainage or disputed items; and incomplete work, such as punch list or seasonal items.

b. Final Payment. The PHA is not authorized to make final payment of any amounts withheld without prior Field Office approval. When punch list or seasonal work items are completed, the PHA shall prepare a revised certificate of completion for Field Office approval.

9-30. WARRANTY INSPECTIONS. The PHA is responsible for performing required warranty inspections during the warranty period and promptly notifying the contractor in writing to remedy any defects relating to manufacturer or contractor warranties on equipment and systems and contractor warranty on materials and workmanship.

a. Contractor Responsibility. Upon receipt of PHA written notice, the contractor shall promptly remedy any defects due to the use of faulty equipment or materials, or poor workmanship. The contractor also is responsible for paying for any damage to other work resulting from such defects.

b. Warranty Period. The warranty period for all construction work shall be at least 365 calendar days from the date specified on the certificate of completion that is applicable to the work in question or such longer period as otherwise specified in the contract.

Section 8. Contracts for Management Improvements

9-31. DETERMINATION OF NEED. During the Joint Review, the PHA and the Field Office shall reach agreement upon the PHA's need for the professional services of a consultant or consulting firm in the identification of management problems and their causes and/or the development and implementation of appropriate solutions.

9-32. SELECTION PROCESS. The PHA shall obtain professional consultant services by issuing a Request for Proposals (RFP), identifying the two or three most highly qualified consultants or consulting firms, and then negotiating a contract with the

most highly qualified consultant who will provide the required services at a fair and reasonable cost.

a. PHA Preparation of RFP. The PHA shall prepare the RFP which shall contain: a brief description of the PHA and the project(s) to be modernized; the general scope of the management improvements; the specific consultant services required; the time frame for provision of the services; the submission deadline; and the PHA contact person. The RFP shall request the consultant, if interested, to respond with a proposal that demonstrates an understanding of the required services, provides evidence of the firm's ability to perform the services and profiles of the firm's principles, staff and facilities, provides a cost estimate, and includes a completed Form HUD-2530, Previous Participation Certificate marked "Modernization."

b. PHA Submission of Proposed RFP. The PHA shall submit the RFP to the Field Office, Attention: Chief, AHM Branch, for review and approval before issuance.

c. Field Office Review and Approval. The Field Office review shall be completed and the PHA advised of the results within 15 calendar days of receipt of the RFP. When the RFP is in order, the Housing Management Officer (HMO) shall prepare a letter to the PHA for the signature of the Director, Housing Management Division, or designee, indicating approval, with or without modification, and authorizing the PHA to issue the RFP.

d. PHA Issuance of RFP. Upon receipt of the Field Office approval letter, the PHA shall immediately issue the RFP through: public announcement in local newspapers and, if appropriate, in national publications; direct requests to consultants in the PHA's files which the PHA or other PHAs have previously retained; and direct requests to local associations of minority consultants.

e. PHA Evaluation of Proposals. The PHA shall evaluate all responses to the RFP and eliminate those that are obviously unqualified to provide the required services. The PHA shall select the two or three most highly qualified consultants, in terms of their professional competence and experience, capability to provide professional services in a timely manner, and general response to the RFP. The PHA shall then meet with each of the two or three selected consultants to discuss the required services in greater depth and the consultant's ideas about carrying out the

required services. After these meetings, the PHA shall select the most highly qualified consultant at the best possible price and reach agreement on specific tasks and costs. Any changes to the required services stated in the RFP, as a result of the negotiations, shall be incorporated into the contract.

9-33. PHA SUBMISSION AND HUD APPROVAL.

a. PHA Submission of Proposed Contract. Upon selecting and reaching agreement with the consultant, the PHA shall immediately transmit Form HUD-2530 to the Field Office, Attention: PCR. The PHA then shall prepare and submit the proposed contract to the Field Office, Attention: Chief, AHM Branch, for review and approval before execution.

b. Previous Participation Review. Upon receipt of Form HUD-2530, PCR shall distribute Form HUD-2530 and Form HUD-2530-RC, Report Card, to appropriate Field Office staff for review and comment. Within 5 working days, PCR shall notify the Chief, AHM Branch, of any comments received on the Report Cards. If there are adverse findings, the Director, Housing Management Division, or designee, shall review and discuss the findings with appropriate Field Office staff, including the Field Counsel. In all cases, the Director, Housing Management Division, or designee, shall immediately transmit Form HUD-2530 and related documents to the Participation Control Officer in Headquarters for determination. In addition, the HMO shall check the HUD Consolidated List of Debarred, Suspended or Ineligible Contractors and Grantees to ensure that the consultant is not on the List.

c. Field Office Technical Review and Approval. The HMO shall review the proposed contract and prepare a letter to the PHA for the signature of the Director, Housing Management Division, or designee, advising the PHA of any required changes or authorizing the PHA to proceed with execution. To recommend approval, the HMO shall determine that the consultant is approved under the previous participation review process and the debarment check and that the proposed contract contains:

(1) a clear statement of the specific services, including tasks, to be performed;

(2) a description of the methodology to be used in carrying out the services;

(3) an identification of the type and frequency of written reports to be provided to the PHA;

(4) a time frame for completion of all services that is related to and coordinated with the physical improvements;

(5) a payment schedule that is related to the successful completion of specific tasks; and

(6) a total cost that is fair and reasonable. Where the total cost exceeds the approved budget amount and adjustments can be made within the existing budget, the PHA shall be required to submit a revision to the program budget.

d. PHA Contract Execution. Upon receipt of the Field Office approval letter, the PHA shall immediately execute the contract.

e. Contract Changes. The PHA shall not order or agree to any changes in the contract work without the prior written approval of the Field Office. Change orders shall include a description of the proposed change in work, a fixed price (credit, debit or no change) for the change, and an estimate of any additional time required to complete the work. Upon receipt of the change order, the HMO shall review the change and advise the PHA in writing of the results within 10 calendar days.

9-34. ABANDONMENT OR TERMINATION. In the event of abandonment of the project or termination of the contract for any cause, under the respective sections of the contract, the terms of any settlement between the PHA and the consultant shall be subject to Field Office approval. The PHA shall not disburse any monies to the consultant after the giving of notice of abandonment or termination until the Field Office has approved the settlement agreement.

CHAPTER 10. MODERNIZATION FINANCING

10-1. SEPARATE BANK ACCOUNT.

a. Requirement. A PHA with over 500 units in management shall establish a separate General Fund bank account for modernization. The Field Office may require a PHA with 500 or less units in management to establish a separate bank account for modernization, where the Field Office determines, on the basis of a fiscal audit or year-end financial reports, that the PHA has expended modernization funds for purposes other than modernization. The PHA Books of Account shall shall reflect this as Account 1111.3, Cash - General Fund (Modernization). The PHA shall transfer to this account all modernization funds in Account 1111.1, Cash - General Fund, at the time the special modernization account is established.

b. Establishment. If the modernization account is established in a bank in which the PHA already has an account, the PHA shall complete Form HUD-274, Designation of Depositary for Direct Deposit of Loan and/or Grant, and forward this form to the Regional Director, Office of Housing, or the Regional Project Financing Specialist (PFS). If the modernization account is established in a bank in which the PHA does not currently have an account, the PHA shall complete Form HUD-274 and enter into a depository agreement with the new bank on Form HUD-51999, General Depository Agreement, and forward these forms to the Regional PFS.

10-2. HUD CONTROLS.

The Financial Management Specialist (FMS) shall:

a. Keep appropriate financial records on the total funds provided by project for each modernization program approved after June 30, 1975 and on the total funds provided by Modernization Project after modernization as a separate project was implemented (July 1, 1978). See Sample Modernization Requisition for Funds Control Log, attached as Appendix 20;

b. Consult with the Housing Management Officer (HMO) and the Maintenance Engineer regarding the PHA's need for funds and with the Regional PFS regarding the method of financing; and

c. At the beginning of each Federal Fiscal Year (FFY), obtain from the Regional PFS a listing of all the project note sales scheduled for the coming year.

10-3. METHOD OF FINANCING. Modernization funds shall be provided to PHAs primarily through the sale of tax-exempt project notes in the private market, rather than through direct advances from the United States Treasury, which are subject to much higher interest rates. Adequate planning is essential.

a. Project Notes. For most PHAs, note sales shall be scheduled at least twice a year to provide modernization funds. In this way, the PHA shall only estimate cash needs for a six-month period. For PHAs with large amounts of approved modernization funds or poor past performance in correctly estimating cash needs, at least quarterly note sales shall be scheduled so that the time period for estimating cash needs is reduced from six to at most three months. This should limit the overestimates of cash needs where large sums of monies are involved. At least 6 to 8 weeks in advance of the advertising date, shown on the latest Private Market Financing Schedule, of the next regularly scheduled note sale, the Field Office shall evaluate whether funds provided in the previous note sale were inadequate, adequate or excessive and make adjustments accordingly in the PHA's estimate of need for the next time period. See paragraph 10-6.

b. Direct Advances. Direct advances shall only be approved where the PHA has an immediate cash need that cannot be delayed until the next possible note sale and if the total amount of the PHA's outstanding direct advances, when added to the amount of direct advances currently requested, does not exceed $400,000. Direct advances shall be repaid at the next note sale.

10-4. PHA ASSESSMENT OF NEED AND REQUEST.

a. PHA Assessment of Need. The PHA shall continually reassess its current needs for modernization funds and project cash requirements, based upon actual work progress in comparison with planned work progress. The PHA shall not request, and the Field Office shall not approve, funds in excess of need for the time period.

b. PHA Request. Whenever the PHA needs modernization funds, it shall consult with the Field Office as to the amount needed for the time period, the immediacy of need, and the method of financing (project notes or direct advances). After agreement is reached with the Field Office, the PHA shall submit a signed original and two copies of Form HUD-

5402, Requisition for Funds, and supporting justification to the Field Office, Attention: Chief, Assisted Housing Management (AHM) Branch.

(1) Form HUD-5402. The PHA shall prepare a separate Form HUD-5402 for modernization funds being requisitioned through the sale of project notes and through direct advances, each identified on the heading as "Modernization - Project Notes" or "Modernization - Direct Advances." Where required to have a separate bank account, the PHA shall enter its modernization account number on Form HUD-5402.

(a) For modernization programs approved before modernization as a separate project was implemented, the PHA shall enter the number and amount requested for each project. The PHA also shall insert the letter "M" after each project number, e.g., Conn-22-4M. If funds are being requested for more than one modernization program or phase involving the same project, the PHA shall enter the total amount requested for the project. A single Form HUD-5402 may cover more than one project if all of the projects are under the same consolidated ACC.

(b) For modernization programs approved after modernization as a separate project was implemented, the PHA shall enter the number and amount requested for each Modernization Project. A single Form HUD-5402 may cover more than one Modernization Project if all of the Modernization Projects are under the same consolidated ACC.

(c) A single Form HUD-5402 may cover projects included in modernization before modernization as a separate project was implemented and Modernization Projects, if both types of projects are under the same consolidated ACC. Completed samples of Form HUD-5402 are attached as Appendices 21 and 22 for project notes and direct advances, respectively, and may be used as guides in preparation.

(2) Supporting Justification. The supporting justification relates to the amounts requested for each project included in modernization before modernization as a separate project was implemented and for each Modernization Project. The following format is required:

Phase No. or Mod Project No.	Project No. if Appropriate	Amount Requested: Direct Advances	Project Notes	Total	Reasons
78-05	1-1	-0-	35,000	35,000	Kitchen contract awarded 7/1
	1-3	-0-	75,000	75,000	Force account work started on grounds
VA-1-901	-	15,000	45,000	60,000	Equipment to be purchased 7/15
		$15,000	$155,000	$170,000	

10-5. REQUIRED DOCUMENTS. The Field Office shall not process any requests for modernization funds unless there are:

a. Final Application approved by the Field Office Manager;

b. Form HUD-5079, Modernization List, signed by the Field Office Manager;

c. Form HUD-53009, Modernization Project Amendment to Consolidated ACC, or Form HUD-53008, Modernization Project Amendment to Consolidated ACC for Modernization of Section 23 Leased Housing Bond-Financed Projects, entered into by the PHA and executed by the Field Office Manager;

d. Form HUD-52250, Permanent Note, executed by the PHA;

e. Form HUD-274 and, if necesary, Form HUD-51999, completed by the PHA and forwarded to the Field Office, where required;

f. Latest required quarterly reports submitted by the PHA, under Section 2 of Chapter 11, unless the first required reports are not yet due; and

g. Overdue fiscal audit submitted by the PHA and approved by HUD.

10-6. HUD EVALUATION OF PHA NEED AND REQUEST. The FMS, in consultation with the HMO and the Maintenance Engineer, shall evaluate the PHA's need for modernization funds on the basis of the latest required progress reports and the on-site inspections of work progress and quality. The FMS shall consider the following questions to determine if the PHA has a genuine and legitimate need for funds and what amount is reasonable and appropriate for the time period:

a. Is the modernization work proceeding according to the planned schedule? If so, does the amount requested reasonably reflect the planned expenditures for the time period?

b. If the modernization work is not proceeding according to the planned schedule, has the amount requested been revised downward or upward to reflect that actual expenditures will probably be less or more than planned expenditures for the time period?

c. Has the PHA been previously provided modernization funds that it did not spend, thereby affecting the amount of funds needed in the future?

d. What amount of funds is necessary to enable the PHA to meet previously approved and accrued contractual commitments during the time period?

e. Does the amount requested for a Modernization Project (or project), together with the total amount previously provided for the Modernization Project (or project), exceed the amount in the latest approved ACC for the same Modernization Project (or project)? If so, the requested amount shall not be approved, but shall be adjusted downward to conform with an amount not to exceed the approved ACC amount.

f. Would the withholding of additional funds give HUD an effective means of curing any outstanding breaches, such as unsatisfactory PHA progress on any required management improvements, weak and ineffective program administration, poor work quality, noncompliance with any ACC provisions, or other deficiencies?

10-7. FIELD OFFICE PROCESSING. If the FMS determines in consultation with the Regional PFS that project notes or direct advances is the most appropriate way to provide modernization funds, the FMS shall advise the PHA to submit Form HUD-5402 and supporting justification. Upon receipt, the FMS shall review the documents

to ensure that the amounts requested do not exceed the amounts informally agreed to by HUD and the PHA, and are reasonable and justified. If Form HUD-5402 is in order, the FMS shall forward the original and one copy of Form HUD-5402 to the Chief, AHM Branch, for approval. The FMS then shall forward the approved original of Form HUD-5402 to the Regional PFS and retain the other copy in the AHM Branch files. The FMS shall work closely with the Regional PFS to correlate new entries on Form HUD-9202, Proposed Sale of Project Notes, with other outstanding note issues for the same PHA, provide for prompt repayment of any outstanding direct advances, and ensure the rapid processing of requests for funds by direct advances.

10-8. REGIONAL OFFICE PROCESSING. The Regional PFS is responsible for the coordination and operation of public housing financing activities within the Region, as follows:

a. Project Notes. Upon receipt of Form HUD-9202 from the Bond Financing Division in Headquarters, the Regional PFS shall forward a copy of Form HUD-9202 to the Field Office for review. The Regional PFS shall coordinate all entries or adjustments to Form HUD-9202 through review of Form HUD-5402 identified as "Modernization-Project Notes" which has been submitted by the Field Office and monitor the adequacy of the supporting financing documents. The Regional PFS also shall work closely with the Regional Counsel to determine need for any legal documents before financing.

b. Direct Advances. Upon receipt of Form HUD-5402 identified as "Modernization-Direct Advances" from the Field Office, the Regional PFS shall review the form and, if in order, and not exceeding $400,000, sign and forward the original Form HUD-5402 to the Office of Finance and Accounting (OFA), Attention: Director, Assisted Housing Accounting Division, Washington, D.C. The copy of Form HUD-5402 shall be retained in the Regional Office files. If the direct advance exceeds $400,000, the Regional PFS shall forward the original Form HUD-5402, with written justification, to the Director, Bond Financing Division, Headquarters.

10-9. INVESTMENT OF FUNDS. The PHA shall invest modernization funds as provided under the Low-Rent Housing Financial Management Handbook 7475.1, Chapter 4. Interest income earned from investment of modernization funds shall be an offset, to the extent required in Handbook 7475.1, against operating subsidy.

10-10. REMITTANCE OF EXCESS FUNDS.

a. Definition. Excess modernization funds are defined as those funds which have been provided to, but will not be obligated by the PHA: (1) within the next six-or-three-month period after a note sale, depending upon the note sale schedule of the PHA, when the funds were provided by note sale; or (2) between now and the next possible note sale where the funds were provided by direct advance. Excess modernization funds shall be remitted, on a temporary basis, by the PHA and may be requisitioned again at a later date without penalty in accordance with paragraph 10-4. Funds which are being permanently remitted, i.e., recaptured, are subject to the procedures set forth in Chapters 12 and 13.

b. Identification. The Field Office shall routinely assess the status of modernization funds previously advanced to PHAs to ensure that PHAs do not have excess funds. This assessment shall occur when the Field Office reviews Form HUD-9202, Proposed Sale of Project Notes, Form HUD-5402, Requisition for Funds, Form HUD-52826, Schedule/Report of Modernization Expenditures, and at any other time when the Field Office has reason to believe that the PHA has excess funds because of a lack of modernization process. See paragraph 10-6.

c. Consultation with Regional PFS. When the Field Office identifies excess modernization funds, the Field Office shall consult with the Regional PFS as to the closing date of the PHA's next note sale and the timing of the remittance (see subparagraphs g and h).

d. Written Commitment from PHA. After the Field Office has consulted with the Regional PFS on the timing of the remittance, the Field Office shall obtain a firm, written commitment from the PHA on the amount by Modernization Project to be remitted and the date of remittance. The project number shall be identified as 1-1M (for modernization approved before July 1, 1978) or as 1-901 (for modernization approved after June 30, 1978), not as the phase number (e.g., Phase V or 77-05). If the Field Office is unable to get this commitment from the PHA, the Field Office shall notify the Regional PFS and the Office of Public Housing, Headquarters.

e. Written Notification to Headquarters.

(1) When the Field Office has received the written commitment from the PHA, the Field Office shall provide the following information to the Director, Bond

Financing Division, Headquarters, with a copy to the Regional PFS:

PHA Name	Modernization Project Number	Amount to be Remitted	Date of Remittance*	Closing Date Of Next Note Sale
		(subtotal by PHA)		

*15 calendar days before closing date of note sale where excess funds were provided by note sale or immediately where excess funds were provided by direct advance.

(2) If there are any subsequent changes in the projects involved and the amounts to be remitted, the Field Office shall immediately notify, by telephone, the Regional PFS, who shall convey the changes, by telephone, to the Director, Bond Financing Division. The Field Office shall confirm the changes in writing to the Director, Bond Financing Division, with a copy to the Regional PFS.

f. Remittance by PHA. When the PHA is remitting excess modernization funds, the PHA shall make its check payable to the Department of HUD and prepare a cover letter explaining the amount by Modernization Project. The PHA shall mail the check and cover letter to the Department of HUD, Office of Finance and Accounting (OFA), GPA Deposit Center, Room 3110, 451 Seventh Street, S.W., Washington, D.C. 20410. The PHA shall send a copy of its check and cover letter to the Regional PFS and the Field Office. The Field Office is responsible for ensuring that the PHA remits the funds on time. Where OFA does not receive the check, the Bond Financing Division will follow up with the Regional PFS or the Field Office.

g. Remittance in Conjunction with Note Sale. If the excess funds were provided by note sale, the excess funds shall be remitted in conjunction with a note sale. The Regional PFS, before the advertising date of the note sale, is responsible for adjusting downward the amount(s) in Column j, PHA General Fund, of Form HUD-9202, by the amount(s) to be remitted. The Regional PFS shall make this adjustment after confirming again with the Field Office the correct amounts to be remitted by project for each PHA. All excess funds remitted in conjunction with

a note sale must be remitted 15 calendar days before the closing date to ensure that OFA has adequate time to process and record receipt of the check.

h. Remittance Not in Conjunction with Note Sale. If the excess funds were provided by direct advance, the excess funds shall be remitted immediately.

CHAPTER 11. MONITORING AND EVALUATION

Section 1. General

11-1. INTRODUCTION. This Chapter sets forth the responsibilities of the PHA and the Field Office in the monitoring and evaluation of approved modernization programs. The monitoring and evaluation system is comprised of three basic elements: (1) quarterly progress reports; (2) budget revisions; and (3) on-site inspections. The purpose of the system is to provide the PHA and HUD with the means for determining whether the modernization is progressing in an efficient and effective manner and, if not, what corrective actions must be taken.

11-2. PHA RESPONSIBILITIES. The PHA has the primary monitoring and evaluation responsibility. The PHA must be concerned with the quality of the physical and management improvement work, as well as with meeting planned fund expenditures and work progress schedules. If properly established and maintained, the system will enable the PHA to have current information about the progress of its modernization program, test the effectiveness of particular activities, take prompt action to remedy deficiencies, and conduct its own evaluation of program performance. See paragraph 9-11 regarding PHA responsibilities for construction contract administration.

11-3. HUD RESPONSIBILITIES. The Field Office Assisted Housing Management (AHM) Branch is responsible for ensuring that PHAs are carrying out their modernization programs in accordance with HUD-approved plans and schedules and applicable laws and regulations. See paragraph 9-12 regarding Field Office responsibilities for construction contract administration. The Field Office shall help PHAs identify problems or potential problems in program implementation, as well as the causes of problems, and help PHAs to correct them. The Field Office shall determine whether PHAs have a continuing capacity to carry out approved modernization programs and to implement additional modernization programs for which they may apply. The Modernization Coordinator is responsible for developing an overall plan and timetable for monitoring and evaluation of modernization programs. In addition, the FH&EO Division is responsible for monitoring on matters related to civil rights and equal opportunity.

Section 2. Quarterly Progress Reports

11-4. FOR MODERNIZATION APPROVED AFTER FFY 1974. The following reporting requirements apply to modernization programs approved

after FFY 1974. For modernization programs approved between FFYs 1975 and 1981, the PHA shall no longer report on Form HUD-52995, Modernization Quarterly Progress Report, but shall convert to and report on Form HUD-52826, Schedule/Report of Modernization Expenditures.

a. Form HUD-52826, Schedule/Report of Modernization Expenditures.

(1) Purpose. The purpose of Form HUD-52826, Schedule/Report of Modernization Expenditures, is to provide the PHA with a systematic method for recording and reporting its actual expenditures and for determining the current status of its program.

(2) PHA Preparation. Complete instructions for the preparation of Form HUD-52826 are contained in Appendix 23. The PHA shall report its progress against the Project Implementation Schedule in the "Comments" column of Form HUD-52826 (see paragraph 7-2).

(3) PHA Submission. The PHA shall submit Form HUD-52826 to the Field Office, Attention: Chief, AHM Branch, in an original and three copies (or any lesser number of copies as specified by the Field Office), no later than the 20th day of the month following the end of a quarter. The PHA shall continue to submit the form until the modernization program has been completed. When no further modernization funds will be expended for a particular project included in the Modernization Project, the PHA shall enter the letter "C" on the appropriate line of Part I of the form, indicating that it will be the last quarterly progress report submitted for that project.

b. Narrative Report on Management Improvement Progress. For modernization programs approved after FFY 1981, the PHA shall submit a quarterly narrative report, describing the current status of each management work item contained on Form HUD-52825, Comprehensive Assessment/Program Budget, including the numerical status where the performance goal was quantified. The PHA also shall describe any actions taken during the quarter toward accomplishment of the goal and explain any lack of progress or actions. For modernization programs approved between FFYs 1975 and 1981, the PHA shall submit a quarterly narrative report where management work items were included on Form HUD-52994, Modernization Work Program.

11-5. HUD REVIEW AND ACTION. For modernization programs approved after FFY 1974, the Field Office shall take the following actions:

a. Follow-up for Timely Receipt. The AHM Branch shall maintain a log of quarterly progress reports received. The HMO shall routinely telephone delinquent PHAs to remind them that their quarterly reports are overdue. No PHA request for modernization funds shall be processed until the latest required progress reports have been received and reviewed, unless the first required reports are not yet due (see paragraph 10-5f).

b. Review. Within 25 calendar days of receipt, the HMO and the Maintenance Engineer shall promptly review the quarterly progress reports for completeness and accuracy. The HMO and the Maintenance Engineer shall review the adequacy of the PHA's explanation of any lack of progress and the appropriateness of the PHA's planned or actual corrective action. The HMO also shall determine if Form HUD-52826 has been correctly filled out.

c. Action. If the HMO or the Maintenance Engineer finds the quarterly progress reports to be satisfactory, the HMO or the Maintenance Engineer shall so indicate on the reports. If the HMO or the Maintenance Engineer finds the quarterly progress reports to be incomplete, inaccurate or inadequate, the HMO or the Maintenance Engineer shall take all necessary steps, in writing, by telephone, or by personal visit, to reach mutual agreement with the PHA on corrective action. The HMO or the Maintenance Engineer shall document any follow-up actions taken, as well as the PHA responses, in notes to the file. The HMO shall consult with the Maintenance Engineer on the need for additional on-site inspections if the progress reports indicate serious problems.

11-6. INTERIM REPORTING SYSTEM.

a. Field Office Summary and Exception Reports.

(1) The Field Office shall consolidate all Forms HUD-52826 into a Field Office Summary Report on the status of all modernization funds approved after FFY 1974. Where a PHA does not submit its reports(s), the Field Office shall use the PHA's report(s) from the previous quarter. The Field Office shall prepare this Summary Report on Page 1 of Form HUD-52826 for FFYs 1975 through 1983, plus any ensuing FFY. See Appendix 24 for format.

The Field Office shall include all funds for a particular FFY, i.e., funds for incomplete as well as completed programs.

(2) The Field Office also shall prepare a Field Office Exception Report showing, for each PHA with unobligated funds over two years old or unexpended funds over three years old, the FFY of program approval, total funds approved, obligated, advanced and expended, the estimated program completion date, and the reasons for the unobligated/unexpended funds and the corrective actions being taken. See Appendix 25 for format. If the Field Office has no PHAs in these categories, the Field Office shall submit a negative report.

(3) The Field Office shall forward its Summary and Exception Reports to the Regional Director, Office of Housing, within 45 calendar days after the end of each quarter.

b. Regional Office Summary Report.

(1) The Regional Office shall consolidate the Field Office Summary Reports into a Regional Office Summary Report on the status of all modernization funds approved after FFY 1974. The Regional Office shall prepare its Summary Report on Page 1 of Form HUD-52826. See Appendix 26 for format.

(2) The Regional Office shall forward its Summary Report, along with copies of the Field Office Summary and Exception Reports, to Headquarters, Director, Office of Public Housing, Attention: Project Management Division, within 60 calendar days after the end of each quarter.

11-7. FOR MODERNIZATION APPROVED BEFORE FFY 1975.

a. PHA Submission. Any PHA with an incomplete modernization program approved before FFY 1975 (July 1, 1974), shall submit to the Field Office the following quarterly reports in an original and three copies (or any lesser number of copies as specified by the Field Office), no later than the 20th day of the month following the end of a quarter:

(1) Form HUD-52993. The PHA shall submit Form HUD-52993, Statement of Modernization Cost (Development), for each modernization program until completion (see Chapter 13).

(2) PHA Summary Report. To provide a complete account of all modernization funds for all programs (completed and incomplete) approved before July 1, 1974, the PHA shall submit a summary of the status of such funds by project and total. The PHA shall record its summary on a blank page 1 of Form HUD-52995 and designate it as "PHA Summary Report on All Modernization Approved Before July 1, 1974." The PHA shall modify Columns E and F to show Total Funds Expended and Total Funds Unexpended, respectively. A Sample PHA Summary Report, appropriately modified, is attached as Appendix 27. The PHA also shall prepare a narrative report showing the amounts of, and reason for, any unexpended funds by project and the expected completion date. Every effort must be made to ensure that accurate modernization reports are submitted. The PHA shall submit the PHA Summary Report and related narrative until no further funds for any modernization program approved before July 1, 1974 will be expended.

b. Field Office Summary Report.

(1) The Field Office shall consolidate all PHA reports into a field summary report on the status of all modernization funds approved before July 1, 1974. The Field Office shall submit this report on page 1 of Form HUD-52995, appropriately modified and designated as "Field Office Summary Report on All Modernization Approved Before July 1, 1974." A Sample Field Office Summary Report is attached as Appendix 28. Columns E and F have been modified to show Total Funds Expended and Total Funds Unexpended, respectively.

(2) The Field Office also shall prepare a narrative report showing, for each PHA with unexpended funds, the amounts of and reasons for the unexpended funds, the expected completion date, and the actions being taken to assist the PHA to complete its program. Where the PHA has unexpended funds that will be recaptured following audit, the Field Office shall so indicate and include the expected audit date.

(3) The Field Office shall forward its summary and related narrative to the Regional Director, Office of Housing, within 45 calendar days after the end of each quarter, until no further funds for any modernization program approved before July 1, 1974 will be expended.

c. Regional Office Summary Report.

(1) The Regional Office shall consolidate all Field Office reports into a regional summary report on the status of all modernization funds approved before July 1, 1974. The Regional Office shall submit this report on page 1 of Form HUD-52995, appropriately modified and designated as "Regional Office Summary Report on All Modernization Approved Before July 1, 1974." A Sample Regional Office Summary Report is attached as Appendix 29. Columns E and F have been modified to show Total Funds Expended and Total Funds Unexpended, respectively.

(2) The Regional Office shall forward its summary along with the Field Office narratives to Headquarters, Director, Office of Public Housing, Attention: Finance and Occupancy Division, within 60 calendar days after the end of each quarter, until no further funds for any modernization program approved before July 1, 1974 will be expended.

Section 3. Budget Revisions

11-8 PHA REQUIREMENTS.

a. Total Funding Limitation. The PHA shall not incur any modernization cost in excess of the total approved modernization budget. HUD will not approve amendments to modernization budgets to cover any excess cost.

b. Prior HUD Approval. The PHA shall obtain prior HUD approval for the following types of proposed revisions:

(1) Deletion or substantial revision of approved work items;

(2) Addition of new work items; or

(3) Incurring of modernization costs in excess of the approved budget amount for any work item or project.

c. PHA Submission.

(1) Informal Revision. If the proposed revision will have little effect on the overall modernization program, the PHA may submit a written request for an informal budget revision to the Field Office without revising the entire budget.

(2) Formal Revision. If the proposed revision is major or when a combination of several approved informal revisions has resulted in substantial differences between the budget and actual implementation, the PHA shall submit a formal revision of the entire budget. For modernization programs approved after FFY 1981, the PHA shall revise Form HUD-52825, Comprehensive Assessment/Program Budget. For modernization programs approved before FFY 1982, the PHA shall revise Form HUD-52990, Modernization Program Budget. Also, the PHA shall submit a Board Resolution, approving a major revision, where required.

d. Field Office Review and Approval. The HMC shall coordinate the prompt review of all informal and formal budget revisions submitted by the PHA. After consultation with the Maintenance Engineer, the FMS, and other Field Office staff, as appropriate, the HMO shall prepare a letter to the PHA for the signature of the Chief, AHM Branch, indicating approval, with or without modification, or disapproval.

11-9. OFFSETS BETWEEN WORK ITEMS OR PROJECTS. If the PHA plans to offset any increase in modernization cost for one or more other work items, the following conditions shall apply:

a. Modernization Programs Approved Before Implementation of Modernization as a Separate Project (Before July 1, 1978).

(1) If the offset involves work items in the same project, Form HUD-52990 shall be revised.

(2) If the offset involves work items in different projects, Form HUD-52990 shall be revised and the ACC shall be amended, provided that the donating project and the receiving project are under the same consolidated ACC, have the same Minimum Loan Interest Rate and Maximum Contribution Percentage, and have the same number of years remaining in their ACCs. The Field Office shall prepare a revised Form HUD-5079, Modernization List (Part II) and a new ACC amendment increasing the Maximum Modernization Cost for the receiving project and reducing the Maximum Modernization Cost for the donating project in the amount of the offset.

(3) If the offset involves projects not having the common elements mentioned in subparagraph a(2), the transfer procedures shall be used.

b. Modernization Programs Approved After Implementation of Modernization as a Separate Project (After June 30, 1978) and Under CIAP.

(1) If the offset involves work items in the same project or different projects that were included in the original ACC amendment for the Modernization Project, Form HUD-52825 or HUD-52990 shall be revised. No revised Form HUD-5079 (Part II) or new ACC amendment is required.

(2) If the offset involves the addition of a project that was not included in the original ACC amendment for the Modernization Project or deletion of a project that was originally included, Form HUD-52825 or HUD-52990 shall be revised. The Field Office shall prepare a revised Form HUD-5079 (Part II) and a new ACC amendment for the Modernization Project. A revised Form HUD-52540, Project Accounting Data, is not required.

(3) The project being added must be under the same consolidated ACC as the other projects originally included the Modernization Project, with the following exception. Only Section 23 Leased Housing Bond-Financed Projects (BFPs) may be added to a Modernization Project composed exclusively of BFPs and only non-BFP projects may be added to a Modernization Project composed exclusively of non-BFPs. If a BFP is being added to a 985 Modernization Project, the BFP must meet the requirements of paragraph 4-13.

(4) For the project being added to a Modernization Project approved after FFY 1980, the PHA shall submit any document required under paragraph 3-16 for the Final Application.

11-10. FUNDS LEFT OVER FROM COMPLETED MODERNIZATION PROGRAMS. This applies to modernization programs approved after FFY 1980 to ensure that the statutory requirements of the CIAP are met. The Field Office shall recapture modernization funds left over from completed modernization programs unless all of the following conditions can be met.

(1) The work item is necessary and approvable under the appropriate type of modernization;

(2) Funding is not available from PHA operating funds or reserves or other sources;

(3) The leftover funds are sufficient to finance the entire work item or a portion of the work item where the PHA is able to use other funding sources for the balance necessary for completion. The Field Office shall not permit PHAs to hold leftover funds longer than 12 months in anticipation of receiving additional modernization or other funds. In such cases, the leftover funds shall be recaptured;

(4) If the leftover funds are used at a new project, the requirements of paragraph 11-9b(3) are met and the PHA submits any documents required under paragraph 3-16 for the Final Application; and

(5) The leftover funds are used in accordance with the requirements for the appropriate type of modernization, i.e., emergency, comprehensive, special purpose or homeownership.

Section 4. On-Site Inspections

11-11. INSPECTIONS BY PHA. The PHA shall provide, by contract or otherwise, adequate and competent supervisory and inspection personnel during modernization, whether the work is performed by contract or force account labor and with or without the services of an architect/engineer. Whether inspections are performed by an architect/engineer or an independent contractor, the PHA shall have the final responsibility for ensuring work quality and progress. The PHA shall state its plans for periodic inspections of the modernization work in the Modernization Organization and Staffing Plan, submitted as part of the Final Application. Before HUD approval of the Final Application, the Field Office and the PHA shall mutually determine in writing the number, type, qualifications and salaries of inspection personnel required.

11-12. INSPECTIONS BY ARCHITECT/ENGINEER. If the PHA is planning to hire an architect/engineer for certain modernization work, the PHA may modify the standard provisions of Form HUD-51915, concerning the services to be rendered during modernization (see paragraph 8-3).

11-13. INSPECTIONS BY HUD. The Field Office shall periodically visit the PHA to examine records, inspect physical work, and review implementation of management improvements. In addition, the Regional Fair Housing and Equal Opportunity Compliance Division shall conduct compliance reviews and complaint investigations related to civil rights statutes, executive orders, and regulations.

a. Work in Progress.

(1) Frequency. After construction has started, the Maintenance Engineer (and the HMO where management improvements are involved) shall visit the PHA and project site(s) at least twice a year. More frequent monitoring visits shall be made if the scope of the rehabilitation is substantial or if serious problems or deficiencies are identified in previous inspections or from review of the quarterly progress reports or revisions to the program budget or work program.

(2) Checklist. The Maintenance Engineer shall review the adequacy of the PHA's contract administration, supervision and inspection and the quality of the physical work, including materials and equipment. At a minimum, the Maintenance Engineer shall use the Sample Checklist for Monitoring of Physical Improvements or similar checklist to conduct this review (see Appendix 30). The Maintenance Engineer shall discuss any adverse findings with the PHA and include them in the monitoring letter.

(3) Monitoring Letter. After each on-site inspection, the Field Office representative shall prepare a monitoring letter to the PHA, setting forth the modernization program(s) monitored, Field Office staff who monitored and date of visit, scope of monitoring, monitoring conclusions (both positive and negative), specific corrective action required, if any, due date of corrective action, and offer of technical assistance, if appropriate. When the monitoring visit is a team visit, a single letter should be sent to the PHA. In no case should the time between the visit and the date of the letter exceed 25 calendar days. Where appropriate, the Field Office representative also shall prepare a trip report, including additional background information not in the monitoring letter.

b. Completion of Construction Contracts. Under Section 7 of Chapter 9, the PHA is required to notify the Field Office of the scheduled final inspection. Where appropriate, the Maintenance Engineer may wish to participate to ensure that the work has been completed in accordance with contract requirements.

c. Completion of a Modernization Program. Upon completion of a modernization program, the HMO and the Maintenance Engineer shall conduct a final on-site inspection to ensure

that all management improvements and physical work have been completed and are of acceptable quality. As appropriate, the Financial Management Specialist (FMS) and the Occupancy Specialist also shall participate. In addition, the review shall evaluate the following program aspects: (1) the success of the PHA in meeting the goals set forth in the Final Application; (2) the PHA's administration of the modernization program; (3) the success and adequacy of the physical work as outlined by the architect/engineer; and (4) the adequacy of any work performed by force account labor. The Field Office representatives shall prepare a final monitoring letter under subparagraph a(3).

Section 5. Corrective Action

11-14. HUD FOLLOW-UP. The Field Office AHM Branch shall take the following appropriate action to follow-up with the PHA on any corrective action required by the Field Office's monitoring letter (see paragraph 11-13a(3)):

a. If the PHA fails to meet a target date for corrective action, the HMO shall follow-up with a telephone call or written reminder.

b. If the PHA has not responded within 30 calendar days after the date the PHA was required to take corrective action, the HMO shall prepare a letter to the PHA for the signature of the Field Office Manager or designee. The letter shall request the status of the required action and warn the PHA of the consequences of failure to comply, as set forth in paragraph 11-15.

c. The HMO and the Maintenance Engineer shall review the PHA's proposed corrective action. If the reviews indicate that the action is less than satisfactory, the HMO or the Maintenance Engineer shall prepare a letter to the PHA for the signature of the Field Office Manager or designee. The letter shall specify needed additional action and the due date.

d. The Field Office may establish a new due date, subject to good faith efforts by the PHA to correct the deficiency. The Field Office may conduct a follow-up visit to verify corrective action taken or to provide technical assistance where the PHA has been unable to correct the deficiency.

e. Where the PHA fails to make good faith efforts to correct the deficiencies, the Field Office shall notify the PHA Board of Commissioners and request a meeting.

11-15. HUD ACTION. Where the PHA is unable to correct an identified deficiency, such as lack of progress, noncompliance with applicable laws and regulations, and lack of continuing capacity, the Field Office shall notify the PHA in writing of its intent to take one or more of the following actions:

a. Disapprove any further requisitions for funds, except where necessary to meet the PHA's outstanding contractual obligations.

b. Impose additional requirements for PHA submission of contracting documents for prior HUD review and approval under Chapter 9.

c. Disapprove any new application for modernization funds.

d. Terminate all or part of the approved modernization program. In such case, the letter shall direct the PHA not to incur additional cost for the terminated program unless the Field Office specifically approves the additional cost. In terminating a partially completed program, the Field Office shall consider what physical work is already underway, the amount of funds previously provided for that work, and the amount of additional funds needed to complete that work, including the PHA's outstanding contractual obligations. Termination of an approved program that is under ACC must be based on a declaration of substantial breach of default. See Chapter 12 regarding the recapture of modernization funds and Chapter 13 regarding the fiscal closeout of modernization programs.

e. Initiate action to find the PHA in substantial default or breach of the terms and conditions of the ACC in order to invoke the remedies under the ACC, including notification to the Depositary Bank not to honor any further withdrawals from the Modernization and/or General Fund bank accounts without prior HUD authorization.

CHAPTER 12. CANCELLATION OR RECAPTURE OF MODERNIZATION FUNDS

12-1. INTRODUCTION. This Chapter provides instructions to the Field Office on the cancellation and recapture of modernization contract, budget and loan authority. These instructions are consistent with those contained in Chapter VI of Handbook 1970.41, Low-Income Housing Program: Procedures for Accounting, Recording, and Reporting of Budget Authority.

12-2. DEFINITIONS.

a. Obligation. The approval of contract, budget and loan authority for a PHA's modernization program through execution of Form HUD-5079A, Modernization List (Part I) and signing of the approval letter to the PHA.

b. Deobligation. The cancellation or recapture of all or part of the contract, budget and loan authority obligated for a PHA's modernization program through execution of a new Modernization List (Part II) and signing of the disapproval letter to the PHA.

c. Cancellation. The deobligation of all or part of the contract, budget and loan authority obligated during the current Federal Fiscal Year (FFY).

d. Recapture. The deobligation of all or part of the contract, budget and loan authority obligated during any previous FFY.

e. Reuse. The reobligation of contract and budget authority previously cancelled or recaptured and loan authority previously cancelled.

12-3. CURRENT FISCAL YEAR CANCELLATIONS. The Field Office may cancel and reuse any current FFY contract, budget and loan authority, as follows:

a. ACC Not Amended. If the Modernization List (Part I) has been approved during a current FFY, but the ACC has not yet been amended, the Field Office may cancel the contract, budget and loan authority obligated by executing a new Modernization List (Part II), rescinding the original Modernization List (Part I), and a new Form HUD-52540, Project Accounting Data, and signing the disapproval letter to the PHA. The Financial Management Specialist (FMS) shall immediately notify Regional or Chief Counsel to stop processing the ACC amendment. The Field Office shall

distribute the approved new Modernization List (Part II) and Form HUD-52540 with the PHA disapproval letter in accordance with paragraphs 4-9 and 4-7c. As soon as the Regional Accounting Division (RAD) records the cancellation, the Field Office may reuse the cancelled contract, budget and loan authority. The Field Office must reuse the cancelled funds by the end of the current FFY or the cancelled funds will be returned to RAD and treated as recaptured funds in the subsequent FFY.

b. ACC Amended. If the Modernization List (Part I) has been approved during a current FFY and the ACC has been amended, the Field Office shall execute a new Modernization List (Part II), rescinding the original Modernization List (Part I), and a new Form HUD-52540, and sign the disapproval letter to the PHA. The contract, budget and loan authority is not considered cancelled until execution of the new ACC amendment. Therefore, the Field Office may not distribute the approved new Modernization List (Part II) and Form HUD-52540 with the PHA disapproval letter in accordance with paragraphs 4-9 and 4-7c until the new ACC amendment has been executed by the Field Office Manager. The Field Office shall forward the original of Form HUD-52540 and one copy each of the new Modernization List (Part II), PHA disapproval letter and executed ACC amendment to the RAD at the same time. Upon receipt of the new ACC amendment, the RAD will record the cancellation and treat the funds as recaptured funds in the subsequent FFY in accordance with Handbook 1970.41

c. Funding of Same PHA More Than Once in Same FFY. For various reasons, the Field Office may have approved the Modernization List (Part I) for a PHA during a FFY, but wish to approve additional funds for that same PHA during the same FFY.

(1) Where the ACC for the Modernization List (Part I) has not been amended, the Field Office may follow the procedures set forth in subparagraph a and then approve a new Modernization List (Part I) for a greater dollar amount. This avoids the funding of two Modernization Projects for the same PHA in the same FFY.

(2) Where the ACC for the Modernization List (Part I) has been amended, the Field Office will be unable to avoid funding two Modernization Projects for the same PHA in the same FFY. The Field Office shall approve another Modernization List (Part I) for the second Modernization Project, even though the same individual projects may be on both Modernization Lists.

12-4. PRIOR FISCAL YEAR RECAPTURES. Prior FFY recaptures will be necessary when the Field Office is terminating all or part of the PHA's modernization program before completion or when the Field Office is recapturing unexpended funds after completion of the PHA's modernization program. Upon receipt of the new ACC amendment, the RAD will record the recapture of the appropriate amounts of contract, budget and loan authority. The Field Office may not reuse recaptured contract and budget authority unless authorized by Headquarters.

a. For Modernization Approved After June 30, 1978. If the Modernization List (Part I) has been approved during any previous FFY, the Field Office may recapture the contract, budget and loan authority obligated by taking the following steps:

(1) ACC Not Amended. The Field Office shall follow the instructions set forth in paragraph 12-3a.

(2) ACC Amended, No Funds Advanced. The Field Office shall follow the instructions set forth in paragraph 12-3b.

(3) ACC Amended, Funds Advanced. The Field Office shall follow the procedures in Chapter 13, regarding audit and approval of Form HUD-53001, Actual Modernization Cost Certificate, and disposition of any excess funds advanced before following the instructions set forth in paragraph 12-3b.

b. For Modernization Approved Before July 1, 1978. If the Modernization List (Part I) has been approved during any previous FFY, the Field Office may recapture the contract, budget and loan authority obligated by taking the following steps:

(1) Follow the procedures in Chapter 13, regarding audit and approval of Form HUD-53001 and disposition of any excess funds advanced.

(2) Execute a new Modernization List (Part II), rescinding the original Modernization List (Part I), and a new Form HUD-52540 and sign the disapproval letter to the PHA. Complete a separate Form HUD-52540 for each project for which funds are being recaptured, leaving blank Blocks 9, 11E and 11F.

(3) Forward the new Modernization List (Part II) and new Form HUD-52540 to the Office of Finance and Accounting, Attention: Assisted Housing Accounting Division, Headquarters, for completion. Upon receipt of the completed documents from OFA, the Field Office shall then execute the ACC amendment. After ACC amendment execution, the Field Office shall distribute the original of Form HUD-52540 and one copy each of the new Modernization List (Part II), PHA disapproval letter and executed ACC amendment to the RAD at the same time.

CHAPTER 13. FISCAL CLOSEOUT OF MODERNIZATION PROGRAMS

13-1. INTRODUCTION. This Chapter provides instructions on the fiscal closeout of modernization programs that are completed or being terminated because of poor performance or other reasons. Program completion means that all authorized modernization costs have been fully paid and no further modernization funds will be expended for that particular modernization program.

13-2. FINAL BUDGET REVISIONS. When a modernization program is nearing completion, the PHA shall consult with the Field Office regarding the need for any further budget revisions, as required in paragraph 11-8.

13-3. PHA SUBMISSION OF FINAL REPORT AND ACTUAL MODERNIZATION COST CERTIFICATE. Upon completion or termination, the PHA shall submit to the Field Office, Attention: Chief, Assisted Housing Management (AHM) Branch, the final quarterly progress report and Form HUD-53001, Actual Modernization Cost Certificate, as explained below:

a. Final Report. The PHA shall submit the final quarterly report in an original and three copies, as follows:

(1) Form HUD-52993, Statement of Modernization Cost (Development), marked "Final," for each modernization program aproved before FFY 1975; or

(2) Form HUD-52826, Schedule/Report of Modernization Expenditures, marked "Final," for each modernization program approved after FFY 1974.

b. Actual Modernization Cost Certificate. The PHA shall submit Form HUD-53001 in an original and one copy. Completed samples of Form HUD-53001 are attached as Appendices 31 and 32, respectively, for modernization programs approved before and after modernization as a separate project was implemented (July 1, 1978). Instructions for preparation of the form are contained on the reverse side of the form.

(1) For modernization programs approved before July 1, 1975, the Housing Management Officer (HMO) shall determine if the PHA may submit one Form HUD-53001 to cover each modernization program as it is completed or must wait until all such programs are completed to submit one Form HUD-53001, covering all these programs. The Field

Office shall base this determination on the accuracy and completeness of Field Office records regarding the provision of modernization funds against each approved modernization program by project and the availability of an audit report that provides a cost break-out by project, by modernization program.

(2) For modernization programs approved after June 30, 1975, the PHA shall submit one Form HUD-53001 to cover each modernization program as it is completed.

13-4. HUD REVIEW. Upon receipt of the required documents, the HMO shall review the documents for any irregularities. The figures on the "Final" Form HUD-52993 or Form HUD-52826 and on Form HUD-53001 must agree as to funds approved, advanced, and expended (see funding limitations in paragraphs 11-8 and 11-9). The amount of funds advanced must agree with Field Office records.

a. If the submitted documents are acceptable, the Field Office shall notify the PHA that Form HUD-53001 is approvable subject to verification by fiscal audit. In addition, the HMO and the Maintenance Engineer shall determine if a final on-site inspection is necessary to ensure that all work has been completed and is of acceptable quality.

b. If Form HUD-53001 indicates that the PHA has incurred costs in excess of the ACC amount for any project in modernization programs approved before modernization as a separate project was implemented, the Field Office shall not approve Form HUD-53001, but use the transfer procedures.

c. If Form HUD-53001 indicates that excess funds have been advanced to the PHA, the Field Office shall direct the PHA to remit excess funds under paragraph 10-10. If the subsequent audit of Form HUD-53001 shows that the PHA over-remitted funds, HUD will return the amount of the over-remittance to the PHA.

13-5. AUDIT VERIFICATION OF ACTUAL MODERNIZATION COST CERTIFICATE. The audit shall follow the guidelines prescribed by OMB Circular A-102, Attachment P - Audit Requirements. The HMO shall prepare a letter for the signature of the Field Office Manager or designee to the PHA, advising that Form HUD-53001 must be verified by the Independent Public Accountant (IPA) during the next regularly scheduled biennial PHA audit. HUD reserves the right to conduct audits.

13-6. HUD APPROVAL OF ACTUAL MODERNIZATION COST CERTIFICATE. Upon acceptance of the fiscal audit, the RIGA shall furnish a copy of the audit report to the Field Office. The HMO and the Financial Management Specialist (FMS) shall review the audit report to determine if the audited costs agree with the costs shown on Form HUD-53001. If Form HUD-53001 indicates that the PHA has incurred costs in excess of the ACC amount for any project on modernization programs approved before modernization as a separate project was implemented, the Field Office shall not approve Form HUD-53001, but use the transfer procedures. If Form HUD-53001 indicates that an ACC amendment is required under paragraph 13-7, the HMO shall so indicate on Form HUD-53001 and then forward the original Form HUD-53001 to the Director, Housing Management Division, for signature, indicating that Form HUD-53001 has been audited and is correct, and to the Field Office Manager for signature, indicating approval. After signature, the HMO shall arrange for the original and five copies of the approved Form HUD-53001 to be distributed, as follows.

a. To the PHA, one copy for records purposes.

b. To the Regional or Chief Counsel, one copy for attachment to the ACC amendment for records purposes.

c. To the AHM Branch files, one copy for records purposes.

d. To the Regional Director, Office of Housing, one copy for informational purposes.

e. To the RIGA, one copy for audit and records purposes.

f. To Headquarters, Office of Finance and Accounting (OFA), Attention: Director, Assisted Housing Accounting Division, the original for fiscal purposes.

13-7. ANNUAL CONTRIBUTIONS CONTRACT AMENDMENT.

a. Determination of Need. An ACC amendment is required where the audited and approved Form HUD-53001 indicates the following:

(1) For modernization programs approved before modernization as a separate project was implemented (before July 1, 1978), that the PHA has incurred costs that are less than the ACC amount for any project.

(2) For modernization programs approved after modernization as a separate project was implemented (after June 30,

1978), the PHA has incurred costs that are less than the ACC amount for the Modernization Project itself.

b. Preparation of Documents. Where an ACC amendment is required, the FMS shall follow the procedures set forth in paragraph 12-4. A new Form HUD-52250, Permanent Note, is not required.

13-8. FINANCING ADJUSTMENTS. After execution of the ACC amendment and receipt of the excess funds, any required correction to the financing of the modernization program shall be accomplished at the time of the next project note sale. OFA will determine the outstanding indebtedness for each project involved and adjust the financing to reflect the outstanding indebtedness. The Regional PFS shall review the adjustments and immediately contact OFA if an error is found.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Part 868

[Docket No. R-82-909]

Comprehensive Improvement Assistance Program; Low-Income Housing

AGENCY: Department of Housing and Urban Development (HUD).

ACTION: Final rule.

SUMMARY: This rule revises the requirements for the modernization of existing public housing projects by setting forth simplified, more flexible requirements as a result of the Department's consideration of the public comments received on the Comprehensive Improvement Assistance Program (CIAP) interim rule published April 14, 1981, and the Department's own efforts to reduce burdensome requirements.

EFFECTIVE DATE: July 19, 1982.

FOR FURTHER INFORMATION CONTACT: Pris Peake, Office of Public Housing, Department of HUD, 451 Seventh Street, SW., Washington, D.C. 20410, (202) 755-5595. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: On April 14, 1981, the Department published an interim rule (46 FR 21932), setting forth the requirements for the CIAP. Under the CIAP, the Department is authorized to provide financial assistance to Public Housing Agencies (PHAs), including Indian Housing Authorities (IHAs), to improve the physical condition and upgrade the management and operation of existing public housing projects to assure that such projects continue to be available to serve low-income families. Comments were invited until June 15, 1981.

Comments were received from 15 organizations and individuals. Each comment was carefully considered. The following is a summary of the comments received and of the changes made to the interim rule by major subject area.

A. Comprehensive Modernization

Four commentors advocated greater flexibility in the use of two-stage funding for Comprehensive Modernization because of the large modernization needs of some PHAs and projects in relation to the small fund allocations of some HUD offices. The Department agrees that greater flexibility is desirable and, therefore, requires two-stage funding for PHAs that lack modernization capability and permits two-stage funding for PHAs that lack management capability. The Department also permits two-stage funding where the magnitude of the total funds required for the Comprehensive Modernization is such that one-stage funding is precluded by the HUD office's allocation of funds. The Department believes that the routine use of two-stage funding is not consistent with the statutory intent to fund modernization in a comprehensive, rather than a piecemeal, manner and that such routine use will discourage PHAs from comprehensive planning of the physical and management improvements at specific projects.

Two commentors recommended annual funding of piecemeal modernization within the context of a comprehensive modernization plan for the projects involved, e.g., partial funding of five projects every year for five years rather than total funding of one project every year. Another commentor recommended that the CIAP be made responsive to variations from the comprehensive modernization approach where those variations are reasonably responsive to the amount of funds available and the individual PHA's modernization needs. Again, the Department does not believe that these approaches are consistent with the statutory intent and, therefore, did not accept these comments. The statute clearly requires comprehensive modernization of projects with the limited exceptions of special purpose and emergency needs.

Another commentor questioned why the implementation period for Comprehensive Modernization was limited to three years when the statutory maximum was five years. The Department believes that a three-year implementation period is adequate for the vast majority of Comprehensive Modernization programs, but will approve up to five years on an exception basis.

Another commentor expressed concern about the timing of the funding of the second stage of Comprehensive Modernization. For example, delay in second stage funding may cause the design to be outdated or the cost estimates to be off. The Department concurs that the timing is important and will work with PHAs to minimize any adverse effects. However, second stage funding is contingent upon the availability of funds and PHA compliance with HUD regulatory and statutory requirements.

B. Special Purpose Modernization and Energy Audits

Five commentors requested that PHAs be allowed to apply for special purpose modernization beyond the first year of their five-year plans. The Department acknowledges the difficulties this may have created and has decided to provide greater flexibility since the energy audit procedures will not be published until late-Federal Fiscal Year (FFY) 1982. PHAs that were approved for modernization in FFY 1981 are now eligible to apply for special purpose modernization through FFY 1983. PHAs that were not approved for modernization in FFY 1981 are now eligible to apply for special purpose modernization in the first two years of their five-year plans. This allows an extra year for all PHAs to respond satisfactorily to the energy audit requirements and to receive funding for cost-effective energy conservation work items.

Three commentors requested clarification on the timing of energy audits and their relationship to special purpose modernization. All PHAs are required by 24 CFR Part 865, Subpart C, to conduct PHA-wide energy audits by May 27, 1983. As indicated above, during FFY 1982, the Department will issue guidelines for PHAs on how to conduct energy audits. This rule clarifies that before approval of Comprehensive Modernization or special purpose modernization, a project must have undergone an energy audit.

C. Emergency Modernization

Two commentors recommended that the definition of emergency modernization be expanded to include the protection of the physical integrity of the structures. Since the statute limits emergency modernization to correcting conditions which threaten the health or safety of the tenants, emergency modernization funds may be used only when protection of the integrity of the structures is necessary to protect tenant life, health and safety or for improvements related to fire safety. If an application which includes emergency modernization and other items does not satisfy the funding preference for cost savings, the other items may be eliminated and the emergency modernization items funded.

D. Proration of Administrative Salaries

Six commentors recommended that PHAs be allowed to charge to modernization a portion of the salaries of non-technical and technical personnel assigned part-time to the modernization program, regardless of whether the positions were in existence before the PHA's Performance Funding System base level was established. This comment was accepted. However, such

salaries are eligible costs only where the scope and volume of the modernization-related work are beyond that which could be reasonably expected to be accomplished by such personnel in the performance of their normal duties. Any proration of salaries must be justified by the PHA and authorized by the HUD office and must be reflected by an appropriate revision to the PHA's operating budget.

E. Selection of PHAs

Two commentors expressed concern that the CIAP was a program to reward poor management and that PHAs with serious physical and management problems would have a better chance for funding than PHAs with serious physical problems, but good management. It is not the intent of the CIAP to reward poor management or to exclude from participation PHAs with management problems. The statute directs the Department to give preference to PHAs which have demonstrated a capability of carrying out the activities proposed in their comprehensive plans. On the other hand, one of the statutory purposes of the CIAP is to upgrade the management and operation of public housing projects. The Department does not believe that a rigid rating system is appropriate and prefers to retain flexibility by allowing HUD offices to exercise judgment in making funding decisions. HUD offices are authorized to disqualify any PHA from funding consideration if its lack of management or modernization capability is so serious that it would be unable to use the funds in a timely and effective manner or if the PHA has not demonstrated an effort to improve its management as a result of past HUD reviews or technical assistance.

One commentor recommended that the method for selecting PHAs to participate in the CIAP be reevaluated to insure participation by small PHAs. The Department wishes to emphasize that all sizes of PHAs are eligible and that the current method of selection does not preclude small PHAs from participation. The statute also directs the Department to give preference to PHAs with projects having conditions which threaten the health or safety of the tenants or having a significant number of vacant, substandard units. Therefore, the extent of physical need will be a selection factor, regardless of the size of the PHA.

For a number of years, the Department has emphasized the need for economy and efficiency in modernization. By requiring that PHAs undertake management improvements as part of programs for the physical improvement of projects, the Department anticipated that after modernization the projects could be operated in a more economical and efficient manner. Today's high operating costs and the resulting need for large operating subsidies are the most serious issues facing the Public Housing Program. The reality of limited budget resources makes it essential that PHAs take effective action, through modernization, to achieve operating cost savings. Therefore, in addition to the two factors for funding preference previously described, i.e., project physical need and PHA capability, the Department believes that the degree of cost savings should also be a factor in funding selection. Accordingly, the Department is adding an additional factor, giving funding preference to PHAs which demonstrate that the modernization will result in the greatest cost savings. This additional funding preference for cost savings is not applicable to physical improvements of an emergency nature affecting the life, health and safety of tenants or related to fire safety.

An additional concern raised during the review of the rule was the approval of Comprehensive or special purpose modernization where modernization was not financially feasible and would not result in long-term physical and social viability. Under the CIAP, the PHA is required to undertake a thorough analysis of its particular problems and design a comprehensive strategy for remedying those problems. Therefore, the Department has determined that it is appropriate to require PHAs, before developing their Preliminary Applications in consultation with local officials, to determine that the proposed Comprehensive or special purpose modernization is financially feasible and will result in long-term physical and social viability. When such a determination cannot be made, the PHA must consider alternatives to improvement of all existing units, such as changes in project density, basic design, unit distribution and/or household type, as well as demolition or disposition under 24 CFR Part 870, and include the selected alternative in the Preliminary Application. Where such a determination can be made, the PHA shall consider every possible approach to reducing operating costs and include the selected approaches in the Preliminary Application.

In view of the anticipated funding of modernization programs from development funds, a provision has been added to the rule which requires PHAs using such funds to comply with the requirements and procedures for application approval, except that they are not subject to competitive selection criteria. The rule further provides that the availability of development funds may be taken into account in making modernization funding decisions.

In addition, section 14(f) of the statute states that where an application for modernization proposes partial or total demolition of a project, the Department may not approve the application unless timely replacement of the units will be undertaken by the PHA, the total cost of providing replacement housing is less than the total cost of rehabilitation, except where waived by HUD, and low-income familes displaced by demolition will be provided with decent, safe, sanitary, and affordable housing. This statutory requirement is consistent with the requirements of 24 CFR Part 870, with which the PHA must comply (see Section 883.4(a)).

F. Consultation with Local Officials/ Tenants

One commentor questioned how the degree of local government and tenant support for proposed modernization would be measured by the HUD office, particularly since the method of consultation is not specified. The degree of local government support may be measured by written support from the locality, which may include evidence that the locality has provided or will provide additional funding for the project or its surrounding neighborhood. The degree of tenant support may be measured by the tenant comments and recommendations secured by the PHA before the Joint Review.

Another commentor stated that the tenant participation requirements should be strengthened and expanded to include emergency modernization. The Department believes that the requirements, as written, are adequate to secure meaningful tenant participation and are inappropriate where correction of physical deficiencies of an emergency nature is involved. Therefore, the comment was not accepted.

G. Replacement Reserves

Five commentors urged that the replacement reserves be established and funded at the earliest possible date to assure that future needs will be met. The Department is currently developing its criteria and procedures for funding these reserves with the objectives of funding them at the earliest possible date. Another commentor requested clarification of the requirement that PHAs provide gross estimates of future

replacement costs at the projects to be comprehensively modernized. The Department has this issue under consideration and will provide further guidance at a future date.

H. Selection of Architects/Engineers

Two commentors questioned why it was necessary to obtain professional services through the competitive negotiations process. The Department believes that this process, which is advocated by various professional organizations, will enable the PHA to select the most highly qualified architect/engineer to provide the required services at a fair and reasonable cost.

I. Contracting Requirements

Two commentors stated that the contracting requirements should be reduced and six commentors advocated greater flexibility in PHA issuance of change orders without prior HUD approval. The Department agrees that the contracting requirements were burdensome and has reduced them significantly. The Department has adopted a basic approach which relies on certification where the PHA has demonstrated satisfactory past performance in modernization contracting and has adequate in-house technical capability. However, where there are deficiencies in the PHA's performance or capability, the Department reserves the authority to impose additional requirements.

J. Modernization and Energy Conservation Standards

In order to carry out the directives under section 14(j)(2) of the United States Housing Act of 1937, as amended, to issue rules and regulations establishing standards which will provide decent, safe and sanitary living accommodations in public housing projects and for energy conserving improvements in such projects, the general criteria for such standards are set forth in § 868.18. The Modernization Standards and the Energy Conservation Standards will be published separately and an opportunity will be afforded for public comment.

K. Miscellaneous

One commentor requested more information on the definition of an eligible project. The Department is unclear what additional information is required beyond what is provided in § 868.2. The same commentor requested a more detailed explanation of the application and reporting process. Additional guidance is provided in the CIAP Handbook 7485.1 REV-1 which will be printed and available at HUD offices.

One commentor noted that estimating planned expenditures by quarter is difficult. The Department has reduced its requirements to require only that PHAs estimate planned expenditures by year, one year at a time. The same commentor requested clarification of the minority business enterprise (MBE) goal. Additional guidance is provided in the CIAP Handbook 7485.1 REV-1.

One commentor stated that HUD funding of preventive maintenance would protect the public housing stock and increase the effectiveness of programs such as the CIAP. This comment reflects a concern which is outside the realm of the CIAP.

One commentor requested guidance on how to handle a scattered site project and two contiguous projects. The CIAP Handbook 7485.1 REV-1 provides guidance in this area. Scattered site projects are treated the same as non-scattered site projects, i.e., the entire scattered site project is funded in one stage. Two or more separate, but contiguous, projects may be funded together for Comprehensive Modernization.

One commentor stated that the planning costs of non-financially distressed PHAs should be reimbursable in cases where the PHAs are not funded. Due to limited fund availability, this is not possible.

One commentor recommended that the Department establish management standards against which PHA management improvement needs could be measured. The Department believes that this comment has merit and is pursuing this matter for future implementation.

One commentor recommended that the Davis-Bacon wage rate requirement be eliminated. Since this requirement is statutory, the Department cannot accept this comment.

One commentor recommended that all products, programs and computer software developed through management improvements funded by the CIAP remain in the public domain. Although the Department believes that this comment has merit, the feasibility of imposing such requirements requires further study.

Another commentor advocated raising the dollar threshold from $10,000 to $100,000 as to when bid bonds and performance and payment bonds are required in order to encourage greater participation from minority and women's business enterprises. The Department did not accept this comment because it does not believe that a higher threshold would afford PHAs adequate protection against frivolous bids and contractor defaults.

One commentor maintained that the requirements for prior HUD approval of budget revisions were burdensome and that budget revisions should be processed on a quarterly basis. The CIAP Handbook provides for minor changes to be approved without PHA submission of formal budget revisions. This procedure provides adequate flexibility to both HUD and PHAs.

One commentor recommended that the provisions concerning eligibility for funding of certain staff to provide social services were confusing and should be deleted. These provisions have been deleted.

This rule does not constitute a "major rule" as that term is defined in section 1(b) of the Executive Order 12291 on Federal Regulation issued by the President on February 17, 1981. Analysis of the rule indicates that it does not: (1) Have an annual effect on the economy of $100 million or more; (2) Cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) Have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) and have been assigned OMB control numbers. The applicable regulatory sections and OMB control numbers are listed below:

CFR citation	OMB control No.
§ 868.5(b)	2502-0218.
§ 868.5(c)	2502-0218.
§ 868.5(d)	2502-0208.
§ 868.5(f)	2502-0208.
§ 868.7	2502-0218.
§ 868.8	2502-0218.
§ 868.12(a)	2502-0157 and 2502-0218.
§ 868.12(b)	2502-0157.
§ 868.12(c)	2502-0157.
§ 868.12(h)	2502-0157.
§ 868.12(f)	2502-0219.
§ 868.13(b)	2502-0188.
§ 868.13(c)	2502-0184 and 2502-0218.
§ 868.14(a)	2502-0184 and 2502-0218.
§ 868.14(b)	2502-0219.
§ 868.15	2502-0184 and 2502-0208.
§ 868.17	2502-0219.

A Finding of No Significant Impact with respect to the environment was

made in accordance with HUD regulations 24 CFR Part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969, for the interim rule and is applicable to the final rule. The Finding of No Significant Impact is available for public inspection and copying during regular business hours in the Office of the General Counsel, Rules Docket Clerk, Room 5218, 451 Seventh Street, SW., Washington, D.C. 20410.

Pursuant to 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undersigned hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities.

This rule was listed as item (B) 13 H-21-80 under the Office of Housing in the Department's Semiannual Agenda of Regulations published on August 17, 1981 (46 FR 41713) pursuant to Executive Order 12291 and the Regulatory Flexibility Act.

The Catalog of Federal Domestic Assistance program number and title are 14.158, Public Housing—Modernization of Projects.

OMB Control Numbers: 2502-0157; 2502-0164; 2502-0188; 2502-0208; 2502-0216; 2502-0218; and 2502-0219.

List of Subjects in 24 CFR Part 868

Loan programs: Housing and community development, Public housing, Reporting and recordkeeping requirements.

Accordingly, 24 CFR Part 868 is revised to read as follows:

PART 868—COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM

Sec.

868.1 Purpose.
868.2 Applicability.
868.3 Definitions.
868.4 Eligible costs.
868.5 Procedures for obtaining approval of a modernization program.
868.6 Modernization Project.
868.7 Tenant participation.
868.8 Homebuyer participation.
868.9 Other program requirements.
868.10 Special requirements for homeownership projects.
868.11 Special requirements for Section 23 Leased Housing Bond-Financed projects.
868.12 Contracting requirements.
868.13 Modernization financing.
868.14 Progress reporting.
868.15 Budget revisions.
868.16 On-site inspections.
868.17 Fiscal closeout of a modernization program.
868.18 Modernization and Energy Conservation Standards.

Authority: United States Housing Act of 1937 (42 U.S.C. 1437 et seq.), sec. 7(d), Department of HUD Act (42 U.S.C. 3535(d)).

§ 868.1 Purpose.

Section 14 of the United States Housing Act of 1937, as amended, establishes the Comprehensive Improvement Assistance Program (CIAP), authorizing the Department of Housing and Urban Development (HUD) to provide financial assistance to Public Housing Agencies (PHAs), including Indian Housing Authorities (IHAs), to improve the physical condition and upgrade the management and operation of existing public housing projects to assure that such projects continue to be available to serve low-income families. These physical and management improvements are financed by annual contributions provided under section 5(c) of the Act. The purpose of this Part is to prescribe requirements and procedures for the CIAP. In the case of modernization programs funded from contract authority made available under section 5(c)(3)(C) of the Act, as amended by the Housing and Community Development Amendments of 1981, the PHA shall comply fully with the requirements and procedures under § 868.5, but shall not be subject to competitive selection criteria thereunder so that any application meeting the regulation requirements will be funded. The availability of such additional contract authority may be considered in making the preliminary funding decisions under § 868.5(h).

§ 868.2 Applicability.

This Part applies to PHA-owned low-income public housing projects, including conveyed Lanham Act and Public Works Administration (PWA) projects, and to section 23 Leased Housing Bond-Financed projects, for which PHAs request assistance under the CIAP in Federal Fiscal Year (FFY) 1981 and thereafter. This Part also applies to the implementation of modernization programs which were approved before FFY 1981. This Part does not apply to projects under the Section 23 Leased Housing Non Bond-Financed Program, the section 10(c) Leased Housing Program, and the Section 23 and Section 8 Housing Assistance Payments Programs.

§ 868.3 Definitions.

As used in this Part:

"Act" means the United States Housing Act of 1937, as amended (42 U.S.C. 1437 et seq.).

"Annual Contributions Contract (ACC)" means a contract under the Act between HUD and the PHA, containing the terms and conditions under which the Secretary makes loans and annual contributions to assist PHAs in providing decent, safe and sanitary housing for families of low-income and provides modernization funds to PHAs to improve existing public housing projects.

"Comprehensive Modernization" means a modernization program for a project which provides for all needed physical and management improvements. Under the CIAP, all modernization programs are Comprehensive Modernization, except those defined as special purpose, emergency or homeownership.

"Emergency modernization" means a modernization program for a project that is limited to physical work items of an emergency nature, affecting the life, health and safety of tenants or related to fire safety. Under emergency modernization, management improvements are not eligible modernization costs.

"Financial feasibility" means that the cost (excluding the cost of management improvements) of a modernization program does not exceed the prototype cost of a new project.

"Financially distressed PHA" means a PHA that has an operating reserve level of 20 percent or less of its authorized maximum or other level as determined by HUD, as shown on the latest year-end financial statement.

"Force account labor" means labor directly employed by the PHA on either a permanent or a temporary basis.

"Homebuyer Agreement" means a Mutual Help and Occupancy Agreement or a Turnkey III Homebuyer's Ownership Opportunity Agreement.

"Homeownership modernization" means a modernization program for a project that is under the Turnkey III Homeownership Opportunities Program or the Mutual Help Homeownership Opportunities Program. Under homeownership modernization, limited physical improvements are eligible modernization costs, but management improvements are not eligible modernization costs.

"HUD office" means the HUD Area Office or Multifamily Service Office with which the PHA normally transacts its low-income housing business.

"Lack of management capability" means that the PHA has inadequate management practices, as determined by the HUD office on the basis of regular monitoring and performance of on-site reviews, audits and surveys and that the PHA has not taken appropriate corrective action. Management practices which are to be considered include, but are not limited to: management, financial and accounting controls; tenant selection and eviction; occupancy levels; rent collection; and maintenance.

"Lack of modernization capability" means that the PHA has previously approved, but unobligated modernization funds that are over three years old and that the HUD office has determined that the failure to obligate such funds is due to reasons within the PHA's control. "Unobligated" means that the PHA has not awarded contracts or started force account work for use of the funds. "Funds that are over three years old" mean funds approved in a FFY which is three or more FFYs before the current FFY. For example, if the PHA is applying for FFY 1982 funds, then "funds that are over three years old" are those from FFY 1978 and prior FFYs. "Reasons within the PHA's control" mean that the PHA did not take every feasible action toward completion and excludes lengthy delays outside of the PHA's control, such as litigation, environmental reviews, strikes, and other reasons determined to be valid by the HUD office.

"Major repairs" means work items that are usually not recurrent, are substantial in scope, involve expenditures that would otherwise materially distort the level trend of maintenance expenses, and may include replacement of structural elements and nonexpendable equipment due to normal wear and tear by items of substantially the same kind.

"Modernization funds" mean funds derived from an allocation of annual contributions contract authority under Section 5(c) of the Act for the purpose of financing physical and management improvements under an approved modernization program.

"Modernization program" means a PHA's program for carrying out modernization, as set forth in the proposed or approved Final Application for modernization funds.

"Modernization Project" means the improvement of one or more existing public housing projects. The term "project" means a development project with a unique project number.

"Special purpose modernization" means a modernization program for a project that is limited to cost-effective energy conservation work items which will not be adversely affected by any subsequent Comprehensive Modernization and that is approved only on a one-time basis for a project. For such projects, management improvements are not eligible modernization costs. PHAs that were approved for modernization in FFY 1981 are eligible for special purpose modernization through FFY 1983. PHAs that were not approved for modernization in FFY 1981 are eligible to apply for special purpose modernization only in the first two years of their five-year plans. Special purpose modernization also means the approval of additional contract and/or budget authority to effect the transfer of modernization funds between projects of modernization programs approved before July 1, 1978 or to meet increased interest costs.

"Work item" means any separately identifiable unit of work constituting a part of a modernization program.

§ 868.4 Eligible costs.

(a) *Physical improvements.* Physical improvements eligible for modernization funding may include alterations, betterments, additions, replacements and major repairs that are necessary to meet the Modernization and Energy Conservation Standards prescribed in § 868.18 for decent, safe and sanitary living conditions in public housing projects. These Standards may be exceeded only when necessary or highly desirable for the long-term physical and social viability of the individual project. If demolition is proposed, the PHA shall comply with 24 CFR Part 870.

(b) *Management improvement costs.*—(1) *Eligibility.* Management improvements that are project specific or PHA-wide in nature are eligible modernization costs subject to the following conditions:

(i) The management improvements are necessary to correct identified management problems and to sustain the physical improvements at the project to be modernized.

(ii) The management improvements require additional funds for implementation and the funds are not available from other sources.

(iii) The combined costs for management improvements and planning under paragraph (d) of this section shall not exceed 10 percent of the approved physical improvement costs for a PHA in a particular FFY, unless specifically approved by HUD. Under paragraph (d) of this section, planning costs shall not exceed five percent of the funds available to the HUD office in a particular FFY.

(iv) Management improvement costs shall be fundable only for the implementation period of the physical improvements. In rare cases, the HUD office may approve a longer period, up to a maximum of five years, where it is clearly shown to be necessary to complete the initial installation and demonstrate that the management work item will bring about needed management improvements.

(v) Where an approved modernization program includes management improvements which involve ongoing costs, HUD will not be obligated to provide continued funding or additional operating subsidy after the end of the implementation period of the management improvements. The PHA shall be responsible for finding other funding sources, reducing its ongoing management costs, or terminating the management activities.

(2) *Eligible management areas.* Subject to the conditions set forth in paragraph (b)(1) of this section, management improvements may involve or upgrade the following areas:

(i) Management, financial and accounting control systems of the PHA which are related to the project to be modernized;

(ii) Adequacy and qualifications of personnel employed by the PHA in the management and operation of the project to be modernized for each category of employment; and

(iii) Adequacy and efficacy of the following for the project to be modernized:

(A) Tenant programs and services;

(B) Tenant and project security;

(C) Tenant selection and eviction;

(D) Occupancy;

(E) Rent collection; and

(F) Maintenance.

(c) *Tenant moving costs.* Moving costs for tenants who have to be moved, either temporarily or permanently, to accommodate the modernization, including the move back to the modernized project or units where necessary, are eligible modernization costs. The PHA shall provide temporary or permanent housing at comparable cost for affected tenants on a nondiscriminatory basis.

(d) *Planning costs.* Planning costs necessary for developing the Preliminary and/or Final Applications (i.e., costs incurred before modernization program approval) are eligible modernization costs. These costs may be reimbursed after Final Application approval. Financially distressed PHAs, as defined in § 868.3, may request approval from HUD for up-front funding of planning costs where the HUD office determines that developing the Preliminary and/or Final Applications would otherwise present an undue financial hardship. Not more than five percent of the funds available to the HUD office in a particular FFY shall be used for planning costs.

(e) *Administrative costs.* Administrative costs necessary for the additional design and implementation of the physical and management improvements (i.e., costs to be incurred after modernization program approval)

(ii) *Optional.* Where the HUD office determines that the PHA lacks management capability, as defined in § 868.3, or that the magnitude of the total funds required for Comprehensive Modernization is such that one-stage funding is precluded by the HUD office's allocation, the HUD office may fund Comprehensive Modernization in two stages. At the first stage, approval may include funds for architectural/engineering work and a portion of the physical and management improvements.

(iii) *First stage.* The first stage shall be approved out of funds for single FFY, under one Final Application. The Final Application shall address all required improvements at the project, except that the modernization plan under paragraph (i)(2) of this section shall pertain only to work items to be completed during the first stage. When approving the first stage, the HUD office will indicate the approximate balance of the modernization funds to be approved for the project at the second stage and its intent to approve that balance, subject to the availability of future funds, satisfactory progress by the PHA in obligating first stage funds, PHA submission of additional documents and PHA compliance with HUD regulatory and statutory requirements.

(iv) *Second stage.* Where the PHA is requesting funding for the second stage of a two-stage Comprehensive Modernization at a project, the HUD office will determine whether the PHA has met the conditions stated in paragraph (g)(2)(iii) of this section. If not, the HUD office may not approve the second stage for funding at this time. The PHA submission for the second stage is limited only to the items as deemed necessary by HUD.

(v) *Implementation period.* The entire modernization program for the project shall be completed within a maximum five-year period. The PHA and the HUD office shall agree on the length of the implementation period of each stage. The first stage shall be completed within a maximum two-year period and the second stage within a maximum three-year period.

(h) *HUD preliminary funding decisions.* After all of the Joint Reviews, the HUD office will determine whether the PHA will be invited to submit the Final Application for the identified project(s) by considering whether the PHA has adequately addressed all the relevant issues, as determined by HUD, and giving preference to PHA's which:

(1) Request assistance for projects having conditions that threaten tenant health or safety, including elimination of lead-based paint hazards in public housing family units built before 1950, or a significant number of vacant, substandard units;

(2) Have demonstrated a capability of carrying out the activities proposed in the plan and approved by HUD; and

(3) Demonstrate that the modernization will result in the greatest cost savings, except for physical improvements of an emergency nature affecting the life, health and safety of tenants or related to fire safety.

(i) *Final application.* Upon notification from HUD, the PHA shall submit to the HUD office a Final Application which shall contain:

(1) For each project, an identification of and an estimate of the total costs of replacement of the equipment, systems or structural elements which would normally be replaced (assuming routine and timely maintenance is performed) over the remaining period of the ACC or during the 30-year period beginning on the date of submission of the Final Application, whichever period is longer. This estimate shall include an estimate of such costs accrued for the period which ends upon the date on which the Final Application is made and an estimate of the costs which will accrue during each 12-month period subsequent to the Final Application;

(2) A comprehensive assessment of physical and management improvement needs, described in paragraph (e)(2) of this section, and a plan for making the improvements and replacements and for meeting the needs. The plan shall include: (i) A schedule of actions to be completed over a period of not greater than five years from the date of approval of the application, within each 12-month period covered by the plan, and which are necessary to make the physical improvements and to upgrade the management and operation (see paragraph (g)(1) of this section); (ii) The estimated cost of each action; (iii) A project operating budget for each 12-month period covered by the plan, excluding modernization costs; and (iv) an estimate of the financial resources to be available from all sources and the amounts of modernization funds to be requested for each 12-month period covered by the plan.

(3) An organization and staffing plan, stating the proposed organization, staffing and inspection of the modernization program.

(4) A PHA report on compliance by the local governing body with the terms of the Cooperation Agreement, or as embodied by Article VIII of the Tribal Ordinance as applicable for certain IHAs, and any additional services or facilities that the PHA plans to request from the local governing body.

(5) A civil rights compliance certification, in a form prescribed by HUD.

(6) A resolution by the PHA Board of Commissioners, approving the Final Application and certifying that:

(i) The PHA will comply with all policies, procedures and requirements prescribed by HUD for the modernization, including implementation of the modernization in a timely, efficient and economical manner;

(ii) The estimated costs of the modernization program cannot be funded from current operating funds;

(iii) The proposed physical work meets the Modernization Standards;

(iv) The PHA has adopted the goal of awarding a specified percentage of the dollar value of the total of the modernization contracts, to be awarded during the subsequent FFY, to minority business enterprises;

(v) The PHA has complied with tenant/homebuyer participation requirements under § 868.7 and § 868.8;

(vi) The PHA has furnished a copy of the flood insurance policy to HUD or determined that flood insurance is not required under § 868.9(d);

(vii) The PHA will comply (where applicable) with requirements for the physically handicapped under § 868.9(f); and

(viii) Where the proposed modernization involves the temporary or permanent rehousing of tenants, the PHA will ensure nondiscrimination in the selection of tenants to be rehoused, determination of which tenants require temporary and permanent rehousing, assignment of tenants within the PHA, and provision of assistance to tenants being rehoused.

(7) *Special provisions for excepted categories.*—(i) *Special purpose modernization.* For a project under special purpose modernization, the PHA shall limit the items required in paragraph (i)(2)(i) of this section to only those special purpose work items.

(ii) *Emergency modernization.* For a project under emergency modernization, the PHA shall omit from the Final Application the items required in paragraphs (i)(1), (i)(2) (iii) and (iv), and (i)(3) and (4) of this section and limit the items required in paragraph (i)(2)(i) of this section to only those emergency work items.

(iii) *Homeownership modernization.* For a project under homeownership modernization, the PHA shall omit from the Final Application the items required in paragraphs (i)(1) and (i)(2) (iii) and (iv) of this section and limit the items required in paragraph (i)(2)(i) of this

section to only those homeownership work items. The PHA shall include in the Final Application a listing of the units to be included in the modernization program and the estimated cost attributed to each home.

(Approved by the OMB under OMB control number 2502-0206.)

(j) *ACC amendment.* After HUD approval of the Final Application, the PHA shall enter into an ACC amendment to obtain modernization funds.

§ 868.6 Modernization Project.

(a) For purposes of financing modernization, each modernization program approved for PHA shall be treated as a separate Modernization Project. The Modernization Project may include improvements to one or more projects. Improvements to a single project may be included in more than one Modernization Project.

(b) HUD and the PHA shall enter into ACC amendment, for each Modernization Project. The ACC amendment shall provide for the payment of annual contributions sufficient to amortize the modernization cost over a period of no more than 20 years, and shall require low-income use of the housing for not less than 20 years (subject to sale of homeownership units in accordance with the terms of the ACC).

§ 868.7 Tenant participation.

For a rental project only, before submission of the Preliminary Application, the PHA shall consult with the tenants regarding its intent to submit an application for modernization funds. Before the Joint Review, the PHA shall notify the tenants of the project to be modernized and the tenant organization, if any, of the proposed modernization program, afford tenants a reasonable opportunity to present their views on the proposed program and alternatives to it, and give full and serious consideration to tenant recommendations. At the Joint Review, the PHA shall provide the tenants and HUD with a copy of and an evaluation of tenant recommendations, indicating the reasons for PHA acceptance or rejection, consistent with HUD requirements and the PHA's own determination of efficiency, economy and need. The PHA also shall provide a copy of this evaluation to the tenants and the tenant organization, if any. After HUD approval of the modernization program, the PHA shall inform the tenants and the tenant organization, if any, of the approved work items. The provisions of this section do not apply to proposed work items of an emergency nature, affecting the life, health and safety of tenants. However, the PHA shall inform tenants of approved emergency work items.

(Approved by the OMB under OMB control number 2502-0218.)

§ 868.8 Homebuyer participation.

(a) For a homeownership project only, before the Joint Review, the PHA shall discuss the modernization program with the homebuyer families of the project to be modernized and advise them of the effect of the modernization on the terms of the Homebuyer Agreements. The PHA shall afford the homebuyer families a reasonable opportunity to present their views on the proposed program and give full and serious consideration to their recommendations consistent with HUD requirements and the PHA's own determination of efficiency, economy and need.

(b) The PHA shall inform each homebuyer family that:

(1) To participate, it must be in substantial compliance with the terms of its Homebuyer Agreement;

(2) It will have an opportunity to express its views and preferences with respect to the modernization of its home;

(3) The purchase price and the amortization period will be increased as provided in § 868.10;

(4) It will have an opportunity to participate in the final inspection of the work to determine completion in accordance with the requirements; and

(5) Participation in the program is optional.

(c) The PHA shall provide each homebuyer family with a copy of the PHA's evaluation of its recommendations, the tentative decisions reached on the modernization program to be submitted to the HUD office, the estimated cost of the proposed modernization program, and the amount of this cost to be attributed to its home.

(d) If the homebuyer family decides to participate in the modernization program with respect to any of the proposed work items, it must agree in writing that its Homebuyer Agreement will be amended upon approval of the Final Application to provide that, as result of the amount of modernization cost attributed to its home, the purchase price and the amortization period will be increased as provided in § 868.10.

(e) Any homebuyer family may decline to participate without risk to its homebuyer status.

(f) Before submission of the Final Application, the PHA shall obtain a signed agreement from each participating homebuyer family that it will amend its Homebuyer Agreement upon approval of the Final Application. The PHA shall retain copies of the signed agreements and the amended Homebuyer Agreements in its files for inspection by the HUD office.

(g) The provisions of paragraphs (b) through (f) of this section do not apply where modernization work is limited to correction of development deficiencies.

(Approved by the OMB under OMB control number 2502-0218.)

§ 868.9 Other program requirements.

The PHA shall comply with the following program requirements for a HUD allocation of modernization funds.

(a) *Civil rights compliance.* In the case of PHAs other than Indian Housing Authorities (IHAs), the PHA shall comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4), Title VIII of the Civil Rights Act of 1968, as amended (42 U.S.C. 3601-3619), Executive Orders 11063, 11246 and 12138 (Women's Business Enterprise), Section 3 of the HUD Act of 1968 (12 U.S.C. 1701u), and the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). (For IHAs, see 24 CFR 805.105, Applicability of civil rights statutes, and 24 CFR 805.106, Preferences, opportunities, and nondiscrimination in employment and contracting.)

(b) *Minority and women's business or Indian enterprise opportunity.* In the case of PHAs other than IHAs, in conformance with Executive Order 11625, the PHA shall take every action to meet Departmental goals for awarding modernization contracts to minority business enterprises. For IHAs, see 24 CFR 805.106(a) regarding preference in the award of modernization contracts to Indian organizations and Indian-owned economic enterprises. Both PHAs and IHAs shall take appropriate affirmative action to assist women's business enterprises.

(c) *Environment and historic preservation.* The PHA's Final Application is subject to any applicable requirements under the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4332 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), the Archeological and Historic Preservation Act of 1974 (16 U.S.C. 469 et seq.), Executive Order 11593 on Protection and Enhancement of the Cultural Environment (including the procedures prescribed by the Advisory Council on Historic Preservation in 36 CFR Part 800), the Clean Air Act (42 U.S.C. 7401 et seq.), the Federal Water Pollution

Control Act (33 U.S.C. 1251 et seq.). Executive Orders 11988 and 11990 (Floodplain Management and Protection of Wetlands), and HUD environmental regulations (24 CFR Part 50).

(d) *Flood insurance.* The PHA shall comply with the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001 et seq.).

(e) *Lead-based paint poisoning prevention.* The PHA shall comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4801 et seq.) and HUD implementing regulations (24 CFR Part 35).

(f) *Accessibility for physically handicapped.* The PHA shall comply with the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151) and HUD implementing regulations (24 CFR Part 40).

(g) *Energy conservation.* The PHA shall comply with 24 CFR Part 805, Subpart C, regarding the conduct of an energy audit and the undertaking of cost-effective energy conservation measures, before HUD approval of Comprehensive Modernization or special purpose modernization for a project. The cost of performing an energy audit is an eligible modernization cost.

(h) *Wage rates*—(1) *HUD-determined wage rates.* Under Section 12 of the Act, the PHA and its contractors shall pay not less than the wages prevailing in the locality, as determined or adopted (subsequent to a determination under applicable State, tribal, or local law) by the Secretary, to all laborers and mechanics employed by the PHA or its contractors in carrying our major repairs as defined in § 868.3.

(2) *Davis-Bacon wage rates.* Under section 12 of the Act, the PHA and its contractors shall pay not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor, under the Davis-Bacon Act (42 U.S.C. 276a et seq.), to all laborers and mechanics employed by the PHA or its contractors for modernization work or contracts over $2,000, except major repairs as defined in § 868.3.

(3) *Technical wage rates.* The PHA and its contractors shall pay HUD-determined prevailing wage rates to all architects, technical engineers, draftsmen and technicians employed in the modernization of a project.

(i) *Insurance.* The PHA shall carry insurance, as prescribed by HUD, to cover the additional exposures created by the modernization activities and reflect the increased value of the buildings after modernization.

§ 868.10 Special requirements for homeownership projects.

(a) Promptly after HUD approval of the Final Application, each homebuyer family shall execute an amendment to its Homebuyer Agreement, reflecting an increase in the purchase price of its home and an extension of the amortization period in accordance with paragraphs (b) and (c) of this section, except where the modernization work is limited to the correction of development deficiencies.

(b) For Turnkey III projects and for Mutual Help projects placed under ACC from March 9, 1976 or converted in accordance with 24 CFR 805.428:

(1) The amount of estimated modernization cost attributable to the home, as shown in the HUD-approved Final Application, shall be added to the homebuyer's purchase price as initially determined (under 24 CFR 804.113(a) or 804.115(b) for Turnkey III projects or under 24 CFR 805.422 (b) or (c) for Mutual Help projects).

(2) The period of the homebuyer's current purchase price schedule shall be extended by the same percentage as the percentage of increase in the homebuyer's purchase price. The new purchase price schedule shall:

(i) Show monthly amortization of the new purchase price over a period commencing on the same day as the original purchase price schedule and terminating at the end of the extended period; and

(ii) Be computed on the basis of the same interest rate as used for the current purchase price schedule.

(3) If a modernization program is approved for a project after one or more earlier modernization programs for the same project, the total amount of modernization cost attributable to the home under the prior modernization program(s) shall be included as part of the homebuyer's initial purchase price in applying the provisions of paragraphs (b) (1) and (2) of this section.

(c) For Mutual Help projects placed under ACC before March 9, 1976, and not converted in accordance with 24 CFR 805.428 and for Turnkey III projects that do not have purchase price schedules:

(1) These projects do not involve purchase price schedules for amortization of the homebuyer's purchase price over a fixed period of time because the homebuyer's purchase price in these projects is based on the unamortized balance of the portion of the project's development debt attributable to the home. Consequently, it is necessary to establish a separate schedule for the amortization of the estimated modernization cost attributable to the home, as shown by the HUD-approved Final Application.

(2) The PHA shall furnish to the homebuyer a schedule showing monthly amortization of the estimated modernization cost attributable to the home, at the Minimum Loan Interest Rate specified in the ACC for the Modernization Project, over a period commencing on the first day of the month after the date of original occupancy of the home by the homebuyer and terminating at the end of the period determined as follows:

(i) Divide the amount of the estimated modernization cost attributable to the home (including the total amount of modernization cost attributable to the home under prior modernization programs, if any) by the amount of the current HUD-approved estimated replacement cost of the home.

(ii) Multiply this amount by 25, round the result to the next higher number and add that number to 25. This is the number of years to be used as the period for the modernization amortization schedule.

(iii) The purchase price for the unit shall be the sum of (A) the balance of the debt attributable to the home and (B) the amount remaining on the modernization schedule at the time of settlement.

(3) The calculation provided in paragraph (c)(2) of this section shall apply retroactively to modernization programs approved from FFY 1980 funds. Therefore, the PHA shall recalculate the homebuyer's amortization schedule to reflect the provisions of paragraph (c)(2) of this section.

§ 868.11 Special requirements for Section 23 Leased Housing Bond-Financed projects.

A Section 23 Leased Housing Bond-Financed project is eligible for modernization only if HUD determines that the project has met the following conditions:

(a) The project was financed by the issuance of bonds;

(b) Clear title to the project will be conveyed to or vested in the PHA at the end of the Section 23 lease term;

(c) There are no legal obstacles affecting the PHA's use of the property as public housing during the 20-year amortization period of the modernization;

(d) After completion of the modernization, the project will have a remaining useful life of at least 20 years and it is in the financial interest of the Federal Government to improve the project; and

(a) The project is covered by a Cooperation Agreement between the PHA and local governing body during the 20-year amortization period of the modernization.

§ 868.12 Contracting requirements.

(a) *Compliance with State, tribal, and local law and Federal requirements.* The PHA shall comply with State, tribal and local laws and Federal requirements applicable to bidding and contract award.

(b) *Competitive bidding requirements.* For each construction or equipment contract over $10,000, the PHA shall conduct competitive bidding, except for procurement under the HUD Consolidated Supply Program.

(c) *Bonding requirements.* For all construction or equipment contracts of $10,000 or more, the contractor shall furnish a performance and payment bond for 100 percent of the contract price or, as may be required by law, separate performance and payment bonds, each for 50 percent or more of the contract price, or a 20 percent cash escrow or a 25 percent letter of credit.

(d) *PHA agreement with architect/engineer.* The PHA shall obtain architectural/engineering services through the competitive negotiation process, except where: (1) FFY 1981 or subsequent year funds are being used to finance additional services under an existing contract; or (2) FFY 1980 or prior year funds are being used to finance a contract not yet executed, but for which the PHA has initiated discussions with an architect/engineer before the effective date of this rule. The PHA shall comply with HUD requirements either to submit for HUD approval the contract before execution or to certify that the scope of work is consistent with any agreements reached with HUD, that the fee is appropriate and does not exceed the HUD-approved budget amount, and that, if applicable, the competitive negotiation process was used.

(Under section 18(b) of OMB Circular A-40, OMB has waived the requirement that the information collection requirement contained in this paragraph must be reviewed and assigned an OMB control number.)

(e) *Construction and bid documents.* The PHA shall comply with HUD requirements either to submit for HUD approval complete construction and bid documents before inviting bids or to certify to receipt of the required architect's/engineer's certification, that the construction documents accurately reflect HUD-approved work, and that the bid documents are complete and include all mandatory items.

(Approved by the OMB under OMB control numbers 2502-0157 and 2502-0218.)

(f) *Contract award.* The PHA shall obtain HUD approval of the proposed award of modernization construction and equipment contracts if the bid amount exceeds the HUD-approved budget amount or the PHA receives a single bid. In all other instances, the PHA shall comply with HUD requirements either to submit the proposed award for HUD approval or to make the award without HUD approval after the PHA has certified that the bidding procedures and award were conducted in compliance with State, tribal or local laws and Federal requirements, that the award does not exceed the approved budget amount and is not being made on the basis of a single bid, and that HUD clearance has been obtained for the award under previous participation procedures, including absence from the HUD Consolidated List of Debarred, Suspended or Ineligible Contractors and Grantees.

(Approved by the OMB under OMB control number 2502-0157.)

(g) *Change orders.* Except in an emergency endangering life or property, the PHA shall comply with HUD requirements either to submit the proposed contract changes for HUD approval or to certify that the proposed work is not within the scope of the contract, that the proposed work cannot be postponed and is necessary and economical, and that the additional costs are within the latest HUD-approved budget or otherwise approved by HUD.

(Approved by the OMB under OMB control number 2502-0157.)

(h) *Construction requirements.* The PHA shall submit to the HUD office periodic progress reports and shall submit all contract settlement documents for HUD approval.

(Approved by the OMB under OMB control number 2502-0157).

(i) *Management improvement contracts.* The PHA shall obtain consultant services through the competitive negotiation process. The PHA shall submit both proposals and contracts for management improvements, as well as contract changes, for prior HUD approval.

(Approved by the OMB under OMB control number 2502-0219.)

§ 868.13 Modernization financing.

To request modernization funds against the approved modernization program, the PHA shall:

(a) Consult informally with the HUD office as to the amount of modernization funds needed for the time period in question, the immediacy of need, and the method of financing. Direct advances shall be approved only where the PHA has an immediate cash need that cannot be delayed until the next possible note sale and if the total amount of the PHA's outstanding direct advances, when added to the amount of direct advances currently requested, does not exceed $200,000.

(b) Submit a request to the HUD office for only the amount of modernization funds needed for the time period in question and support the request with a written justification, in a form prescribed by HUD. The amount of financial assistance made available for any one fiscal year may not exceed the sum of the amounts determined necessary by HUD to:

(1) Undertake the actions specified for the year in the schedule submitted under § 868.5(i)(2);

(2) Fund the replacement costs identified under § 868.5(i)(1), which have accrued for the period ending at the beginning of such year, but have not been previously paid;

(3) Reimburse the PHA for the cost of developing the plan described in § 868.5(i)(2), less any amount provided the PHA with respect to such year under paragraph (b)(4) of this section, subject to the limitation set forth in § 868.4(d); and

(4) Enable a financially distressed PHA, as defined in § 868.3, to develop a plan, subject to the limitation set forth in § 868.4(d).

(Approved by the OMB under OMB control number 2502-0168.)

(c) Submit the latest required progress reports under § 868.14, unless the first required report is not yet due.

(Approved by the OMB under OMB control numbers 2502-0164 and 2502-0219.)

(d) No financial assistance shall be made available to a PHA for any year subsequent to the first year unless HUD determines that the PHA has made substantial efforts to meet the objectives for the preceding year under the plan described in § 868.5(i)(2).

§ 868.14 Progress reporting.

For each quarter until completion of the modernization program, the PHA shall submit, in a form prescribed by HUD, to the HUD office:

(a) A report on modernization fund expenditures; and

(Approved by the OMB under OMB control numbers 2502-0164 and 2502-0219.)

(b) A narrative report on management improvement progress, where applicable.

(Approved by the OMB under OMB control number 2502-0219.)

§ 868.15 Budget revisions.

The PHA shall not incur any modernization cost in excess of the total approved budget. The PHA shall submit a revision of the budget, in a form prescribed by HUD, for prior HUD approval if the PHA plans (within the total approved modernization budget) to:

(a) Delete or substantially revise approved work items;

(b) Add new work items; or

(c) Incur modernization costs in excess of the approved budget amount for:

(1) A work item; or

(2) Any project.

(Approved by the OMB under OMB control number 2502-0164 for modernization undertaken with pre-FFY 1982 funds and OMB control number 2502-0208 for modernization undertaken with FFY 1982 and subsequent year funds.)

§ 868.16 On-site inspections.

The PHA shall provide, by contract or otherwise, adequate and competent supervisory and inspection personnel during modernization, whether work is performed by contract or force account labor and with or without the services of an architect/engineer, to assure work quality and progress.

§ 868.17 Fiscal closeout of a modernization program.

Upon completion of a modernization program, the PHA shall submit the actual modernization cost certificate, in a form prescribed by HUD, to the HUD office for review, audit verification and approval. The audit shall follow the guidelines prescribed by OMB Circular A-102, Attachment P-Audit Requirements. If the audited modernization cost certificate indicates that excess funds have been approved, the PHA shall dispose of the excess funds as directed by HUD. If the audited modernization cost certificate discloses unauthorized expenditures, the PHA shall take such corrective actions as HUD may direct.

(Approved by the OMB under OMB control number 2502-0219.)

§ 868.18 Modernization and Energy Conservation Standards.

(a) All improvements funded under this Part, which may include alterations, betterments, additions, replacements or major repairs, shall meet the HUD Modernization Standards, described in paragraph (c) of this section and established to provide decent, safe and sanitary living conditions in PHA-owned public housing projects, and the HUD Energy Conservation Standards for cost-effective energy conserving improvement in such projects, described in paragraph (d) of this section.

(b) The Modernization Standards and the Energy Conservation Standards are being published separately.

(c) The Modernization Standards prescribe standards which will provide decent, safe and sanitary living conditions in public housing, including corrections of violations of basic health and safety codes, and address all deficiencies, including those related to deferred maintenance, in order to meet the intent of HUD's Minimum Property Standards as they could reasonably be applied to existing housing. In addition, these standards cover improvements relating to site and building security. The Modernization Standards are contained in HUD Handbook 7485.2, Public Housing Modernization Standards, and other documents cited therein.

(d) The Energy Conservation Standards prescribe standards for the installation of cost-effective energy conserving improvements, including solar energy systems. The Energy Conservation Standards provide for the conducting of energy audits, including cost-benefit analyses of energy saving opportunities, in order to determine which measures will be effective in conserving energy. The Energy Conservation Standards will be contained in HUD Handbook 7485.3, Public Housing Energy Conservation, and other documents cited therein.

Dated: May 18, 1982.

Philip Abrams,

General Deputy Assistant Secretary for Housing, Deputy Federal Housing Commissioner.

[FR Doc. 82-17866 Filed 5-20-82 8:45 am]

BILLING CODE 4210-27-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

24 CFR Part 868

[Docket No. R-83-1103]

Comprehensive Improvement Assistance Program

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Interim rule.

SUMMARY: The rule amends the Comprehensive Improvement Assistance Program regulations by revising the definition of Special Purpose Modernization to eliminate: (1) The one-time limitation on filing an application for Special Purpose Modernization for an individual project and (2) the deadline on Public Housing Agencies (PHAs) for filing such applications. These revisions are intended to allow PHAs to make energy-related improvements which are cost-effective.

DATES: Effective Date: October 11, 1983. Comment due date: October 17, 1983.

ADDRESS: Interested persons are invited to submit comments regarding this rule to the Office of General Counsel, Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, D.C. 20410. Comments should refer to the above docket number and title. A copy of each set of comments submitted will be available for public inspection and copying during regular business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Pris Buckler, Room 4224, Office of Public Housing, Department of Housing Urban Development, 451 Seventh Street, SW., Washington, D.C. 20410, (202) 755-5595. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Limitations on Special Purpose Modernization Removed

The Comprehensive Improvement Assistance Program (CIAP), which was established by section 14 of the United States Housing Act (USHA of 1937) (42 U.S.C. 1437*l*), provides assistance to Public Housing Agencies (PHAs), including Indian Housing Authorities, to improve the physical condition of existing public housing projects, and to upgrade the management and operation of such projects.

One form of assistance provided under CIAP is special purpose modernization which is a project modernization program that is limited to cost-effective energy conservation work items which will not be adversely affected by any subsequent Comprehensive Modernization.

Under § 868.3 of the current CIAP regulations, special purpose modernization may be approved only on a one-time basis for a particular project. This limitation is unduly restrictive in certain situations, for example, when:

1. In a prior year, the energy audit was funded under special purpose modernization and the PHA is now requesting funds under special purpose modernization to implement the results of the audit at the same project;

2. Energy conservation devices which were not on the market when the special purpose modernization was first approved are now available and the PHA is requesting funds under special purpose modernization for these items;

3. Energy conservation work which was not previously determined to be cost-effective is now determined to be cost-effective because of a large reduction in the cost of an energy conservation device or a large increase in the cost of energy; or

4. Special purpose modernization was approved for certain items with the greatest cost-savings and the PHA is now requesting funds for other items which are cost-effective, but have a slightly longer payback period.

In addition, the current § 868.3 provides that special purpose modernization may now be approved only in the first two years of a PHA's five-year plan. The Department believes that this limitation is inappropriate, since lack of funding may have prevented a PHA from completing all energy conservation work in the first two years of its five-year plan. Therefore, in order to facilitate cost-effective energy conservation improvements, the Department is revising the definition of "special purpose modernization" in § 868.3 to eliminate (1) the one-time limit on filing a request for funding of an individual project and (2) the deadline for filing such requests by a PHA.

Other Matters

This rule also corrects typographical errors in §§ 868.3 and 868.4 of the current rule.

This rule amends the requirements for applying for special purpose modernization in Federal Fiscal Year (FFY) 1984 and thereafter. Since PHAs must be provided sufficient time to prepare their FFY 1984 applications, the Department has determined that notice and prior public comments are impracticable and contrary to the public interest and that good cause exists for making this rule effective as soon after publication as possible. However, public comments are invited and will be considered in adopting a final rule.

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR Part 50, which implement Section 102(2)(C) of the National Environmental Policy Act of 1969. The finding is available for public inspection during regular business hours in the Office of the Rules Docket Clerk, Room 10276, 451 Seventh Street, SW., Washington, D.C. 20410.

This rule does not constitute a "major rule" as that term is defined in Section 1(b) of Executive Order 12291 on Federal Regulation issued by the President on February 17, 1981. Analysis of the rule indicates that it does not: (1) Have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Pursuant to 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undersigned hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities. This rule should have no different economic impact on small PHAs than it does on large PHAs. Any economic impact should be beneficial since the rule provides PHAs greater flexibility in using special purpose modernization.

This rule was not listed in the Department's Semiannual Agenda of Regulations published on April 25, 1983 (48 FR 18054), pursuant to Executive Order 12291 and the Regulatory Flexibility Act.

The Catalog of Federal Domestic Assistance program number and title is 14.156—Public Housing—Modernization of Projects.

List of Subjects in 24 CFR Part 868

Loan programs: Housing and community development, Public housing, Reporting and recordkeeping requirements.

Part 868—[AMENDED]

Accordingly, the Department amends 24 CFR Part 868 as follows:

1. In § 868.3, the definition of "special purpose modernization" is revised to read as follows:

§ 868.3 *Definitions.*

* * * * *

"Special purpose modernization" means a modernization program for a project that is limited to cost-effective energy conservation work items which will not be adversely affected by any subsequent Comprehensive Modernization. For such projects, management improvements are not eligible modernization costs. Special purpose modernization also means the approval of additional contract or budget authority to meet increased interest costs, or to effect the transfer of modernization funds between projects with modernization programs approved before July 1, 1978.

* * * * *

2. In FR Doc. 82-13698, appearing in the Federal Register issue of May 21, 1982 at page 22315, § 868.3, the definition "HUD office" is corrected by changing "of" to read "or."

3. In FR Doc. 82-13698, appearing in the Federal Register issue of May 21, 1982 at page 22316, § 868.4, the introductory text to paragraph (b)(1) is corrected by changing "of" to read "or."

(United States Housing Act of 1937 (42 U.S.C. 1437), sec. 7(d), Dept. of HUD Act (42 U.S.C. 3535(d))

Dated: July 27, 1983.

W. Calvert Brand,

General Deputy Assistant Secretary of Housing—Federal Housing Commissioner.

[FR Doc. 83-22348 Filed 8-15-83; 8:45 am]

BILLING CODE 4210-27-M

APPENDIX 2. LISTING OF DEVELOPMENT ACCOUNTS THAT MAY BE USED IN THE COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM

For work items to be financed with modernization funds, the appropriate development account number that relates to an individual work item is entered on Form HUD-52825 for modernization programs approved after FFY 1981 or on Form HUD-52990 for modernization programs approved before FFY 1982. Listed below are the development accounts that may be used in the Comprehensive Improvement Assistance Program (CIAP) or the previous Modernization Program.

Account Number	Development Account Title
1408	Management Improvements
1410.1	Nontechnical Salaries
1410.2	Technical Salaries
1410.4	Legal Expense
1410.9	Employee Benefit Contributions
1410.10	Travel
1410.19	Sundry (advertising costs only)
1415	Liquidated Damages
1430.1	Architectural and Engineering Fees
1430.2	Consultant Fees
1430.6	Permit Fees
1430.7	Inspection Costs
1430.19	Sundry Planning Costs
1440.1	Property Purchases
1440.2	Condemnation Deposits
1440.4	Surveys and Maps
1440.5	Appraisals
1440.6	Title Information
1440.8	Legal Cost-Site
1440.10	Option Negotiations
1440.12	Current Tax Settlements
1440.19	Sundry Site Costs
1450	Site Improvement
1460	Dwelling Structures

Account Number	Development Account Title
1465.1	Dwelling Equipment - Nonexpendable
1470	Nondwelling Structures
1475.1	Nondwelling Equipment - Office Furniture and Equipment
1475.2	Nondwelling Equipment - Maintenance Equipment
1475.3	Nondwelling Equipment - Community Space Equipment
1475.7	Nondwelling Equipment - Automotive Equipment
1495.1	Relocation Costs - Moving Families and Individuals

For definitions of the above development accounts, refer to the Low-Rent Housing Accounting Handbook 7510.1. Additional guidance on Development Accounts 1408, 1410.9 and 1410.10 is provided below:

1408 Management Improvements. This account shall be charged with all costs incurred by the PHA for management improvements after modernization program approval, including non-technical salaries, technical salaries, employee benefit contributions, and consultant fees. NOTE: Management improvement costs are eligible costs only in conjunction with modernization funds approved after FFY 1980, unless the PHA meets the substance of the CIAP application requirements.

1410.9 Employee Benefit Contributions. This account also shall be charged with unemployment compensation expenses, as required by State law, related to costs of terminating employees hired on a temporary basis for modernization.

1410.10 Travel. This account shall be charged with travel expenses of PHA officials and employees traveling on official business in connection with HUD-approved CIAP training, only where prior HUD approval is obtained.

APPENDIX 3. LISTING OF DEVELOPMENT ACCOUNTS THAT MAY NOT BE USED IN THE COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM

The following listing of development accounts that may not be used in the Comprehensive Improvement Assistance Program or the previous Modernization Program are defined in the Low-Rent Housing Accounting Handbook 7510.1.

Account Number	Development Account Title
1410.12	Publications
1410.14	Membership Dues and Fees
1410.16	Telephone and Telegraph
1410.18	Equipment Expended
1410.19	Sundry (other than advertising costs)
1420.1	Interest to HUD
1420.2	Interest on Notes - Non-HUD
1420.3	Interest on Bonds
1420.7	Interest - Income From Investments
1425	Initial Operating Deficit
1430.5	Cost Estimates
1430.8	Fee for HUD Services
1430.9	Housing Surveys
1440.3	Excess Property
1440.20	Site Net Income
1465.2	Dwelling Equipment - Expendable
1475.9	Nondwelling Equipment - Expendable
1480	Contract Work in Process.
1482	Developer's Contract Price (Turnkey)
1495.2 through 1495.7	Relocation Costs

Flow Chart - Application Processing - Comprehensive Improvement Assistance Program

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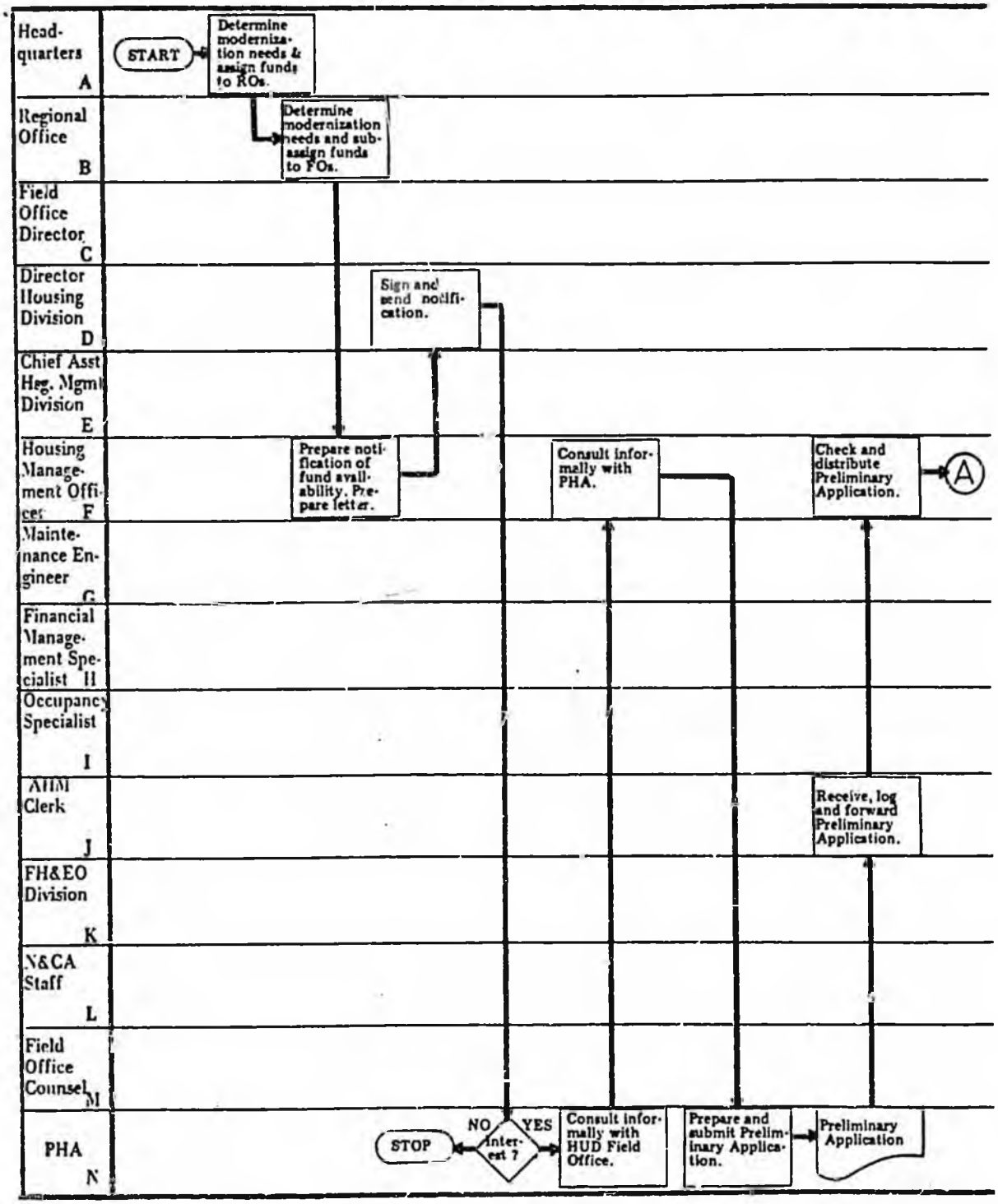
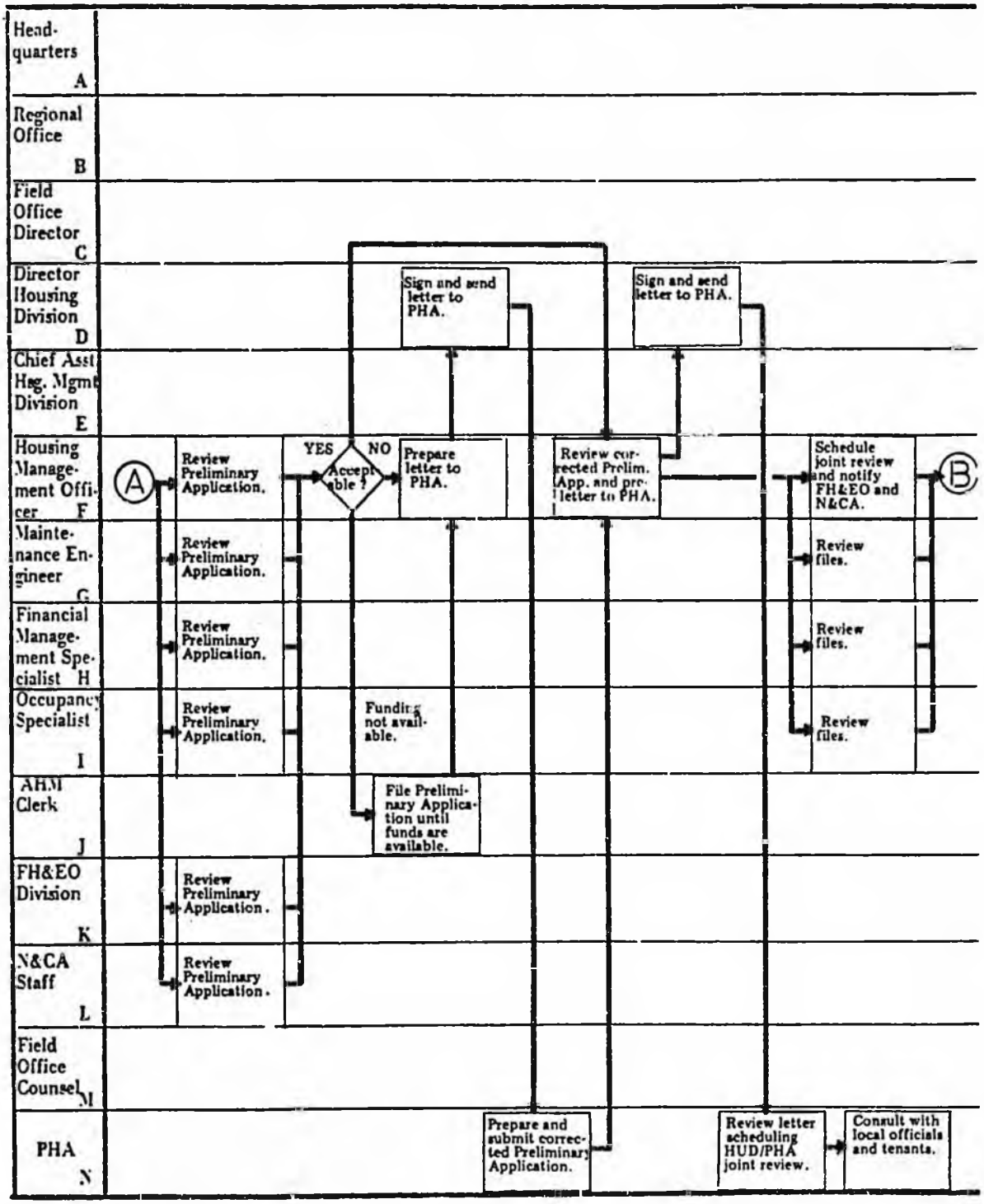


APPENDIX 4

Flow Chart - Application Processing - Comprehensive Improvement Assistance Program Page 2 of 6 pages.



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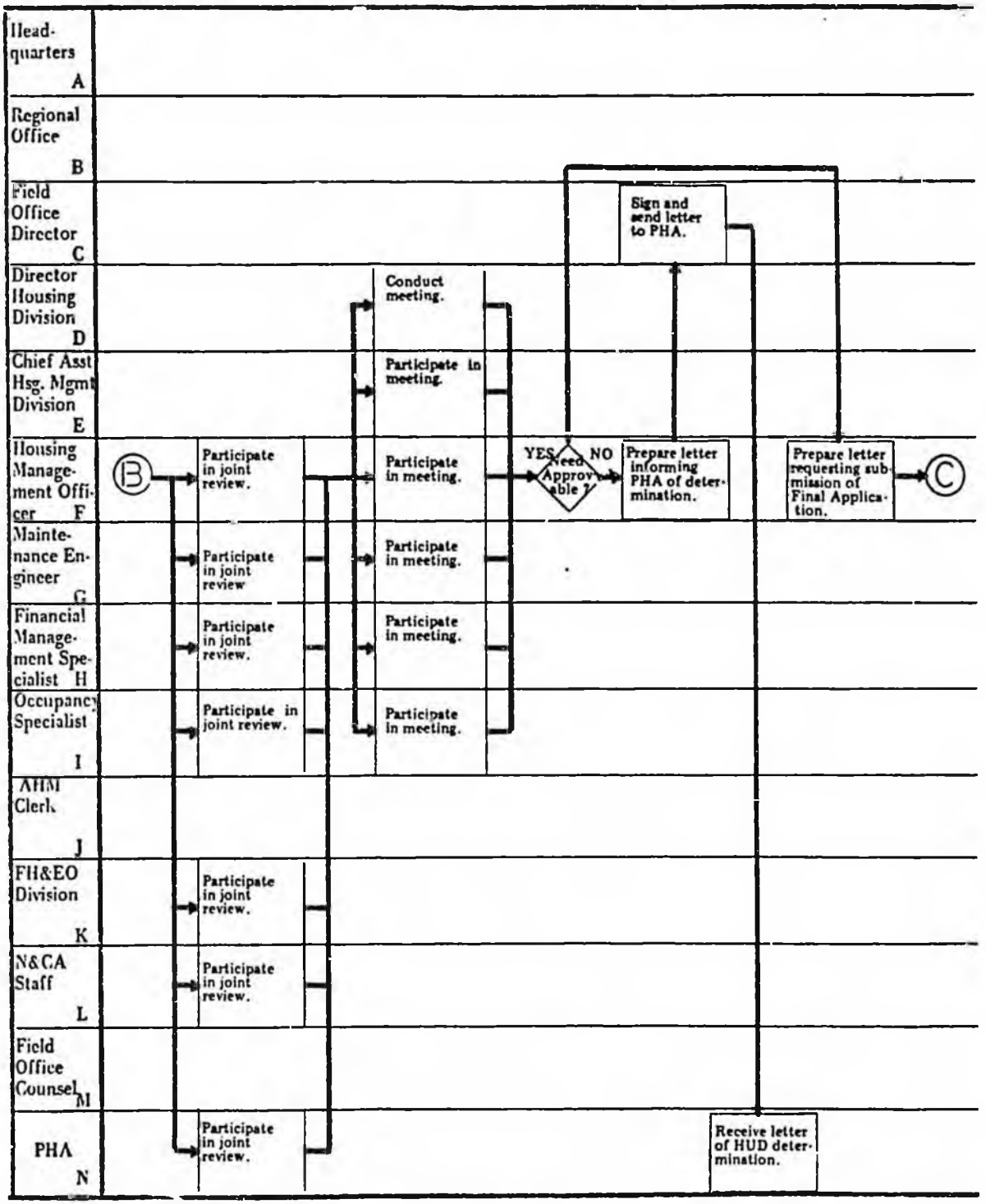

APPENDIX 4

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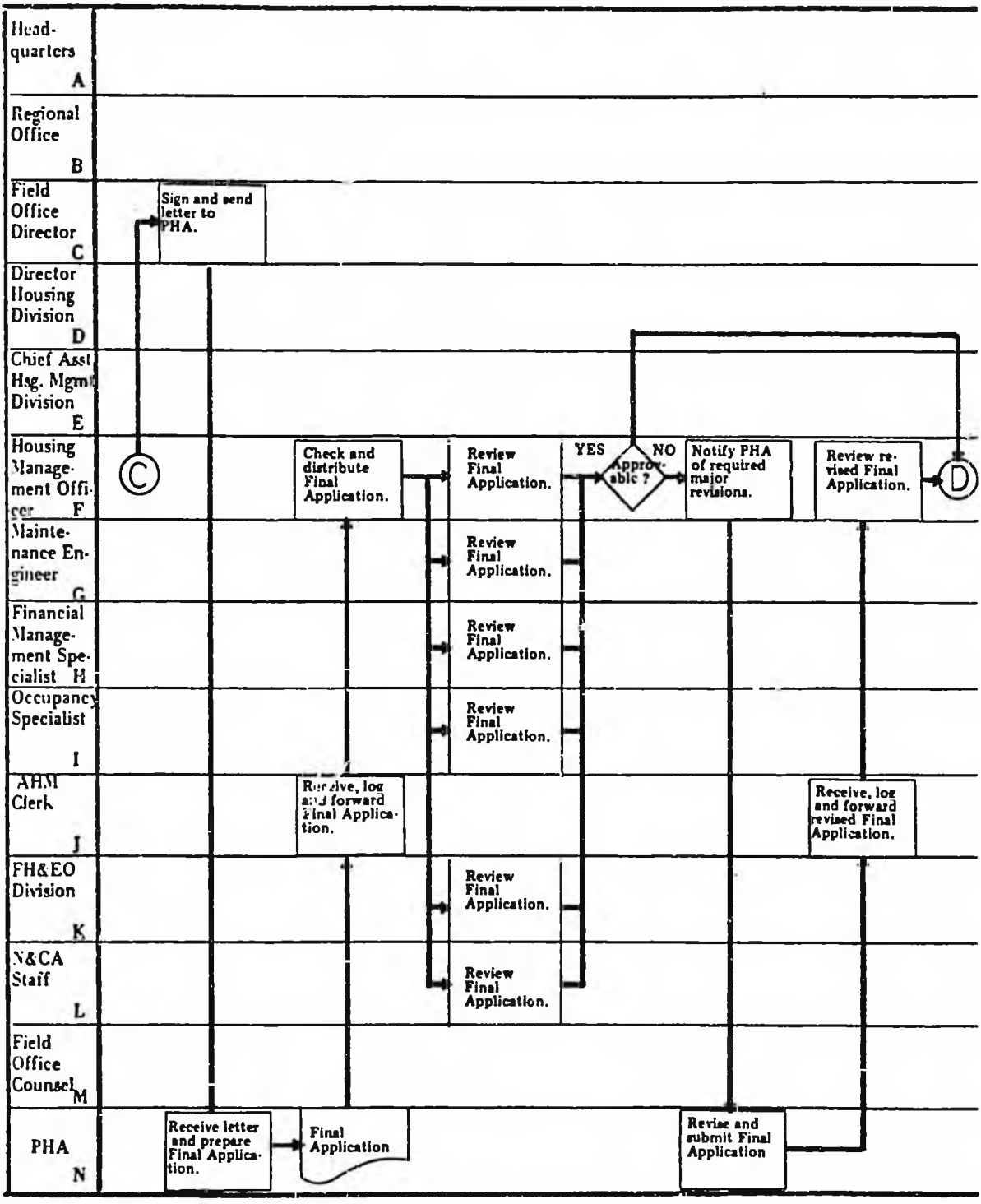
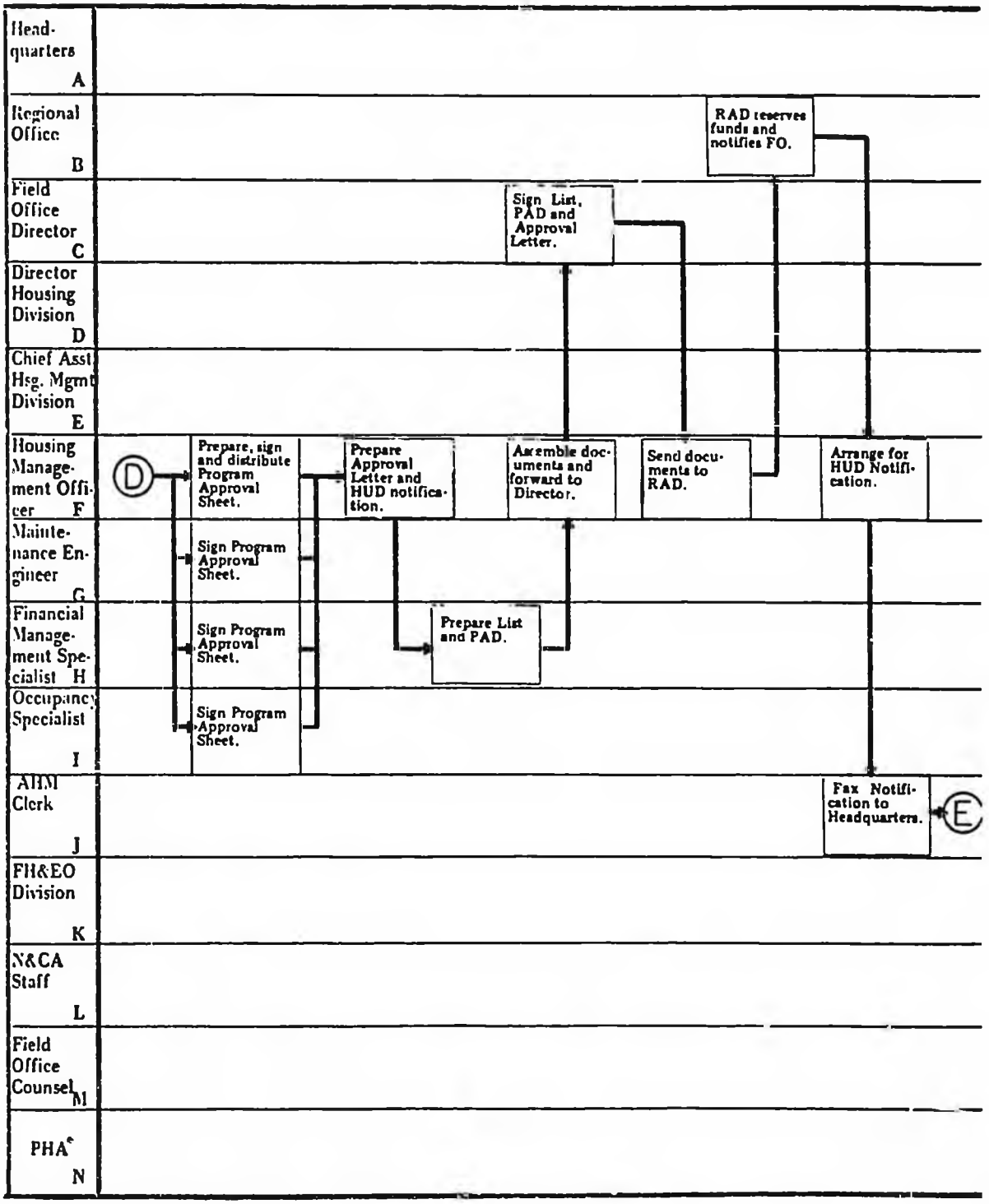
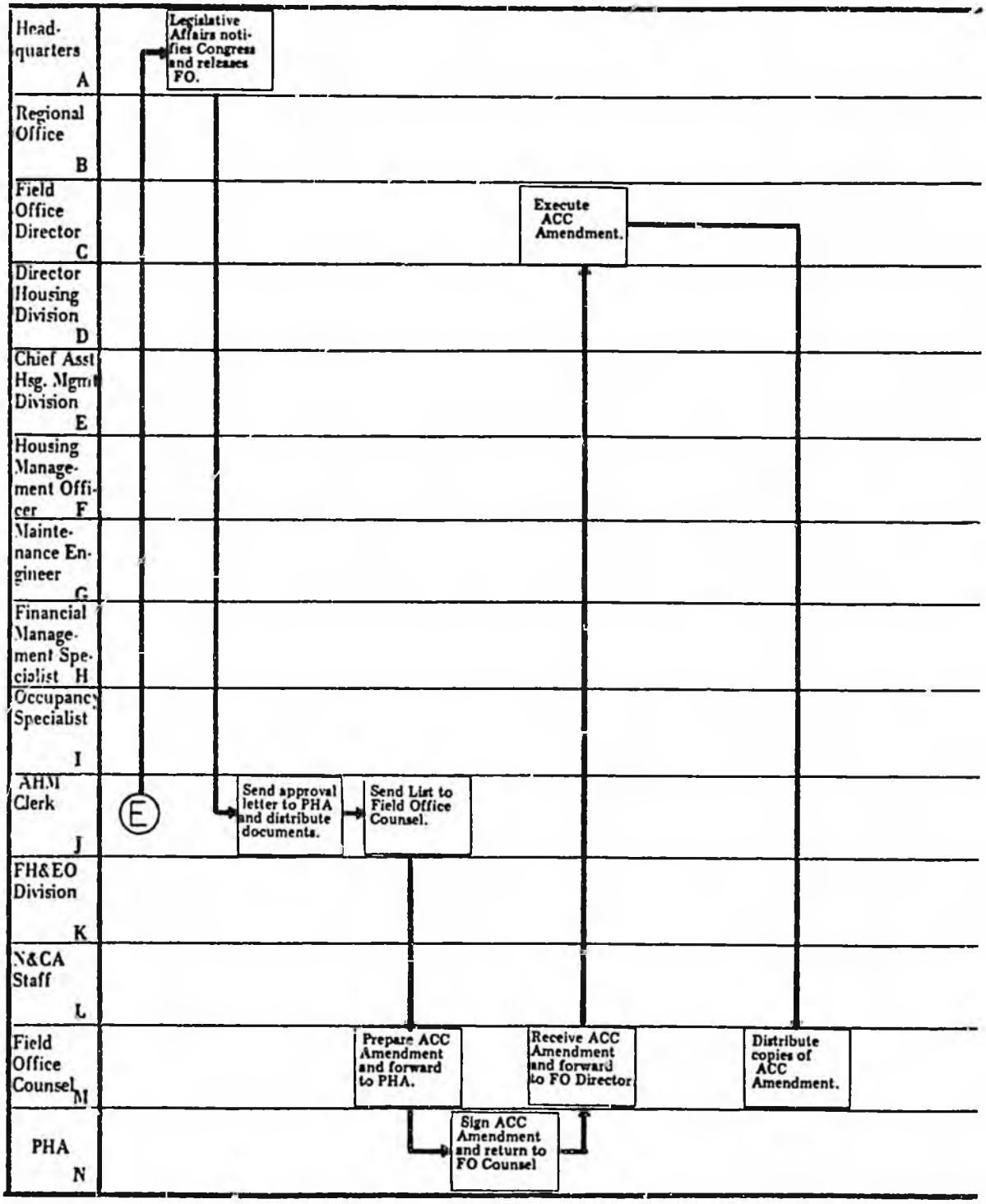


Flow Chart - Application Processing - Comprehensive Improvement Assistance Program Page 5 of 6 pages.



Flow Chart - Application Processing - Comprehensive Improvement Assistance Program



Field Office:_____ Federal Fiscal Year:_____

PHA NAME	Notif. of Fund Avail.	Prelim. Applic. Rec'd	Letter Sent to PHA	Joint Review Scheduled/ Completed	Letter Report Sent to PHA	Final Applic. Rec'd	Review Completed		Approval Documents Prepared	List Signed	PAD Sent to RAD	HUD Notif. Sent to HQ	Approved Documents Sent to PHA	ACC Amended
							AHM	FHAEO						

Form Approved
OMB No. 2502-0208

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM

PRELIMINARY APPLICATION

NAME OF PUBLIC HOUSING AGENCY	LOCALITY (City/County and State)	CURRENT FFY	PAGE ____ OF ____

PRIORITY NUMBER	INDIVIDUAL PROJECT NUMBER	TYPE OF MODERNIZATION	FUNDING REQUESTED/APPROVED					BRIEF DESCRIPTION OF BASIC APPROACH/ MAJOR WORK ITEMS	ANNUAL COST SAVINGS	
			FFY____	FFY____	FFY____	FFY____	FFY____		TOTAL	PUM
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	

I hereby certify that the PHA has notified tenants of its intent to submit a Preliminary Application. I hereby certify that, in consultation with local officials, the PHA has determined that the proposed Comprehensive or Special Purpose Modernization is financially feasible and will result in long term physical and social viability at the project. Where such a determination cannot be made, the PHA has considered alternatives to improvement of all existing dwelling units, and has included the selected alternative in the Preliminary Application. I hereby certify that the PHA has considered and included every possible cost savings.

SIGNATURE OF EXECUTIVE DIRECTOR OR DESIGNEE

DATE

HUD 52824 (4-82)

INSTRUCTIONS FOR PREPARATION OF PRELIMINARY APPLICATION, FORM HUD-52824

REPORT SUBMISSION

Prepare and submit the original and three copies *(or any lesser number of copies as specified by HUD)* of this form to HUD by the HUD-established submission date. Use as many pages of this form as necessary to cover all individual projects for which modernization funding is requested. This form includes the five-year plan *(original submission or annual update)*.

HEADING INSTRUCTIONS

Insert the Public Housing Agency *(PHA)* Name, Locality *(city/county and State where the PHA Central Office is located)*, Current Federal Fiscal Year *(FFY)*, and Page Number, e.g., Page 1 of 2.

COLUMN INSTRUCTIONS

1. COLUMN (1), PRIORITY NUMBER. For each individual project in Column (2), enter a number, e.g., 1, 2, 3, etc. . . ., representing the priority order of the projects for which modernization funding is requested. Attach a brief explanation of the priority order of the projects for which modernization funding is requested in the current FFY.

2. COLUMN (2), INDIVIDUAL PROJECT NUMBER. Enter the individual project number, e.g., VA-1-33, of each project for which modernization funding is requested. An individual project may be entered more than once, e.g., where the PHA is requesting more than one type of modernization for the same project, e.g., Emergency as priority 1 and Comprehensive Modernization as priority 4 for project VA-1-33.

3. COLUMN (3), TYPE OF MODERNIZATION. For each individual project in Column (2), enter the type of modernization requested, i.e., Comprehensive, Special Purpose, Emergency or Homeownership. The PHA that was approved for modernization in FFY 1981 is eligible to apply for Special Purpose Modernization through FFY 1983. The PHA that was not approved for modernization in FFY 1981 is eligible to apply for Special Purpose Modernization only in the first two years of its five-year plan. The PHA may apply for Emergency Modernization only in the current FFY.

4. COLUMNS (4) THROUGH (8), FUNDING REQUESTED/APPROVED. Enter in the headings of Columns (4) through (8) the sequential numbers of five Federal Fiscal Years *(FFYs)*, beginning with the first FFY in which the PHA is applying or was approved for modernization under the Comprehensive Improvement Assistance Program *(CIAP)*. The earliest FFY which could be entered in Column (4) is FFY 1981. For example, if the PHA was approved for modernization in FFY 1981 and is appiying for additional modernization in FFY 1982, the PHA shall enter FFYs 1981 through 1985. If the PHA was not approved or did not apply for modernization in FFY 1981 or a subsequent FFY, the PHA shall enter the current FFY in Column (4). Once approved for modernization under the CIAP, the designated FFYs remain the same for a five-year period.

   For each individual project in Column (2), also enter in the appropriate FFY column the gross estimate of the total needs where the PHA is requesting or was approved for Comprehensive Modernization or the gross estimates of the specialized needs where the PHA is requesting or was approved for Special Purpose, Emergency or Homeownership Modernization. For example, if the PHA was approved for modernization in FFY 1981 and is applying for additional modernization in FFY 1982, the PHA shall enter the amounts approved for each individual project in Column (4) and the updated amounts requested in Columns (5) through 8. The total needs of the individual project undergoing Comprehensive Modernization should include all current physical and management improvement needs, which require modernization funding, plus any needs anticipated during the implementation period of the Comprehensive Modernization.

5. COLUMN (9), BRIEF DESCRIPTION OF BASIC APPROACH/MAJOR WORK ITEMS. For each individual project in Column (2) proposed for Comprehensive or Special Purpose Modernization, enter a brief description of the basic approach to the rehabilitation of the project, such as improvement of all existing dwelling units, changes in project density, design, unit distribution and/or household type *(elderly/nonelderly)*, demolition or disposition. For each individual project in Column (2) proposed for Emergency or Homeownership Modernization, enter a brief description of the major physical work items.

6. COLUMN (10), ANNUAL COST SAVINGS. For each individual project in Column (2), enter the aggregate annual cost savings of all work items, as a total dollar amount and as a per unit per month *(PUM)* amount. Savings are to be calculated based on the estimated costs involved before and after completion of the modernization work items. All cost estimates shall be made assuming a 100% occupancy before and after modernization. PUM is calculated by dividing the total dollar amount of the annual cost savings by the number of dwelling units after modernization by 12 [cost savings amount ÷ *(units x 12)*]. Attach a brief supporting statement, explaining how the estimates were derived by work item or groups of work items. Where savings are derived from more than one project, the savings per project should be identified.

(RESERVED)

(RESERVED)

Form Approved
OMB No. 2502-0208

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
HOUSING – FEDERAL HOUSING COMMISSIONER
Comprehensive Improvement Assistance Program

PROJECT PROFILE

NOTE: Public Housing Agencies (PHA s) with 100 or less units in management are only required to fill out the asterisked (*) items.

1c. Project Number*

1d. End of Initial Operating Period (EIOP) Date*

1a. Project Name*

1b. Project Address*

2. PHYSICAL DESCRIPTION*

2a. Number of Units Available for Occupancy

2c. Brief Description of NonDwelling Space *(if any)*

2b. UNITS BY BEDROOM AND BY STRUCTURE TYPE *(Enter Data Below.)*

TYPE OF BEDROOM \ TYPE OF UNIT	DETACHED & SEMI-DETACHED	ROW	WALK-UP	ELEVATOR
0 Bedroom				
1 Bedroom				
2 Bedrooms				
3 Bedrooms				
4 Bedrooms				
5 Bedrooms				

3. OCCUPANCY DATA

3a. Current Vacancy Rate* ____ %

3b. Average Rent: $

3c. Broad Range Average Rent: $

4. Brief Description of Surrounding Neighborhood *(including neighborhood description, such as CDBG, NSA, Section 8 NSA, etc., if applicable)**

5. RENT COLLECTION

5a. Does the PHA have a written rent collection policy for the project? ☐YES ☐NO

5b. Are all reexaminations current? ☐YES ☐NO

5c. Tenant Accounts Receivable (TAR) of tenants in possession as a percentage of the total monthly charges:* ____ %

6. TENANT SELECTION, ASSIGNMENT AND EVICTION

6a. Is project management implementing the HUD-approved Tenant Selection and Assignment Plan?* ☐YES ☐NO

6b. Is project management implementing the Non-Economic Selection Criteria Requirements?* ☐YES ☐NO

6c. Estimated number of notices to quit issued in the last twelve months:

6d. Estimated number of eviction notices filed in the last twelve months:

6e. Estimate number of units vacated due to evictions in the last twelve months:

6f. Estimated number of units vacated in the last twelve months:

6g. Estimated average number of days a unit remains vacated:

6h. Number of grievance hearings held in the last twelve months:

Rent Disputes	Other	TOTAL

7. MAINTENANCE*

7a. Is project management conducting a regular preventive maintenance schedule? ☐YES ☐NO *(If "Yes," attach copy of checklist used)*

7b. Estimated average routine response time from date of request to service in the last twelve months:

7c. Estimated average emergency response time from date of request to service in the last twelve months:

8. SECURITY*

Does the project have a crime or vandalism problem? ☐YES ☐NO

9 PHA/TENANT RELATIONS

Is there an active project/PHA wide tenant organization?

PROJECT ☐YES ☐NO

PHA WIDE ☐YES ☐NO

Use this space if needed for additional remarks. Identify remarks to appropriate item number above.

HUD-52921 (3/81)

OMB No. 2577-0044

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM

COMPREHENSIVE ASSESSMENT/PROGRAM BUDGET

PART I - SUMMARY

PAGE 1 OF 7

NAME OF PHA	LOCALITY (City/County and State)	ACC NUMBER	MODERNIZATION PROJECT NUMBER	FEDERAL FISCAL YEAR	☒ ORIGINAL ☐ REVISION (Give Number)
USA Housing Authority	Anywhere, Virginia	A-1234	VA-30-403	1982	

LINE NO	SUMMARY BY DEVELOPMENT ACCOUNT	INDIVIDUAL PROJECT NO VA-30-1	INDIVIDUAL PROJECT NO VA-30-2	INDIVIDUAL PROJECT NO	INDIVIDUAL PROJECT NO.	INDIVIDUAL PROJECT NO.	TOTAL FUNDS REQUESTED	HUD APPROVED FUNDS
1	TOTAL OPERATING FUNDS PROVIDED BY PHA (CDBG)	$ 33,000	$ 26,400	$	$	$		
2	1408 Management Improvements	23,100	23,100				46,200	
3	1410 Administration	10,350	10,350				20,700	
4	1415 Liquidated Damages	- 0 -	- 0 -				- 0 -	
5	1430 Fees and Costs	73,800	60,240				134,040	
6	1440 Site Acquisition	- 0 -	- 0 -				- 0 -	
7	1450 Site Improvement	27,100	9,360				36,460	
8	1460 Dwelling Structures	2,106,000	1,684,800				3,790,800	
9	1465.1 Dwelling Equipment - Nonexpendable	121,250	147,000				318,250	
10	1470 Nondwelling Structures	- 0 -	- 0 -				- 0 -	
11	1475 Nondwelling Equipment	- 0 -	- 0 -				- 0 -	
12	1495.1 Relocation Costs	- 0 -	- 0 -				- 0 -	
13	MAXIMUM MODERNIZATION COST (Sum of Lines 2 through 12)	$ 2,411,600	$ 1,934,850	$	$	$	$4,346,450	$
14	TOTAL MODERNIZATION PROGRAM COST (Line 1 + Line 13)	$ 2,444,600	$ 1,961,250	$	$	$	$4,405,850	$
15	AMOUNT OF LINES 3 AND 5 RELATED TO PLANNING COSTS						$ 17,000	$
16	TOTAL PLANNING AND MANAGEMENT IMPROVEMENT COSTS (Line 15 + Line 2)						63,200	
17	AMOUNT OF LINE 13 RELATED TO PHYSICAL IMPROVEMENTS (Line 13 - Line 15)						$4,283,250	$
18	LINE 16 – LINE 17 (Not to exceed 10%)						1 %	%
19	ANNUAL COST SAVINGS	$ 40,000	$ 36,000				$ 76,000	

The PHA will not be allowed to participate in the Comprehensive Improvement Assistance Program unless this form is completed and filed as required by existing regulation.	SIGNATURE OF EXECUTIVE DIRECTOR OR DESIGNEE	DATE	SIGNATURE OF FIELD OFFICE DIRECTOR	DATE

HUD 52825 (4-82)

NAME OF PHA	COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM COMPREHENSIVE ASSESSMENT/PROGRAM BUDGET PART II - SUPPORTING PAGES				PAGE 3 OF 7
USA Housing Authority					

WORK ITEM NUMBER	DEVELOPMENT ACCOUNT NUMBER	ASSESSMENT OF NEED	DESCRIPTION OF PROPOSED/APPROVED ACTION	INDIVIDUAL PROJECT NUMBER	TOTAL FUNDS REQUESTED	HUD APPROVED FUNDS
(1)	(2)	(3)	(4)	(5)	(6)	(7)
		d. Tenant Accounts Receivable (TAR) is 20% of current rent roll. There is no written rent collection procedure.	d. Develop written rent collection procedure. Implement, monitor and evaluate rent collection procedures to reduce TAR from 20% to 10% within 2 years.	VA-30-1 VA-30-2	No Funding Required	
		e. When ADP systems are installed, clerical and management staff will not be familiar with their use.	e. Train staff on use of ADP systems. Contract will include provision for callback during first year of implementation. Cost of $11,000 prorated equally between projects. Contract labor.		11,000	
				VA-30-1	5,500	
				VA-30-2	5,500	
M-82-3	1410.2	TECHNICAL SALARIES			18,000	
		Inadequate supervision of force account labor.	Pay ½ of maintenance foreman's salary of $18,000 for 2 years to supervise force account labor and serve as the PHA contracting officer working with the architect. Cost of $18,000 prorated equally between projects. Force account labor.	VA-30-1	9,000	
				VA-30-2	9,000	
M-82-4	1410.9	EMPLOYEE BENEFIT CONTRIBUTIONS			2,700	
		Inadequate supervision of force account labor.	Pay ½ of PHA's annual contribution of $2,700 (15% of salary) for maintenance foreman for two years. Cost of $2,700 prorated equally between projects.	VA-30-1	1,350	
				VA-30-2	1,350	
M-82-5	1430.1	ARCHITECTURAL AND ENGINEERING FEES			11,000	
		a. Professional services required.	a. HUD Field Office approved contract for engineering firm to survey VA-30-1 and VA-30-2 and perform unit-by-unit inspections on plumbing, heating, electrical, utility distribution and structural components. Survey provided basis for budget. Contract labor. (Planning cost)	VA-30-1	5,500	
				VA-30-2	5,500	

HUD 52828 (4-82)

NAME OF PHA: USA Housing Authority	COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM COMPREHENSIVE ASSESSMENT/PROGRAM BUDGET PART II - SUPPORTING PAGES					PAGE 2 OF 7
WORK ITEM NUMBER	DEVELOPMENT ACCOUNT NUMBER	ASSESSMENT OF NEED	DESCRIPTION OF PROPOSED/APPROVED ACTION	INDIVIDUAL PROJECT NUMBER	TOTAL FUNDS REQUESTED	HUD APPROVED FUNDS
(1)	(2)	(3)	(4)	(5)	(6)	(7)
G-82-1		GUTTER AND DOWNSPOUT REPLACEMENT			59,400	
		Gutters and downspouts have deteriorated and are no longer securely anchored. Replacements are needed.	Replace 15,000 linear feet of downspout at VA-30-1 and 12,000 linear feet at VA-30-2 at $2.20 per linear foot, including labor, with No. 24 gauge galvanized 3 inch round, with joints, double screw fastened, masonry anchored, and cast iron boot, including painting. Force account labor.	VA-30-1 VA-30-2	33,000 26,400	
M-82-2	1408	MANAGEMENT IMPROVEMENTS				
		a. Maintenance work order delivery system is terrible. There is a backlog of work orders. Emergency work orders are not handled within 24 hours.	a. Contract with City Manpower Department on reduced fee basis for services of 2 manpower specialists to analyze maintenance operations, hiring practices, classification levels and procurement practices and recommend training for maintenance staff. Cost of $5,200 prorated equally between projects. Contract labor.		5,200	
				VA-30-1 VA-30-2	2,600 2,600	
		b. Maintenance staffs are not familiar with work order system and lack technical skills.	b. Use training vendors on a contract basis for maintenance staff at two projects. Preliminary discussions with manpower specialists indicate cost of $8,000, prorated equally between projects. Contract labor.		8,000	
				VA-30-1 VA-30-2	4,000 4,000	
		c. Manual accounting and work order/inventory systems are unreliable and do not supply necessary information on a timely basis.	c. Contract with Constitutional Housing Authority for general ledger, tenant accounting and work order/inventory systems. Contract cost, prorated equally between projects, is for reproduction, installation and modification and includes 4 on-site visits to resolve any problems. Software package alone has no cost due to public domain status.		22,000	
				VA-30-1 VA-30-2	11,000 11,000	

HUD 52828 (4-82)

NAME OF PHA	COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM	PAGE 3 OF 7
USA Housing Authority	COMPREHENSIVE ASSESSMENT/PROGRAM BUDGET PART II - SUPPORTING PAGES	

WORK ITEM NUMBER	DEVELOPMENT ACCOUNT NUMBER	ASSESSMENT OF NEED	DESCRIPTION OF PROPOSED/APPROVED ACTION	INDIVIDUAL PROJECT NUMBER	TOTAL FUNDS REQUESTED	HUD APPROVED FUNDS
(1)	(2)	(3)	(4)	(5)	(6)	(7)
		d. Tenant Accounts Receivable (TAR) is 20% of current rent roll. There is no written rent collection procedure.	d. Develop written rent collection procedure. Implement, monitor and evaluate rent collection procedures to reduce TAR from 20% to 10% within 2 years.	VA-30-1 VA-30-2	No Funding Required	
		e. When ADP systems are installed, clerical and management staff will not be familiar with their use.	e. Train staff on use of ADP systems. Contract will include provision for callback during first year of implementation. Cost of $11,000 prorated equally between projects. Contract labor.		11,000	
				VA-30-1	5,500	
				VA-30-2	5,500	
M-82-3	1410.2	TECHNICAL SALARIES				
		Inadequate supervision of force account labor.	Pay ½ of maintenance foreman's salary of $18,000 for 2 years to supervise force account labor and serve as the PHA contracting officer working with the architect. Cost of $18,000 prorated equally between projects. Force account labor.		18,000	
				VA-30-1	9,000	
				VA-30-2	9,000	
M-82-4	1410.9	EMPLOYER BENEFIT CONTRIBUTIONS			2,700	
		Inadequate supervision of force account labor.	Pay ½ of PHA's annual contribution of $2,700 (15% of salary) for maintenance foreman for two years. Cost of $2,700 prorated equally between projects.	VA-30-1	1,350	
				VA-30-2	1,350	
M-82-5	1430.1	ARCHITECTURAL AND ENGINEERING FEES				
		a. Professional services required.	a. HUD Field Office approved contract for engineering firm to survey VA-30-1 and VA-30-2 and perform unit-by-unit inspections on plumbing, heating, electrical, utility distribution and structural components. Survey provided basis for budget. Contract labor. (Planning cost)		11,000	
				VA-30-1	5,500	
				VA-30-2	5,500	

HUD-52826 (4-82)

NAME OF PHA	COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM	PAGE 5 OF 7
USA Housing Authority	COMPREHENSIVE ASSESSMENT/PROGRAM BUDGET PART II - SUPPORTING PAGES	

WORK ITEM NUMBER	DEVELOPMENT ACCOUNT NUMBER	ASSESSMENT OF NEED	DESCRIPTION OF PROPOSED/APPROVED ACTION	INDIVIDUAL PROJECT NUMBER	TOTAL FUNDS REQUESTED	HUD APPROVED FUNDS
(1)	(2)	(3)	(4)	(5)	(6)	(7)
M-82-8	1460	DWELLING STRUCTURES				
		a. Original porcelain kitchen sinks and metal cabinets are rusty.	a. Install new wall and base cabinets, stainless steel sinks, laminated plastic counter tops and kitchen exhaust fans at a cost of $900 per unit. 500 units at VA-30-1 and 400 units at VA-30-2. 10% contingency included. Contract labor.		810,000	
				VA-30-1	450,000	
				VA-30-2	360,000	
		b. Water damage to walls and floors in bathrooms round bathtubs.	b. Install tub surrounds (ceramic tile or porcelain steel panels) around bathtubs to prevent serious structural damage at a cost of $250 per unit. 500 units at VA-30-1 and 400 units at VA-30-2. 10% contingency included. Contract labor.		225,000	
				VA-30-1	125,000	
				VA-30-2	100,000	
		c. Concrete floors are uncovered. This is unattractive and causes excessive heat losses.	c. Cover floor space with 12" x 12" vinyl or sheet goods at a cost of $0.90 per sq. ft. including installation. VA-30-1 has 350,000 sq. ft. and VA-30-2 has 280,000 sq. ft. 10% contingency included. Contract labor.		567,000	
				VA-30-1	315,000	
				VA-30-2	252,000	
		d. Windows are steel casement type without storms. Replacement hardware is difficult to obtain. Excessive amounts of air enter the units.	d. Replace steel casement windows with double pane insulating windows at a cost of $1,000 per unit including installation. 500 units at VA-30-1 and 400 units at VA-30-2. 10% contingency included. Contract labor.		900,000	
				VA-30-1	500,000	
				VA-30-2	400,000	
		e. Energy audit revealed PHA utility costs are excessive and it would be cost-effective to convert to tenant-paid utilities.	e. Install individual electric meters at a cost of $165 per meter. 500 meters at VA-30-1 and 400 meters at VA-30-2. Force account labor.		148,000	
				VA-30-1	82,500	
				VA-30-2	66,000	

HUD-52828 (4-82)

NAME OF PHA: USA Housing Authority	COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM COMPREHENSIVE ASSESSMENT/PROGRAM BUDGET PART II - SUPPORTING PAGES				PAGE 6 OF 7
WORK ITEM NUMBER	DEVELOPMENT ACCOUNT NUMBER	ASSESSMENT OF NEED	DESCRIPTION OF PROPOSED/APPROVED ACTION	INDIVIDUAL PROJECT NUMBER	TOTAL FUNDS REQUESTED	HUD-APPROVED FUNDS
(1)	(2)	(3)	(4)	(5)	(6)	(7)
M-82-8 (Continued)	1460	f. Heating system is 25 years old. Furnaces require constant maintenance. It is difficult to obtain replacement parts. Energy audit revealed excessive energy usage.	f. Replace furnaces with energy efficient, gas, forced air, 65,000 - 80,000 BTUs. Furnaces will have vent dampers. New energy efficient thermostats will be installed. Cost estimates are $1,100 per unit. 500 units at VA-30-1 and 400 units at VA-30-2. 10% contingency included. Contract labor.		990,000	
				VA-30-1	550,000	
				VA-30-2	440,000	
		g. Energy audit revealed PHA utility costs are excessive and it would be cost-effective to convert to tenant-paid utilities.	g. Install individual gas meters at a cost of $77 per meter. 500 meters at VA-30-1 and 400 meters at VA-30-2. Force account labor.		69,300	
				VA-30-1	38,500	
				VA-30-2	30,800	
					81,000	
		h. Energy audit revealed excessive heat losses from hot water lines.	h. Install hot water line insulation to pipes under dwelling unit floors. Cost of $1.50 per linear foot includes wire brush cleaning or scraping. 30,000 linear feet at VA-30-1 and 24,000 linear feet at VA-30-2. 10% contingency included. Contract labor.		45,000	
				VA-30-1	36,000	
				VA-30-2		
M-82-9	1465.1	DWELLING EQUIPMENT - NONEXPENDABLE				
		a. One-half of ranges and refrigerators need replacing because of excessive maintenance required.	a. Purchase through Consolidated Supply Program 250 - 30" gas ranges and 250 - 12.4 cubic feet automatic defrost refrigerators at VA-30-1 and 200 ranges and 200 refrigerators at VA-30-2. Cost for each range is $175 ($180 less $5 salvage) and for each refrigerator is $310 ($315 less $5 salvage) including installation.		218,250	
				VA-30-1	121,250	
				VA-30-2	97,000	

HUD 52825 (4-82)

NAME OF PHA	COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM COMPREHENSIVE ASSESSMENT/PROGRAM BUDGET PART II - SUPPORTING PAGES					PAGE 7 OF 7
USA Housing Authority						
WORK ITEM NUMBER	DEVELOPMENT ACCOUNT NUMBER	ASSESSMENT OF NEED	DESCRIPTION OF PROPOSED/APPROVED ACTION	INDIVIDUAL PROJECT NUMBER	TOTAL FUNDS REQUESTED	HUD APPROVED FUNDS
(1)	(2)	(3)	(4)	(5)	(6)	(7)
M-82-9 (Continued)	1465.1	b. Manual accounting and work order/ inventory systems are unreliable and do not provide necessary information on a timely basis.	b. Purchase and install XYE model computer to complement software package acquired from the Constitutional Housing Authority Cost of $100,000 prorated equally between projects. 10% contingency included. Contract labor.	VA-30-1 VA-30-2	100,000 50,000 50,000	

HUD 52825 (4-82)

INSTRUCTIONS FOR PREPARATION OF COMPREHENSIVE ASSESSMENT/PROGRAM BUDGET, FORM HUD-52825

REPORT SUBMISSION

Before the Joint Review, prepare a separate Part II covering all individual projects which will be inspected during the Joint Review. Use as many pages of Part II as are necessary. Where invited by HUD to submit a Final Application, prepare a separate Form HUD-52825 *(Parts I and III)*, for each Modernization Project. All individual projects included in the Modernization Project must be under the same consolidated Annual Contributions Contract. Submit the original and three copies *(or any lesser number of copies as specified by HUD)* of this form to HUD at the time of Final Application or when revisions are necessary, in accordance with the requirements of the Comprehensive Improvement Assistance Program Handbook 7485.1 REV-1.

PART I - SUMMARY

1. HEADING. Insert the Public Housing Agency *(PHA)* Name, Locality *(city/county and State where the PHA Central Office is located)*, and Annual Contributions Contract Number. Insert the Modernization Project Number which is: the State abbreviation, e.g., VA; the one-, two-, or three-digit PHA code; and a three-digit Modernization Project code where the first digit is always the number "9" and the last two digits are the sequential number of the Modernization Project, beginning with the first modernization funding after modernization as a separate project was implemented *(July 1, 1978)*. For example, in FY 1982, HUD approved the third Modernization Project for the USA Housing Authority. The Modernization Project Number would be USA-1-903. Also insert the Federal Fiscal Year in which modernization funds are being requested or were approved. Also check the appropriate block as to whether the form is the Original or a Revision. If a Revision, indicate the revision number. Also insert the Page Number, e.g., Page 1 of 5. Number the pages for both Parts sequentially.

2. LINES 1 THROUGH 14. For each line, enter the amount to be allocated to each individual project included in the Modernization Project, as well as the total funds requested, rounded to the nearest ten dollars. If the amount of modernization funds requested by the PHA is modified by HUD, HUD will enter the adjusted amount in the appropriate column(s) for the individual projects(s) and the adjusted total in the column, HUD-Approved Funds, rounded to the nearest ten dollars.

3. LINE 15, AMOUNT OF LINES 3 AND 5 RELATED TO PLANNING COSTS. Enter the sum of the portions of Lines 3 and 5 related to planning costs.

4. LINE 16, TOTAL PLANNING AND MANAGEMENT IMPROVEMENT COSTS. Enter the sum of Lines 15 and 2.

5. LINE 17, AMOUNT OF LINE 13 RELATED TO PHYSICAL IMPROVEMENTS. Subtract Line 16 from Line 13 and enter the difference.

6. LINE 18, LINE 16 DIVIDED BY LINE 17. Divide Line 16 by Line 17 to obtain the percentage of total planning and management improvement costs to physical improvement costs. Move the decimal two digits to the right. If the percentage exceeds 10%, the PHA shall submit appropriate justification.

7. LINE 19, ANNUAL COST SAVINGS. For each individual project, enter the aggregate annual cost savings of all work items, as a total dollar amount and as a per unit per month *(PUM)* amount. Savings are to be calculated on the estimated costs involved before and after completion of the modernization work items. All cost estimates shall be made assuming a 100 percent occupancy before and after modernization. PUM is calculated by dividing the total dollar amount of the annual cost savings by the number of dwelling units after modernization by 12 *(cost savings ÷ (units x 12))*. Attach a brief supporting statement, explaining how the estimates were derived by work item or groups of work items. Where savings are derived from more than one project, the savings per project should be identified. For the Modernization Project, enter the aggregate annual cost savings of all work items as a total dollar amount only in the column, Total Funds Requested. Where modified by HUD, HUD will enter the adjusted amount in the appropriate column(s) for the individual project(s) and the adjusted total in the column, HUD-Approved Funds.

PART II - SUPPORTING PAGES

1. HEADING. Insert the PHA Name and Page Number, e.g., Page 2 of 5.

2. COLUMN (1), WORK ITEM NUMBER. Enter all work items to be financed from operating funds prior to listing all work items to be financed from modernization funds. After listing all work items to be financed from operating funds, leave one space and draw a double line across the page to separate the operating fund work items from the modernization fund work items. Assign each work item a number in numerical sequence, combining the current FFY with the item number, e.g., 82-1, 82-2, etc. Distinguish work items involving operating funds from work items involving modernization funds by the use of the letters "O" and "M" respectively, preceding the assigned work item number, e.g., O-82-1 or M-82-5. Each work item shall be limited to such work which is chargeable to the same development account. However, if there is more than one work item for the same development account, use the letters "a," "b," etc. to differentiate among work items, e.g., M-82-6a or M-82-6b.

3. COLUMN (2), DEVELOPMENT ACCOUNT NUMBER. This column is not applicable for work items to be financed from operating funds or which require no modernization funding. For work items to be financed from modernization funds, enter the appropriate development account which relates to each work item in Column (4). The development account numbers are more detailed than those summarized in Part I of this form. For development account numbers used in the Comprehensive Improvement Assistance Program, refer to HUD Handbook 7485.1 REV-1.

4. COLUMN (3), ASSESSMENT OF NEED. Enter the total needs of the individual project where the PHA is requesting Comprehensive Modernization or the specialized needs of the individual project where the PHA is requesting Special Purpose, Emergency or Homeownership Modernization in the current FFY. The total needs of the individual project undergoing Comprehensive Modernization shall include all current physical and management improvement needs, regardless of whether modernization funds are required, plus any needs anticipated during the implementation period of the Comprehensive Modernization. The physical improvement needs shall be assessed against the Modernization Standards set forth in the Modernization Standards Handbook 7485.2.

   NOTE: Under Comprehensive Modernization where only the first stage of a two-stage funding is to be approved, the PHA shall submit two Part II's. One Part II shall include all current physical and management improvement needs of the individual project; the other Part II shall include only the work items to be funded at the first stage.

5. COLUMN (4), DESCRIPTION OF PROPOSED/APPROVED ACTION. For each need in Column (3), enter a description of the action proposed to meet the need, including the type of material or equipment to be used, quantity, cost, and method of accomplishment *(contract or force account labor)*. Where appropriate, add a reasonable contingency amount to each work item and indicate the amount. Where architectural or engineering services are necessary, show the fees as a line item, identifying the work items involved and justifying the amount of the fees. Asterisk the physical work items that exceed the Modernization Standards set forth in the HUD Handbook 7485.2. For each management work item, quantify, to the extent possible, the current status and performance goal and state the planned process for accomplishing the goal by the end of the implementation period. For example, if an identified need in Column (3) is a high Tenant Accounts Receivable *(TAR)*, the proposed action may be to reduce the TAR from 15% to 10% by hiring two temporary employees to implement a new rent collection system.

6. COLUMN (5), INDIVIDUAL PROJECT NUMBER. For each work item in Column (4), enter separately each individual project number involved in the work item.

7. COLUMN (6), TOTAL FUNDS REQUESTED. Opposite each individual project number in Column (5), enter the operating funds to be provided or the modernization funds requested, rounded to the nearest ten dollars, or indicate that no modernization funds are required.

8. COLUMN (7), HUD-APPROVED FUNDS. If the amount of modernization funds requested by the PHA in Column (6) is modified by HUD, HUD will enter the adjusted amount of the work item which is approved for an individual project and the adjusted total, rounded to the nearest ten dollars.

Joint Review Checklist

Section I. General Information

A. PHA _____ B. Dates of review _____

C. HUD staff participating:

Name	Title	Phone number

D. PHA staff contacted:

Name	Title	Phone number

E. Projects included in Joint Review:

Name	Number	Type of modernization	Estimated cost

F. Current reserve level of the PHA?

_____

Could PHA use operating funds/reserves to finance all or part of the proposed modernization? Yes___ No ___

If yes, how much? _____

Are CDBG or other funds available to finance all or part of the proposed modernization? Yes _____ No _____

If yes, how much? _____

Section II: Proposed Modernization Program

All the questions listed below should be answered by checking the "yes" or "no" column. Where additional comments or explanation are appropriate, a space has been provided. If a question is not appropriate for the particular project under review, please put "NA" (not applicable) in the "comments" column. Section A (Physical Improvements) should be completed separately for each project being reviewed and Section B (Management Improvements) for each project being reviewed for comprehensive modernization. Section C (Administration), D (Additional Requirements) and E (PHA Modernization Capability) should be completed once for the entire PHA.

	Yes	No	Comments/Explanation
A. Physical Improvements			
Project Number _____			
1. Physical Needs Assessment is completed and of acceptable quality.			
2. All work items necessary to meet the mandatory standards have been identified.			
3. All work items exceeding the mandatory standards have been identified and determined necessary for long-term viability.			
4. Project has prospects for long-term viability (not applicable for emergency modernization).			
5. There are no duplicative work items in the PHA's operating budget or previously approved modernization budgets and the proposed modernization budget.			
6. Energy audit is completed and of acceptable quality.			
7. Eligible ECOs have been included in proposed work items.			
8. Cost estimates are reasonable and accurate.			

	Yes	No	Comments/Explanation
9. Modernization cost, excluding management improvements, does not exceed prototype cost limit.			
10. Method of accomplishment (contract or force account) has been determined. Indicate method.			
11. Use of force account labor will not adversely impact on routine maintenance.			
12. Proposed implementation schedule is realistic.			
13. PHA method of inspection of physical work has been determined. Indicate method.			
14. PHA need for A/E services for detailed design work and preparation of bid documents has been determined.			
15. Plans for rehousing tenants and paying moving costs are adequate.			
16. Proposed demolition/disposition appears justified, subject to Headquarters approval.			
17. Homeownership project will, upon final approval, comply with all special requirements.			
18. Section 23 Leased Housing Bond-Financed project (BFP) will, upon final approval, comply with all special requirements.			

	Yes	No	Comments/Explanation
B. Management Improvements (must be completed for comprehensive modernization)			
Project Number _____			
1. PHA has prepared Form HUD-52821, Project Profile.			
2. PHA has reviewed following areas:			
a. Management, financial and accounting control systems.			
b. Qualifications of personnel employed in management and operation of project to be modernized.			
c. Tenant programs and services.			
d. Tenant and project security.			
e. Tenant selection and eviction.			
f. Occupancy.			
g. Rent collection (Tenant Accounts Receivable).			
h. Maintenance.			
3. Proposed work items appropriately address identified problems.			
4. Cost estimates are reasonable and accurate.			
5. Management improvements to be done, but not funded under CIAP, have been identified.			

	Yes	No	Comments/Explanation
6. Method of accomplishment has been determined. Indicate method.			
7. Proposed implementation schedule is realistic.			
8. PHA need for professional consultant services has been determined.			
9. All open findings from previous reviews, audits and surveys have been addressed and satisfactory progress is being made:			
a. Management review.			
b. Occupancy audit.			
c. Fiscal audit.			
d. Engineering survey.			
e. Utilities review.			
C. Administration			
1. PHA plans for organizing and staffing the modernization program are adequate and appropriate.			
2. PHA needs full-time modernization coordinator.			
3. PHA needs full-time contract administrator/construction manager.			
4. PHA will reassign existing staff.			
5. PHA will hire additional staff.			

	Yes	No	Comments/Explanation
D. Additional Requirements			
1. PHA has complied with local official and tenant/homebuyer consultation requirements.			
2. PHA is in compliance with civil rights statutes, executive orders and regulations.			
3. PHA has plans to provide minority and women's business or Indian enterprise opportunity.			
4. Environmental assessment is required.			
5. a. Project buildings are subject to flood insurance requirements.			
b. PHA is continuing to carry flood insurance on other buildings, where previously required for modernization.			
6. PHA will comply with requirements to eliminate lead-based paint hazards.			
7. PHA will comply with requirements to provide accessibility for the physically handicapped.			
E. PHA Modernization Capability			
1. Previously approved modernization programs are progressing on schedule.			
2. All modernization funds over three years old have been expended.			
3. All modernization funds over two years old have been obligated.			

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	Yes	No	
4. Additional modernization funds are not required to complete any previously approved programs.			
5. Established threshold levels are appropriate for the PHA.			
6. PHA is complying with HUD requirements regarding contracting and budgeting.			
7. PHA is submitting its quarterly progress reports, including the narrative report on the management improvements, on a timely basis.			
8. Any problems identified in the last Checklist for Monitoring of Physical Improvements have been corrected.			
9. PHA has capability to implement proposed modernization in timely manner.			
10. Funds left over from completed modernization programs are being recaptured or reprogrammed.			

Form Approved
OMB No. 2502-0202

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
HOUSING – FEDERAL HOUSING COMMISSIONER
COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM

PROJECT FINANCIAL FORECAST

CONTRACT NUMBER

PROJECT NUMBER

HUD FIELD OFFICE

PHA NAME

PHA LOCALITY

LINE NO	(1)	(2)		(3)		(4)		(5)	
001	Fiscal Year Ending	FYE		FYE		FYE		FYE	
002	Number of Dwelling Units								
003	Number of Unit Months Available								
	RECEIPTS	PUM (a)	AMOUNT (b)	PUM (a)	AMOUNT (b)	PUM (a)	AMOUNT (b)	PUM (a)	AMOUNT (b)
010	OPERATING RECEIPTS: Dwelling Rentals								
020	Excess Utilities								
030	Nondwelling Rentals								
040	Total Rental Income *(Lines 010+020+030)*								
050	Interest on General Fund Investments								
060	Other PHA Operating Receipts								
070	Total Operating Receipts *(Lines 040 + 050 + 060)*								
081	MODERNIZATION: Management Improvement								
082	Physical Improvement								
085	TOTAL MODERNIZATION FUNDS *(Lines 081 + 082)*								
090	Other Non-PHA Income								
095	TOTAL RECEIPTS WITHOUT SUBSIDY *(Lines 070+085+090)*								
100	OPERATING SUBSIDY								
105	TOTAL RECEIPTS WITH SUBSIDY *(Lines 095+100)*								
	EXPENDITURES								
110	ROUTINE: Administration								
120	Tenant Services								
130	Utilities								
140	Ordinary Maintenance and Operations								
150	Protective Services								
160	General								
170	TOTAL ROUTINE *(Lines 110 through 160)*								
210	NON-ROUTINE Extraordinary Maintenance								
220	Replacement of Equipment								
230	Betterments and Additions								
240	Other Non-Routine								
250	TOTAL NON-ROUTINE *(Lines 210 through 240)*								
310	OTHER EXPENDITURES								
350	TOTAL OPERATING EXPENDITURES *(Lines 170+250+310)*								
	MODERNIZATION:								
410	Management Improvement								
430	Physical Improvement								
450	TOTAL MODERNIZATION EXPENDITURES *(Lines 410+430)*								
500	TOTAL EXPENDITURES *(Lines 350+450)*								
600	SURPLUS *(Or Deficit)*								

HUD-52823 (2-81)

STRUCTIONS FOR PREPARATION OF FORM HUD-52823, PROJECT FINANCIAL FORECAST

REPORT SUBMISSION

Prepare a separate Project Financial Forecast for each individual project. Submit the original and three copies *(or any lesser number of copies as specified by HUD)* of this form to HUD at the time of Final Application, in accordance with the requirements of the Comprehensive Improvement Assistance Program Handbook 7485.1 REV.

GENERAL

The Forecast includes a column for each PHA fiscal year in the implementation period of the modernization starting with the first full PHA fiscal year after the year in which the Final Application is submitted. For those programs to be approved and funded in two stages, this form shall include all management and physical improvements to be accomplished during each year of the two-stage period. If the implementation period will exceed four full PHA fiscal years, use another copy of this form. Refer to the Low-Rent Housing Accounting Handbook 7510.1 for a description of the accounts on this form.

HEADING INSTRUCTIONS

Enter the name and locality of the Public Housing Agency, the Annual Contributions Contract Number, the Project Number for which the form is being prepared and the name of the HUD Field Office.

LINE INSTRUCTIONS

1. Line 001. Enter the PHA fiscal year ending dates for all years of the implementation period starting with the first full PHA fiscal year after the year in which the Final Application is submitted.

2. Line 002. Enter in each column the number of units anticipated in the project as of the last day of each fiscal year.

3. Line 003. Enter the number of unit months available *(UMA's)* associated with the units shown on Line 002.

4. General Instructions for the Completion of Lines 010 through 600. The data to be entered on Lines 010 through 600 for each column will be based on the current operating data of the project, the PHA's assumptions of succeeding years' operations and certain economic indicators. The PHA shall consider the impact that the modernization program may have upon operations, such as the reduction of certain expense categories because of the effect of cost saving innovations, or the reduction in occupancy during the implementation period. The PHA shall discuss with the HUD Field Office the appropriate adjustment factors to be applied to the current fiscal data of income, utility expenses, non-utility expenses and operating subsidy so as to reasonably project the information to subsequent fiscal years. The data is to be entered in total dollar amounts and also as a per unit per month *(PUM)* amount. Apply the instructions of this paragraph to specific line items below, as appropriate.

   a. Lines 010 through 060. Enter the amounts of income attributable solely to this project and that part of the overall income of the Annual Contributions Contract *(ACC)* that is to be prorated to this project.

   b. Line 081. Enter the amount of modernization funds to be used for management improvements.

   c. Line 082. Enter the amount of modernization funds to be used for physical improvements.

   d. Line 090. Enter the estimated amount of non-PHA generated income available to this project *(e.g., Community Development Block Grant funds)*.

   e. Line 100 First Fiscal Year. Enter in Column 2, the product of the following calculation:

      (1) Take the operating subsidy eligibility amount of the ACC for the PHA fiscal year after the year in which the Final Application is submitted, if available. *(Source: Line 23 of Form HUD-52721A, Calculation of Performance Funding System Operating Subsidy)*. If not available, take the current fiscal year's eligibility amount and apply the current Performance Funding System *(PFS)* inflation factor to project the eligibility amount to the next fiscal year. Use this same inflation factor to project each subsequent fiscal year.

      (2) Divide the amount in paragraph 4e (1) by the number of unit months available for the ACC. *(Source: Line 16 of Form HUD-52721A)*. This PUM amount represents the operating subsidy amount for each unit month of the total ACC. Enter the PUM on Line 100, Column 2(a).

      (3) Multiply the PUM amount in paragraph 4e(2) by the number of UMA's available shown on Line 003 of this form and enter this dollar amount on Line 100, Column 2(b).

   f. Line 100 Subsequent Fiscal Years. For each subsequent fiscal year, multiply the PUM amount shown on Line 100 for each preceding fiscal year by the PFS inflation factor used in paragraph 4e(1) to compute the estimable PUM operating subsidy eligibility amount. Multiply each PUM amount by the number of UMA's applicable to each fiscal year.

   g. Lines 110 through 310. The estimates entered on these lines shall represent the expenses attributable to this project. These estimates shall include the following types of expense:

      (1) Direct Charges. Those expenses that are attributable solely to this project *(i.e., cost of utilities used at this project and salary expense of employees assigned solely to this project)*.

      (2) Indirect Charges. Those expenditures that are for the benefit of more than one project shall be prorated to the projects involved *(i.e., administrative salaries)*. It is recommended that indirect charges be prorated on a unit basis unless the PHA believes another basis to be more reasonable.

   h. Line 410. Enter the amount shown on Line 081.

   i. Line 430. Enter the amount shown on Line 082.

   j. Line 600. Enter the difference between Line 105 and Line 500. If Line 500 is greater than Line 105, enter the difference in brackets.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
LOW INCOME HOUSING PROGRAM

MODERNIZATION FUND LEDGER

FIELD OFFICE Chicago

FEDERAL FISCAL YEAR 1979

DATE	PUBLIC HOUSING AGENCY	MODERNIZATION PROJECT NUMBER	LOAN AUTHORITY		CONTRACT AUTHORITY		MAXIMUM DEBT SERVICE ANNUAL CONTRIBUTIONS	BUDGET AUTHORITY	
			USED	ASSIGNED/ BALANCE	USED	ASSIGNED/ BALANCE		USED	ASSIGNED/ BALANCE
1	2	3	4	5	6	7	8	9	10
12/1/78	SUB-ASSIGNMENT			($10,909,884)		($1,000,000)			($20,000,000)
2/3/79	USA	ILL-666-901	$500,000	10,409,884	$45,830	954,170	20	$916,600	19,083,400
2/10/79	AAA	ILL-555-901	425,000	9,984,884	38,[illegible]	915,214	20	779,120	18,304,280
3/10/79	SUB-ASSIGNMENT			(109,098)		(10,000)			(200,000)
	SUB-TOTAL			10,093,982		925,214			18,504,280
4/6/79	XYZ	ILL-444-902	275,000	9,818,982	25,207	900,007	20	504,140	18,000,140

(Based on Minimum Loan Interest Rate of 6-5/8 and Amortization Factor of .09165)

HUD 53001 (4 78)

Page 1

12/83

7485.1 REV-2

APPENDIX 13

INSTRUCTIONS FOR PREPARATION OF FORM HUD-53003 MODERNIZATION FUND LEDGER

GENERAL

For proper management of modernization program funds, each Field Office shall maintain this financial ledger by Federal fiscal year. When modernization funds are sub-assigned to Field Offices on Form HUD-185.1, Regional Fund and Contract Authority Sub-Assignment, the Field Office shall enter the assigned amounts, in brackets, of loan authority in Column 5, contract authority in Column 7, and budget authority in Column 10. After each Modernization Project is approved, Columns 5, 7, and 10 shall reflect running balances.

COLUMN INSTRUCTIONS:

1. Column 1, Date. For funds sub-assigned, enter the date on which Form HUD-185.1 is approved. For funds approved, enter the date on which the modernization funds for a particular PHA's Modernization Project are obligated *(under List approval)* by the Field Office Director.

2. Column 2, Public Housing Agency. Enter the name of the Public Housing Agency for which a Modernization Project is being approved.

3. Column 3, Modernization Project Number. Enter the Modernization Project Number.

4. Column 4, Loan Authority, Used. Enter the amount of loan authority used for each Modernization Project.

5. Column 5, Loan Authority, Assigned/Balance. Enter the total amount, in brackets, of loan authority sub-assigned to the Field Office on Form HUD-185.1. Enter the amount of loan authority remaining after each approval by subtracting the amount entered in Column 4 for each Modernization Project, from the previous running balance in Column 5. For subsequent sub-assignments, enter a new balance by adding the new assignment amount *(disregarding the brackets)* to the last previous running balance.

6. Column 6, Contract Authority, Used. Enter the amount of contract authority used for each Modernization Project.

7. Column 7, Contract Authority, Assigned/Balance. Enter the total amount, in brackets, of contract authority sub-assigned to the Field Office on Form HUD-185.1. Enter the amount of contract authority remaining after each approval by subtracting the amount entered in Column 6 for each Modernization Project, from the previous running balance in Column 7. For subsequent sub-assignments, enter a new balance by adding the new assignment amount *(disregarding the brackets)* to the last previous running balance.

8. Column 8, Maximum Debt Service Annual Contributions. Enter the number of Maximum Debt Service Annual Contributions which is twenty (20).

9. Column 9, Budget Authority, Used. Enter the amount of budget authority used for each Modernization Project by multiplying the amount of contract authority used in Column 6 by the number of Maximum Debt Service Annual Contributions in Column 8.

10. Column 10, Budget Authority, Assigned/Balance. Enter the total amount, in brackets, of budget authority sub-assigned to the Field Office on Form HUD-185.1. Enter the amount of budget authority remaining after each approval by subtracting the amount entered in Column 9 for each Modernization Project, from the previous running balance in Column 10. For subsequent sub-assignments, enter a new balance by adding the new assignment amount *(disregarding the brackets)* to the last previous running balance.

Modernization List
Annual Contributions Contract
Part I

U.S. Department of Housing
and Urban Development
Office of Public and Indian Housing

Low-Income Housing Program

To be entered into by HUD and Public Housing Agencies for loans and/or annual contributions for low-income housing Modernization Projects.

1 Public Housing Agency		2 Modernization List Number	3 Modernization Project Number
4 Maximum Modernization Cost $	5 Contract Authority $	6 Budget Authority $	7 Minimum Loan Interest Rate
8 Maximum Debt Service Contribution Percentage		9 Maximum Number of Debt Service Annual Contributions	
10 Individual Projects in Modernization Project		11 Maximum Modernization Cost $	
Modernization Project Total		$	

Recommended for Approval

Director, Housing Management Division or Director, Office of Housing	Date

Approved

Field Office Manager Regional Administrator	Date

HUD-5079-A (9-83)
HB 7485.1 REV-2

Instructions for Preparation of Form HUD-5079 Modernization List Part I

U.S. Department of Housing
and Urban Development
Office of Public and Indian Housing

Low-Income Housing Program

This Part shall only be used to obligate additional modernization funds for a particular PHA under the modernization as a separate project system. Refer to the Comprehensive Improvement Assistance Program Handbook 7485.1 REV-2.

1. **Block 1, Public Housing Agency.** Enter the name of the Public Housing Agency (PHA) for which a Modernization Project is being approved.

2. **Block 2, Modernization List Number.** Enter the Modernization List Number which consists of the Regional Office code identification, the Field Office numeric code identification (see Handbook of Codes, 2160.4B, Chapter 1, paragraph 1-1), the last two digits of the current Federal Fiscal Year (FFY), and the chronological number (expressed as three digits) of the List recommended for approval during that FFY. For example, the fifth List recommended for approval by the Chicago Office during FFY 1982 would be designated V-06-82-005.

3. **Block 3, Modernization Project Number.** Enter the Modernization Project Number which is: the State abbreviation, e.g., VA; the one-, two-, or three-digit PHA code; and a three-digit Modernization Project code where the first digit is always the number "9" and the last two digits are the sequential number of the Modernization Project, beginning with the first modernization funding after modernization as a separate project was implemented. For example, if the Chicago Office approved the sixth Modernization Project for the Chicago Housing Authority in FFY 1982, the Modernization Project Number would be ILL-2-906.

4. **Block 4, Maximum Modernization Cost.** For the Modernization Project in Block 3, enter the total amount of loan authority (capital funds).

5. **Block 5, Contract Authority.** For the Modernization Project in Block 3, enter the total amount of contract authority which is computed by multiplying the maximum modernization cost in Block 4 by the appropriate amortization factor, e.g., .09166 when the Minimum Loan Interest Rate is 6-5/8%.

6. **Block 6, Budget Authority.** For the Modernization Project in block 3, enter the total amount of budget authority which is computed by multiplying the contract authority in Block 5 by the maximum number of debt service annual contributions in Block 9 which is twenty (20).

7. **Block 7, Minimum Loan Interest Rate.** Enter the Minimum Loan Interest Rate that is in effect at the time the Modernization List will be approved and that is provided in Handbook 7560.1, Chapter 5, Section 1, and updated periodically by telegram.

8. **Block 8, Maximum Debt Service Contribution Percentage.** Enter the Maximum Debt Service Contribution Percentage that is in effect at the time the Modernization List will be approved and that is provided in Handbook 7560.1, Chapter 5, Section 1, and updated periodically by telegram. The Maximum Debt Service Contribution Percentage is the amortization factor (e.g., 09166) with the decimal point moved two digits to the right, e.g., 9.166.

9. **Block 9, Maximum Number of Debt Service Annual Contributions.** Enter the Maximum Number of Debt Service Annual Contributions which is twenty (20).

10. **Column 10, Individual Projects in Modernization Project.** Enter the project number of each individual project included in the Modernization Project in Block 3, e.g., ILL-2-1, ILL-2-2, etc.

11. **Column 11, Maximum Modernization Cost.** For each individual project in Column 10, enter the amount of loan authority (capital funds).

12. **Totaling Column 11.** For all individual projects listed in Column 10, enter the total of the figures in Column 11. This total must be equal to the maximum modernization cost for the Modernization Project in Block 4.

Modernization List
Annual Contributions Contract
Part II

U.S. Department of Housing
and Urban Development
Office of Public and Indian Housing

Low-Income Housing Program

To be entered into by HUD and Public Housing Agencies for loans and/or annual contributions for low-income housing Modernization Projects.

1. Public Housing Agency		2. Modernization List Number	3. Modernization Project Number
4. Previous Modernization List Number	4A. Date Approved	5. Minimum Loan Interest Rate	6. Maximum Debt Service Contribution Percentage
7. Maximum Number of Debt Service Annual Contributions		8. Cancellation ☐ Recapture ☐ Other ☐	

Modernization Project	9. Current Allocation	10. Revised Allocation	11. Amount Canceled or Recaptured
Maximum Modernization Cost	$	$	$
Contract Authority	$	$	$
Budget Authority	$	$	$

12. Individual Projects in Modernization Project	13. Current Maximum Modernization Cost	14. Revised Maximum Modernization Cost	15. Difference
	$	$	$
Modernization Project Total	$	$	$

Certified that for Previous List, ACC Amended ☐ or ACC Not Amended ☐

Regional or Chief Counsel	Date

Recommended for Approval

Director, Housing Management Division or Director, Office of Housing	Date

Approved

Field Office Manager Regional Administrator	Date

HUD-5079-B (9-83)
HB 7485.1 REV-2 (9-83)

Instructions for Preparation of Form HUD-5079 Modernization List Part II

U.S. Department of Housing
and Urban Development
Office of Public and Indian Housing

Low-Income Housing Program

The Part shall be used where a previously approved Modernization List is being amended for a Modernization Project or a Modernization Program. The term "Modernization Project" refers to modernization approved after June 30, 1976. The term "Modernization Program" refers to modernization approved before July 1, 1976. This Part shall be used to cancel or recapture unused modernization funds and to add or delete individual projects from the Modernization Project. In both cases, an Annual Contributions Contract (ACC) amendment also is required. See Handbook 7485.1 REV-2.

1. **Block 1, Public Housing Agency.** Enter the name of the PHA for which a previously approved Modernization List is being revised.

2. **Block 2, Modernization List Number.** Enter a new Modernization List Number which consists of the Regional Office code identification, the Field Office numeric code identification (see Handbook of Codes, 2160.4B, Chapter 1, paragraph 1-1), the last two digits of the current Federal Fiscal Year (FFY), and the chronological number (expressed as three digits) of the List recommended for approval during the FFY. For example, the seventh List recommended for approval by the Chicago Area Office during FFY 1982 would be designated V-06-82-007.

3. **Block 3, Modernization Project Number.** Enter either the Modernization Project Number or the Phase Number, as shown on the previous Modernization List which is being revised. The Phase Number is the FFY in which the Modernization Program was approved and the sequential number of the Modernization Program, e.g., 75-04.

4. **Block 4, Previous Modernization List Number and Date Approved.** Enter the number and approval date of the previous Modernization List which is being revised.

5. **Block 5, Minimum Loan Interest Rate.** For the Modernization Project or the Modernization Program, enter the Minimum Loan Interest Rate that was in effect at the time the previous Modernization List was approved.

6. **Block 6, Maximum Debt Service Contribution Percentage.** For the Modernization Project or the Modernization Program, enter the Maximum Debt Service Contribution Percentage that was in effect at the time the previous Modernization List was approved.

7. **Block 7, Maximum Number of Debt Service Annual Contributions.** For the Modernization Project, enter the Maximum Number of Debt Service Annual Contributions which is twenty (20). For the Modernization Program, leave blank for subsequent entry by the Office of Finance and Accounting (OFA), Headquarters, the number of years remaining for each individual project.

8. **Block 8, Cancellation, Recapture or Other.** Check the appropriate box to indicate whether the type of action is a cancellation, recapture, or other (such as the addition or deletion of individual projects). If other, explain at the bottom of Columns 13-15.

9. **Column 9, Current Allocation.** For the Modernization Project or the Modernization Program, enter the current allocation of costs approved under the previous Modernization List by the amounts of maximum modernization cost, contract authority, and budget authority. For the Modernization Program, obtain the current allocations from the Assisted Housing Accounting System in the Regional Accounting Division.

10. **Column 10, Revised Allocation.** For the Modernization Project, enter the revised allocation of costs being approved under this Modernization List by the amounts of maximum modernization cost and contract authority. To calculate the revised allocation of contract authority, multiply the revised allocation of maximum modernization cost by the Maximum Debt Service Contribution Percentage in Block 6. Enter the revised allocation of budget authority only if the ACC for the previous Modernization List has not been amended. For the Modernization Program, enter only the maximum modernization cost, leaving blank for subsequent entry by OFA, Headquarters, the contract authority and budget authority.

11. **Column 11, Amount Canceled or Recaptured.** For the Modernization Project, enter the amount canceled or recaptured, if any, which is Column 9 less Column 10, by the amounts of maximum modernization cost and contact authority. Enter the amount of budget authority only if the ACC for the previous Modernization List has not been amended. For the Modernization Program, enter only the maximum modernization cost, leaving blank for subsequent entry by OFA, Headquarters, the contract authority and budget authority.

12. **Column 12, Individual Projects in Modernization Project.** Enter the number of each individual project included in the Modernization Project or Modernization Program, e.g., ILL-2-1, ILL-2-2, etc., including the number of each individual project to be added or deleted under the Modernization Project.

13. **Column 13, Current Maximum Modernization Cost.** For each individual project in Column 12, enter the current allocation of maximum modernization cost approved under the previous Modernization List.

14. **Column 14, Revised Maximum Modernization Cost.** For each individual project in Column 12, enter the revised amount of maximum modernization cost being approved under this Modernization List.

15. **Column 15, Difference.** For each individual project in Column 12, enter the difference between the amounts of maximum modernization cost in Column 13 and Column 14. If Column 13 is more than Column 14, enter a minus (−). If Column 13 is less than Column 14, enter a plus (+).

16. **Totaling Columns 13 through 15.** For all individual projects listed in Column 12, enter the totals of the figures in Columns 13 through 15. These totals must be equal to the maximum modernization cost for the Modernization Project or Modernization Program in Columns 9 through 11.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
HOUSING - FEDERAL HOUSING COMMISSIONER

PROJECT ACCOUNTING DATA

TO: ✓

FROM: ✓

REGIONAL OFFICE CODE *(RAD Only)*

FIELD OFFICE CODE *(RAD Only)*

REQUEST FOR RESERVATION ACTION AS FOLLOWS:

RAD ONLY	1. TYPE OF ACTION *(One Only)*	HOUSING ONLY
	New . . . . . (N, R)	
	Amendment Modernization . . . . . (A)	
	Amendments - Sec. 8/Public Housing	
	Unit Increase . . . . . (B)	
	Cost Increase . . . . . (E)	
	Decrease . . . . . (G)	
Code	Termination . . . . . (T)	Code
	Correction . . . . . (I or P)	N
	2. PROGRAM TYPE *(One Only)*	
	Section 8 - NC . . . . . (N)	
	Section 8 - SR . . . . . (R)	
	Section 8 - E/Mod. Rehab. . . . . (E)	
	Public Housing - Conventional . . . . . (A)	
	Public Housing - Turnkey . . . . . (C)	
	Public Housing - AWR . . . . . (F)	
	Public Housing - AWOR . . . . . (H)	
	Indian - Conventional . . . . . (I)	
	Indian - Turnkey . . . . . (L)	
	Indian - AWR . . . . . (M)	
	Indian - AWOR . . . . . (P)	
	Section 23 - NC . . . . . (S)	
	Section 23 - SR . . . . . (T)	
Code	Section 23 - E . . . . . (V)	Code
	Modernization . . . . . (X,Y)	Y
	3. PROJECT NUMBER	
	VA-30-901	
	4. PHA/PRIVATE OWNER NAME	
	USA Housing Authority	
	5. AREA *(One Only)*	
Code	Metropolitan . . . . . (M)	Code
	Non-Metropolitan . . . . . (N)	

RAD ONLY	6.1 MEMO ENTRY - MODERNIZATION ENTER TITLE *(Code O, Q, S, V, W, X, Y, Z)* ✓	HOUSING ONLY
6.1	6.2 MEMO ENTRY - SEC. 8/PUBLIC HOUSING	6.1
	A. Farmers Home . . . . . (E)	
	HFDA *(Sect. 8-E)* . . . . . (H)	
	HFDA - 40 Years . . . . . (I)	
	HFDA - 30 Years . . . . . (J)	
	Moderate Rehabilitation . . . . . (M)	
	PHA-Owned . . . . . (P)	
	Section 202 . . . . . (T)	
	Other . . . . . (O)	
	B. Areawides . . . . . (A)	
6.2A	New Communities . . . . . (N)	6.2A
	Section 23 - Conversions . . . . . (C)	
6.281	Loan Management . . . . . (L)	6.281
	Property Disposition . . . . . (D)	
6.282	N.S.A. . . . . (R)	6.282
	Not Applicable . . . . . (B)	
	7. DATE PRIOR LETTER OF NOTIFICATION/ RESERVATION DOCUMENT SIGNED (MM / DD / YY)	
	8. DATE LETTER OF NOTIFICATION/ RESERVATION DOCUMENT SIGNED (MM / DD / YY): 6 / 15 / 80	
	9. TERM (IN YEARS): 2 0	
	10. TYPE OF FUNDS *(One Only)*	
	Assigned Program Funds . . . . . (P)	
	Assigned Amendment Funds . . . . . (A)	
Code	Recaptured Funds . . . . . (R)	Code
	Not Applicable . . . . . (N)	P

11. UNIT AND FUND SECTION

RAD ONLY RECAPTURE (R) OR CANCELLATION (I, A, B, E)	HOUSING USE ONLY *(Columns B through G)*						RAD USE ONLY HASH TOTAL
	TOTAL UNITS	ELDERLY UNITS	SOURCE YEAR	CONTRACT AUTHORITY	BUDGET AUTHORITY	LOAN AUTHORITY	
A	B	C	D	E	F	G	H
	900	0	1980	$114,414	$2,288,280	$1,248,240	

(A copy of the completed form shall accompany the required documentation as stipulated in the appropriate administrative program HUD Handbook)

✓ *(Date)*

✓ *(Signature of Field Office Manager or Supervisor)*

Previous Edition is Obsolete

HUD-52540 (2-80)

TABLE - FORM HUD-52540, MEMO ENTRY CODES *(Item 6.2)* FOR SECTION 8

MEMO 6.2A	MEMO 6.2B1	MEMO 6.2B2	CODE 6.2A, B1, + B2
FMHA	Not Applicable	Not Applicable	EBB
	Areawide	Not Applicable	EAB
	Areawide	New Community	EAN
	New Community	Not Applicable	ENB
HFDA *(Other than 40 or 30 Years)*	Not Applicable	Not Applicable	HBB
	Areawide	Not Applicable	HAB
	Areawide	Section 23 - Conversion	HAC
	Areawide	Loan Management	HAL
	Section 23 - Conversion	Not Applicable	HCB
	Loan Management	Not Applicable	HLB
HFDA *(40 Years)*	Not Applicable	Not Applicable	IBB
	Areawide	Not Applicable	IAB
	Areawide	New Community	IAN
	Areawide	Section 23 - Conversion	IAC
	New Community	Not Applicable	INB
	New Community	Section 23 - Conversion	INC
	Section 23 - Conversion	Not Applicable	ICB
	Neighborhood Strategy Area	Not Applicable	IRB
HFDA *(30 Years)*	Not Applicable	Not Applicable	JBB
	Areawide	Not Applicable	JAB
	Areawide	New Communities	JAN
	Areawide	Section 23 - Conversion	JAC
	New Community	Not Applicable	JNB
	New Community	Section 23 - Conversion	JNC
	Section 23 - Conversion	N Applicable	JCB
	Neighborhood Strategy Area	Not Applicable	JRB
MODERATE REHAB **	Not Applicable	Not Applicable	MBB
	Area Wide	Not Applicable	MAB
	Property Disposition	Not Applicable	MDB
	Area Wide	Property Disposition	MAD
PHA-OWNED	Not Applicable	Not Applicable	PBB
	Areawide	Not Applicable	PAB
	Areawide	New Community	PAN
	Areawide	Section 23 - Conversion	PAC
	New Community	Not Applicable	PNB
	New Community	Section 23 - Conversion	PNC
	Section 23 - Conversion	Not Applicable	PCB
PHA-OWNED*	Areawide	Property Disposition	PAD
	Property Disposition	Not Applicable	PDB
SECTION 202	Not Applicable	Not Applicable	TBB
	Areawide	Not Applicable	TAB
	Areawide	New Community	TAN
	New Community	Not Applicable	TNB
	Areawide	Property Disposition	TAD
	Property Disposition	Not Applicable	TDB
OTHER	Not Applicable	Not Applicable	OBB
	Areawide	Not Applicable	OAB
	Areawide	New Community	OAN
	Areawide	Section 23 - Conversion	OAC
	New Community	Not Applicable	ONB
	New Community	Section 23 - Conversion	ONC
	Section 23 - Conversion	Not Applicable	OCB
	Neighborhood Strategy Area	Not Applicable	ORB
OTHER*	Areawide	Property Disposition	OAD
	Property Disposition	Not Applicable	ODB
OTHER**	Areawide	Loan Management	OAL
	Loan Management	Not Applicable	OLB

* Only Applicable to Substantial Rehabilitation
** Only Applicable to Existing

INSTRUCTIONS FOR PREPARATION OF FORM HUD-52540, PROJECT ACCOUNTING DATA

General - Form HUD-52540, Project Accounting Data (PAD) must be completed for each action relating to the reservation of units and/or loan, contract, and budget authority for a project. The PAD, signed by the Field Office Manager/Supervisor, and supporting documentation shall be submitted to the Regional Accounting Division (RAD) in accordance with outstanding procedures in the appropriate administrative program HUD Handbook. All applicable codes shall be entered by Housing on the lines provided for *Housing only* and by RAD on the lines provided for *RAD only.*

Any correction to data previously submitted on the Project Accounting Data form shall not be entered on this form. The Field Office must notify the RAD by memorandum of any corrections required. The RAD will enter all corrections relating to the reservation of units and/or loan, contract, and budget authority.

Specific Instructions for Completing the Project Accounting Data Form -

Block TO: - Enter the name and address of the Regional Accounting Division Director.
Block FROM: - Enter the name and address of the Field Office Manager/Supervisor.
Blocks Office Codes - Do not enter the Regional and Field Office Codes. This part will be completed by the RAD

Block 1, Type of Action: Enter the type of action as described below using the appropriate code letter:

(N, R) New (N) - an initial reservation for the subject project, including new Modernization Projects.
New (R) - do not enter. For RAD use only.
(A) Amendment - a change (increase or decrease) to a previous reservation for the subject project. All decr units and/or funds shall be shown in parentheses, e.g., (10,000).
(T) Termination - a total termination of a previous reservation as a result of an official HUD action.
(I, C or P) Correction - do not enter. For RAD use only.

Block 2, Program Type: One only of the following program types must be entered using the designated code letter:

(N) - Section 8 New Construction
(R) - Section 8 Substantial Rehabilitation
(E) - Section 8 Existing
(A) - Public Housing - Conventional
(C) - Public Housing - Turnkey
(F) - Public Housing - Acquisition with Rehabilitation
(H) - Public Housing - Acquisition without Rehab.
(I) - Indian - Conventional
(L) - Indian - Turnkey
(M) - Indian - Acquisition with Rehabilitation
(P) - Indian - Acquisition without Rehabilitation
(S) - Section 23 - New Construction
(T) - Section 23 - Substantial Rehabilitation
(V) - Section 23 - Existing
(Y) - Modernization - Approved since July 1, 1978
(X) - Modernization - Approved prior to July 1, 1978

Block 3, Project Number: For Section 8 enter the appropriate 11-character assigned project number. For Public Housing, Indian, Section 23, and Modernization, enter the appropriate assigned project number. For actions involving conversion of projects from Section 23 to Section 8, both project numbers should be listed. The project number relating to the current action should be listed first; the related project number should be listed following the abbreviation "Ref:_____."

Block 4, PHA/Private Owner Name: Enter the name of the (Public Housing Agency/Private Owner) program participant as shown on the Notification Letter.

Block 5, Area: Enter either Metropolitan or Non-Metropolitan. Do not enter for Modernization program.

Block 6, Memo Entry: *(See Table of Codes printed on reverse side of Form HUD-52540.)*

Section 8: All memo entries must have a three-letter code, comprised of one letter code from Group A and two letter codes from Group B. Project types in Group A are shown in their order of importance i.e., if a project was both a HFDA and a Section 202 project - - for coding purposes - - it would be classified as a HFDA project and the corresponding code letter (H), (I), or (J) would be entered in Block 6A. Enter in Blocks 6B1 and 6B2 all applicable Group B categories. If no Group B categories apply, enter the code letter (B) Not Applicable in Blocks 6B1 and 6B2. If only one category is applicable, enter that code letter in Block 6B1 and enter the code letter (B) Not Applicable in Block 6B2.

It should be noted that several of the above combinations may apply to all program types. For example, the code letters OAB designating *OTHER-AREAWIDE-NOT APPLICABLE* could be for Construction, Substantial Rehabilitation or Existing. You will have already indicated the type in E Program Type, and in order to keep this listing as short as possible identical codes have not been duplicated.

Other Programs: For Public Housing, enter in Block 6A, one of the following categories as applicable: Loan Management (L); Property Disposition D); or Other (O) - leave Block 6B1 and Block 6B2 blank. No entries shall be made for Indian Housing or the Modernization programs.

INSTRUCTIONS CONTINUED:

Block 7, Date Prior Letter of Notification/Reservation Document Signed: Enter the date (month/day/year) of the most recent Notification Letter or Reservation Document. Not applicable to New types of action.

Block 8, Date Letter of Notification/Reservation Document Signed:

Section 8, Public and Indian Housing: During the first 11 months of a fiscal year the RAD shall enter the reservation transaction date (month/day/year) which has been transmitted to the Field Office for which a PAD is being submitted. During the last month of the fiscal year, the Field Office shall enter the date of the Notification Letter or Reservation Document for which a PAD is being submitted and a copy of the Notification Letter or Reservation Document must be attached. This includes documents for the termination of projects.

Modernization Program: The Field Office shall enter the approved date shown on Form HUD-5079, Modernization List.

Block 9, Term: Enter the number of years for which HUD is obligated to pay annual contributions. For amendments, enter the number of years remaining in the Annual Contributions Contract of the project.

Block 10, Type of Funds:

a. Use this block for new reservations and amendments which increase the loan, contract, and/or budget authority. Enter in this block the type of funds being used to make the reservation. e.g., assigned program funds, assigned amendment funds or recaptured funds. If it is determined that more than one type of fund is to be used to make the reservation, a separate PAD shall be prepared for each type of fund.
b. For amendments which decrease the loan, contract, and/or budget authority, leave this block blank. The RAD will enter the applicable type of funds.
c. There may be instances whereby no funds are involved in the transaction taking place. In this instance, the type of funds is Not Applicable (N). Also, Not Applicable (N) shall be entered when recapturing prior year funds and/or units.

Block 11, Unit and Fund Section: Complete this section for all new or amendatory types of action. This section shall not be completed if termination is shown in Block 1. Complete columns B through G for each source year of funds affected by a new or amendatory action. Columns A and H are to be completed by the RAD.

Column A - To be completed by the RAD.

Column B - Total Units: Enter the total number of assisted housing units for the subject project. If the type of action is amendment (Change), enter only the units increased or decreased. If units are being decreased, enter the number of units in parentheses, e.g., (25).

Column C - Enter the number of elderly units included in the total units shown in column B.

Column D - Source Year: Enter the contract and budget authority source year to which the reservation is charged i.e., 1974 (1974 and prior) or current fiscal year. Enter in this column the letters "RR" for Funds Recaptured from other than 1974 and prior, and the current fiscal year, e.g., 1976 and 1977.

Column E - Contract Authority: Enter the amount of annual contributions contract authority being reserved for the subject project. If type of action is for an amendment, enter only the amount of the increase or decrease. If contract authority is being decreased, enter the amount of funds in parentheses, e.g., ($25,000).

Column F - Budget Authority: Enter the amount of budget authority being reserved. Budget authority is the maximum total amount of annual contributions committed to a project. If the type of action is amendment, amount shown shall be the increase or decrease only of budget authority. If being decreased, enter the amount of budget authority in parentheses, e.g., ($25,000).

Column G - Loan Authority: Enter the amount of loan authority (estimated total development cost) being reserved. If type of action is amendment, amount shown shall be for increase or decrease only of loan authority. If being decreased, enter the amount of loan authority in parentheses, e.g., ($25,000).

Column H- To be completed by the RAD.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
LOW-INCOME PUBLIC HOUSING

MODERNIZATION PROJECT AMENDMENT TO CONSOLIDATED ANNUAL CONTRIBUTIONS CONTRACT

1. Modernization Project Number _____.

2. Individual Project Number(s) _____

_____.

3. Amendment to Annual Contributions Contract Number __ _____ dated _____ *(the "Contract").*

TERMS

4. The Contract is amended to assist in financing modernization of the Individual Projects. This amendment is a part of the Contract.

5. The following provisions shall be applicable to the Modernization Project:

   a. Number and Date of Modernization List _____
   b. Maximum Modernization Cost _____
   c. Contract Authority _____
   d. Minimum Loan Interest Rate _____
   e. Maximum Debt Service Contribution Percentage _____

6. The modernization work shall be carried out in accordance with all HUD regulations and other requirements applicable to the public housing modernization program. The PHA agrees to comply with these regulations and requirements.

7. The modernization work to be carried out is described in a Modernization Program, a statement of the basic elements of the Modernization Project. The Modernization Program has been adopted by the PHA and approved by HUD, and may be revised from time to time by agreement between HUD and the PHA. The PHA agrees to carry out the modernization work in accordance with the Modernization Program.

8. a. The Modernization Program includes a budget stating the maximum amounts approved by HUD for the modernization work. The PHA shall not incur Modernization Cost over the amount approved in the budget for the Modernization Project. The PHA shall not incur Modernization Cost over the amounts approved in the budget for each Individual Project or for any work item, except in accordance with a HUD-approved budget revision.

   b. Modernization Cost means Development Cost for the modernization work.

   c. The Maximum Modernization Cost for the Modernization Project is stated in Section 5 to this amendment. The PHA shall complete the modernization work at the lowest possible cost in accordance with the approved Modernization Program, and in no event in excess of the Maximum Modernization Cost for the Modernization Project.

9. a. Subject to the provisions of Part II of this Contract, and to assist in the modernization, HUD agrees to lend to the PHA up to the amount of the Maximum Loan Commitment. The Maximum Loan Commitment shall be equal to the Maximum Modernization Cost for the Modernization Project, as stated in Section 5, or the approved Actual Modernization Cost of the Modernization Project, if the Actual Modernization Cost Certificate has been approved, less the amount by which advances against the HUD loan provided for in this Contract for the Modernization Project, and Project Notes issued for the Modernization Project, have been retired with funds other than loans provided under this Contract. The Maximum Loan Commitment under this Contract for a Modernization Project shall in no event be less than the aggregate amount of the outstanding advances against the HUD loan provided for in this Contract, and advances HUD has agreed to make against such HUD loan to secure Project Notes issued for the Modernization Project.

   b. Each advance on account of the HUD loan for the Modernization Project shall bear interest on the unrepaid principal amount from the date the advance is made to the date of repayment at the rate or rates which HUD determines on the date such advance is made and redetermines on each anniversary of such date to be equal to the annual rate on Treasury borrowings by HUD pursuant to Section 4 (b) of the Act. However, the interest rate for each advance, shall not be less than the "Minimum Loan Interest Rate" determined by HUD pursuant to Section 4 (a) of the Act and specified in Section 5 to this amendment.

10. After issuance of the Actual Modernization Cost Certificate *(in accordance with Section 405 of Part II of the Contract)*, Section 5 to this amendment shall be amended as follows:

    a. To state the Actual Modernization Cost in lieu of the Maximum Modernization Cost.

    b. To reduce the amount of contract authority for the Modernization Project to an amount equal to the product of the Maximum Debt Service Contribution Percentage times the Actual Modernization Cost.

11. a. HUD shall make Debt Service Annual Contributions to the PHA for the Modernization Project.

b. The first Debt Service Annual Contribution shall accrue and be payable on the first Annual Contributions Date after the effective date of this amendment, and shall be disbursed to the PHA no later than the second Annual Contributions Date after the effective date. The first Debt Service Annual Contribution shall be an amount equal to the Maximum Debt Service Contribution Percentage times the Maximum Modernization Cost.

c. The second and subsequent Debt Service Annual Contributions shall be payable on each Annual Contributions Date after the date on which the first Debt Service Annual Contribution is payable for the Modernization Project. HUD shall pay no more than twenty Debt Service Annual Contributions for the Modernization Project. The second and subsequent Debt Service Annual Contributions shall be in the amounts determined in accordance with Section 415 of Part II of the Contract.

d. The Maximum Contribution Period for the Modernization Project shall begin on the date the first Debt Service Annual Contribution is payable under paragraph b of this Section, and shall continue for twenty years.

12. Upon payment in full of all indebtedness of the PHA in connection with the Modernization Project for which Debt Service Annual Contributions are pledged and of any other indebtedness of the PHA to HUD in connection with such Modernization Project, all obligations of HUD and the PHA shall terminate except as provided in Section 406(C) of Part II of the Contract with respect to operating reserves: Provided, however, that the provisions of Section 308(B) or (C) of Part II of the Contract shall remain in effect so long as HUD determines that there is an outstanding indebtedness of the PHA to HUD which arose in connection with any Individual Project or Projects under the Contract and is not eligible for payment from annual contributions; and provided further that for a period of ten years following the last payment of operating subsidy to the PHA, any disposition or demolition of any Individual Project buildings or realty shall be accomplished in accordance with HUD regulations and requirements and the PHA shall continue to operate the Individual Project(s) as low-income housing under the Contract in accordance with HUD regulations and requirements.

13. The PHA shall continue to operate each Individual Project as low-income housing in compliance with this Contract, the Act and all HUD regulations and other requirements for so long as HUD and the PHA have any further obligations under this amendment or the Contract with respect to the Modernization Project or the Individual Project(s).

14. Section 404 of Part II of the Contract shall not be applicable to the Modernization Project.

15. If the PHA does not comply with any of its obligations under this amendment, HUD may direct the PHA to terminate work on all or any part of the work described in the Modernization Program. The PHA shall not incur any additional cost for the terminated work without HUD approval.

The parties have caused this amendment to be effective as of the date of execution on behalf of the United States, as stated below.

(Seal)
Attest

_____
(Public Housing Agency)

By _____
(Chairman)

Date _____

UNITED STATES OF AMERICA
Secretary of Housing and Urban Development

By _____

_____
(Official Title)

Date _____

HUD-53009 12-81

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
HOUSING—FEDERAL HOUSING COMMISSIONER
LOW INCOME PUBLIC HOUSING

MODERNIZATION PROJECT AMENDMENT TO CONSOLIDATED ANNUAL CONTRIBUTIONS CONTRACT FOR MODERNIZATION OF SECTION 23 LEASED HOUSING BOND-FINANCED PROJECTS

1 Leased Housing Bond-Financed Modernization Project Number _____

2 Individual Leased Housing Bond-Financed Project Number(s) _____

_____

3 Amendment to Annual Contributions Contract Number _____

dated _____ (the "Contract")

TERMS

4. This Contract is amended to assist in financing modernization of the Individual Leased Housing Bond-Financed Project(s) listed above. This amendment is a part of the Contract.

5 The following provisions shall be applicable to the Modernization Project:

a. Number and Date of Modernization List _____

b. Maximum Modernization Cost _____

c. Contract Authority _____

d. Minimum Loan Interest Rate _____

e. Maximum Debt Service Contribution Percentage _____

6. The modernization work shall be carried out in accordance with all HUD regulations and other requirements applicable to the public housing modernization program. The PHA agrees to comply with these regulations and requirements.

7. The modernization work to be carried out is described in a Modernization Program, a statement of the basic elements of the Modernization Project. The Modernization Program has been adopted by the PHA and approved by HUD, and may be revised from time to time by agreement between HUD and the PHA. The PHA agrees to carry out the modernization work in accordance with the Modernization Program.

8. a. The Modernization Program includes a budget stating the maximum amounts approved by HUD for the modernization work. The PHA shall not incur Modernization Cost over the amount approved in the budget for the Modernization Project. The PHA shall not incur Modernization Cost over the amounts approved in the budget for each Individual Project or for any work item, except in accordance with a HUD-approved budget revision.

b. Modernization Cost means Development Cost for the modernization work.

c. The Maximum Modernization Cost for the Modernization Project is stated in Section 5 to this amendment. The PHA shall complete the modernization work at the lowest possible cost in accordance with the approved Modernization Program, and in no event in excess of the Maximum Modernization Cost for the Modernization Project.

9. a. Subject to the provisions of Part II of this Contract, and to assist in the modernization, HUD agrees to lend to the PHA up to the amount of the Maximum Loan Commitment. The Maximum Loan Commitment shall be equal to the Maximum Modernization Cost for the Modernization Project, as stated in Section 5, or the approved Actual Modernization Cost of the Modernization Project, if the Actual Modernization Cost Certificate has been approved, less the amount by which advances against the HUD loan provided for in this Contract for the Modernization Project, and Project Notes issued for the Modernization Project, have been retired with funds other than loans provided under this Contract. The Maximum Loan Commitment under this Contract for a Modernization Project shall in no event be less than the aggregate amount of the outstanding advances against the HUD loan provided for in this Contract, and advances HUD has agreed to make against such HUD loan to secure Project Notes issued for the Modernization Project.

b. Each advance on account of the HUD loan for the Modernization shall bear interest on the unrepaid principal amount from the date the advance is made to the date of repayment at the rate or rates which HUD determines on the date such advance is made and redetermines on each anniversary of such date to be equal to the rate per annum on Treasury borrowings by HUD pursuant to Section 4(b) of the Act, however, the interest rate for each advance shall not be less than the "Minimum Loan Interest Rate" determined by HUD pursuant to Section 4(a) of the Act and specified in Section 5 to this amendment.

10. After issuance of the Actual Modernization Cost Certificate (in accordance with Section 405 of Part II of the Contract), Section 5 to this amendment shall be amended as follows:

a. To state the Actual Modernization Cost in lieu of the Maximum Modernization Cost.

b. To reduce the amount of contract authority for the Modernization Project to an amount equal to the product of the Maximum Debt Service Contribution Percentage times the Actual Modernization Cost.

11. a. HUD shall make Debt Service Annual Contributions to the PHA for the Modernization Project.

b. The first Debt Service Annual Contribution shall accrue and be payable on the first Annual Contributions Date after the effective date of this amendment, and shall be disbursed to the PHA no later than the second Annual Contributions Date after the effective date. The first Debt Service Annual Contribution shall be an amount equal to the Maximum Debt Service Contribution Percentage times the Maximum Modernization Cost.

c. The second and subsequent Debt Service Annual Contributions shall be payable on each Annual Contributions Date after the date on which the first Debt Service Annual Contribution is payable for the Modernization Project. HUD shall pay no more than twenty Debt Service Annual Contributions for the Modernization Project. The second and subsequent Debt Service Annual Contributions shall be in the amounts determined in accordance with Section 415 of Part II of the Contract.

d. The Maximum Contribution Period for the Modernization Project shall begin on the date the first Debt Service Annual Contribution is payable under paragraph b of this Section, and shall continue for twenty years.

12. Upon payment in full of all indebtedness of the PHA in connection with the Modernization Project for which Debt Service Annual Contributions are pledged and of any other indebtedness of the PHA to HUD in connection with such Modernization Project, all obligations of HUD and the PHA shall terminate except as provided in Section 406(C) of Part II of the Contract with respect to operating reserves: Provided, however, that the provisions of Section 308(B) or (C) of Part II of the Contract shall remain in effect so long as HUD determines that there is an outstanding indebtedness of the PHA to HUD which arose in connection with any Individual Project or Projects under the Contract and is not eligible for payment from annual contributions, and provided further that for a period of ten years following the last payment of operating subsidy to the PHA, any disposition or demolition of any Individual Project buildings or realty shall be accomplished in accordance with HUD regulations and requirements and the PHA shall continue to operate the Individual Project(s) as low-income housing under the Contract in accordance with HUD regulations and requirements.

13. Section 404 of Part II of the Contract shall not be applicable to the Modernization Project.

14. If the PHA does not comply with any of its obligations under this amendment, HUD may direct the PHA to terminate work on all or any part of the work described in the Modernization Program. The PHA shall not incur any additional cost for the terminated work without HUD approval.

15. a. Under the Constitution and laws of the State, the Modernization Project and each Individual Project are exempt from all real and personal property taxes levied or imposed by the State, city, county or other political subdivision.

b. An agreement or agreements, identified as follows, have been adopted and executed by the governing body of each locality in which each Individual Project is located, providing for the local cooperation required by HUD under the Act.

16. The PHA certifies that clear title will be conveyed to or vest in the PHA at the end of the Section 23 lease term in accordance with the Lease Agreement and Trust Indenture.

Individual Project No.	Governing Body of Locality	Date

17. After expiration of the respective lease terms, the PHA shall continue to operate each Individual Project as low-income housing in compliance with the Contract, the Act and all HUD regulations and requirements for so long as HUD and the PHA have any further obligations under this amendment or the Contract with respect to the Modernization Project or the Individual Project(s).

The parties have caused this amendment to be effective as of the date of execution on behalf of the United States, as stated below.

(Seal)
Attest

_____
(Public Housing Agency)

By _____
(Chairman)

Date _____

UNITED STATES OF AMERICA
Secretary of Housing and Urban Development

By _____

_____
(Official Title)

Date _____

HUD-53008 (8-81)

(RESERVED)

PHA_____

HUD-Established Threshold_____

SAMPLE MODERNIZATION CONTRACT STATUS CONTROL LOG

RMS No. HI-00445R

		Architect/Engineer Agreement					Bidding Documents			Contract Award					Contract Changes			Contract Settlement		
Mod Project Number	Indiv. Project Number	Dat Rec'd	Action Taken	Date Letter To PHA	Amount & Date of Execution	Description of Contract	Date Rec'd	Action Taken	Date Letter To PHA	Date Rec'd	Action Taken	Date Letter To PHA	Budget Amount	Amount & Date of Award	Date Rec'd	Action Taken	Date Letter To PHA	Date Rec'd	Action Taken	Date Letter To PHA

SAMPLE MODERNIZATION REQUISITION FOR FUNDS CONTROL LOG

RMS No. HI-00446R

Public Housing Agency USA Housing Authority

Individual Project No. or Modernization Project No. VA-30-901

Federal Fiscal Year	Allocation (Phase No.)	Date HUD-5402 Received	Amount Requested (Phase No.)	Amount Approved	Cumulative Amount Approved	Dir. Advance (DA) or Proj. Note (PN)	Funds Available for Requisition	Remarks
1979	$ 230,000		$	$	$		$ 250,000	ACC amendment executed on 11/29/79
		1/15/80	20,000	20,000	20,000	DA	230,000	HUD-5402 to RO on 1/16/80
		6/24/80	150,000	150,000	170,000	PN	80,000	HUD-5402 to RO on 6/26/80 PN Closing on 8/2/80
		9/14/80	60,000	20,000	190,000	DA	60,000	HUD-5402 to RO on 9/14/80

SAMPLE MODERNIZATION REQUISITION FOR FUNDS CONTROL LOG

Public Housing Agency USA Housing Authority

Individual Project No. or Modernization Project No. VA-30-5

Federal Fiscal Year	Allocation (Phase No.)	Date HUD-5402 Received	Amount Requested (Phase No.)	Amount Approved	Cumulative Amount Approved	Dir. Advance (DA) or Proj. Note (PN)	Funds Available for Requisition	Remarks
1976	$ 100,000 (Phase 76-02)		$	$	$		$ 100,000	ACC amendment executed on 12/15/76
		2/28/77	25,000 (Phase 76-02)	15,000	15,000	DA	85,000	HUD-5402 to RO on 3/1/77
		5/1/77	40,000 (Phase 76-0[illegible])	40,000	55,000	PN	45,000	HUD-5402 to RO on 5/2/77 PN Closing on 7/11/77
1977	75,000 (Phase 77-03)						120,000	ACC amendment executed on 11/13/77

Form Approved
OMB No. 2502-0188

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
LOW-INCOME PUBLIC HOUSING PROGRAM

NUMBER

REQUISITION FOR FUNDS

MODERNIZATION - PROJECT NOTES

Department of Housing and Urban Development

We hereby request an advance of $ 285,000 under our:

1/ 1. Preliminary Loan Contract Number _____ and

1/ 2. Annual Contributions Contract Number A-123h and

3/ _____

to be paid to National Bank. P.O. Box 000. Anywhere. Virginia 23546 363-47-5899
(General Depositary and Account Number)

1/ 1. The Public Housing Agency (PHA)

1/ 2. Paying Agents as provided in Requisition Agreement Number _____

for account of:

Project number	Note Number	Amount	DEDUCTIONS FOR APPLICATION TO REPAYMENT OF PRELIMINARY LOAN 2/ Principal	Interest
VA-30-1M		D $100.000	$	$
VA-30-3M		75.000		
VA-30-001		50.000		
VA-30-002		60.000		

We hereby certify that all applicable provisions of the contract, including those relating to the payment of prevailing salaries and wages, have been complied with by the PHA, that no litigation is pending or threatened which would materially affect the planning, development, operation, or financing of any project covered by the contract, that the PHA is not in default under any of the provisions of the contract; and that the people of the locality in which any such project is situated have not *(either by vote of the governing body of such locality, or by referendum)* indicated that they do not want such project.

FOR PHA USE ONLY		FOR HUD USE ONLY
NAME AND ADDRESS *(Include ZIP Code)* OF PUBLIC HOUSING AGENCY USA Housing Authority P.O. box 1122 Anywhere, Virginia 23546		APPROVED *(Signature of Official Authorized to Approve)* TITLE
BY TITLE	DATE	CONCURRENCE *(Signature of Project Financing Specialist) (Direct Advance Only)*

Direct Advance to be repaid from proceeds of Project Note Sale closing _____

1/ *Cross out lines not applicable.*
2/ *Indicate Preliminary Loan Note, Advance Note or Permanent Note.*
3/ *Show the principal amount of deduction (if any) applicable to repayment of preliminary loans, by Project. Interest will be computed by HUD.*

FOR HUD USE ONLY *(Treasury and Program Accounting Groups, if any)*

VERIFIED	DATE	AUTHORIZED CERTIFYING OFFICER-INITIALS ONLY	DATE
SF-1166 NUMBER	DATE	AMOUNT OF CHECK	

Interest Accrues From _____

SECURITY TYPE	PRINCIPAL PURCHASES	INTEREST PURCHASES	ACCRUED INTEREST (BENEFITS)	JOURNAL VOUCHER NUMBER
SECURITY NUMBER				PREPARED BY
PUBLIC LAW				APPROVED BY
INTEREST RATE %				COUNTY LOT NUMBER
NUMBER OF INTEREST DAYS				SECURITY LOT NUMBER

Previous Edition is Obsolete

HUD-5449 (6-76)

12/83

Form Approved
OMB No. 2502-0188

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
LOW-INCOME PUBLIC HOUSING PROGRAM

NUMBER

REQUISITION FOR FUNDS

MODERNIZATION - DIRECT ADVANCES

Department of Housing and Urban Development

We hereby request an advance of $ 90,000 under our

1/ 1. Preliminary Loan Contract Number _____ and

1/ 2. Annual Contributions Contract Number A-1234 and

1/ _____

to be paid to National Bank, P.O. Box 099, Anywhere, Virginia 23546 365-47-5859
(General Depositary and Account Number)

1/ 1. The Public Housing Agency (PHA)

1/ 2. Paying Agents as provided in Requisition Agreement Number _____

for account of:

Project number	Note Number	Amount	DEDUCTIONS FOR APPLICATION TO REPAYMENT OF PRELIMINARY LOAN 2/ Principal	Interest
VA-30-1M		D $15,000	$	$
VA-30-2M		20,000		
VA-30-4M		10,000		
VA-30-901		30,000		
VA-30-902		15,000		

We hereby certify that all applicable provisions of the contract, including those relating to the payment of prevailing salaries and wages, have been complied with by the PHA, that no litigation is pending or threatened which would materially affect the planning, development, operation, or financing of any project covered by the contract, that the PHA is not in default under any of the provisions of the contract; and that the people of the locality in which any such project is situated have not (either by vote of the governing body of such locality, or by referendum) indicated that they do not want such project.

FOR PHA USE ONLY		FOR HUD USE ONLY
NAME AND ADDRESS (Include ZIP Code) OF PUBLIC HOUSING AGENCY USA Housing Authority P.O. Box 1122 Anywhere, Virginia 23546		APPROVED (Signature of Official Authorized to Approve) TITLE
BY		CONCURRENCE (Signature of Project Financing Specialist) (Direct Advance Only)
TITLE	DATE	

Direct Advance to be repaid from proceeds of Project Note Sale closing _____

1/ Cross out lines not applicable.
2/ Indicate Preliminary Loan Note, Advance Note or Permanent Note.
3/ Show the principal amount of deduction (if any) applicable to repayment of preliminary loans, by Project. Interest will be computed by HUD.

FOR HUD USE ONLY (Financial and Program Accounting Group, if 1)

VERIFIED	DATE	AUTHORIZED CERTIFYING OFFICER-INITIALS ONLY	DATE
SF-1166 NUMBER	DATE	AMOUNT OF CHECK	

Interest Accrues From _____

SECURITY TYPE	PRINCIPAL PURCHASES	INTEREST PURCHASES	ACCRUED INTEREST (If Applicable)	JOURNAL VOUCHER NUMBER
SECURITY NUMBER				PREPARED BY
PUBLIC LAW				APPROVED BY
INTEREST RATE				CLOSING LOT NUMBER
NUMBER OF INTEREST DAYS				SECURITY LOT NUMBER

Previous Edition is Obsolete

HUD-5402 (4-78)

Form Approved
OMB No. 2502-0219

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM

SCHEDULE/REPORT OF MODERNIZATION EXPENDITURES

PART I - SUMMARY - MODERNIZATION PROJECT EXPENDITURES

NAME OF PHA	ABBREVIATED MODERNIZATION PROJECT NUMBER	REPORT FOR _____ QUARTER OF FFY 19_____	DATE SUBMITTED	PAGE_____OF _____

CONTROL NUMBER	TOTAL FUNDS APPROVED	TOTAL FUNDS OBLIGATED	TOTAL FUNDS ADVANCED	TOTAL FUNDS EXPENDED	COMPLETION	QUARTER AND FFY OF END OF IMPLEMENTATION PERIOD	COMMENTS
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
MODERNIZATION PROJECT TOTAL							

I hereby certify that the above information is true and accurate, and that the planned PHA inspections as specified in the Modernization Organization and Staffing Plan have been performed.

SIGNATURE OF EXECUTIVE DIRECTOR OR DESIGNEE	DATE

HUD-52828 (4-82)

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM

SCHEDULE/REPORT OF MODERNIZATION EXPENDITURES

PART II - INDIVIDUAL PROJECT EXPENDITURES

NAME OF PHA	ABBREVIATED MODERNIZATION PROJECT NUMBER	PAGE____ OF ____
INDIVIDUAL PROJECT NUMBER	REPORT FOR _____ QUARTER OF FEDERAL FISCAL YEAR 19_____	

SUMMARY BY DEVELOPMENT ACCOUNT	TOTAL FUNDS APPROVED	TOTAL FUNDS OBLIGATED	TOTAL FUNDS EXPENDED	
			PLANNED	ACTUAL
1408 Management Improvements				
1410 Administration				
1415 Liquidated Damages				
1430 Fees and Costs				
1440 Site Acquisition				
1450 Site Improvement				
1460 Dwelling Structures				
1465.1 Dwelling Equipment - Nonexpendable				
1470 Nondwelling Structures				
1475 Nondwelling Equipment				
1495.1 Relocation Costs				
Maximum Modernization Cost				

INDIVIDUAL PROJECT NUMBER

SUMMARY BY DEVELOPMENT ACCOUNT	TOTAL FUNDS APPROVED	TOTAL FUNDS OBLIGATED	TOTAL FUNDS EXPENDED	
			PLANNED	ACTUAL
1408 Management Improvements				
1410 Administration				
1415 Liquidated Damages				
1430 Fees and Costs				
1440 Site Acquisition				
1450 Site Improvement				
1460 Dwelling Structures				
1465.1 Dwelling Equipment - Nonexpendable				
1470 Nondwelling Structures				
1475 Nondwelling Equipment				
1495.1 Relocation Costs				
Maximum Modernization Cost				

HUD-52826 (4-82)

INSTRUCTIONS FOR PREPARATION OF SCHEDULE/REPORT OF MODERNIZATION EXPENDITURES, FORM HUD-52826

REPORT SUBMISSION

Where a modernization program has been approved by HUD, submit the original and three copies *(or any lesser number of copies as specified by HUD)* of this form to HUD no later than the twentieth day of the month following the end of a quarter, i.e., January 20, April 20, July 20 and October 20, for each Modernization Project. The first quarterly report is due twenty days after the end of the start quarter, which is the first full quarter following execution of the Annual Contributions Contract *(ACC)* amendment.

PART I - SUMMARY - MODERNIZATION PROJECT EXPENDITURES

1. HEADING. Insert the PHA Name and the Abbreviated Modernization Project Number, which is the Federal Fiscal Year *(FFY)* in which the Modernization Project was approved and two digits representing the sequential number of the Modernization Project, beginning with the first modernization funding after modernization as a separate project was implemented, e.g., 82-03. Also insert the number of the Quarter and FFY for which the form is being submitted, Date Submitted, and Page Number, e.g., Page 1 of 3.

Quarter Ending	FFY Quarter
12/31	1
3/31	2
6/30	3
9/30	4

2. COLUMN A, CONTROL NUMBER. Enter the standard eight-digit number used in automatic data processing. The first two digits represent the State code, the next three digits represent the PHA code, and the last three digits represent the individual project code, e.g., 00-000-000. For a list of State codes, refer to these instructions below.

3. COLUMN B, TOTAL FUNDS APPROVED. For each individual project in Column A, enter the latest HUD-approved amount of modernization funds, rounded to the nearest ten dollars.

4. COLUMN C, TOTAL FUNDS OBLIGATED. For each individual project in Column A, enter the cumulative amount of modernization funds, rounded to the nearest ten dollars, obligated by the PHA for work to be performed by contract labor *(i.e., contract award)* and force account labor *(i.e., work actually started, including funds expended on administrative salaries and management improvements).* Funds that are recorded as being obligated shall remain obligated so that total funds obligated are always greater than or equal to total funds expended. Total funds obligated shall not exceed total funds approved.

5. COLUMN D, TOTAL FUNDS ADVANCED. For each individual project in Column A, enter the cumulative amount of modernization funds, rounded to the nearest ten dollars, advanced by HUD to date through either direct advances or project notes. This is the amount of funds actually received, not requisitioned, by the PHA. Total funds advanced shall not exceed total funds approved.

6. COLUMN E, TOTAL FUNDS EXPENDED. For each individual project in Column A, enter the amount of actual cumulative expenditures through the quarter being reported, rounded to the nearest ten dollars. Total funds expended shall not exceed total funds approved.

7. COLUMN F, COMPLETION. For each individual project in Column A, enter the letter "C" if no further modernization funds will be expended. For the Modernization Project total, enter the letter "C" if no further modernization funds will be expended.

8. COLUMN G, QUARTER AND FFY OF END OF IMPLEMENTATION PERIOD. For each individual project in Column A, enter the number of the latest HUD-approved quarter and FFY in which the modernization program will be completed, e.g., 1-84, which is by December 31, 1983. For determining FFY quarters, see item 1 above.

9. COLUMN H, COMMENTS. For each individual project in Column A, enter any appropriate comments concerning implementation progress or problems.

10. TOTALING COLUMNS. For the Modernization Project total, enter the totals of the figures in Columns B, C, D and E.

PART II - INDIVIDUAL PROJECT EXPENDITURES

1. GENERAL. Prepare a separate Part II for each individual project included in the Modernization Project, except where two or more individual projects with separate project numbers are approved for Comprehensive Modernization, but are considered to be a single project because they are contiguous and constitute a single management entity. In such cases, the individual projects may be treated as one individual project for purposes of completing Part II of this form.

2. HEADING. Insert the PHA Name, Individual Project Number, Abbreviated Modernization Project Number, number of the Quarter and FFY for which the form is being submitted, and Page Number, e.g., Page 2 of 3.

3. COLUMNS. For each development account, enter the total modernization funds approved by HUD, obligated by the PHA, and actually expended by the PHA. The development accounts are the same as those on Part I of Form HUD-52825, Comprehensive Assessment/Program Budget.

4. TOTAL FUNDS EXPENDED-PLANNED. When the first quarterly report is submitted, enter the cumulative planned expenditures for each development account for the first year *(4 quarters)* of the implementation period. These planned expenditures shall remain the same until the fifth, ninth, thirteenth or seventeenth quarters of the implementation period, when planned expenditures for the second or a subsequent year of the implementation period shall be updated to show an additional year. For example, if the total planned expenditures are estimated to be $100,000 for the first year and $300,000 for the second year, the PHA would update the first year estimates when the fifth quarterly report is submitted to show $400,000 total planned expenditures through the second year of implementation.

INSTRUCTIONS FOR ADAPTING FORM FOR USE FOR MODERNIZATION PROGRAMS APPROVED BETWEEN FFYS 1975 AND 1981

1. For modernization programs approved before modernization as separate project was implemented *(July 1, 1978)*, the PHA shall insert, on Parts I and II, the Phase Number in lieu of the Abbreviated Modernization Project Number. The Phase Number is the FFY in which the modernization program was approved and the sequential number of the modernization program, e.g., 77-05.

2. On Part II, the development accounts are at a higher level of summary. The PHA shall enter the total modernization funds approved by HUD, obligated by the PHA and actually expended by the PHA which are consistent with the latest HUD-approved Form HUD-52990, Modernization Program Budget.

3. On Part II, the PHA shall enter the cumulative planned expenditures for the balance of the implementation year at the time the form is first submitted. Thereafter, the PHA shall follow the instructions set forth in Item 4 of Part II.

STATE CODES

The following is a list of the state codes. The applicable state code is the first two digits of the Control Number.

State or Possession	Code	State or Possession	Code
Alabama	01	Ohio	39
Alaska	02	Oklahoma	40
Arizona	04	Oregon	41
Arkansas	05	Pennsylvania	42
California	06	Rhode Island	44
Colorado	08	South Carolina	45
Connecticut	09	South Dakota	46
Delaware	10	Tennessee	47
District of Columbia	11	Texas	48
Florida	12	Utah	49
Georgia	13	Vermont	50
Hawaii	15	Virginia	51
Idaho	16	Washington	53
Illinois	17	West Virginia	54
Indiana	18	Wisconsin	55
Iowa	19	Wyoming	56
Kansas	20	American Samoa	60
Kentucky	21	Canal Zone	61
Louisiana	22	Canton and Enderbury Isl(s)	62
Maine	23	Guam	66
Maryland	24	Johnston Atoll	67
Massachusetts	25	Midway Islands	71
Michigan	26	Puerto Rico	72
Minnesota	27	Ryukyu Islands South	73
Mississippi	28	Swan Islands	74
Missouri	29	Trust Territories of Pacific Islands	75
Montana	30	Misc. Caribbean Islands (U.S.)	76
Nebraska	31	Misc. Pacific Islands (U.S.)	77
Nevada	32	Virgin Islands	78
New Hampshire	33	Wake Island	79
New Jersey	34		
New Mexico	35		
New York	36		
North Carolina	37		
North Dakota	38		

SAMPLE FIELD OFFICE SUMMARY REPORT ON ALL MODERNIZATION APPROVED AFTER FFY 1974

Form Approved
OMB No. 2502-0215

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM

FFYs 1975-1983

SCHEDULE/REPORT OF MODERNIZATION EXPENDITURES

PART I - SUMMARY - MODERNIZATION PROJECT EXPENDITURES

_____ FIELD OFFICE | ABBREVIATED MODERNIZATION PROJECT NUMBER | REPORT FOR _____ QUARTER OF FFY 19____ | DATE SUBMITTED | PAGE____OF____

FFY	TOTAL FUNDS APPROVED	TOTAL FUNDS OBLIGATED	TOTAL FUNDS ADVANCED	TOTAL FUNDS EXPENDED	COMPLETION	QUARTER AND FFY OF END OF IMPLEMENTATION PERIOD	COMMENTS
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
1975							
1976							
1977							
1978							
1979							
1980							
1981							
1982							
1983							
FIELD OFFICE TOTAL							

[redacted]

SIGNATURE OF MANAGER | DATE

HUD-52826 (4-82)
PART I

Page 1

12/83

APPENDIX 24

7485.1 REV-1

FIELD OFFICE			FIELD OFFICE EXCEPTION REPORTS ON PHAS WITH UNOBLIGATED MODERNIZATION FUNDS OVER TWO YEARS OLD AND/OR UNEXPENDED MODERNIZATION FUNDS OVER THREE YEARS OLD				
PHA	FY OF PROGRAM APPROVAL	TOTAL FUNDS APPROVED BY HUD	TOTAL FUNDS OBLIGATED BY PHA	TOTAL FUNDS ADVANCED BY HUD	TOTAL FUNDS EXPENDED BY PHA	ESTIMATED PROGRAM COMPLETION DATE	REASONS FOR UNOBLIGATED/ UNEXPENDED FUNDS AND CORRECTIVE ACTIONS BEING TAKEN

SAMPLE REGIONAL OFFICE SUMMARY REPORT ON ALL MODERNIZATION APPROVED AFTER FFY 1974

Form Approved
OMB No. 2502-0219

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM

FFYS 1975-1983

SCHEDULE/REPORT OF MODERNIZATION EXPENDITURES

PART I - SUMMARY - MODERNIZATION PROJECT EXPENDITURES

REGIONAL OFFICE | ~~ABBREVIATED MODERNIZATION PROJECT NUMBER~~ | REPORT FOR _____ QUARTER OF FFY 19____ | DATE SUBMITTED | PAGE____OF____

FFY	TOTAL FUNDS APPROVED	TOTAL FUNDS OBLIGATED	TOTAL FUNDS ADVANCED	TOTAL FUNDS EXPENDED	COMPLETION	QUARTER AND FFY OF END OF IMPLEMENTATION PERIOD	COMMENTS
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
1975							
1976							
1977							
1978							
1979							
1980							
1981							
1982							
1983							
REGIONAL OFFICE TOTAL							

SIGNATURE OF REGIONAL ADMINISTRATOR | DATE

HUD-52826 (4-82)
PART 1

Page 1

12/83

APPENDIX 26

7485.1 REV-2

SAMPLE PHA SUMMARY REPORT ON ALL MODERNIZATION APPROVED BEFORE JULY 1, 1974

Form Approved
OMB No. 2502-0164

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
LOW INCOME HOUSING PROGRAM

MODERNIZATION QUARTERLY PROGRESS REPORT SUMMARY

DATE SUBMITTED: 4/20/81

REPORT FOR: 2 Quarter of Federal Fiscal Year 19 81

PHA: USA Housing Authority

MODERNIZATION PROJECT NUMBER:

LOCALITY (City, County and State): Anywhere, Virginia

NUMBER OF INDIVIDUAL PROJECTS: 6

INDIVIDUAL PROJECT CODE	TOTAL FUNDS APPROVED	TOTAL FUNDS OBLIGATED	TOTAL FUNDS ADVANCED	TOTAL FUNDS Expended	TOTAL FUNDS Unexpended
(A)	(B)	(C)	(D)	(E)	(F)
001	xxx,xxx	xxx,xxx	xxx,xxx	XXX	xxx,xxx
002	xxx,xxx	xxx,xxx	xxx,xxx	x,xxx	xxx,xxx
003	xxx,xxx	xxx,xxx	xxx,xxx	x,xxx	xxx,xxx
007	xx,xxx	x,xxx	x,xxx	XXX	x,xxx
010	xxx,xxx	xx,xxx	x,xxx	xxx	x,xxx
013	x,xxx	x,xxx	x,xxx	xxx	x,xxx
MODERNIZATION PROJECT TOTAL	x,xxx,xxx	x,xxx,xxx	x,xxx,xxx	xx,xxx	xxx,xxx

*I hereby certify that the above information is true and accurate, and that the planned PHA inspections, as specified in the Modernization Organization and Staffing Plan, have been performed.

SIGNATURE OF EXECUTIVE DIRECTOR OR DESIGNEE:

DATE:

No further monies for modernization may be paid by HUD unless this report is completed and filed as required by existing regulations

HUD-52995 (4-78)

SAMPLE FIELD OFFICE SUMMARY REPORT ON ALL MODERNIZATION Form Approved
APPROVED BEFORE JULY 1, 1974 OMB No. 2502-0164

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
LOW-INCOME HOUSING PROGRAM

MODERNIZATION QUARTERLY PROGRESS REPORT SUMMARY

DATE SUBMITTED: 5/15/81

REPORT FOR: 2 Quarter of Federal Fiscal Year 1981

PHA: Chicago Area Office

MODERNIZATION PROJECT NUMBER:

LOCALITY (City/County and State)

PAGE OF

NUMBER OF INDIVIDUAL PROJECTS: PHAs - 5

INDIVIDUAL PROJECT CODE	TOTAL FUNDS APPROVED	TOTAL FUNDS OBLIGATED	TOTAL FUNDS ADVANCED	TOTAL FUNDS Expended	TOTAL FUNDS Unexpended
(A)	(B)	(C)	(D)	(E)	(F)
PHA #1	xx,xxx,xxx	xx,xxx,xxx	xx,xxx,xxx	XXX,XXX	xx,xxx,xxx
PHA #2	x,xxx,xxx	x,xxx,xxx	x,xxx,xxx	X,YXY	x,xxx,xxx
PHA #3	x,xxx,xxx	xxx,xxx	xxx,xxx	XXX	xx,xxx
PHA #4	xxx,xxx	xxx,xxx	xxx,xxx	X,XXX	xx,xxx
PHA #5	xx,xxx	xx,xxx	xx,xxx	XXX	x,xxx
MODERNIZATION PROJECT TOTAL	xx,xxx,xxx	xx,xxx,xxx	xx,xxx,xxx	XXX,XXX	xx,xxx,xxx

I hereby certify that the above information is true and accurate, and that the planned PHA inspections, as specified in the Modernization Organization and Staffing Plan, have been performed.

SIGNATURE OF EXECUTIVE DIRECTOR OR DESIGNEE | DATE

No further monies for modernization may be paid by HUD unless this report is completed and filed as required by existing regulations

HUD-52995 (4-79)

SAMPLE REGIONAL OFFICE SUMMARY REPORT ON ALL MODERNIZATION Form Approved
APPROVED BEFORE JULY 1, 1974 OMB No. 2502-0164

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
LOW INCOME HOUSING PROGRAM

MODERNIZATION QUARTERLY PROGRESS REPORT SUMMARY

DATA SUBMITTED: 6/1/81

REPORT FOR: 2 Quarter of Federal Fiscal Year 1981

PHA: Region V

MODERNIZATION PROJECT NUMBER

LOCALITY (City, County and State)

PAGE OF

NUMBER OF INDIVIDUAL PROJECTS: FOs - 7

INDIVIDUAL PROJECT CODE	TOTAL FUNDS APPROVED	TOTAL FUNDS OBLIGATED	TOTAL FUNDS ADVANCED	TOTAL FUNDS	
				Expended	Unexpended
(A)	(B)	(C)	(D)	(E)	(F)
Chicago	xx,xxx,xxx	xx,xxx,xxx	xx,xxx,xxx	XXX,XXX	xx,xxx,xxx
Cleveland	xx,xxx,xxx	xx,xxx,xxx	xx,xxx,xxx	XXX,XXX	xx,xxx,xxx
Columbus	xx,xxx,xxx	xx,xxx,xxx	xx,xxx,xxx	XXX,XXX	xx,xxx,xxx
Detroit	xx,xxx,xxx	xx,xxx,xxx	xx,xxx,xxx	XXX,XXX	xx,xxx,xxx
Indianapolis	xx,xxx,xxx	xx,xxx,xxx	xx,xxx,xxx	XXX,XXX	xx,xxx,xxx
Milwaukee	xx,xxx,xxx	xx,xxx,xxx	xx,xxx,xxx	XXX,XXX	xx,xxx,xxx
Minneapolis	xx,xxx,xxx	xx,xxx,xxx	xx,xxx,xxx	XXX,XXX	xx,xxx,xxx
MODERNIZATION PROJECT TOTAL	xx,xxx,xxx	xx,xxx,xxx	xx,xxx,xxx	XXX,XXX	xx,xxx,xxx

I hereby certify that the above information is true and accurate, and that the planned PHA inspections, as specified in the Modernization Organization and Staffing Plan, have been performed.

SIGNATURE OF EXECUTIVE DIRECTOR OR DESIGNEE | DATE

No further monies for modernization may be paid by HUD unless this report is completed and filed as required by existing regulations

HUD-52995 (4-78)

SAMPLE CHECKLIST FOR MONITORING OF PHYSICAL IMPROVEMENTS

PHA Name: _____ Field Office Engineer: _____

Modernization Project or Phase No: _____ Date: _____

Project No: _____

ITEMS	YES	NO	COMMENTS
1. Site inspections being conducted by the PHA or its architect/engineer are adequate to ensure that PHA interests are being preserved.			
2. Contractor is providing adequate supervision and direction of the work.			
3. Material and workmanship conform to contract requirements.			
4. Architect/engineer is keeping the PHA informed of work progress and endeavoring to guard against defects and deficiencies in the contractor's work.			
5. Architect's/engineer's decisions and interpretations are consistent with the intent of and reasonably inferable from the contract documents.			
6. Architect/engineer revises and approves or takes other appropriate action upon contractor's submittal of shop drawings and product data and samples, with reasonable promptness so as to cause no delay.			
7. Premises are being kept free from accumulation of waste materials or rubbish caused by the contractor.			
8. There are no observable safety violations.			
9. Where applicable, PHA has used competitive negotiation process to obtain professional services.			
10. Where architect's/engineer's contracts were not reviewed by HUD before execution:			
a. PHA certifications are on file and are correct; and			

SAMPLE CHECKLIST FOR MONITORING OF PHYSICAL IMPROVEMENTS

ITEMS	YES	NO	COMMENTS
b. HUD-established threshold is correct.			
11. Where construction and bid documents were not reviewed by HUD before bid advertisement:			
a. PHA certifications are on file and are correct; and			
b. HUD-established threshold is correct.			
12. Where proposed contracts were not reviewed by HUD before award:			
a. PHA certifications are on file and are correct; and			
b. Additional PHA submissions are not required.			
13. PHA has sent required notices of contract awards to Regional Office of Department of Labor.			
14. PHA has sent copies of all executed contract documents to HUD.			
15. PHA disapproval of any subcontractor was for justifiable cause.			
16. PHA has cleared each subcontractor with regard to the HUD Consolidated List of Debarred, Suspended, or Ineligible Contractors and Grantees.			
17. PHA has obtained certificates of insurance from each contractor and subcontractor.			
18. Where change orders were not reviewed by HUD before issuance:			
a. PHA certifications are on file and are correct; and			
b. HUD-established threshold is correct.			
19. PHA is properly approving time extensions.			

SAMPLE CHECKLIST FOR MONITORING OF PHYSICAL IMPROVEMENTS

ITEMS	YES	NO	COMMENTS
20. Where partial payments are necessary, PHA is requiring contractors to submit construction progress schedules.			
21. PHA is approving schedules of amounts for contract payments which have reasonable amounts of payments for scheduled work.			
22. PHA is keeping appropriate contractor files, which record progress of each contract, change orders, claims, disputes and other matters in question between the PHA and contractor relating to work progress. PHA is taking appropriate steps to respond to any notice from contractors involving potential claims.			
23. PHA is properly accepting part of a project for occupancy before contract settlement.			
24. PHA is notifying HUD of all scheduled final inspections.			
25. PHA is submitting all contract settlement documents to HUD before making final payments to contractors.			

FOR MODERNIZATION PROGRAMS APPROVED BEFORE MODERNIZATION AS A SEPARATE PROJECT WAS IMPLEMENTED

Form Approved
OMB No. 2502-0219

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
LOW-INCOME HOUSING PROGRAM

ACTUAL MODERNIZATION COST CERTIFICATE

NAME OF PUBLIC HOUSING AGENCY	ANNUAL CONTRIBUTIONS CONTRACT NUMBER
USA Housing Authority	A-1234
LOCALITY	**MODERNIZATION PROJECT NUMBER**
Anywhere, Virginia	75-04 (Phase Number)

The Public Housing Agency hereby certifies to the Department of Housing and Urban Development as follows:

1. That the total amount of Modernization Cost *(herein called the "Actual Modernization Cost")* of the Project(s), approved in Federal fiscal year_____, is as shown below:

	INDIVIDUAL PROJECT NUMBER VA-1	INDIVIDUAL PROJECT NUMBER VA-2	INDIVIDUAL PROJECT NUMBER	INDIVIDUAL PROJECT NUMBER	INDIVIDUAL PROJECT NUMBER	MODERNIZATION PROJECT TOTAL
a. Funds Approved *(ICC)*	340,000.00	260,000.00				600,000.00
b. Funds Approved *(Latest Budget)*	340,000.00	260,000.00				600,000.00
c. Funds Advanced	338,000.00	260,000.00				598,000.00
d. Funds Expended *(Actual Modernization Cost)*	335,000.00	259,000.00				594,000.00
e. Excess of Funds Approved *(a–d)*	5,000.00	1,000.00				6,000.00
f. Excess of Funds Advanced *(c–d)*	3,000.00	1,000.00				4,000.00

2. That all modernization work in connection with the Project(s) has been completed;

3. That the entire Actual Modernization Cost or liabilities therefor incurred by the PHA have been fully paid;

4. That there are no undischarged mechanics', laborers', contractors', or material-men's liens against such Project(s) on file in any public office where the same should be filed in order to be valid against such Project(s), and

5. That the time in which such liens could be filed has expired.

DATE	SIGNATURE OF EXECUTIVE DIRECTOR

FOR HUD USE ONLY

The audited costs agree with the costs shown above.

DATE	VERIFIED *(Director, Housing Division)*
DATE	APPROVED *(Field Office Director)*

No further modernization monies may be approved unless an actual modernization cost certificate is filed at HUD's request upon completion of a modernization program.

Previous Edition is Obsolete

HUD-53001 (6-78)

FOR MODERNIZATION PROGRAMS APPROVED AFTER MODERNIZATION AS A SEPARATE PROJECT WAS IMPLEMENTED

Form Approved OMB No. 2502-0219

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
LOW-INCOME HOUSING PROGRAM

ACTUAL MODERNIZATION COST CERTIFICATE

NAME OF PUBLIC HOUSING AGENCY	ANNUAL CONTRIBUTIONS CONTRACT NUMBER
USA Housing Authority	A-1234
LOCALITY	**MODERNIZATION PROJECT NUMBER**
Anywhere, Virginia	79-VA-30-901

The Public Housing Agency hereby certifies to the Department of Housing and Urban Development as follows:

1. That the total amount of Modernization Cost *(herein called the "Actual Modernization Cost")* of the Project(s), approved in Federal fiscal year _____, is as shown below:

	INDIVIDUAL PROJECT NUMBER 10-1	INDIVIDUAL PROJECT NUMBER 10-2	INDIVIDUAL PROJECT NUMBER	INDIVIDUAL PROJECT NUMBER	INDIVIDUAL PROJECT NUMBER	MODERNIZATION PROJECT TOTAL
a. Funds Approved *(ACC)*						1,248,240.00
b. Funds Approved *(Latest Budget)*	709,530.00	538,710.00				1,248,240.00
c. Funds Advanced						1,248,240.00
d. Funds Expended *(Actual Modernization Cost)*	709,530.00	537,710.00				1,247,240.00
e. Excess of Funds Approved *(a-d)*						1,000.00
f. Excess of Funds Advanced *(c-d)*						1,000.00

2. That all modernization work in connection with the Project(s) has been completed;

3. That the entire Actual Modernization Cost or liability therefor incurred by the PHA have been fully paid;

4. That there are no undischarged mechanics', laborers', contractors', or material-men's liens against such Project(s) on file in any public office where the same should be filed in order to be valid against such Project(s); and

5. That the time in which such liens could be filed has expired.

DATE	SIGNATURE OF EXECUTIVE DIRECTOR

FOR HUD USE ONLY

The audited costs agree with the costs shown above.

DATE	VERIFIED *(Director, Housing Division)*
DATE	**APPROVED** *(Field Office Director)*

No further modernization monies may be approved unless an actual modernization cost certificate is filed at HUD's request upon completion of a modernization program.

Previous Edition is Obsolete

HUD-53001 (6-78)

INSTRUCTIONS FOR PREPARATION OF FORM HUD 53001 ACTUAL MODERNIZATION COST CERTIFICATE

GENERAL INSTRUCTIONS:

Prepare a separate Actual Modernization Cost Certificate for each terminated or completed Modernization Project. Use as many pages of this form as necessary to cover all of the individual projects included in the Modernization Project. Submit the original and one copy of this form to HUD upon termination or completion of the Modernization Project.

HEADING INSTRUCTIONS:

In the upper left corner, insert the PHA Name and Locality *(city/county and State where the PHA Central Office is located)*. In the upper right corner, insert the Annual Contributions Contract *(ACC)* Number and Modernization Project Number, which was previously entered on Form HUD-52990, Modernization Program Budget.

LINE INSTRUCTIONS:

Enter only modernization funds provided by HUD for the Modernization Project. Enter all figures in dollars and cents.

1. Line 1a, Funds Approved *(ACC)*. For the Modernization Project, enter the total funds as they were originally approved through amendment to the ACC. Do not enter any figures for individual projects included in the Modernization Project.

2. Line 1b, Funds Approved *(Latest Budget)*. For each individual project included in the Modernization Project, enter the latest HUD-approved funds through revisions to Form HUD-52990. Also enter the total funds approved for the Modernization Project, which is the same total entered on Line 1a.

3. Line 1c, Funds Advanced. For the Modernization Project, enter the total funds advanced by HUD through either direct advances or project notes. Do not enter any figures for individual projects included in the Modernization Project.

4. Line 1d, Funds Expended. For each individual project included in the Modernization Project, enter the funds actually expended. Also enter the total funds expended for the Modernization Project.

5. Line 1e, Excess of Funds Approved. For the Modernization Project, enter the total excess of funds approved by subtracting the total on Line 1d from the total on Line 1a. If Line 1d is greater than Line 1a, enter the figure in brackets. Do not enter any figures for individual projects included in the Modernization Project.

6. Line 1f, Excess of Funds Advanced. For the Modernization Project, enter the total excess of funds advanced by subtracting the total on Line 1d from the total on Line 1c. Do not enter any figures for individual projects included in the Modernization Project.

INSTRUCTIONS FOR ADAPTING FORM FOR USE FOR MODERNIZATION PROGRAMS APPROVED BEFORE MODERNIZATION AS A SEPARATE PROJECT WAS IMPLEMENTED:

1. In the upper right corner, insert the Phase Number in lieu of the Modernization Project Number. The Phase Number is the Federal fiscal year in which the modernization program was approved and the sequential number of the modernization program, e.g., 75-04.

2. For Lines 1a, 1c, 1e, and 1f, enter the funds approved (ACC), funds advanced, excess of funds approved, and excess of funds advanced, respectively, for each individual project.

3. Enter the Modernization Program Total in lieu of the Modernization Project Total.

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Office of Housing

Washington, D.C. 20410

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U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
H O U S I N G

TRANSMITTAL

7460.8
8/24/81

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1. This Transmits:
A new HUD Handbook 7460.8, Procurement Handbook for Public Housing Agencies, dated 8/81.

2. Purpose:
This Handbook concerns procurement practices, policy and procedures. It is a guide for use by Public Housing Agencies (PHAs) when purchasing supplies and services needed to manage projects with economy and efficiency and corresponding savings in subsidy costs to the Government.

Assistant Secretary for Housing-
Federal Housing Commissioner

H:DISTRIBUTION: W-1, W-2, W-3, W-3-1, W-4, R-1, R-2, R-3, R-3-1(H), R-3-2, R-4, R-4-1, R-4-2, R-5, R-5-1, R-5-2, 138, 045, 061

Handbook 7460.8

U.S. Department of Housing and Urban Development
Washington, D.C. 20410
Office of Housing

Program Participants and Departmental Staff

August 1981

Procurement Handbook for Public Housing Agencies

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CHAPTER 1. INTRODUCTION

1-1. PURPOSE. This Handbook concerns procurement practice, policies and procedures for Public Housing Agencies (PHAs) and Indian Housing Authorities (IHAs) to enter into and administer contracts for purchasing supplies and services needed to manage existing projects including public housing and modernization work. It is not intended for use in preparing contracts for new construction because other administrative controls apply and the construction contracts are closely monitored by a HUD Field Office. However, many of the procurement practices herein are also appropriate for construction contracts. All references to PHAs in this Handbook shall also include IHAs except where separate or specific procedures are written for IHAs.

1-2. GENERAL INFORMATION. This Handbook provides procedures and guidelines for the procurement of supplies, equipment and services by PHAs, to ensure that they are obtained efficiently and economically, and in compliance with applicable Federal law and Executive Orders. The procedures and guidelines herein follow the procurement standards established by the Office of Management and Budget, outlined in Attachment A to OMB Circular A-102. (See Appendix 5.) Compliance with the Attachment O are not mandatory at this time. In view of the fact that they may become mandatory in the near future, PHAs should have a current OMB Circular A-102 on file and should seek to comply on a voluntary basis at this time.

a. Financial assistance is provided to PHAs under an Annual Contributions Contract (ACC) with the Department of Housing and Urban Development (HUD). The Annual Contributions Contract establishes contractual requirements that a PHA must comply with while using HUD-assisted project funds. HUD's interest in the economic use of such funds is based on the fact that the HUD annual contribution is the amount of Federal subsidy necessary, after application of net operating income, to meet operating expenses and interest and principal payments on the indebtedness of the PHA.

b. A substantial portion of a PHA's operating funds are expended for the purchase of items of personal property and services required for administering PHA programs and managing its projects. This Handbook will implement the

basic obligation under the ACC that the PHA shall operate its projects in such manner as to promote serviceability, efficiency, economy, and stability. The Handbook should be used by PHAs to develop purchasing procedures that will ensure PHA compliance with this obligation.

c. Proper purchasing practice results in monetary savings, good public relations, and avoidance of allegations of favoritism, collusion, or other improper actions. This Handbook is based on the best features of private and public practice, including past experiences and current operations of PHAs. The sample forms included are intended as guides to be adapted to suit the particular requirements of each PHA. Similarly, the suggested procedures and recommendations are intended as guides to be adapted to meet local circumstances, consistent with the ACC and HUD regulations and requirements.

1-3. DEFINITIONS.

a. Procurement Practice. The combined actions of all individuals involved in the day-to-day procurement for an organization. Good procurement practice should result in effective and timely support of the organization's goals. Simply put, it is "what is done".

b. Procurement Policy. That written policy which directs and to an extent limits procurement actions and practices of an organization. In short, it is the "do's and don'ts".

c. Procedures. The "how to's" of procurement - the specific steps to do the job, using methods that have been tried and proven acceptable, and that are efficient and yet at all times ethical.

d. Ethics. The rules or standards governing the conduct of the members of a profession; also the moral quality of a course of action.

e. Mismanagement. Failure of those charged with management responsibilities to accomplish the goals and objectives of the program through adequate performance.

CHAPTER 2. PROCUREMENT PRACTICE AND AUTHORITY

2-1. GENERAL.

a. Good procurement practice is both an art and a science, requiring professional ability and skill that must be developed over a long period of experience and training. Procurement practice is in a process of continual change, with new procedures and methods to be learned every day; yet the unwritten rules of exchange between individuals, the customs of trade, and the basic concepts of contract law have existed for thousands of years.

b. Purchasing and Contracting are separate procurement functions in which one involves the other. Contracts state the terms of an anticipated or actual purchase, but not all contracts are purchases nor do they necessarily lead to a purchase. Some do create a purchase when all the terms of a purchase are stated, including the parties involved, specific quantities and prices, and time and place of delivery and payment. Other contracts may establish only the price, means of payment, method of placing orders, and a specified time period during which the terms are effective. Purchases may or may not be made under that type of contract. (The HUD Consolidated Supply Contracts are an example of the latter type.) All purchases are contracts in the broad sense, even over-the-counter sales, in that two parties agree to exchange something of value at a specific time and place. However, for the purpose of this Handbook, the contracts referred to will mean written contracts signed by properly appointed Contracting Officers or other officals duly authorized and empowered by a Federal, State or local governing body to write such contracts.

2-2. PURCHASING RESPONSIBILITY. Purchasing Clerks, Agents and Officers are normally authorized to make purchases under existing contracts and agreements; the size of purchase authorized and the complexity of each purchase separates the skill levels. The normal skill progression for a person in the procurement field is entry as a Purchasing Clerk and progress to Purchasing Agent, Purchasing Officer, and eventually promotion to Contracting Officer.

2-3. CONTRACTING RESPONSIBILITY. Contracting Officer is the highest level in the procurement field, with lateral moves possible to Contract Analysts, Contract Law, Contract Negotiation, and other

specialized contracting functions. When writing contracts, the Contracting Officer's signature binds the PHA to the contract. It is generally accepted that a PHA contract is not valid unless an authorized Contracting Officer has signed it, but there are exceptions. For instance, if the individual that signs the contract is not authorized in writing but the actions of the PHA lead a contractor to believe that the individual has contracting authority (e.g., by referring to that person as the "Contracting Officer"), the court may uphold a contract signed by that individual whether or not written contracting authority exists. If an individual has contracting authority, that individual must not bind the PHA by making an implied contract. An example would be by making a promise or statement of intent to buy, verbally or in a written request for price quotation. All actions which could be misinterpreted as committing the PHA to a purchase must be clarified with a statement such as, "This Request for Price Quotation is not an offer to buy, and must not be assumed as such."

2-4. PROCUREMENT AS A MANAGEMENT-ORIENTED FUNCTION. Many PHAs view procurement as a simple buying function intended as a support service for their project managers. Such an approach is no longer appropriate. Procurement as a function has become a complex process involving the expenditure of such large sums of money that it has become imperative to find ways and means of accomplishing that function in the most effective and economical manner. This requires a shift in the perception of the purchasing function. It must become management-oriented, which involves:

a. Centralization of responsibility for procurement.

b. Establishment of planning and control mechanisms such as performance goals and reports on actual performance.

c. Installation of a reporting system that will provide management with complete, timely, accurate, and comprehensive information on the various aspects of the procurement function.

d. Measurement of performance against the procurement goals.

Individuals performing the procurement function at many PHAs do not have any specialized procurement experience or training. For the most part, they are clerks who have moved up into the procurement positions. Successful application of this Handbook by the PHAs will depend on (1) the staffing of the procurement

function by the PHAs with people qualified by experience and training and (2) their commitment and dedication at the direction of PHA management to effective performance of that function, using the guidance provided by this Handbook. PHAs must recognize that procurement is no longer a simple buying function, and be prepared to staff the procurement function with people who are qualified and to provide them with the training to keep abreast of developments in the purchasing field. PHAs should periodically review their entire procurement system in light of their experience and changing conditions.

2-5. FRAUD ASSESSMENT. Where the potential for fraud is greatest, the controls must also be greatest. For instance, when the same individual places purchase orders, receives the items purchased, and disburses the funds in payment of the purchase, there is an obvious lack of checks and balances and a high potential for fraud. Although a small PHA must at times assign multiple functions to a single individual, the PHA Board must be aware of the potential for fraud, and understand that this situation calls for continued monitoring by the Board or another responsible official.

2-6. CODE OF CONDUCT. PHAs shall maintain a written code or standards of conduct which shall govern their officers, employees or agents engaged in the award and administration of procurement contracts. No employee, officer or agent of the PHA shall participate in selection, or in the award or administration of a contract if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when a financial or other interest in a firm selected for award as held by:

a. The employee, officer or agent involved in making the award;

b. Any member of his or her immediate family;

c. His or her partner; or

d. An organization which employs, or is about to employ, any of the above.

The PHA's officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements.

PHAs may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value.

(2-6) To the extent permitted by State or local law or regulations, such standards of conduct shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the PHA's officers, employees, or agents, or by contractors or their agents.

CHAPTER 3. PROCUREMENT POLICY

3-1. ACC PROVISIONS. Under Section 5 of Part 1 of each Annual Contribution Contract (ACC) the PHA is required to operate its projects in compliance with all provisions of the ACC and all applicable provisions of the United States Housing Act of 1937 (42 U.S.C. 1437) Section 1.1. Section 201 of Part 2 of the ACC provides that the Local Authority at all times operate each project in such manner as to promote serviceability, efficiency, economy and stability.

Section 306 of Part 2 of the ACC requires that in purchasing of equipment, materials, and supplies, and in the award of contracts for services or for repairs, maintenance, and replacements, the Local Authority shall comply with all applicable State and local laws, and in any event shall make such purchases and award such contracts only to the lowest responsible bidder after advertising a sufficient time previously for proposals with specified exceptions.

3-2. ACC EXCEPTIONS TO COMPETITIVE BIDDING. The ACC requires that the PHA make purchases and award contracts only to the lowest responsible bidder after formal advertising for a sufficient time as established by the Board, except:

a. When the amount involved in any one case does not exceed an amount specified by HUD; or

b. When the public exigencies require the immediate delivery of the articles or performance of the service; or

c. When only one source of supply is available and the purchasing or contracting officer of the Local Authority shall so certify; or

d. When the services required are (1) of a technical and professional nature, or (2) to be performed under Local Authority supervision and paid for on a time basis. 1/

In addition, procurement under the Consolidated Supply Program may be made without advertising, unless advertising is required by State or local law; and in the latter case, the CSP supplier should be included in the solicitation for bids (see paragraph 5-4b).

1/ Instructions contained in paragraphs 3-1 and 3-2, a through d, are taken from the Annual Contributions Contract and are binding upon PHAs.

3-3. THE BOARD OF COMMISSIONERS. The governing body of the PHA is normally the Board of Commissioners (the Board). It is similar in function to the board of directors of a private corporation. A PHA Commissioner is normally a non-salaried public official. The Board selects and employs the Executive Director of the PHA (referred to herein as the Director). The Director is responsible to the Board for the efficient operation of the PHA's business and for carrying out Board policies.

3-4. PHA POLICY. Among the specific policies which should be established by the Board of Commissioners is the procurement policy of the PHA. Although the size of a PHA will determine which positions/individuals will perform certain functions, the procurement policy should not vary by PHA size except in dollar amount limits. The Board should designate the Director as the person responsible for carrying out its policy. The Director should have the authority to then formally delegate responsibility for certain functions to positions/individuals based on the organization of the PHA and its staffing. The Director, with the assistance of HUD, may prepare the implementation of this policy. The adoption of such a policy would authorize the Director and his/her staff to make purchases, standardize administrative procedures, and furnish internal controls on purchases and contracts. It should not contain detailed procedures, but should authorize the Director to establish such procedures as he/she deems necessary to carry out the policy. All procurement policy should be established by Board resolution and entered in the minutes of the Board meeting. Paragraph 3-5 is a sample statement of procurement policy appropriate for medium-sized PHAs. Each PHA Board should prepare a procurement policy which expresses goals and limits which are appropriate for the size of the PHA.

a. Section 7(b) of the Indian Self-Determination and Assistance Act and the Indian housing regulation, at 24 CFR 805.204, requires that Indian Housing Authorities (IHAs) give preferences in the award of contracts and subcontracts to Indian organizations and Indian-owned economic enterprises. Accordingly, an IHA's "Statement of Procurement Policy" should be modified from the Sample Statement in paragraph 3-5 to identify its Indian preference policy and requirements.

3-5. SAMPLE STATEMENT OF PROCUREMENT POLICY.

The following sample statement of "procurement policy" includes HUD requirements under the ACC and recommended policies for adoption by the PHA.

(3-5) Procurement Policy of the ___(locality)___ Housing Agency

Established by Board Action on ___(date)___

"a. Purchases and contracts for equipment, materials, supplies and nonpersonal services, shall be made in the following manner:

"(1) The Executive Director (or other qualified individuals) shall make purchases not to exceed $ _____ (e.g., $250) in the open market using small purchase procedures (including petty cash and blanket purchase agreements) after such inquiry as necessary to ensure that the price obtained is the most advantageous to the PHA; and the Director shall adopt procedures for audit of the petty cash fund to eliminate abuse and misuse. Specific use of the petty cash fund should be defined by the Director.

"(2) For purchases and contracts from $ _____ to $ _____ (e.g., $250 to $5000), the Director (or other qualified individuals) shall use competitive negotiation and invite offers orally, by telephone, or in writing from at least three suppliers if they are available in the locality. A file shall be kept with an abstract of invitations made and offers received.

"(3) For purchases and contracts in excess of $ _____ (e.g., $5000), the Director (or other qualified individuals) shall use formal advertising methods (unless otherwise justified) and shall solicit bids by advertisement in at least one newspaper of general circulation, or by mailing solicitations to bid to all available dealers, and by posting notices in public places, or by a combination of such methods. (If State or local laws require particular methods of advertising, this statement should be revised to reflect such methods.)

"(4) For equipment and supplies included in HUD Consolidated Supply Contracts (CSCs), purchases should be made from the contract supplier offering the lowest price without further solicitation or invitation for bids, unless required by state law or it is believed that lower prices may be available elsewhere. If the purchase is made from any supplier other than one offering the lowest price, based on a requirement for quality, availability, optional features, local service options, or other justifiable reasons, such justification shall be in

(3-5) writing and filed with the purchase order file copy. For purchases from CSCs over $ _____ (e.g. $50,000) the Director shall conduct a survey of other sources to investigate the possibility that a better price may be obtained by formal advertising. A statement of the results of this survey shall be attached to the file copy of each CSC purchase over $50,000 for audit review.

"(5) The PHA should enter into governmental agreements to use State and local contracts, and request that the contracting agency (State, County or City) note in the contract that use by the PHA is authorized. Approval for use of these contracts should also be a part of the Board Policy regarding procurement.

"(6) All procurement of equipment, materials. supplies and non-personal services shall be docum- . Expenditures under $ _____ (e.g. $250) shall be supported by receipts, and purchases over that amount shall be made by standard purchase order. Each purchase, regardless of dollar amount, shall be supported by a purchase request approved by a department supervisor or higher authority. Purchase requests for over this limitation shall be stamped or signed by the Comptroller to indicate that sufficient funds are available for payment. However, the Comptroller shall not exercise approval authority. Furthermore, purchase orders and contracts for over this limitation shall be sent to the Comptroller for firm obligation of funds before purchase is made. Purchase requests shall be filed with the resulting purchase documents.

"b. The Director shall establish written procedures to monitor the procurement actions of the staff and which will ensure compliance with the above policy. These procedures and any changes thereto will be submitted to the Board for approval.

"c. For purchases specified in paragraphs a(2) and a(3) of this policy statement, lack of competition is permissible only when an emergency exists which permits no delay because of the possibility of injury, loss of life or destruction of property, or when only one source of supply is available and the Director or Contracting Officer shall so certify. If an award is made without competition, a formal report of such award, together with a certification or statement justifying the lack of competition shall be made to the Board. When there is competitive bidding, the award shall be made to the lowest responsible bidder who meets the requirements.

When there is no competition the best possible price shall be negotiated with the supplier.

"d. Positive efforts shall be made by the Director to use small, minority-owned and women-owned businesses as sources for supplies and services. Such efforts should include developing a bidders mailing list for these sources, and encouraging these businesses to compete for contracts to be awarded."

3-6. CONTRACTING AUTHORITY.

a. The Director, together with such staff as he/she may authorize, is responsible for conducting the PHA's purchasing and contracting activities; preparing bid offerings as appropriate; opening and evaluating bids; recommending bid acceptance to the Board; and negotiating competitive and non-competitive contracts. If the Board desires that the Director or a member of the staff have contracting authority, it should state in the minutes of a Board meeting that the Director or staff member is appointed as Contracting Officer. The Board should also designate which members of the staff are empowered to make purchases or sign purchase orders, and the dollar limit each is allowed for a single purchase.

b. The Contracting Officer is a position encompassing many responsibilities. Although contracting authority flows from the PHA Board through the Executive Director, the Contracting Officer bears responsibility at the operating level, performing the tasks of contract initiation, development, negotiation, award, and subsequent contract administration throughout the life of the contract.

c. The signature of the Contracting Officer on PHA contracts is a legal commitment, and requires continuing performance by the Contracting Officer on behalf of the PHA or performance by the PHA through the Contracting Officer under the terms of the contract. Such performance involves response to disputes and claims by the contractor, as well as consideration and acceptance or rejection of contractors' requests for changes in performance, specifications or price. The Contracting Officer may also negotiate equitable price increases if allowed under the terms of the contract or caused by changes in performance or specifications requested by the PHA.

d. The Contracting Officer must answer all challenges to bid awards and, should a bidder or contractor elect to sue the PHA regarding any dispute or claim, the Contracting Officer

must be prepared to defend the contract in court. The signature on a contract makes the Contracting Officer responsible for that contract; this responsibility cannot be passed to subordinates who assist in contract preparation. The legal and ethical obligations of each term and clause of a contract must be understood and accepted by the Contracting Officer before the contract is signed. A higher authority signature of concurrence or approval on any cover letter of attachment to a contract does not affect the legal commitment which is the contract signature, but only signifies that the Contracting Officer's actions are in accord with the agency's policies and goals.

3-7. ACCOUNTING FOR PROCUREMENT ACTIONS.

a. Day-to-day Operations of the PHA. The ACC, under Article III, requires that the PHA maintain complete and accurate books of account and records which permit a speedy and effective audit, and which will fully disclose the amount and disposition by the PHA of funds used in the development and operation of each project. This includes personal property records showing the acquisition and disposition of all nonexpendable equipment and a record of an annual inventory of such equipment. The Director is responsible for the annual inventory, as well as maintaining the records for this equipment. Since equipment required by the PHA is normally obtained through the purchasing department, the functions of accounting for and inventorying equipment may be assigned to that department.

b. Nonexpendable Equipment. Attachment N to OMB Circular A-102 defines nonexpendable equipment as that personal property having a useful life of more than one year and an acquisition cost of $300 or more per unit. A PHA may use its own definition of nonexpendable personal property provided that such definition would at least include all tangible personal property as defined above.

c. Audits. HUD and the Comptroller General of the United States have the right to audit all books, documents, papers, and records of the PHA that are pertinent to financial assistance under the ACC. The PHA is also responsible for contracting for additional audits as required by HUD, and the cost of such audits should be charged to Development Cost or Operating Expense, as appropriate. OMB Circular A-102, Attachment O, Section 14h states that negotiated contracts should contain provisions for audit.

CHAPTER 4. PROCUREMENT PROCEDURES

4-1. GENERAL. Compliance with the procedures herein does not relieve the PHA of any contractual responsibilities under its contracts. The PHA is responsible, in accordance with good administrative practice and sound business judgement, for the settlement of all contractual and administrative issues arising under contracts entered into. These include but are not limited to contractor evaluation, disputes and claims. Violations of law are to be referred to the local, State or Federal authority having proper jurisdiction.

4-2. AUDITS AND REVIEWS. HUD will periodically perform audits and management reviews of PHA procurement procedures to determine whether the PHA's procurement meets the standards set forth in this Handbook and to serve as an opportunity to give technical assistance to remedy any areas of the procurement procedures that do not fully comply.

4-3. OPEN MARKET PROCUREMENT. Any supplier should have an opportunity to compete for the business of a PHA, except where the amount of the purchase is so small that it is administratively impractical to do so, or where an IHA's procurement policy provides for preferences in soliciting bids or estimates from Indian firms. PHAs should follow this principle of free competition by soliciting bids in the open market. The extent of solicitation depends on a variety of factors, including the availability of suppliers, the amount of the purchase, the time element involved, the provisions of applicable local and State laws, and the policy of the PHA Board. In addition, special attention should be given to soliciting bids from and awarding contracts to small and minority firms, women's business enterprises, and labor surplus area firms. Discrimination in contracting practices on the basis of race, color, or national origin is a violation of Title VI of the Civil Rights Act of 1964. Procurement standards governing State and local grantee procurement, as established by the U.S. Office of Management and Budget, and outlined in Attachment O to OMB Circular A-102, paragraph 9, give the following guidelines:

"a. It is national policy to award a fair share of contracts to small and minority business firms. Accordingly, affirmative steps must be taken to assure that small and minority businesses are utilized when possible as sources of supplies, equipment, construction and services. Affirmative steps shall include the following:

"(1) Including qualified small and minority business on solicitation lists.

"(2) Assuring that small and minority businesses are solicited whenever they are potential sources.

"(3) When economically feasible, dividing total requirements into small tasks or quantities so as to permit maximum small and minority business participation.

"(4) Where the requirement permits, establishing delivery schedules which will encourage participation by small and minority businesses.

"(5) Using the services and assistance of the Small Business Administration, the Office of Minority Business Enterprise of the Department of Commerce and the Community Services Administration, as required.

"(6) If any subcontracts are to be let, requiring the prime contractor to take the affirmative steps in (1) through (5) above.

"b. Grantees shall take similar appropriate affirmative action in support of women's business enterprises.

"c. Grantees are encouraged to procure goods and services from labor surplus areas."

4-4. THE PURCHASE REQUEST. (See Appendix 2 for sample.)

a. Procurement action is normally initiated when the PHA's Purchasing Department receives a Purchase Request from another department of the PHA. The Purchase Request is an internal form prepared by a department in response to a requirement for managment of a project. It may be for supplies, or services, or both. Internal procedures should be developed which limit the kinds of supplies and/or services that may be entered on one Purchase Request, and which specify exactly what information is required by the Purchasing Department. Inasmuch as the requesting department is normally most familiar with the item(s) requested, providing complete and accurate purchase information should be the responsibility of that department.

b. As a minimum, Purchase Request information should include:

(1) an established unit cost;

(2) sufficient purchase description to simplify procurement, but not so detailed as to eliminate all suppliers except one;

(3) quantity to be purchased, sufficient to last a reasonable time so that repeated small purchases need not be made, but not so large as to cause storage problems or that would eliminate small suppliers from competing;

(4) approval for the request by department head or higher authority;

(5) indication by finance or accounting that funds are available; and

(6) time the items are required and point of delivery.

Successive or separate deliveries should be specified if it will facilitate work in progress.

4-5. PRELIMINARY STEPS.

a. Before initiating any procurement action, the PHA should follow an established procedure which provides that proposed procurement actions will be reviewed to select the most advantageous method of purchase that is consistent with Board Policy and to avoid the purchase of unnecessary or duplicative items. Consideration should be given to consolidating requests in some cases or breaking them out in others to obtain a more economical purchase. Where appropriate, an analysis should be made of leasing alternatives, and any other analysis to determine which source of supply would be the most economical.

b. One source of supply that a PHA should consider is to purchase directly under an existing State or local contract. The PHA should enter into governmental agreements to use State and local contracts, and request that the contracting agency (State, County or City) note in the contract that use by the PHA is authorized. Approval for use of these contracts should also be a part of the Board Policy regarding procurement.

c. The type of procurement action, whether by small purchase procedures, formal advertising, or negotiation, should be appropriate for the particular circumstance, and should be one which results in the most efficient and economical purchase in the best interest of the PHA. However, the methods of contracting known as the "cost-plus-a-fixed fee" and "cost-plus-a-percentage-of-cost" contract should not be used by a PHA. These methods are extremely difficult to administer and monitor, and are generally considered not to be in the best interest of the purchasing agency. OMB Circular A-102, 10 U.S.C. 2306(a) and 41 U.S.C. 254(b) specifically prohibits the "cost-plus-a-percentage-of-cost" type of contract because it binds the government agency to pay costs to be incurred in the future but undetermined at the time the contract is made, plus a commission based on a percentage of these future costs. The result of such a pricing arrangement is that the profit to the contractor increases in proportion to the contractor's cost incurred in the performance of the contract.

4-6. HUD CONSOLIDATED SUPPLY PROGRAM (CSP).

a. An alternate source that always should be considered is a direct purchase under the HUD Consolidated Supply Program contracts for common use items and equipment such as ranges, refrigerators, water heaters, paint, windows, doors, etc. The CSP objective is to assist PHAs to operate efficiently and economically and to assure the availability to PHAs of material with the extra durability required for safety and security and economical maintenance of low-income housing.

b. The basic concept of the CSP is that HUD enters into open-end contracts with suppliers of common use items under which PHAs are entitled to make purchases through issuance of a purchase order. If the PHA adds additional requirements or clauses to the purchase other than those listed in the CSP contract, a separate PHA contract may be made. There is no guarantee to the suppliers of any specific, or minimum, volume of business under the CSP contracts, and all ordering, billing and payment is handled through direct contact between the PHAs and the suppliers without further HUD involvement. PHA use of CSP contracts in making their purchases generally results in considerable savings of both time and money over any other method of purchase available to PHAs. Copies of CSP catalogs listing current contracts and ordering information are published by HUD and distributed to each PHA. Additional copies of the catalogs may be obtained upon request from:

(4-6)

Department of Housing and Urban Development
Supply Management Branch
Room 6240
451 - 7th Street S.W.
Washington, D.C. 20410
Telephone No.: (202) 755-5840

c. PHAs should use Consolidated Supply Contracts (CSCs) in operating projects in order to take advantage of the savings they offer. To obtain delivery under a CSC, the PHA merely sends a purchase order directly to the contractor. The purchase order should state the CSC contract number, and items, quantities and prices as listed in the CSC. The contract prices may include delivery, and also may offer installation as an option. If purchase orders are issued during the development of a project, delivery of the items may be scheduled in increments to coincide with the completion of sections of the project.

d. The CSC provides for multiple contract awards, giving the PHA the opportunity to standardize on items in use, or to select items that have features which are more suitable to the needs of the PHA. However, justification is required for any selection other than the lowest priced one as an effort to encourage purchasing at the lowest available price. If a PHA makes its selection from any contractor other than one offering the lowest price, based on a specific requirement for quality, availability, optional features, or local service options, it should have no difficulty justifying its selection. This justification must be in writing and should be filed with the purchase order file copy.

e. Since PHAs order directly from the suppliers listed in the CSP Contract, any complaints arising from an order should be made directly to the supplier. If the complaint is not resolved by the supplier in a reasonable time, the PHA should then inform HUD in writing of the unresolved complaint. Contractor performance is monitored by HUD throughout the contract year and evaluated before new awards are made.

f. Installed item prices in CSCs include:

(1) Total compliance with the Davis-Bacon Act; compliance with Equal Employment Opportunity requirements as set forth at 41 CFR Section 1-12.803.

(4-6)

(2) A one year guarantee on the workmanship.

(3) A 100% Labor Performance Bond.

(4) Complete installation, according to approved shop drawings.

(5) Weekly progress reports of installation submitted to the PHA.

(6) Supervision by factory-trained personnel to assure installation is in accordance with the manufacturer's recommendations.

(7) Complete comprehensive and liability insurance on every job.

(8) Removal and disposal of all debris from the job site.

g. If the PHA should require any bond other than the 100 percent Labor Performance Bond included in the installed item price, the contractor may add the cost of such additional bond to the total invoice charged to the PHA. If any State or local law requires licensing or registration by the contractor, such license or registration will be at the expense of the contractor.

h. Prior to the start of any installation, the contractor should should furnish to the PHA evidence of (1) 100 percent Labor Performance Bond, and (2) complete comprehensive and liability insurance.

i. The PHA should perform on-site inspection of every item delivered and/or installed under CSP contracts for compliance with the specifications therein. In any instance where contractor performance is questioned, the PHA is encouraged to secure the services of an independent testing laboratory to assist in the inspection and to perform field testing of the product where required.

j. Prior to or with the contractor's invoice and request for payment to the PHA for items installed by the contractor, the contractor must furnish to the PHA full and complete payroll records as evidence of the contractor's compliance with the Davis-Bacon Act.

CHAPTER 5. METHODS OF PROCUREMENT

5-1. GENERAL. Once the preliminary steps have been taken and the PHA has made a decision to initiate procurement action, a further decision must be made as to what method of procurement will be used. The PHA may use Appendix 1, Contract Process Checklist as a guide. Procurement may be made by one of the following methods:

a. small purchase procedures;

b. formal advertising (competitive sealed bids);

c. competitive negotiation;

d. noncompetitive negotiation.

5-2. SMALL PURCHASE PROCEDURES. These are relatively simple and informal procurement methods that are appropriate when authorized by the PHA Board and do not exceed State and local law limits. The administrative cost of issuing separate purchase orders for small purchases and paying separately by issuing a check, often exceeds the cost of the items purchased. Likewise, it is usually administratively impractical to solicit bids or quotations on individual purchases involving such small amounts. The following methods are being used by many PHAs to handle such small purchases efficiently:

a. Blanket Purchase Agreements (BPAs) are similar to charge accounts, and provide monthly invoicing. They are established by negotiating a contract for discounted purchases with local wholesale and retail supply firms. Generally, a hardware store, a plumbing supply firm, an electrical supply firm, a gasoline service station, and an office supply store provide the necessary variety. In order to avoid the appearance of sole source procurements, several of each of these types of firms should be considered as sources, with purchases made on a rotational basis.

(1) A fixed discount from the standard price is written into the contract. Where there is a choice among firms of the same type, the one offering the best discount is normally selected. Individuals authorized to purchase may be specified in a letter to each firm

(5-2) and a total dollar limit for each purchase also may be established. This letter must be updated as often as personnel changes require.

(2) For each purchase, the supplier is requested to furnish a delivery or sales ticket describing the items and showing the cost, date delivered, and person making the purchase. The tickets are usually accumulated until the end of the month and compared with a monthly invoice from the vendor, at which time a check is issued for full payment if the delivery tickets support the invoice.

b. Petty Cash. Petty cash funds, if established by Board policy, can be used for small purchases which cannot be obtained from BPA suppliers. The maximum amount for each purchase is established by the PHA Board as part of its policy, and the supplier's sales ticket is used to support a petty cash voucher for the purchase.

(1) The Director may appoint one or more individuals as a Petty Cash Purchasing Agent in a letter which may be carried by the individual(s) to show suppliers the authority for making BPA purchases. This letter should also show the maximum amount for a purchase from a single vendor at one time.

(2) The petty cash fund should be established in an amount sufficient to cover small purchases over a reasonable period, for instance one week. The petty cash agent can replenish funds by submitting vouchers to the PHA finance officer or comptroller, vouchers which have accumulated since the previous turn-in. A check is then issued for the total dollar amount of the vouchers and the check may be cashed at the petty cash agent's convenience.

(3) The Director should establish procedures for periodic audits and frequent spot checks of the petty cash fund. The fund total should always equal the cash on hand plus the total of accumulated vouchers. The petty cash agent must never commingle personal cash with the petty cash fund. During the workday petty cash should be carried in a secure holder such as a wallet or pouch secured by a chain. Petty cash should not be taken from the PHA after work, but kept in a safe in a secure area.

5-3. REASONABLE SOLICITATION. When the amount of a purchase warrants some solicitation but does not warrant formal competitive bidding, the extent of solicitation should depend on the amount involved. For smaller purchases, it may be sufficient to telephone only one supplier if the price quoted is known to be reasonable. Solicitation of quotations from three or more suppliers is recommended for larger purchases, with informal bids obtained orally, by telephone, or in writing. All oral or telephone bids should be recorded on the file copy of the purchase order or on some other form designed for that purpose. If an item is bought from time to time and the price is the same at all suppliers, it is suggested that the PHA avoid purchasing from one supplier to the exclusion of all others.

5-4. FORMAL ADVERTISING. (See Appendix 3 for Sample Solicitation.)

a. In formal advertising, competitive sealed bids are publicly solicited and a firm fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price. An Indian Housing Authority, if provided for in its procurement policy, may solicit competitive sealed bids from Indian firms only. (See paragraph 5-14d(11) and 24 CFR 805.204a.)

b. When the amount and nature of a purchase justify competitive bidding or if it is required by paragraph 3-2, PHAs generally invite formal bids from suppliers located in the normal markets that ordinarily supply the locality in which the project is situated. In this manner all bidders receive equal opportunity to compete for public business and the PHA receives the benefits which flow from competition. If the required item is listed in a CSC also, the PHA should include the CSC contractor(s) in its mailing list, as the CSC contractors are obligated to submit a bid equal to or less than the price they offer in the CSC (plus the cost of bid and performance bonds, if required).

c. In most cases it is desirable to invite bids by mailing copies of the solicitation to prospective bidders and posting copies in the PHA office and the local Post Office. The purpose of inviting bids is to obtain the best price, and solicitations need not be limited to those in the immediate locality. Unless State or local laws require newspaper advertising, the amount of the proposed purchase normally influences the decision to advertise in newspapers.

d. In order for formal advertising to be effective, appropriate conditions should be present, including the following:

(1) A complete, adequate and realistic specification or purchase description is available to bidders.

(2) Two or more responsible suppliers are willing and able to compete effectively for the PHA's business.

(3) The procurement lends itself to a firm-fixed-price contract and the selection of the successful bidder can be made on the basis of price.

e. If formal advertising is used for a procurement, the following procedures apply:

(1) A sufficient time as established by Board Policy prior to the date set for opening of bids, bids shall be solicited from an adequate number of known suppliers. In addition, the invitation shall be publicly advertised.

(2) The invitation for bids, including specifications and pertinent attachments, shall clearly define the items or services needed in order for the bidders to properly respond to the invitation.

(3) All bids shall be opened publicly at the time and place stated in the invitation for bids.

(4) A firm-fixed-price contract award shall be made by written notice to that responsible bidder whose bid, conforming to the invitation for bids, is lowest. Where specified in the bidding documents, factors such as discounts, transportation costs and life cycle costs shall be considered in determining which bid is lowest. Prompt payment discounts may only be used to determine low bid when prior experience of the PHA indicates that such discounts are generally taken.

(5) All bids may be rejected when there are sound documented business reasons in the best interest of the PHA.

5-5. BID OPENING.

a. Sealed bids received by the PHA should be delivered promptly to the Office designated for the public bid opening. The bid should be marked on the outside of the sealed wrapper

(5-5) with the date and time of receipt with a stamp identifying the agency, and, if done manually, the receiving employee's signature should be included. To avoid unnecessary disputes, the Director should ensure that bids are delivered to the designated office unopened and without delay; and that on the day bids are to be opened, incoming mail is searched for additional sealed bids up to the time set for opening. Sealed bids should be stored in a locked bid box, cabinet, or safe until the appointed bid opening time.

b. Bids should be publicly opened on the scheduled date and time shown in the solicitation, and read aloud to all bidders attending the opening. The reading should include the bidder's name, the bid price(s), and other date required to be submitted with the bid, such as bonds, and acknowledgment of amendments. This information should be recorded and made available for public inspection. No commitment should be made to any bidder at the bid opening. This is to permit full and complete evaluation of all bids that may be considered under the conditions allowed for late bids. Questions and disagreements raised by bidders at the opening should be taken under advisement for consideration. When the bids received have been publicly opened and read, an abstract or tabulation of bids should be prepared showing all bidders and prices bid. When only one bid is obtained, an abstract of bids should still be made, indicating why only one bid was received. Firms contacted but not bidding may be listed on the abstract as "no bid received". Even items considered to be "sole source" should be abstracted in this manner.

c. No bid should be considered for award if the bid is not responsive to the essential requirements of the solicitation. Conditions and alternatives imposed by the bidder which give the bidder an advantage over other bidders, or limit the PHA's rights, or affect price, quantity or delivery against the best interest of the PHA, are causes for bid rejection as nonresponsive. Under the "firm bid" rule, one of the principles upon which formal advertising is based, the bidder is legally bound by the bid, as submitted, after bids have been opened. The only exception to this rule is an obvious mistake in the bid, such as a misplaced decimal.

d. Questions often arise concerning bid and performance bonds, modifications of bids, withdrawal of bids, errors in bids, late bids, alternate bids, equal bids, etc. The following general rules may be helpful guides:

(5-5)

(1) Bid and performance bonds may be required by the PHA when the amount of the contract is expected to exceed $2500 or such other amount as the Board may establish. Bid bonds merely guarantee that the bidder will execute a contract, if awarded, and provide a performance bond. Usually a performance bond equal to 25% of the contract amount is adequate. The PHA should decide whether the protection of a bond is prudent for any specific case, considering that the cost of the bond premium will be included in the bid and therefore will increase the cost of the items purchased. This does not change bonding requirements for modernization and development programs.

(2) Usually a bidder is permitted to withdraw or modify his/her bid prior to the time of opening, but should not be permitted to change it thereafter, as this would give the bidder an advantge over other bidders. Where there is an obvious error in the bid (such as a misplaced decimal), it is customary, upon verification of the error, to consider the bid as corrected. The unit price usually governs if there is a error in the extension of total prices.

(3) If the PHA modifies the specifications or conditions prior to opening bids, the changes must be mailed to all firms or persons who received a copy of the invitation to bid. Use of registered mail with return receipt is a good method of mailing amendments that ensures each bidder receives a copy. To minimize disputes and protests, all information made available to one bidder must be made available to all bidders.

(4) Bids received after the time specified for submission should be classified as late bids and returned unopened to the bidder. A record of the time, date, and person receiving the late bid should be made on the outside of the envelope. Late bids received before the award is made may be considered if they were: (1) sent by registered or certified mail a reasonable time in advance of the opening date and it is determined by the PHA that the late receipt was due solely to delay in the mails for which the offeror was not responsible; or (2) submitted by certified mail a reasonable time in advance of the opening date and it is determined

by the PHA that the late receipt was due solely to mishandling by the PHA; provided that timely receipt at the PHA is established by examination of an appropriate date stamp or other documentary evidence.

(5) When two or more low bids are equal in all respects, the award usually is decided by drawing lots.

(6) Unless responsive to the specifications, alternate bids should not be considered unless all bidders have an opportunity to bid on the alternate.

5-6. AWARD OF CONTRACT.

a. After bids are opened publicly at the time and place specified in the invitation for bids, an abstract or tabulation of all bids received is prepared and filed as part of the permanent record of any contract awarded. Each bid is then evaluated by the Director or Contracting Officer, and the award made only to a responsible contractor that possesses the technical capacity and ability to perform successfully under the terms and conditions of the solicitation. In determining responsibility, consideration must be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. Rejection of any bid during the evaluation process must be fully documented and all reasons for rejections stated. After evaluation, the lowest responsible bidder as to price who meets the requirements specified is awarded the contract.

b. The evaluation as to contractor responsibility is very important. The award of a contract to an offeror solely on the basis of the lowest evaluated price is a disservice to the PHA if subsequently the contractor defaults, is late in his/her deliveries, or otherwise performs unsatisfactorily, with the result that the PHA incurs additional procurement or administrative costs, and acceptable supplies or services may not be furnished within the time required. Such awards are also unfair to other offerors who are capable of satisfactory performance, and tend to discourage them from submitting bids or proposals on future procurements.

c. A determination of nonresponsibility shall be made by the Contracting Officer if, after a thorough pre-award survey, the information obtained does not support a finding that the

prospective contractor is responsible. Recent unsatisfactory performance regarding either quality or timeliness of delivery is an example of a problem which the Contracting Officer must consider and resolve as to its impact on the current procurement prior to making an affirmative determination of responsibility. Additional information helpful to making a pre-award survey can be found in the Code of Federal Regulations Title 41, Subpart 1-1.12 (CFR 41 1-1.12), which may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

5-7. THE PURCHASE ORDER. (See Appendix 4 for sample.)

a. Purchase from vendors, under small purchase procedures, may be made by an authorized Purchasing Agent placing a verbal order with a local vendor, and either a telephone or letter order with a distant vendor to ship C.O.D. The sales slip or cash register receipt should be attached to the Purchase Request and used to substantiate either a petty cash turn-in or a Blanket Purchase Agreement invoice.

b. Purchases from vendors who have been awarded contracts with the PHA are made in two ways:

(1) If the contract has a stated quantity, price, time and place of delivery, then receipt of the award and properly signed contract constitutes a purchase order, and the contractor must comply with the contract terms and deliver the items as stated.

(2) If the contract is an "open-end" contract, an appropriate purchase order should be furnished to the contractor to initiate delivery of any item. The purchase order is usually a standard form, and is initiated by the Purchasing Department in response to a departmental Purchase Request. Since the vendor and the price are already established in the contract, the purchase order may be prepared without delay and processed through the Finance or Accounting section for obligation of available funds. This purchase order, when signed by an authorized Purchasing Agent, is sent to the contractor and constitutes an order for delivery of the quantity specified on the Purchase Request at the contract price.

(3) Purchase orders used with "open-end" contracts may be prepared in multiple copies, with one or more to be used as a receiving report. Receiving information, including notice of inspection and acceptance, should be forwarded to the Finance or Accounting section to be matched with the contractor's invoice before payment is made.

5-8. PURCHASE, RECEIPT AND PAYMENT.

a. It is most important in the orderly process of purchase, receipt and payment to ensure that funds are available and obligated towards final payment for all items purchased. At the start of the process, any request for purchase should be routed through the finance or accounting department of the PHA, and an indication made on the face of the purchase request that sufficient funds are available to cover the estimated cost of the items requested. The finance or accounting department may at that time commit funds by recording that the funds are available for the intended purchase. If funds are not available that department may return the Purchase Request to the originating department, but at no time should the finance or accounting department have the authority to approve or disapprove Purchase Requests.

b. Further in the process, before a contract or purchase order is signed, these documents should be routed through the finance or accounting department for a final obligation of funds. With the recording of an obligation, the funds are then "frozen", and may be used only to pay for the specific contract or purchase order. Sufficient copies of the purchase document should be prepared and distributed to provide purchase, receipt, payment, accounting and, if required, suspense copies to be held for reference pending delivery of unfilled orders or back-orders.

c. The PHA must keep an effective control on unfilled orders and available obligated funds by maintaining suspense files until delivery is made. Payment is made only after the delivery is inspected and found to be satisfactory. This helps to eliminate disputes that arise when shortages or damages are not discovered until after payment has been made.

d. It is the responsibility of the Director or the Contracting Officer to see that supplies and/or services received from vendors and contractors are inspected (if supplies) or

certified that performance was satisfactory (if services), and that receiving documents are prepared and processed for payment. This acceptance should not be delayed, since prompt payment will help to ensure good relations with the public, and in addition, many contracts allow a discount for prompt payment if made within a specified number of days. Discounts, if offered by the contractor, should always be taken by the PHA to the greatest extent possible, and procedures should be established which facilitate expedited receipt and prompt payment.

5-9. TRADE-IN OF EQUIPMENT. When an invitation to bid is issued by a PHA for replacement of items having trade-in value, such as motor vehicles or office equipment, the invitation should include a description of the items that will be replaced. The invitation should then invite bidders to quote:

a. A price for furnishing of the new item, or

b. A price for furnishing the new item less the allowance for trade-in of the old item, or

c. A cash offer for the old items, regardless whether the new item is purchased from that bidder.

It is not necessary that the same quantity of old items be offered as the quantity of new items to be purchased. The award of the contract would be made in the manner which would be most financially advantageous. In the case of paragraph c., invitations to bid may also be sent to firms that purchase used equipment, whether or not they also sell new items.

5-10. OPEN-END SUPPLY CONTRACTS.

a. When a PHA knows that it will use recurringly needed items such as floor wax or cleaning compounds, but does not know the exact quantity that will be required for the coming year, the estimated quantity needed is stated in the invitation to bid, and the resulting contract is known as an open-end contract. Annual open-end contract purchasing has long been recognized as a worthwhile instrument in procurement by many government departments as well as commercial firms. Some of the advantages are:

(1) Prices are fixed in advance for a one-year period, facilitating budget preparation and ready determination of material costs.

(5-10) (2) A ready source of supply of frequently needed items is ensured.

(3) Operating capital is not tied up in shelf stocks.

(4) There is no deterioration or obsolescence of items on hand, such as when large stocks are carried.

(5) Custodial care and record-keeping of supply stocks is greatly reduced.

(6) The need for making repeated contracts is eliminated.

b. An annual open-end contract is normally entered into by formal advertising and, when feasible, may provide for a minimum quantity or fixed dollar amount to be ordered. In inviting bids, the following provision should be included as a special condition:

> "Any contract resulting from this invitation will be an 'open-end' type of contract and there is no guarantee that any specified quantities will be ordered. For the information of the bidder there are _____ dwelling units operated by this PHA and items costing approximately $ _____ were used last year. In accepting this contract the contractor agrees to accept all orders placed under this contract during its existence and furnish items in strict accordance with the specifications listed herein and in accordance with the stated terms and conditions. The contractor shall bill the PHA monthly for all items accepted during the preceding month. Such billing shall be supported with sales or delivery tickets signed and dated by an authorized agent of the PHA."

c. Some larger PHAs may wish to consider establishing two-year open-end contracts containing escalator clauses (if permitted by State and local law) providing for upward or downward price adjustments based on market fluctuations. This type of contract is difficult to administer properly unless the PHA has staff members trained in evaluating market conditions.

5-11. MAILING LISTS. PHAs will find it helpful to maintain mailing lists of suppliers for the items they frequently purchase. The lists usually include the names of suppliers who are known to be in a position to furnish required items as well as those qualified bidders who request the opportunity to bid on specified requirements. The PHA may request the HUD Field Office for assistance in finding additional sources of supply.

5-12. SPECIFICATIONS.

a. In preparing bid documents, PHAs must describe clearly and completely the items or services required and the conditions of the contract. A PHA may request the HUD Field Office for assistance in preparing specifications for items which are not regularly purchased. To ensure adequate competition, specifications should be designed to not restrict the bidding to one supplier. If the time permitted for delivery is a factor for consideration in awarding the contract, the solicitation should so indicate and, if possible, specify the delivery requirements. Be sure there is complete understanding between the PHA and the bidder as to what is desired and what will be furnished. Some suggestions are:

(1) Avoid the term "as per sample" unless samples can be supplied to each bidder.

(2) Avoid the term "best commercial quality" and similar terms since they are indefinite, and all manufacturers consider their products to be of "best quality".

b. There are three basic types of specifications used in preparing contracts:

(1) Performance specifications. Here the specifications contain performance characteristics desired for the item. The detailed design or exact measurements are not stated. The specification merely states the overall requirements allowing each contractor to furnish his/her own item to meet the required performance.

(2) Design specifications. Here the specifications contain description of the item desired as opposed to performance standard. Depending on the nature of the item, the design specification may contain precise measurements, tolerances, materials, product tests, quality control and other detailed information. The

information furnished is sufficiently detailed to ensure that all items manufactured to the specifications will be exactly the same.

(3) Purchase descriptions. Here the specifications identify the item by a brand name with the mandatory use of an "or equal" statement to allow competition. Such specifications are used to procure items on the commercial market. Avoid specifying trade names except where there is no other method of clearly designating the quality of the item desired. When trade names or catalog numbers are used bidders should be informed that it is intended to be descriptive and not restrictive.

c. In practice it is rare to find a government specification which fits completely into one of the above categories. Most specifications contain a combination of detail and performance requirements, and may include brand name descriptions of components. In evaluating contract performance, the aspects of technical performance and time of delivery relate to each other. Failure to meet time requirements is often caused by technical difficulties, while technical difficulties are often caused by the contractor not having enough time available to properly accomplish the job. When preparing contract specifications, the PHA must ensure that both the technical requirements and delivery time are within the capabilities of qualified bidders.

5-13. SOLICITATION PROCEDURES. All solicitations, regardless of whether by sealed bids or by negotiations, and without regard to dollar value, should be conducted in a manner that provides maximum open and free competition. Procedures should not restrict or eliminate competition. Examples of what is considered to be restrictive include, but are not limited to: (a) placing unreasonable requirements on firms in order for them to qualify to do business, (b) noncompetitive practices (collusion) between firms, and (c) unnecessary experience and bonding requirements. The PHA should have written procedures which provide, as a minimum, the following requirements.

a. Solicitations of offers, whether by competitive sealed bids or competitive negotiation, should:

(1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall

not contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service, and when necessary, set forth minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other basic requirements of an item. The specific features of the named brand which must be met by offerors should be clearly stated.

(2) Clearly set forth all requirements which offerors must fulfill, and all other factors to be used in evaluating bids or proposals. These include time and place of delivery, packing, labeling and shipping instructions, freight charges f.o.b. origin or destination, guarantees expected, subcontractor approval reservations, tax considerations, and other appropriate provisions which would affect either the contractor's price or ability to deliver as specified.

5-14. CONTRACT CLAUSES. Special provisions are normally included in the solicitation for bids as well as in the final contract award (or in a combined Solicitation-Offer-Award form), and the offeror has the option to not bid if compliance with any clause or provision is undesirable or impossible. In addition to provisions defining a sound and complete procurement contract, a PHA should include the following contract provisions or clauses in contracts and subcontracts as appropriate. Assistance is available from the HUD Field Office to help the PHA in writing standard clauses for the provisions indicated below, and many other commonly used procurement clauses.

a. Contracts for other than small purchases should contain provisions or conditions which will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate.

b. All contracts in excess of $10,000, or such lesser amount as may be required by the PHA Board or State or local law, should contain suitable provisions for termination by the PHA including the manner by which it will be effected and

(5-14) the basis for settlement. In addition, such contracts should describe conditions under which the contract may be terminated because of circumstances beyond the control of the contractor, or for the convenience of the government.

c. Provisions for specific types of procurement are contained in Attachment O to OMB Circular A-102. This Circular should be reviewed before any solicitation and/or contract is prepared.

d. Many contract clauses are in standard use by PHAs and government agencies. Some of the most common are listed below:

(1) "No member, officer, or employee of the Local Authority, no member of the governing body of the locality in which the Project is situated, no member of the governing body of the locality in which the Local Authority was activated, and no other public official of such locality or localities who exercises any functions or responsibilities with respect to the Project, during his tenure or for one year thereafter, shall have any interest, direct or indirect, in this contract or the proceeds thereof."

(2) Award - The Agency reserves the right to reject any or all bids, to waive any informality in bids and, unless otherwise specified by the Authority or by the bidder, to accept any item in the bid. In case of mathematical error in the extension of prices in the bid, the unit prices will govern. The Agency reserves the right to award by item or in its entirety unless qualified by specific limitation of the bidder. Awards will be made to the lowest responsible bidder(s) conforming to the requirements of the invitation. (Items listed may be by project or community served and multiple awards may be made for same item delivered to a different project or community.)

(3) Payment Terms - In connection with any discount offered by the vendor, time will be computed from date of the delivery of the supplies to the carrier when final inspection and acceptance are at point of origin, or from date of delivery at the destination when final inspection and acceptance are at destination, or from date a correct bill or invoice, properly certified by the contractor, is received if the latter date is later than the date of delivery.

(5-14)

(4) Default - In case of default of the contractor, the Agency may procure the articles or services from other sources and hold the contractor responsible for any excess cost occasioned thereby. Provided, however, that if public necessity requires the use of materials or supplies not conforming to the specifications they may be accepted and payment therefor shall be made at a proper reduction in price.

(5) Delivery - When not otherwise specified, bidder must definitely state time of proposed delivery. Time, if stated as a number of days, will include Sundays and holidays. If the contractor refuses or fails to make deliveries of the materials or supplies within the time specified, or any extension thereof, the Agency may by written notice terminate the right of the contractor or proceed with deliveries of such parts thereof as to which there has been delay. In such event, the Agency may purchase similar materials or supplies in the open market or secure or the manufacture and delivery of the materials and supplies by contract or otherwise and the contractor shall be liable to the Agency for any excess cost occasioned the Agency thereby.

(6) Samples - Samples of items, when required, must be furnished free of expense prior to the opening of bids. Samples received from successful bidders will not be returned. Samples received from unsuccessful bidders, upon request, will be returned at the bidders expense.

(7) Prices - Unit price for each unit bid on shall be shown and such unit price shall include packing unless otherwise specified. In each case totals shall be inserted in the amount column of the solicitation. All prices are to be f.o.b. destination unless otherwise designated herein.

(8) Late Bids - No bid or modification thereof received after the time specified for submission of bids will be considered except that when a bid or modification arrives by mail after the time set for opening, but before award is made, and it is determined by the Agency that nonarrival on time was due solely to delay in the mails or mishandling by the Agency after arrival, and for which bidder was not responsible, such bid or or modification thereof will be considered.

(5-14) (9) Inspection - All items covered by this contract shall be subject to inspection and acceptance at destination, including acceptance or rejection of some or all of the items.

(10) Changes - The Agency shall have the right at any time to make changes to this contract of any kind including quantity, method of shipment or packing, place of delivery, and delivery schedule. If any such change causes an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be negotiated in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. (Note: If any contract is changed or modified, it becomes a negotiated contract, and it must then contain those contract provisions and clauses applicable to negotiated contracts.)

(11) Indian Preference. In accordance with 24 CFR 805.204, an Indian Housing Authority shall incorporate the following clause (referred to as a section 7(b) clause) in each contract awarded in connection with a Project: 1/

(a) The work to be performed under this contract is on a project subject to section 7(b) of the Indian Self-Determination and Education Assistance Act (25 USC 450e(b)). Section 7(b) requires that to the greatest extent feasible (i) preferences and opportunities for training and employment shall be given to Indians, and (ii) preferences in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned Economic Enterprises.

(b) The parties to this contract shall comply with the provisions of said section 7(b) an all HUD requirements pursuant thereto.

1/ Instructions contained in this paragraph (11) are taken from the Indian Housing Regulation (24 CFR 805.204) and are binding upon Indian Housing Authorities.

(c) The contractor shall, in connection with this contract, to the greatest extent feasible, give preference in the award of any subcontracts to Indian organizations and Indian-owned Economic Enterprises, and preferences and opportunities for training and employment to Indians.

(d) The contractor shall include this section 7(b) clause in every subcontract in connection with the project, and shall, at the direction of the IHA, take appropriate action pursuant to the subcontract upon a finding by the IHA or HUD that a subcontractor is in violation of the section 7(b) clause.

5-15. COMPETITIVE NEGOTIATION. This method is used when the exact specifications are not defined and the PHA desires the supplier to furnish a proposal to furnish an item that meets a general requirement. An example would be the purchase of cleaning services. Several suppliers would propose similar items but each would have different and perhaps desirable features. In competitive negotiation, proposals are requested from a number of sources, and the Request for Proposal (RFP) would also be publicized. Negotiations are normally conducted with more than one of the sources submitting offers, and when specifications and features are agreed upon, a firm-fixed-price contract is awarded. If competitive negotiation is used, the following procedures apply:

a. Proposals should be solicited from an adequate number of qualified sources to permit reasonable competition, and a RFP should be publicized. An RFP is similar to a solicitation for bids except that it is not a firm offer.

b. The RFP should identify all significant evaluation factors, including price or cost parameters and performance or functional standards. Service contracts need not extend for 12 months if vendors are unwilling to commit a firm price for that long, but the length of the term may be an evaluation factor.

c. The PHA should plan appropriate mechanisms for technical evaluation of the proposals received, determination of responsible offerors, designation of written or oral discussions, and method of selection for contract award. Proposals must be evaluated in accordance with published evaluation factors.

d. Award may be made to the responsible offeror whose proposal will be most advantageous to the PHA, price and other factors considered. Unsuccessful offerors should be notified promptly.

e. Competitive negotiation may be used for procurement of professional services, such as architectural or engineering services, whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation.

f. Automatic Data Processing (ADP) equipment and software (including programs, maintenance and services) should be procured by competitive negotiation. Desired performance standards should be specified and proposals invited from as many suppliers as possible so that various options and innovatice features can be evaluated. The PHA should negotiate with all responsive and competitive suppliers under equal terms and conditions until a single proposal offers a clear advantage in cost or other considerations. Selection of a proposal other than one offering the lowest cost should be justified in writing, and PHA Board approval of this justification should be filed with the final purchase documents. Assistance in evaluating proposals may be requested from other PHAs already using ADP systems. In addition, many ADP programs and software packages are in the public domain since they were purchased as such by other PHAs. If a public domain ADP saftware package meets the PHA's requirements, it usually can be obtained from the owning PHA by paying for actual expenses incurred in preparation and transfer to the requesting PHA.

5-16. NONCOMPETITIVE NEGOTIATION. This is procurement by requesting a proposal from only one source (reasons for which must be fully justified), or after solicitation of a number of sources, competition is determined inadequate. Noncompetitive negotiation may be used when the other methods of award are considered infeasible. However, if the procurement is for professional, technical or managerial services (including ADP software and related services) and is expected to exceed $10,000, prior HUD approval is necessary as described in paragraph 4-6a(2). Circumstances under which a contract may be awarded by noncompetitive negotiation usually are limited to the following:

a. Where the PHA's minimum needs could be satifised only by items or services which are unique;

b. Where time is of the essence and only one known source can meet the PHA's need within the required time-frame

(5-16) c. Where data is unavailable for competitive procurement; or

d. Where it is necessary that the desired item manufactured by one source be compatible and interchangeable with existing equipment.

CHAPTER 6. CONTRACT ADMINISTRATION

6-1. GENERAL. During the life of a contract situations may arise which affect the operation of either the PHA or the contractor, and which in turn may require that the contract be modified or terminated. Depending on other situations, it may be necessary for the PHA to debar or suspend the contractor. The following general definitions apply to these terms; due process requirements may be found in State and local laws.

a. Modification. A change after award of a contract in any of the contract terms, including price, quantity, time and place of delivery, etc. Such changes are negotiated between the Contracting Officer and the contractor. When the changes are mutually agreed upon, including price adjustments for concessions made by either party, a contract modification document is prepared and signed by both parties to the original contract.

b. Termination. PHA contracts are usually terminated by the PHA, although the PHA may do so at the request of the contractor. Contracts are terminated for many different reasons. Most contracts have a "Default Clause" which provides for termination without negotiation when the contractor fails to perform as specified in the contract. Contracts terminated for other reasons, such as "for the convenience of the PHA" are negotiated until a satisfactory settlement is reached.

c. Debarment and Suspension. In general, a debarment by HUD is an exclusion from participation in all HUD-related programs for a reasonable, specified period of time commensurate with the seriousness of a violation of or failure to perform on other contracts. The time period may be indefinite pending the elimination of the circumstances for which debarment was imposed. Debarment may be imposed for violation of many contract clauses, including equal employment opportunity provisions, acceptance of contingent fees, or any of the Secretary of Labor regulations such as the Davis-Bacon Act. In each instance the seriousness of the offense should be considered in deciding whether debarment is warranted, and the decision should be made at the discretion of the Assistant Secretary for Housing in the best interests of the Department.

(6-1) (1) Suspension means a disqualification from all HUD related programs for a temporary period of time because a contractor is suspended upon adequate evidence of engaging in criminal, fraudulent, or seriously improper conduct. Suspension is a drastic action and, as such, should not be based upon an unsupported accusation. A contractor is suspended pending investigation and appropriate action by HUD. All suspensions should be for a temporary period pending the completion of an investigation and such legal proceedings as may ensue. The contractor concerned should be furnished by registered mail a written notice of the suspension within ten working days after the effective date, stating the reasons for the suspension and as with debarment the right of the subject of the action to a hearing regarding the charges. Suspension and debarment result in the listing of the subject individual and firm in the Consolidated List of Debarred, Suspended and Ineligible Contractors and Grantees. Parties so listed are ineligible for contracts involving participation in HUD programs for the life of the sanction period, absent a finding by the Assistant Secretary for Housing that a contract would be in the public interest.

(2) The PHA's role in debarment and suspension actions is an important one. It must make recommendations regarding suspensions and debarments and refer those recommendations and the evidence regarding cases involving serious complaints (4-10.f.), nonresponsibility (5-14.c.) and other violations and failures to the HUD Area Office for review. The Area Office, if it finds the evidence adequate, substantial or persuasive, will forward the matter to HUD Headquarters for action by the Assistant Secretary for Housing. The Area Office may, in such cases also take Temporary Denial of Participation or Conditional Participation action.

d. Temporary Denial of Participation (TDP) and Conditional Participation (CP). These are administrative sanctions which restrict participation in HUD related programs and which may be applied by a HUD Area Manager or Regional Administrator. These restrictions are narrower in scope and effect than suspension and debarment. As with suspension and debarment PHAs are responsible for referring cases to HUD Area Offices for review and possible action. When the Area Office issues a TDP or a CP the subject becomes ineligible for HUD related participation in the program (multifamily or public housing) in which the violation occurred or the participation of the party is limited by

the provisions of the order. Such orders are effective within the jurisdiction of the Area or Regional office issuing the order. Such orders remain in effect until the causes are eliminated and the action is withdrawn or until the life of the sanction has run out.

6-2. LEGAL COUNSEL. Before proceeding with any of the above actions, the HUD Area Office and its Legal Counsel should consult with the PHA. Action to exclude or disqualify contractors from participation in HUD related programs should be based upon all available relevant facts. These actions should be used for the purpose of protecting the public and not for punitive purposes. To assure the public of benefits from the full and free competition of interested contractors, these measures should not be instituted for any time longer than deemed necessary, and should preclude awards only for the duration of the period of TDP, debarment or suspension.

6-3. OBTAINING PERFORMANCE.

a. While there are a number of promises made and duties assumed by a contractor under the wide variety of PHA contracts presently used, the heart of performance problems is in either the technical requirements of the contract or in the time for performance. Much of the difficulty in the technical area is involved with the interpretation of specifications. There is no assurance that the articles delivered under a contract will meet those specifications. Whether or not the PHA inspects, accepts, rejects, or takes some other actions with respect to such non-specification supplies, will in all probability seriously affect its rights against the contractor. Monitoring the contractor's performance against the time when the performance is required is also an important part of contract administration.

b. To make certain that the PHA gets what it is paying for, it is necessary to examine the contractor's work. In assuring technical performance this involves inspection. By whatever means it is accomplished, inspection is the key to the PHA's enforcing the technical requirements of the contract. This is particularly so because of the rules of law and the contract language which may in certain instances relieve the contractor of liability for defects which are not complained of before acceptance and use of the articles by the PHA. The PHA is not obligated to pay for the goods or accept them until the PHA has had an opportunity to inspect them. Such inspection, and any rejection resulting therefrom, must be within a reasonable time after delivery. If the PHA fails

to specify a particular defect because of failure to inspect, when such defect could have been found by reasonable inspection, the PHA may have waived its rights to future rejection based on that particular defect. Acceptance may be assumed to have occurred, with or without concurrence by the PHA, after a reasonable opportunity to inspect the goods has passed and the PHA has failed to make any notification to the seller that the goods do not conform to the contract requirements. After acceptance, the PHA must pay at the contract rate for any goods accepted.

c. When goods do not conform to the contract, there are basically three choices. First, the PHA can reject the items; second, it can require the contractor to correct them; and third, it can accept them. Ordinarily contractors will be given an opportunity to correct the items. If the items are rejected, that means that the contractor is subject to being declared in default unless he can furnish conforming items within the required delivery schedule. If the contractor is required to correct the defects it would appear that the PHA has elected to have them corrected and could not, therefore, terminate the contract for default until the contractor has had a reasonable opportunity to correct the defects. If the contractor does not correct the defects within the required delivery schedule, the PHA may require delivery of the uncorrected items and negotiate a reduction in the contract price. The choice of which action to take under the circumstances is within the Contracting Officer's discretion.

6-4. PERFORMANCE UNDER CSCs. For purchases made by a PHA under Consolidated Supply Contracts, a specific failure of performance by a contractor should be reported immediately to the HUD CSC Contracting Officer at the office indicated in the CSC Catalog. Initial reports may be by telephone, but in all cases a written record of the offense or failure to perform should be submitted to HUD. This documented record is necessary for the HUD CSC Office to evaluate contractor performance and to take any action necessary to enforce the terms of the CSP contract.

CONTRACT PROCESS CHECKLIST

1. DETERMINE REQUIREMENTS, by reviewing:

   a. Requests from other Departments for products

   b. Recurring purchases

2. PREPARE SPECIFICATIONS, including:

   a. Product description

   b. Technical parameters

   c. Time of performance

   d. Place of delivery

   e. Inspection and acceptance requirements

3. SELECT METHOD OF PROCUREMENT, either:

   a. Small purchase

   b. Negotiated Contract or Blanket Purchase Agreement (After negotiation go to Step 8)

   c. Formal advertising

4. PETTY CASH FUND

   a. Establish Petty Cash Fund

   b. Appoint one or more individuals as a petty cash purchasing agent

   c. Establish procedures for periodic audits and frequent spot checks of the petty cash fund.

5. DEVELOP BIDDERS LIST, using:

   a. Previously compiled lists

   b. Other agency lists, such as Minority Contractors Association membership list

   c. Current requests from suppliers for inclusion on bid list

6. PREPARE SOLICITATION FOR BIDS

   a. Establish time and place of public opening

   b. Select specific contract clauses and terms

   c. Establish evaluation and award procedures

   d. Prepare solicitation and mail to bidders

   e. Advertise solicitation in newspapers

7. RECEIVE SEALED BIDS and product samples or product test reports

   a. Evaluate samples and test reports

   b. Safeguard sealed bids until public opening

8. HOLD PUBLIC OPENING of all bids received

   a. Record and abstract all bids and bidders

   b. Indicate qualified contractors

9. CONTRACTING OFFICER'S EVALUATION of qualified contractors

   a. Review past performance on other contracts

   b. Examine capability of contractor to produce acceptable product

   c. Investigage financial capability of contractor to remain in business

   d. Research debarment and suspension lists and any other source that would indicate that the contractor is under investigation for criminal acts

10. AWARD CONTRACT to qualified and acceptable contractors

   a. Specify each or all items awarded

   b. Sign and date contract and mail to contractor

   c. Notify disqualified low bidders of reasons for disqualifying

11. MAKE PURCHASES in accordance with contract terms

    a. Submit purchase orders

    b. Receive items

    c. Inspect for performance

    d. Enforce contract terms if performance is unsatisfactory

    e. Process receipt documents for prompt payment discount

SAMPLE PURCHASE REQUEST

PURCHASE REQUEST			Page 1 of			
1. Requested by: (Department)	2. Request No.	3. Date Requested				
	4. Required by: (date)					
	5. For Work Order No.					
☐ Department will pick up ☐ For Delivery To:						
SCHEDULE						
Item	Full Description of Supplies or Services	Quantity Required	Unit	Unit Price Estimated	Total Estimated	
	(See continuation of Schedule)	Total Estimated Cost				
Justification for Request						
Name and Title of Requesting Individual (Type or Print) Signature Date		Name and Title of Department Supervisor or other approving official (Type or Print) Signature Date				
Telephone no.		Telephone no.				
Fund Availability and/or Commitment		By Date				

SAMPLE SOLICITATION, OFFER AND AWARD

SOLICITATION, OFFER AND AWARD		Page 1 of
1. Issued by/address offer to:	2. Solicitation No. ☐ Formal Advertising ☐ Negotiated Contract	3. Date Issued 4. For Purchase Request No.

In advertised procurement "offer" and "offeror" shall mean "bid" and "bidder".

SOLICITATION

5. Sealed offers in original and _____ copies for furnishing the supplies or services in the Schedule will be received at the place specified in block 4. or if handcarried, in the depository located in _____ (place) until _____ (hour) local time _____ (date)

If this is an advertised solicitation, bids will be publicly opened at that time.

All offers are subject to the provisions, specifications, instructions and conditions included herein, attached hereto, or incorporated herein by reference.

FOR INFORMATION CALL (Name and number) (No collect calls): _____

SCHEDULE

Item	Description of Supplies or Services	Quantity	Unit	Unit Price	Total
	(See continuation of Schedule)				

OFFER (To be completed by supplier or vendor)

In compliance with the above, the undersigned offeror agrees, if this offer is accepted within _____ calendar days (60 days unless specified otherwise by offeror) from the date for receipt of offers specified above, to furnish any or all items at the price indicated in the schedule, delivered at the designated point(s), within the time specified in the schedule. The following discount is offered for prompt payment:

_____% 10 Calendar Days, _____% 20 Calendar Days, _____% 30 Calendar Days

OFFEROR: Name and Address Including ZIP Code	Name and Title of Person Authorized to Sign Offer (Type or Print)	
Area Code and Telephone No:	Signature	Date

AWARD (To be completed by PHA)

Accepted as to Items Numbered:	Amount	Contract No.
Fund Obligation	Amount	Payment will be made by:

Name of Contracting Officer	Signature of Contracting Officer	Award Date

SAMPLE PURCHASE ORDER

PURCHASE ORDER							Page 1 of
1. Issued by/mail invoice to:		2. Purchase Order No.					3. Date Issued
		4. For Purchase Request No.					
		5. Against Contract No.					
☐ Agency will pick up by _____ ☐ Deliver by _____ to:							
Subject to provisions of the above contract and additional terms and conditions on the reverse side of this form. FOR INFORMATION CALL (Name and number) (No collect calls): _____							
SCHEDULE							
Item	Description of Supplies or Services	Quantity Ordered	Unit	Quantity Received	Unit Price	Total	
	(See continuation of Schedule)				Total Cost of Items Ordered		
					Total Cost of Items Received		
Name and Title of Ordering Agent (Type or Print)		Signature of Ordering Agent				Date Signed	
Fund Obligation and Amount		By:			Date		
Items indicated in the "Quantity Received" column have been received, inspected and accepted except as noted herein. Signature of Receiver				Date Received			
Processed for Payment ____ Partial ____ Final							
Date	Amount	Voucher	By		Date		

SAMPLE OF REVERSE SIDE ON NEXT PAGE

APPENDIX 4

SAMPLE PURCHASE ORDER, REVERSE SIDE

TERMS AND CONDITIONS

1. CONFLICT OF INTEREST - The vendor certifies by acceptance of an order that "No Related Official, during his or her tenure or for one year thereafter, shall have any interest, direct or indirect, in this contract or the proceeds thereof. The term "Related Official" means any (1) member, officer, or employee of the Public Housing Agency, (2) member of the governing body of the locality in which the Project is situated, (3) member of the governing body of the locality in which the PHA was activated, and (4) other public official of such locality or localities who exercises any functions or responsibilities with respect to the Project."

2. DELIVERY - If the vendor refuses or fails to make deliveries of the materials or services within the time specified, the PHA may by written notice terminate the right of the vendor to proceed with such deliveries. All packages shall bear the Purchase Order number.

3. PRICES - Prices should be stated in units specified, with packing included. All prices are considered to be F.O.B. destination unless otherwise designated herein.

4. INSPECTION - All items covered by this contract shall be subject to inspection and acceptance at destination.

5. BILLING - All invoices must bear our Purchase Order number. Submit separate invoices for each delivery, in duplicate.

ATTACHMENT O TO OMB CIRCULAR A-102

OFFICE OF MANAGEMENT AND BUDGET

[Circular No. A-102, Revised; Transmittal Memorandum No. 1]

Standards Governing State and Local Grantee Procurement, Attachment O of OMB Circular A-102

August 1, 1979.

To heads of Executive Departments and Establishments

1. *Purpose:* This Memorandum transmits an amendment (revised Attachment O) to Office of Management and Budget (OMB) Circular A-102.

2. *Background:* This notice, pursuant to the authority of Pub. L. 93-400, the Office of Federal Procurement Policy Act and the Intergovernmental Cooperation Act, amends Attachment O to OMB Circular A-102 issued September 12, 1977, Federal Register, Vol. 42, No. 176, page 45828. The proposed revision was circulated to State and local interest groups in accordance with Circular A-85 procedures and Executive Order 12044 and to affected Federal agencies and contractor organizations. The proposed revision was published in the Federal Register December 8, 1978, Vol. 43, No. 235, page 57201, and a public hearing was held January 16, 1979. No regulatory analysis is required in accordance with Executive Order 12044. The amendment (1) reaffirms the maximum reliance on State and local government grantees management of their own procurement; (2) directs grantor agencies to rescind nonconforming provisions of current agency subordinate regulations and limits the issuance of additional requirements; (3) creates a grantee certification program to reduce the grantee agencies' burdensome pre-award review of individual procurements; (4) adds provisions to reduce the possibility of fraud and waste; and (5) expands coverage addressing small, minority, women and labor surplus contracting. The amendment, it is anticipated, will reduce administrative cost, paperwork and other such factors which contributed to inefficiency, waste and delay in implementing assistance programs.

3. *Action:* Remove the old Attachment O from the Circular and insert the new Attachment. Grantor agencies shall begin immediately to amend nonconforming subordinate regulations.

4. *Summary of Changes:* Section 1. Prohibits grantor agencies from adding additional requirements or subordinate regulations. This attachment strikes a balance between agencies' stewardship role and the policy of placing the maximum reliance on grantees to conduct their own affairs. To avoid confusion, areas not covered by this prohibition are enumerated.

Section 2. Spells out the responsibilities that properly belong to the grantor or the grantee. To avoid burdensome detailed reviews of grantees' discretionary actions the substitution of grantors' judgment is prohibited, unless it is primarily a Federal question.

Section 3. Grantor agencies are encouraged to provide technical assistance to grantees rather than require submission for review.

Section 4. Proposes that grantor agencies conduct grantee procurement system reviews and that when a grantee procurement system meets the standards of this attachment it may be certified by the grantor agencies, thus reducing individual pre-award contract reviews by that agency or other agencies making grants. Both grantees and grantors expressed their concern about keeping the quality of the certification reviews constant. A paragraph was added to make reviews adhere to OFPP standards.

Section 5. Limits grantor agencies' authority to review protests. This is properly the responsibility of the grantee.

Section 6. Limits grantor pre-award review of grantee procurements to non-competitive and brand name procurements, and procurements by grantees who do not meet Attachment O standards.

Section 7. Expands the code of conduct from merely prohibiting the acceptance of gifts and gratuities to prohibiting the participation in the award of contracts to firms in which the employee has some financial interest.

Section 9. Expands the section requiring affirmative steps to ensure minority and small business participation in contracting under Federal grant programs, and encourages the placement of contracts in labor surplus areas and with women business enterprises.

Section 11. Explains when it is appropriate to use one of the following four methods of procurement, small purchase, competitive sealed bids, competitive negotiations and noncompetitive negotiations, and recognizes price competition need not be used for A/E contracts.

Section 12. Prohibits the use of a percentage of construction cost method of contracting, requires either a cost or price analysis of all procurement, and states costs will be allowed if consistent with Federal cost principles.

Section 14G. Expands contract provision on inventions to cover copyrights and rights in data.

Section 14J. Adds provision requiring compliance with State Energy Conservation Plans.

5. *Effective Date:* This revision is effective October 1, 1979. Grantees may comply with this amendment immediately where they do not conflict with grantor agency regulations. Grantor agencies may implement this amendment immediately or allow grantee agencies to implement.

6. *For Further Information Contact:* Mr. Jack Nadol, Assistant for Intergovernmental Affairs, Office of Federal Procurement Policy, Telephone 202-395-6166.

James T. McIntyre, Jr.,
Director.

Procurement Standards

1. *Applicability.*

a. This Attachment establishes standards and guidelines for the procurement of supplies, equipment, construction, and services for Federal assistance programs. These standards are furnished to ensure that such materials and services are obtained efficiently and economically and in compliance with the provisions of applicable Federal law and Executive orders.

b. No additional procurement requirements or subordinate regulations shall be imposed upon grantees by Executive agencies unless specifically required by Federal law or Executive orders or authorized by the Administrator for Federal Procurement Policy. This prohibition is not applicable to payment conditions issued in accordance with Treasury Circular 1075, individual grantee requirements pursuant to section 10 of the basic circular or the provisions of this or other OMB circulars.

c. Provisions of current subordinate requirements not conforming to this attachment shall be rescinded by grantor agencies unless approved by the Office of Federal Procurement Policy (OFPP).

2. *Grantee/Grantor Responsibility*

a. These standards do not relieve the grantee of any contractual responsibilities under its contracts, the grantee is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements entered into in support of a grant. These include but are not

limited to: source evaluation, protests, disputes, and claims. Executive agencies shall not substitute their judgment for that of the grantee unless the matter is primarily a Federal concern. Violations of law are to be referred to the local, State, or Federal authority having proper jurisdiction.

b. Grantees shall use their own procurement procedures which reflect applicable State and local laws and regulations, provided that procurements for Federal Assistance Programs conform to the standards set forth in this attachment and applicable Federal law.

3. *Grantee Procurement Improvement.*

Executive agencies awarding Federal grants or other assistance which require or allow for procurement by the recipients are encouraged to assist recipients in improving their procurement capabilities by providing them with technical assistance, training, publications, and other aid.

4. *Procurement System Reviews.*

a. Executive agencies are encouraged to perform reviews of their grantees' procurement systems if a continuing relationship with the grantee is anticipated or a substantial amount of the Federal assistance is to be used for procurement and review of individual contracts is anticipated. The purpose of the review shall be to determine: (1) whether a grantee's procurement system meets the standards prescribed by this Attachment or other criteria acceptable to the OFPP, such as provisions of the model procurement code for State and local government and (2) whether the grantee's procurement system should be certified by the reviewing agency. Such a review will also give an agency an opportunity to give technical assistance to a grantee to remedy its procurement system if it does not fully comply. In addition, such a review may provide a basis for deciding whether the grantee's contracts and related procurement documents should be subject to the grantor's prior approval, as provided by Section 6.

b. In conducting procurement system reviews, grantor agencies will evaluate a grantee's procurement system in terms of whether it complies with the standards prescribed by this Attachment and represents a fair, efficient and effective procurement system. To the maximum extent feasible, reviewers will rely upon State or local evaluations and analyses performed by agencies or organizations independent of the grantee contracting activity.

c. When a Federal grantor agency completes a procurement review, it shall furnish a report to the grantee, with a copy to OFPP.

d. All agencies should normally rely upon the resultant findings or certification for a period of 24 months before another review is performed.

e. Reviews shall be conducted in accordance with standards and guidelines approved or issued by OFPP.

f. The reviews authorized by Section 6 are waived if a grantee's procurement system is certified.

5. *Protest Procedures.*

Grantor agencies may develop an administrative procedure to handle complaints or protests regarding grantee contractor selection actions. The procedure shall be limited as follows:

a. No protest shall be accepted by the grantor agency until all administrative remedies at the grantee level have been exhausted.

b. Review is limited to:

(i) Violations of Federal law or regulations. Violations of State or local law shall be under the jurisdiction of State or local authorities.

(ii) Violations of grantee's protest procedures or failure to review a complaint or protest.

6. *Grantor Review of Proposed Contracts.*

Federal grantor pre-award review and approval of the grantee's proposed contracts and related procurement documents, such as requests for proposals and invitations for bids, is permitted only under the following circumstances:

a. The procurement is expected to exceed $10,000 and is to be awarded without competition or only one bid or offer is received in response to solicitation.

b. The procurement expected to exceed $10,000 specifies a "brand name" product; or

c. The grantee's procurement procedures or operation fails to comply with one or more significant aspects of this Attachment. The grantor agency shall notify the grantee in writing, with a copy of such notification to the OFPP.

7. *Code of Conduct.*

Grantees shall maintain a written code or standards of conduct which shall govern the performance of their officers, employees or agents engaged in the award and administration of contracts supported by Federal funds. No employee, officer or agent of the grantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

a. The employee, officer or agent;

b. Any member of his immediate family;

c. His or her partner; or

d. An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award.

The grantee's officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements.

Grantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value.

To the extend permitted by State or local law or regulations, such standards of conduct shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's officers, employees, or agents, or by contractors or their agents.

8. *Procurement Procedures.*

The grantee shall establish procurement procedures which provide that proposed procurement actions shall be reviewed by grantee officials to avoid the purchase of unnecessary or duplicative items. Consideration should be given to consolidation or breaking out to obtain a more economical purchase. Where appropriate, an analysis shall be made of lease versus purchase alternatives, and any other appropriate analysis to determine which approach would be the most economical. To foster greater economy and efficiency grantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

9. *Contracting With Small and Minority Firms, Women's Business Enterprise and Labor Surplus Area Firms.*

a. It is national policy to award a fair share of contracts to small and minority business firms. Accordingly, affirmative steps must be taken to assure that small and minority businesses are utilized when possible as sources of supplies, equipment, construction and services. Affirmative steps shall include the following:

(1) Including qualified small and minority businesses on solicitation lists.

(2) Assuring that small and minority businesses are solicited whenever they are potential sources.

(3) When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum small and minority business participation.

(4) Where the requirement permits, establishing delivery schedules which will encourage participation by small and minority business.

(5) Using the services and assistance of the Small Business Administration, the Office of Minority Business Enterprise of the Department of Commerce and the Community Services Administration as required.

(6) If any subcontracts are to be let, requiring the prime contractor to take the affirmative steps in 1 through 5 above.

b. Grantees shall take similar appropriate affirmative action in support of women's business enterprises.

c. Grantees are encouraged to procure goods and services from labor surplus areas.

d. Grantor agencies may impose additional regulations and requirements in the foregoing areas only to the extent specifically mandated by statute or presidential direction.

10. *Selection Procedures.*

a. All procurement transactions, regardless of whether by sealed bids or by negotiation, and without regard to dollar value, shall be conducted in a manner that provides maximum open and free competition consistent with this attachment. Procurement procedures shall not restrict or eliminate competition. Examples of what is considered to be restrictive of competition include, but are not limited to: (1) placing unreasonable requirements on firms in order for them to qualify to do business, (2) noncompetitive practices between firms, (3) organizational conflicts of interest, and (4) unnecessary experience and bonding requirements.

b. The grantee shall have written selection procedures which shall provide, as a minimum, the following procedural requirements:

(1) Solicitations of offers, whether by competitive sealed bids or competitive negotiation, shall:

(a) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated.

(b) clearly set forth all requirements which offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(2) Awards shall be made only to responsible contractors that possess the potential ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

11. *Method of Procurement.*

Procurement under grants shall be made by one of the following methods, as described herein: a) small purchase procedures; b) competitive sealed bids (formal advertising); c) competitive negotiation; d) noncompetitive negotiation.

a. Small purchase procedures are those relatively simple and informal procurement methods that are sound and appropriate for a procurement of services, supplies or other property, costing in the aggregate not more than $10,000. Grantees shall comply with State or local small purchase dollar limits under $10,000. If small purchase procedures are used for a procurement under a grant, price or rate quotations shall be obtained from an adequate number of qualified sources.

b. In competitive sealed bids (formal advertising), sealed bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price.

(1) In order for formal advertising to be feasible, appropriate conditions must be present, including, as a minimum, the following:

(a) A complete, adequate and realistic specification or purchase description is available.

(b) Two or more responsible suppliers are willing and able to compete effectively for the grantee's business.

(c) The procurement lends itself to a firm-fixed-price contract, and selection of the successful bidder can appropriately be made principally on the basis of price.

(2) If formal advertising is used for a procurement under a grant, the following requirements shall apply:

(a) A sufficient time prior to the date set for opening of bids, bids shall be solicited from an adequate number of known suppliers. In addition, the invitation shall be publicly advertised.

(b) The invitation for bids, including specifications and pertinent attachments, shall clearly define the items or services needed in order for the bidders to properly respond to the invitation.

(c) All bids shall be opened publicly at the time and place stated in the invitation for bids.

(d) A firm-fixed-price contract award shall be made by written notice to that responsible bidder whose bid, conforming to the invitation for bids, is lowest. Where specified in the bidding documents, factors such as discounts, transportation costs and life cycle costs shall be considered in determining which bid is lowest. Payment discounts may only be used to determine low bid when prior experience of the Grantee indicates that such discounts are generally taken.

(e) Any or all bids may be rejected when there are sound documented business reasons in the best interest of the program.

c. In competitive negotiation, proposals are requested from a number of sources and the Request for Proposal is publicized, negotiations are normally conducted with more than one of the sources submitting offers, and either a fixed-price or cost-reimbursable type contract is awarded, as appropriate. Competitive negotiation may be used if conditions are not appropriate for the use of formal advertising. If competitive negotiation is used for a procurement under a grant, the following requirements shall apply:

(1) Proposals shall be solicited from an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirements of the procurement. The Request for Poposals shall be publicized and reasonable requests by other sources to compete shall be honored to the maximum extent practicable.

(2) The request for proposal shall identify all significant evaluation factors, including price or cost where required and their relative importance.

(3) The grantee shall provide mechanisms for technical evaluation of the proposals received, determinations of responsible offerors for the purpose of written or oral discussions, and selection for contract award.

(4) Award may be made to the responsible offeror whose proposal will be most advantageous to the procuring party, price and other factors considered. Unsuccessful offerors should be notified promptly.

(5) Grantees may utilize competitive negotiation procedures for procurement of Architectural/Engineering professional services, whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation.

d. Noncompetitive negotiation is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. Noncompetitive negotiation may be used when the award of a contract is infeasible under small purchase, competitive bidding (formal advertising) or competitive negotiation procedures. Circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following:

(1) The item is available only from a single source;

(2) Public exigency or emergency when the urgency for the requirement will not permit a delay incident to competitive solicitation;

(3) The Federal grantor agency authorizes noncompetitive negotiation; or

(4) After solicitation of a number of sources, competition is determined inadequate.

e. Additional innovative procurement methods may be used by Grantees with the approval of the Grantor Agency. A copy of such approval shall be sent to OFPP.

12. *Contract Pricing.*

The cost plus a percentage of cost and percentage of construction cost method of contracting shall not be used. Grantees shall perform some form of cost or price analysis in connection with every procurement action including contract modifications. Costs or prices based on estimated costs for contracts under grants shall be allowed only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles.

13. *Grantee Procurement Records.*

Grantees shall maintain records sufficient to detail the significant history of a procurement. These records shall include, but are not necessarily limited to, information pertinent to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the cost or price.

14. *Contract Provisions.*

In addition to provisions defining a sound and complete procurement contract, any recipient of Federal grant funds shall include the following contract provisions or conditions in all procurement contracts and subcontracts as required by the provision, Federal Law or the Grantor Agency.

a. Contracts other than small purchases shall contain provisions or conditions which will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate.

b. All contracts in excess of $10,000 shall contain suitable provisions for termination by the grantee including the manner by which it will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

c. All contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees shall contain a provision requiring compliance with Executive Order 11246, entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR Part 60).

d. All contracts and subgrants for *construction* or repair shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 USC 874) as supplemented in Department of Labor regulations (29 CFR, Part 3). This Act provides that each contractor or subgrantee shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The grantee shall report all suspected or reported violations to the grantor agency.

e. When required by the Federal grant program legislation, all *construction* contracts in excess of $2,000 awarded by grantees and subgrantees shall include a provision for compliance with the Davis-Bacon Act (40 USC 276a to a-7) as supplemented by Department of Labor regulations (29 CFR Part 5). Under this Act contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less often than once a week. The grantee shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The grantee shall report all suspected or reported violations to the grantor agency.

f. Where applicable, all contracts awarded by grantees and subgrantees in excess of $2,000 for *construction* contracts and in excess of $2,500 for other contracts which involve the employment of mechanics or laborers shall include a provision for compliance with sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 USC 327-330) as supplemented by Department of Labor regulations (29 CFR, Part 5). Under section 103 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work day of 8 hours and a standard work week of 40 hours. Work in excess of the standard workday or workweek is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 8 hours in any calendar day or 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health and safety as determined under construction, safety and health standards promulgated by the Secretary of Labor. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

g. The contract shall include notice of grantor agency requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental or demonstration work with respect to any discovery or invention which arises or is developed in the course of or under such contract, and of grantor agency requirements and regulations pertaining to copyrights and rights in data.

h. All negotiated contracts (except those awarded by small purchases procedures) awarded by grantees shall include a provision to the effect that the grantee, the Federal grantor agency, the Comptroller General of the United

States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract, for the purpose of making audit, examination, excerpts, and transcriptions.

Grantees shall require contractors to maintain all required records for three years after grantees make final payments and all other pending matters are closed.

i. Contracts, subcontracts, and subgrants of amounts in excess of $100,000 shall contain a provision which requires compliance with all applicable standards, orders, or requirements issued under Section 306 of the Clean Air Act (42 U.S.C. 1857(h)), Section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection agency regulations (40 CFR Part 15), which prohibit the use under non-exempt Federal contracts, grants or loans of facilities included on the EPA List of Violating Facilities. The provision shall require reporting of violations to the grantor agency and to the U.S.E.P.A. Assistant Administrator for Enforcement (EN–329).

j. Contracts shall recognize mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act (P.L. 94–163).

Grantor Agencies are permitted to require changer, remedies, changed conditions, access and record retention and suspension of work clauses approved by the Office of Federal Procurement Policy.

15. *Contract Administration.*

Grantees shall maintain a contract administration system insuring that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

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GLOSSARY OF PUBLIC PURCHASING TERMS

This Glossary of Public Purchasing Terms was developed and made available to HUD by the National Association of State Purchasing Officials and the Council of State Governments. It is reprinted from their 1975 publication "State and Local Government Purchasing;" a revised edition is scheduled to be published in 1981. Their address is P.O. Box 11910, Iron Works Pike, Lexington, Kentucky 40578, Telephone (606) 252-2291.

Glossary of Public Purchasing Terms

INTRODUCTION

This glossary contains selected terms and definitions related to state and local government purchasing that, in many cases, cannot be found in standard, general-purpose dictionaries. The selected definitions are intended to make the terms understandable and usable by public purchasing representatives; thus, practical rather than legally perfect definitions are included.

Some of the definitions have appeared in specialized and technical glossaries and dictionaries. Some of these definitions have been borrowed exactly as earlier used; others have been modified. The sources from which definitions have been borrowed, either in whole or in part, include:

A Dictionary for Accountants. Eric L. Kohler. Prentice-Hall, Inc., Englewood Cliffs, New Jersey, 1970.

Dictionary of Purchasing Terms. National Institute of Governmental Purchasing, Inc., Washington, D.C., 1970.

Purchasing Handbook, second edition. George W. Aljian, Editor-in-Chief, McGraw-Hill Book Co., Inc., 1966.

The definitions for the following words and phrases may be found in the *Uniform Commercial Code* and, to conserve space, are not reproduced here except for the very few having additional definitions peculiar to public procurement.

Definitions Contained in the *Uniform Commercial Code*

Accept
Acceptance
Action
Aggrieved party
Agreement
Alteration
Bailee
Bearer
Bearer form
Bill of lading
Bona fide purchaser
Buyer
Buyer in ordinary course of business
Cancellation
Certificate of deposit
Certification
Conforming to contract
Consignee
Consignor
Consumer goods
Contract
Contract for sale
Contract right
Customer
Debtor
Defendant
Definite time
Delivery
Delivery order
Document
Document of title
Equipment
Fault
Fungible
Genuine
Gives
Good faith
Goods
Holder
Holder in due course
Insolvency proceedings
Insolvent
Installment contract
Instrument
Inventory
Issue
Issuer
Item
Lot
Merchant
Negotiation
Note
Notice
On demand
Order
Party
Presumed
Presumption
Proceeds
Promise
Properly payable
Protest
Purchase
Purchaser
Receipt
Remedy
Rights
Sale
Sale on approval
Sale or return
Secondary party
Secured party
Security
Seller
Surety
Term
Termination
Third party
Unauthorized
Value
Warehouse receipt

GLOSSARY

Acknowledgement—A form used by a vendor to advise a purchaser that his order has been received. It usually implies acceptance of the order.

Act of God—A danger that could not be avoided by human power; any natural cause of damage which is irresistible (e.g., hurricane, flood, lightning), and which is in no way connected with negligence.

Advertising—*See,* Formal advertising; Legal notice.

Advice of shipment—A notice sent to a purchaser advising that shipment has gone forward and usually containing details of packing, routing, etc.

Agency—(1) A relationship between two parties by which one, the agent, is authorized to perform or transact certain business for the other, the principal; also, the office of the agent. (2) An administrative division of a government.

Agent—A person authorized by another, called a principal, to act for him.

All-or-none bid—A bid for a number of different items, services, etc., in which the bidder states that he will not accept a partial award, but will only accept an award for all the items, services, etc., included in the bid. Such bids are acceptable only if provided for in the Invitation for Bids or if the bidder quoted prices for all items, services, etc., and is actually the low bidder for every one.

Alternate bid—(1) A response to a call for alternate bids. *See,* Alternate bid, call for. (2) A bid submitted in knowing variance from the specifications. Such a bid is only acceptable when the variance is deemed to be immaterial.

Alternate bid, call for—An Invitation for Bids for a single need that can be filled by commodities of varying materials, dimensions, or styles. Bidders may submit one or more bids for each material, style, etc., and only one award will be made based on an assessment of what is best for the government, taking price as only one factor involved.

Antitrust legislation—Laws that attempt to prevent or eliminate monopolies or oligopolies and to prevent noncompetitive practices.

Authorized price list—A price list of the products and/or services covered in a contract which contains minimum essential information needed by users for placing orders.

Appropriation—Legislative sanction to use public funds for a specific purpose. Money set apart for a specific use.

Approved brands list—*See,* Qualified products list.

Arbitrary and capricious action—A willful and unreasoning action, without consideration of, and in disregard of, the facts and circumstances, without rational basis; grounds for a court to overrule or remand a discretionary decision or action by an administrative authority of the government.

Arbitration—A process by which a dispute between two contending parties is presented to one or more disinterested parties for a decision.

Architect and Engineer (A&E)—All professional services associated with the research, design, and construction of facilities.

Arrival notice—A notice sent by a carrier to a consignee advising of the arrival of a shipment.

As is—A term indicating that goods offered for sale are without warranty or guarantee, and that the purchaser takes the goods at his own risk without recourse against the seller for the quality or condition of the goods.

Award—The presentation of a purchase agreement or contract to a bidder; the acceptance of a bid or proposal.

Back-door buying—Making a purchase without going through the central purchasing authority.

Back order—That portion of an order which a vendor cannot deliver at the scheduled time and which he has reentered for shipment at a later date.

Best interests of the State (city, county)—A term frequently used in granting a purchasing official the authority to use his discretion to take whatever action he feels is most advantageous to the government. The term is used when it is impossible to anticipate adequately the circumstances that may arise so that more specific directions could be delineated by the law or regulation.

Bid—An offer, as a price, whether for payment or acceptance. A quotation specifically given to a prospective purchaser upon his request, usually in competition with other offerors. Also, an offer by a buyer to a seller, as at an auction.

Bid-award file—A file that is divided into commodity and item sections each of which contains listings of who was solicited for individual bids, what each response was, and other information. The bid-award file is used to compare past bids for award patterns that might reveal collusive agreements or to make other comparisons of data.

Bid bond—An insurance agreement in which a third party agrees to be liable to pay a certain amount of money in

the event that a specific bidder, if his bid is accepted, fails to sign the contract as bid. *See,* Bid deposit; Bid security.

Bid deposit—A sum of money or check, deposited with and at the request of the government, in order to guarantee that the bidder (depositor) will, if selected, sign the contract as bid. If the bidder does not sign the contract, he forfeits the amount of the deposit. *See,* Bid bond; Bid security. *See also,* Forfeiture of deposit or bond.

Bid opening—The process through which the contents of bids are revealed for the first time to the government, to the other bidders, and usually to the public. *See,* Public bid opening.

Bid sample—A sample required by the Invitation for Bids to be furnished by bidders as part of their bids to establish a quality level for the products being offered.

Bid security—A guarantee, in the form of a bond or deposit, that the bidder, if selected, will sign the contract as bid; otherwise, the bidder (in the case of a deposit) or the bidder or his guarantor (in the case of a bond) will be liable for the amount of the bond or deposit. *See,* Bid bond; Bid deposit.

Bidder—Any person who makes a bid.

Bidders list—A list maintained by the purchasing authority setting out the names and addresses of suppliers of various goods and services from whom bids, proposals, and quotations can be solicited. *See,* Prequalification of bidders; Qualified bidder.

Bill—A list of charges or costs presented by a vendor to a purchaser, usually enumerating the items furnished, their unit and total costs, and a statement of the terms of sale; an invoice.

Bill of materials—A list specifying the quantity and character of materials and parts required to produce or assemble a stated quantity of a particular product.

Blanket order—A purchase arrangement in which the purchaser contracts with a vendor to provide the purchaser's requirements for an item(s) or a service, on an as-required and often over-the-counter basis. Such arrangements set a limit on the period of time they are to be valid and the maximum amount of money which may be spent at one time or within a period of time. *See,* Open-end contract; Price agreement; Requirements contract.

Blanket purchase—*See,* Blanket order.

Bona fide—In good faith.

Bond—An obligation in writing, binding one or more parties as surety for another.

Brand name—A product name which serves to identify that product as having been made by a particular manufacturer. A trade name.

Brand name specification—A specification that cites a brand name, model number, or some other designation that identifies a specific product as an example of the quality level desired. *See,* Equal, Or equal.

Breach of contract—A failure without legal excuse to perform any promise which forms a whole or part of a contract. *See,* Forfeiture of deposit or bond.

Breach of warranty—Infraction of an express or implied agreement as to the title, quality, content, or condition of a thing sold.

Bulk purchasing—Purchasing in large quantities in order to reduce the price per unit; volume purchasing.

Buyer—*See,* Purchasing agent. *See also, Uniform Commercial Code.*

Buyer's market—Market conditions in which goods can easily be secured and economic forces of business tend to cause goods to be priced at the purchaser's estimate of value.

Cash discount—A discount from the purchase price allowed to the purchaser if he pays within a specified period. *See,* Discount.

Cash on delivery (COD)—Payment due and payable upon delivery of goods.

Catalog—A listing of item identifications arranged systematically.

Caveat emptor—"Let the buyer beware." A maxim that stands for the rule that the buyer should be careful in making a purchase because the burden of defective goods rests with him. The vendor can be made to take the responsibility for some defects through specifications and warranties.

Caveat venditor—"Let the seller beware." A maxim relating to situations where the vendor bears the responsibility for defects in the goods he sells.

Central purchasing authority—The administrative unit in a centralized purchasing system with the authority, responsibility, and control of purchasing activities.

Centralized purchasing—A system of purchasing in which the authority, responsibility, and control of purchasing activities is concentrated in one administrative unit.

Certificate of compliance—A supplier's certification that the supplies or services in question meet certain specified requirements.

Certificate of non-collusion—A statement signed by a bidder and submitted with his bid to affirm that his bid is made freely without consultation with any other bidder.

Claim—The aggregate of the operative facts which serve as a basis for a demand for payment, reimbursement, or compensation for injury or damage under law or contract; the assertion of such a demand.

Code of ethics—A written set of guidelines within which judgements and considerations of professional ethics and behavior should be made. *See,* Purchasing ethics.

Collusion—A secret agreement or cooperation between two or more persons to accomplish a fraudulent, deceitful, or unlawful purpose.

Collusive bidding—The response to bid invitations by two or more vendors who have secretly agreed to circumvent laws and rules regarding independent and competitive bidding. *See,* Corrupt combination, collusion, or conspiracy in restraint of trade; Price fixing.

Commercial law—That branch of the law that designates the rules that determine the rights and duties of persons engaged in trade and commerce.

Commodity—An article of trade, a moveable article of value, something that is bought or sold; any moveable or tangible thing that is produced or used as the subject of barter or sale.

Competition—The process by which two or more vendors vie to secure the business of a purchaser by offering the most favorable terms as to price, quality, and service.

Competitive bidding—The offer of prices by individuals or firms competing for a contract, privilege, or right to supply specified services or merchandise.

Competitive negotiation—A technique for purchasing goods and services, usually of a technical nature, whereby qualified suppliers are solicited, negotiations are carried on with each bidder, and the best offer (in terms of performance, quality of items, price, etc.), as judged against proposal evaluation criteria, is accepted; negotiated award.

Confirming order—A purchase order issued to a vendor, listing the goods or services and terms of an order placed verbally, or otherwise, in advance of the issuance of the usual purchase document.

Conflict of interest—A situation wherein an individual as part of his duties must make a decision or take action that will affect his personal interests.

Consideration—Acts, promises, or things of value exchanged by two parties and serving as the basis for a contract between them.

Consultants and experts—Those persons who are exceptionally qualified, by education or by experience, in a particular field to perform some specialized service.

Contingency—A possible future event or condition arising from presently known or unknown causes, the outcome of which is indeterminate at the present time.

Contract—A deliberate verbal or written agreement between two or more competent persons to perform or not to perform a specific act or acts. *See, Uniform Commercial Code.*

Contract administration—The management of all facets of contracts to assure that the contractor's total performance is in accordance with his contractual commitments and that the obligations of the purchaser are fulfilled. In government, this management is conducted within the framework of delegated responsibility and authority and includes the support of using agencies.

Contract modification—An alteration that introduces new details or cancels details but leaves the general purpose and effect of the contract intact.

Contract record—A record providing full particulars regarding the orders placed for delivery of goods in a contract so that the volur of purchases against the contact can be determined.

Contractor—One who contracts to perform work or furnish materials in accordance with a contract.

Contractual services—Services furnished under a contract in which charges, effective periods, and extent of work are defined.

Convenience termination clause—A contract clause which permits the government to terminate, at its own discretion, the performance of work in whole or in part, and to make settlement of the vendor's claims in accordance with appropriate regulations.

Cooperative purchasing—The combining of requirements of two or more political entities in order to obtain the benefits of volume purchases and/or reduction in administrative expenses.

Corrupt combination, collusion, or conspiracy in restraint of trade—A phrase referring to an agreement between two or more businesses to stifle, control, or otherwise inhibit free competition in violation of state and/or federal antitrust statutes. *See,* Collusive bidding; Price fixing.

Damages—Compensation, usually in money, for injury to goods, persons, or property.

Debarment—A shutting out or exclusion for cause (as a bidder from the list of qualified bidders).

Debt—Any obligation to pay money. Ordinarily the term debt means a sum of money due by reason of a contract expressed or implied. Broadly, the word may include obligations other than to pay money, such as the duty to render services or deliver goods.

Default—Failure by a party to a contract to comply with contractual requirements; vendor failure.

Defect—A noncomformance of an item with specified requirements.

Delivery schedule—The required or agreed time or rate of delivery of goods or services purchased for a future period.

Delivery terms—Conditions in a contract relating to freight charges, place of delivery, time of delivery, and method of transportation.

Descriptive literature—Information, such as charts, illustrations, drawings, and brochures which show the characteristics or construction of a product or explain its operation, furnished by a bidder as a part of his bid to describe the products offered in his bid. The term includes only information required to determine acceptability of the product, and excludes other information, such as that furnished in connection with the qualifications of a bidder or for use in operating or maintaining equipment.

Design specification—A purchase specification delineating the essential characteristics that an item bid must possess to be considered for award and so detailed as to describe how the product is to be manufactured; generic specification.

Designation of special purpose—A technique used when purchasing items for a special use for which no items of that kind are produced (e.g., sewing machines for teaching blind people to sew), accomplished by sending out the specification that is used for the basic item with a description of the special purpose for which the item will be used, and a questionnaire asking what modifications bidders are willing to make in their standard products to meet the particular needs.

Discount—An allowance or deduction granted by the seller to the buyer, usually when certain stipulated conditions are met by the buyer, which reduces the cost of the goods purchased. However, discounts may be granted by the seller without reference to stipulated conditions. An example of such use of discount is the application of discount to a nominal or "list" price to establish the "net" or actual price. *See,* Cash discount; Quantity discount; Standard package discount; Trade discount.

Discount schedule—The list of discounts applying to varying quantities of goods or applicable to differing classifications of purchasers.

Disposition—Acting to remove from the premises and control of a using agency goods that are surplus or scrap.

Disposition can be accomplished by transferring, selling, or destroying the goods.

Emergency purchase—A purchase made without following the normal purchasing procedure in order to obtain goods or services quickly to meet an emergency.

Equal, Or equal—A phrase(s) used to indicate the substitutability of products of similar or superior function, purpose, design, and/or performance characteristics. *See,* Brand name specification.

Equal Employment Opportunity Program—A plan to include minority groups or other disadvantaged persons in the work force of businesses affected by the plan.

Equipment—Personal property of a durable nature which retains its identity throughout its useful life. *See, Uniform Commercial Code.*

Escalation clause—A clause in a purchase contract providing for upward adjustment of the contract price if specified contingencies occur; price escalation clause.

Ethics—*See,* Code of ethics; Purchasing ethics.

Evaluation of bid—The process of examining a bid after opening to determine the bidder's responsibility, responsiveness to requirements, and other characteristics of the bid relating to the selection of the winning bid.

Exhaustion of administrative remedies—A legal doctrine to the effect that where an administrative remedy is provided by statute, relief must be first sought from the administrative body, and all attempts to obtain such administrative relief must be used up before the complaining party may look to the courts for relief.

Expedite—To hasten or to assure delivery of goods purchased in accordance with a time schedule, usually by contact by the purchaser with the vendor.

Express warranty—Any affirmation of fact or promise made by a seller to a buyer which relates to the goods and becomes part of the basis of the bargain.

Extend, option to—A part of a contract which contemplates a continuance of the original contract for a further time upon compliance with the conditions for the exercise of the option.

Fair market value—A price that would induce a willing purchaser to purchase or a willing seller to sell in an open market transaction; the price a property would bring at a fair sale between parties dealing on equal terms.

Fair-trade statute—A state law providing that a manufacturer may legally set a minimum resale price for his products and that retailers and distributors must observe that minimum.

Fidelity bond—A bond which secures an employer up to an amount stated in the bond for losses caused by dishonesty or infidelity on the part of an employee.

Field purchase order—A limited and specific purchase order used in situations where authority to make the type of purchase involved has been delegated to using agencies.

Firm bid—A bid that binds the bidder until a stipulated time of expiration.

Fiscal year—A period of 12 consecutive months selected as a basis for annual financial reporting, planning, or budgeting.

Fixed price contract—A contract which provides for a firm price under which the contractor bears the full responsibility for profit or loss.

Forfeiture of deposit or bond– A loss by omission, negligence, or misconduct for the performing of or the failure to perform a particular act, (e.g., not accepting a contract when an award is made); breach of contract. *See,* Bid bond; Bid deposit; Fidelity bond; Performance bond.

Formal advertising—The placement of a notice in a newspaper or other publication according to legal requirements to inform the public that the government is requesting bids on specific purchases that it intends to make. *See,* Legal notice.

Formal bid or offer—A bid which must be forwarded in a sealed envelope and in conformance with a prescribed format to be opened at a specified time.

Forward purchasing—The purchasing of quantities exceeding immediate needs, e.g., in anticipation of a price increase or a future shortage.

Forward supply contract—A contract for future supply of definite quantities of materials or services over a fixed

period. May be drawn off by "draw-off orders," or delivered at a fixed and predetermined rate set out in the contract.

Fraud—A positive act resulting from a willful intent to deceive another with the purpose of depriving him of his rights or property.

Full cost recovery funding—*See*, Industrial funding.

General provisions—The mandatory (by law or regulation) clauses for all contracts by type of purchase or contract. Clauses devised especially for a given purchase are called special provisions.

Generic name—Relating to or characteristic of a whole group or class; not protected by trademark registration.

Generic specification—*See*, Design specification.

Goods—Anything purchased other than services or real property. *See, Uniform Commercial Code.*

Gross negligence—The degree of lack of care that shows a reckless disregard for life or safety, or that indicates a conscious indifference to the rights of others.

Guarantee—To warrant, stand behind, or ensure performance or quality, as a supplier in relation to his product.

Identical bid—A bid that agrees in all respects with another bid.

Imprest funds—Funds set aside as a cash reserve for expenditures made in accordance with established policies and controls; petty cash.

Improper influence—Domination by the actions of one person over the actions of another so as to prevent the proper exercise of the latter's discretion.

Industrial funding—Full financing of program activities out of sale of goods or services furnished; full cost recovery funding.

Ineligible bidder—A supplier who, by reason of financial instability, unsatisfactory reputation, poor history of performance, or other similar reasons, cannot meet the qualifications for placement on the bidders list or for award.

Informal bid—An unsealed competitive offer conveyed by letter, telephone, telegram, or other means.

Inspection—Critical examination and/or testing of items to determine whether they have been received in the proper quantity and in the proper condition, and to verify that they conform to the applicable specifications.

Inspection report—A report to inform the purchasing authority of the quality or condition of the items delivered.

In-state preference—*See*, Preference.

Invitation for Bids—A request, verbal or written, which is made to prospective suppliers requesting the submission of a bid on commodities or services.

Item—Any product, material, or service.

Labor surplus area—A geographical section of concentrated unemployment or underemployment, as designated by the U.S. Department of Labor.

Late bid or proposal—A bid or proposal which is received at the place designated in the Invitation for Bids after the hour established by the invitation as the time by which all bids or proposals must be received.

Latent defect—A defect which could not be discovered by ordinary and reasonable inspection.

Lead time—The period of time from date of ordering to date of delivery which the buyer must reasonably allow the vendor to prepare goods for shipment.

Lease—A contract conveying from one person (lessor) to another (lessee) real estate or personal property for a term in return for a specified rent or other compensation.

Lease-purchase agreement—A rental contract in which the renting party's periodic payments or parts thereof are applied both to fulfill the rental obligation and as installments for eventual ownership of the commodity upon completion of the agreement.

Legal notice—The notice that is required by law. Legal notice for some purchases may be the posting of an announcement of the purchase in a public place, the notification of the appropriate bidders from the bidders list, a formal advertisement in a newspaper or newspapers, or a combination of these methods. *See*, Formal advertising.

Negligence—The failure to do that which an ordinary, reasonable, prudent man would do, or the doing of some act which an ordinary, prudent man would not do. Reference must always be made to the situation, the circumstances, and the knowledge of the parties.

Negotiated award—*See,* Competitive negotiation.

Net price—Price after all discounts, rebates, etc., have been allowed.

Net terms—*See,* Discount.

No bid—A response to an Invitation for Bids stating that the respondent does not wish to submit a bid. It usually operates as a procedural device to prevent debarment from the bidders list for failure to submit bids.

Nonresponsive bid—A bid that does not conform to the essential requirements of the Invitation for Bids; nonconforming bid, unresponsive bid.

Obsolescent—Becoming obsolete, due usually to technological development.

Obsolete—Out of date; no longer in use.

Offer—The act of one person that gives another person the legal power to create a contract to which both of them are parties; to perform such an act.

Oligopoly—A market situation in which a few companies control or dominate the market for a product or service.

Open-account purchase—A purchase made by a buyer who has established credit with the seller. Payment terms are usually stated to require payment of invoice on or before a specific date or dates; also, to require payment of invoice in full, or less a certain percentage for prompt payment. Such terms are agreed upon between buyer and seller at the time of placing the order, or before.

Open-end contract—A contract in which quantity or duration is not specified, such as a requirements contract. *See,* Blanket order; Price agreement; Requirements contract; Term contracting.

Open-market purchase—A purchase, usually of a limited dollar amount, which is made by buying from any available source, as opposed to buying from a bidder who has responded to an Invitation for Bids.

Option—The right, acquired for consideration, to buy or sell something at a fixed price within a specified time.

Option to extend—*See,* Extend, option to.

Option to renew—A contract clause that allows a party to elect to reinstitute the contract for an additional term.

Or equal—*See,* Equal, Or equal.

Order—A request or command issued to a supplier for goods or services at a specified price. *See, Uniform Commercial Code.*

Order form—A form by which a supplier is informed of an order.

Order level—The level of stock of any item at which an order is initiated for more supplies of that item.

Order record—A central numerical register of orders issued.

Packing list—A document which itemizes in detail the contents of a particular package or shipment.

Partnership—An agreement under which two or more persons agree to carry on a business for profit, sharing in the profits and losses by an agreed to proportion, but each being liable for losses to the extent of all of his personal assets.

Patent—A grant made by a government to an inventor, which gives the inventor the exclusive right to make, use, and sell the invention for a period of years.

Patent clearance—A letter or other formal communication stating that the reporting requirements of the patent rights clause contained in a contract have been complied with by the contractor.

Penalty clause—A clause in a contract specifying the sum of money to be paid if the contractor defaults on the terms of his contract, particularly in respect to time.

Performance bond—A contract of guaranty executed subsequent to award by a successful bidder to protect the government from loss due to his inability to complete the contract as agreed. *See,* Forfeiture of deposit or bond.

Performance record—Record to indicate a supplier's ability to keep delivery promises and reliability, together with consistency of quality of the product.

Performance specification—A specification setting out performance requirements that have been determined to be necessary for the item involved to perform and last as required.

Perishable goods—Goods which are subject to spoilage within a relatively short time.

Personal property—Everything which is not real property, which is subject to ownership, and which has exchangeable value.

Petty cash—*See,* Imprest funds.

Pilot model—A model, usually handmade, used in production planning for production engineering studies. *See,* Mock-up; Prototype.

Political subdivision—A subdivision of a State which has been delegated certain functions of local government, and which can include counties, cities, towns, villages, hamlets, boroughs, and parishes.

Preference -An advantage in consideration for award of a contract granted to a vendor by reason of the vendor's residence, business location, or business classification (e.g., small business).

Prepaid—A term denoting that transportation charges have been or are to be paid at the point of shipment.

Prequalification of bidders—The screening of potential vendors in which a government considers such factors as financial capability, reputation, management, etc., in order to develop a list of bidders qualified to bid on government contracts. *See,* Bidders list; Qualified bidder.

Price—The amount of money that will purchase a definite quantity, weight, or other measure of a commodity.

Price agreement—A contractual agreement in which a purchaser contracts with a vendor to provide the purchaser's requirements at a predetermined price. Usually it involves a minimum number of units, orders placed directly with the vendor by the purchaser, and a limited duration of the contract (usually one year). *See,* Blanket order; Open-end contract; Requirements contract; Term contracting.

Price at the time of delivery—A term used in sales contracts when market prices are so volatile that a vendor will not give a firm price or use an escalator clause but will only agree to charge the price that he is charging all customers for similar purchases on the day he ships or delivers the goods in question.

Price competition—The selection of a contractor, from two or more competing firms, based either solely on prices submitted, or on the final prices resulting from negotiation with all competing contractors within a range.

Price control—The fixing or restricting of prices especially by a governmental agency.

Price escalation clause—*See,* Escalation clause.

Price fixing—Agreements among competitors to sell at the same price, to adopt formulas for the computation of selling prices, to maintain specified discounts, to establish lower prices without prior notification to others, or to maintain predetermined price differentials between different quantities, types, or sizes of products. *See,* Collusive bidding; Corrupt combination, collusion, or conspiracy in restraint of trade.

Price maintenance—The establishment by a manufacturer or wholesaler of a price for an item below which he will not sell or permit his product to be sold by others.

Price protection—An agreement by a vendor with a purchaser to grant the purchaser any reduction in price which the vendor may establish on his goods prior to shipment of the purchaser's order. Price protection is sometimes extended for an additional period beyond the date of shipment.

Price rebate—An allowance on price, usually given after the completion of the contract and most frequently based on some relationship with the business turnover.

Price schedule—The list of prices applying to varying quantities or kinds of goods.

Principal—One who employs an agent; a person who has authorized another to act on his account and subject to his control.

Priority—The degree of precedence given to a particular requisition, order, or contract to obtain completion, delivery, or performance on a particular date at the expense, if necessary, of competing demands to the same supplier or facility.

Procurement—The process of obtaining goods or services, including all activities from the preparation and processing of a requisition, through receipt and approval of the final invoice for payment. The acts of preparing

specifications, making the purchase, and administering the contract are involved. *See,* Purchasing cycle.

Professional behavior—*See,* Code of ethics; Purchasing ethics.

Program—A scheme of action to accomplish a definitive objective covering a major area of an organization's responsibility.

Proprietary article—An item made and marketed by a person or persons having the exclusive right to manufacture and sell it.

Proprietary information—Information or data describing technical processes, tools, or mechanisms that a business wishes to keep from general public view in order to maintain its competitive position in the market. *See,* Trade secret.

Proposal—An offer made by one party to another as a basis for negotiations for entering into a contract.

Proposal evaluation criteria—Weighted standards, relating to management capability, technical capability, approach in meeting performance requirements, price, and other important factors that are used for evaluating which bidder in a competitive negotiation has made the most advantageous offer.

Protest—A complaint about a governmental administrative action or decision brought by a bidder or vendor to the appropriate administrative section with the intention of achieving a remedial result.

Prototype—A model suitable for evaluation of design, performance, and production potential of a system, subsystem, or component. *See,* Mock-up; Pilot model.

Public—The people of an area.

Public bid opening—The process of opening and reading bids, conducted at the time and place specified in the Invitation for Bids and/or the advertisement, and in the view of anyone who wishes to attend. *See,* Bid opening.

Public policy—That which is deemed by courts to be general and well-settled public opinion relating to the duties of men and government.

Public record—All information about government activities that is available for public inspection.

Purchase order—A purchaser's document used to formalize a purchase transaction with a vendor. A purchase order, when given to a vendor, should contain statements as to the quantity, description, and price of the goods or services ordered; agreed terms as to payment, discounts, date of performance, transportation terms, and all other agreements pertinent to the purchase and its execution by the vendor. Acceptance of a purchase order constitutes a contract.

Purchase requisition—A form used to request the purchasing department to purchase goods or services from vendors.

Purchasing agent—An administrator whose job includes soliciting bids for purchases and making awards of purchase contracts; buyer.

Purchasing cycle—The cycle of activities carried out by a purchasing department in the acquisition of goods and services. *See,* Procurement.

Purchasing ethics—Moral principles that apply to the personnel of the purchasing department and all people who are involved in the purchasing process, particularly with respect to the use of government funds and relationships between buyers and sellers. *See,* Code of ethics.

Purchasing manual—A formal collection of instructions relative to procedures to be followed by all parties when making use of or dealing with the purchasing department in procurement actions.

Purchasing official—The administrative official who most directly oversees the activities of purchasing agents and those other aspects of property management that are joined as separate or subordinate sections under individual administrative control.

Purchasing, public—The process of obtaining goods and services for public purposes following procedures implemented to protect public funds from being expended extravagantly or capriciously.

Qualified bidder—A bidder determined by the government to meet minimum set standards of business competence, reputation, financial ability, and product quality for placement on the bidders list. *See,* Bidders list; Prequalification of bidders.

Qualified products list—A specification which is developed by evaluating various brands and models of an item and

listing those that are determined to be acceptable as the only ones for which bids may be submitted; an approved brands list.

Quality assurance—A planned and systematic series of actions considered necessary to provide adequate confidence that a product that has been purchased will perform satisfactorily in service.

Quality control—The procedures and policies used to ensure adequate quality of goods produced or received.

Quantity discount—An allowance determined by the quantity or value of a purchase. *See*, Discount.

Quotation—A statement of price, terms of sale, and description of goods or services offered by a vendor to a prospective purchaser; the stating of the current price of a commodity; the price so stated.

Receiving report—A form used by a receiving function to inform others, such as the purchasing and accounting departments, of the receipt of goods purchased.

Renegotiation—Deliberation, discussion, or conference to change or amend the terms of an existing agreement.

Renew, option to—*See*, Option to renew.

Reordering level—The stock level at which a requisition for the replenishment of the stock should be initiated.

Repudiation of contract—A positive and unequivocal refusal to perform a contract.

Requirements contract—A contract in which the vendor agrees to supply all the purchaser's requirements that arise for an item or items within a specified period. *See*, Blanket order; Open-end contract; Price Agreement; Term contracting.

Requisition—An internal document by which a using agency requests the purchasing department to initiate a procurement.

Research and development (R&D)—The process by which new products or new product forms are created; precedes production.

Responsible bidder—A bidder whose reputation, past performance, and business and financial capabilities are such that he would be judged by the appropriate government authority to be capable of satisfying the government's needs for a specific contract.

Responsive bidder—A bidder whose bid does not vary from the specifications and terms set out by the government in the Invitation for Bids.

Restraint of trade—The effect of contracts or combinations which eliminate or stifle competition, effect a monopoly, artificially maintain prices, or otherwise hamper or obstruct the course of trade and commerce as it would be carried on if left to the control of natural and economic forces.

Restrictive specifications—Specifications that unnecessarily limit competition by eliminating items that would be capable of satisfactorily meeting actual needs.

Rules and regulations—Governing precepts and procedures made by an administrative body or agency under legislative authority that sometimes have the force and effect of law.

Salvage—Property that is no longer useful as a unit in its present condition but has some value in addition to its value as scrap, usually because parts from it may be recovered and reused.

Sample—*See*, Bid sample.

Scheduled purchase—A purchase for which a bid opening date is prescheduled so that using agencies' requirements for the period covered by the contract can be gathered and combined for the Invitation for Bids.

Scrap—Property that has no value except for its basic material content.

Sealed bid—A bid which has been submitted in a sealed envelope to prevent dissemination of its contents before the deadline for the submission of all bids; usually required by the purchasing authority on major procurements to ensure fair competition among bidders.

Seasonal—Depending upon the seasons, either climatic or economic, and usually cyclic on an annual basis.

Seasonal rate—A rate instituted for specified articles or commodities and effective only for certain periods of the year.

Seller's market—A market condition where demand is greater than supply; sellers can set prices and terms of sale, and prices are high or rising.

Service—Work performed to meet a demand, especially work that is not connected with manufacturing a product.

Service contract—A contract that calls for a contractor's time and effort rather than for a concrete end product.

Shipping list—A memorandum listing all items shipped at one time on a given order.

Single-source procurement—An award for a commodity which can only be purchased from one supplier, usually because of its technological, specialized, or unique character.

Small business—A designation for certain statutory purposes referring to a firm, corporation, or establishment having a small number of employees, low volume of sales, small amount of assets, or limited impact on the market.

Small Business Administration—A federal agency created to foster and protect the interests of small business concerns.

Solicitation—The process of notifying prospective bidders that the government wishes to receive bids on a set of requirements to provide goods or services. The process might consist of public advertising, the mailing of Invitations for Bids, the posting of notices, or telephone calls to prospective bidders.

Sovereign immunity—The principle which absolves the sovereign (State, city, county) from responding in damages for past injuries to another party.

Specification—A description of what the purchaser requires and, consequently, what a bidder must offer to be considered for an award.

Specifications committee—A committee whose purpose is to advise and assist the central purchasing authority in establishing specifications. This committee may also offer advice and assistance in developing standards. *See,* Standards committee.

Spot purchase—A one-time purchase made in the open market out of necessity or to take advantage of a bargain price.

Standard—A characteristic or set of characteristics for an item that, for reasons of quality level, compatibility with other products, etc., is generally accepted by the manufacturers and users of that item as a required characteristic for all items of that sort.

Standard commercial supplies—Articles which, in the normal course of business, are customarily maintained in stock by a manufacturer or any dealer, distributor, or other commercial dealer for the marketing of such articles.

Standard package discount—An allowance applied to goods supplied in the vendor's regular package. *See,* Discount.

Standard specification—A specification established through a standardization process to be used for all or most purchases of the item involved.

Standardization (of specifications)—The process of examining specifications and needs for items of similar end usage and drawing up one specification that will meet the needs for most or all purchases of that item.

Standards committee—A committee whose purpose is to advise and assist the central purchasing authority in establishing standards and, in some cases, specifications. *See,* Specifications committee.

Standing order—*See,* Blanket order.

Stock—A supply of goods maintained on hand in a supply system to meet anticipated demands.

Stock control—Control of the level of stock by control over the movement of goods into and out of stores.

Stock record—A record kept of items of materials in stock, usually located at a central point and showing stock level position.

Storage—The holding of goods in a designated place for safekeeping; a space or a place for the safekeeping of goods.

Supplemental agreement—Any contract modification which is accomplished by the mutual action of the parties.

Supplier—A firm that regularly furnishes needed items to a business or government; a vendor.

Supplies —Items which are consumed or expended in the course of being used.

Surplus property—Inventory not required by one using agency or all using agencies at the present time or in the foreseeable future.

Tabulation of bids—The recording of bids and bidding data that was submitted in response to a specific invitation for the purposes of comparison, analysis, and record-keeping.

Term contracting—A technique in which a source or sources of supply are established for a specified period of time,

usually characterized by an estimated or definite minimum quantity, with the possibility of additional requirements beyond the minimum, all at a predetermined unit price. *See*, Blanket order; Open-end contract; Price agreement; Requirements contract.

Terms and conditions—A phrase generally applied to the rules under which all bids must be submitted and the terms that are included in most purchase contracts which are often published by purchasing authorities for the information of all potential bidders.

Terms of payment—All purchase transactions require a payment for the goods or services received and, excepting an unusual exchange or barter agreement, payment is made in negotiable funds in accordance with the terms agreed between the buyer and seller. There are three basic payment terms: cash, open account, and secured account.

Testing—A phase of inspection involving the determination by technical means of the physical and chemical properties of items, or compounds thereof, requiring not so much the element of personal judgment as the application of recognized and established scientific principles and procedures.

Title—The means whereby a person's ownership of property is established.

Token bid—A perfunctory offer submitted by a bidder with no serious intent of being the lowest bid; usually submitted when the bidder wishes to maintain eligibility for the bidders list or as a collusive device.

Total supply—A concept of purchasing, the objective of which is to plan in advance and provide for the broadest scope of purchasing and purchasing-related activities as possible in order to minimize costs, increase managerial effectiveness, and improve operational efficiency. Total supply is not only concerned with ordering but also with requirements planning, logistics, and general procurement management.

Trade discount—A deduction from an established price for items or services, often varying in percentage with volume of transactions, made by the seller to those engaged in certain businesses and allowed irrespective of the time when payment is made. *See*, Discount.

Trade name—*See*, Brand name.

Trade secret—Any aspect of a business or its operations which is known only to the manufacturer. *See*, Proprietary information.

Trademark—Generally, any sign, symbol, mark, word, or arrangement of words in the form of a label adopted and used by a manufacturer or distributor to designate his particular goods, and which no other person has the legal right to use.

Trade-off analysis—The process of determining the "best" course of action by weighing the advantages and disadvantages associated with available alternatives. The selected course will usually involve a compromise with some resources (e.g., time) traded-off for another (e.g., money).

Ultra vires action—An action which is beyond the power or purpose of a corporation, city, county, or other body, but not an action which is merely performed in an unauthorized manner or without authority.

Unit price—The price of a selected unit of a good or service (e.g., price per ton, labor hour, foot).

Unit price extension—The calculation of the total price of goods by multiplying the price per unit by the number of units purchased.

Unresponsive bid—*See*, Nonresponsive bid.

Unsuccessful bidder—An offeror whose bid is not accepted for reasons of price, quality, failure to comply with specifications, etc.

Using agency—A unit of government that requisitions items through central purchasing.

Value—Intrinsic worth. The amount of money for which goods or services can be exchanged. *See*, *Uniform Commercial Code*.

Value analysis—An organized effort directed at analyzing the function of systems, products, specifications and standards, and practices and procedures for the purpose of satisfying the required functions at the lowest total cost of ownership.

Vendor—A supplier.

Vendor failure—*See,* Default.

Vendor file—The accumulated record maintained by the central purchasing authority of information relevant to his business relationship with the government, including application for inclusion on the bidders list, record of performance under contracts, correspondence, and the results of special-purpose analyses.

Void—Without legal effect; unenforceable.

Volume purchasing—*See,* Bulk purchasing.

Waiver of bid(s)—A process, usually statutory, whereby a government purchasing office may procure items without formal bidding procedures because of uniqueness of circumstances related to that procurement action.

Waiver of mistake or informality—The act of disregarding errors or technical nonconformities in the bid which do not go to the substance of the bid and will not adversely affect the competition between bidders.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1981—341-215:118

U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
HOUSING MANAGEMENT
WASHINGTON, D. C. 20411

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U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
COMMUNITY PLANNING AND DEVELOPMENT

NOTICE CPD 79 - 31

October 1979
Expires March 1980

TO: All Regional Administrators, Regional Directors for CPD, Area Managers, CPD Division Directors, and CDBG Entitlement Recipients

SUBJECT: Revised Attachment O of OMB Circular A-102

Have attached copy w/ latest date. ph

This Notice transmits a revised Attachment O, Procurement Standards, of OMB Circular A-102, Uniform Requirements for Grants-In-Aid to State and Local Governments. The revision was published in the Federal Register, Vol. 44, No. 159, page 47874, on August 15, 1979.

A copy of this Notice is being provided directly to entitlement recipients, but not to discretionary grant recipients. Therefore, Area Offices are requested to send a copy of the revised Attachment O to each locality with an active Small Cities program. Additional copies of this Notice are being provided to Area Offices for this purpose and for staff use.

Robert C. Embry, Jr.
Assistant Secretary for
Community Planning and
Development

CCC:DISTRIBUTION: W-3-1, R-1, R-2, R-3-1, R-5, R-5-1, R-5-2, 023, 023-2, 023-3

U.S. Department of Housing and Urban Development
COMMUNITY PLANNING AND DEVELOPMENT

Special Attention of:

CPD Staff
CDBG Grantees

Transmittal

Handbook No.: 1300.17

Issued: March 1, 1982

1. This Transmits : Handbook 1300.17, Uniform Requirements for Assistance to State and Local Governments, OMB Circular A-102

2. Purpose: The Office of Management and Budget (OMB) has promulgated Uniform administrative requirements for grants-in-aid to State and local governments in its Circular A-102 (Revised), January 1981. This Handbook is a reprint of that Circular.

3. Filing Instructions: Insert Handbook 1300.17, dated March 1, 1982

CCB: Distribution: W-3-1, R-1, R-5-1, 023

ATTACHMENT O
Circular No. A-102

PROCUREMENT STANDARDS

1. Applicability

a. This Attachment establishes standards and guidelines for the procurement of supplies, equipment, construction and services for Federal assistance programs. These standards are furnished to ensure that such materials and services are obtained efficiently and economically and in compliance with the provisions of applicable Federal law and executive orders.

b. No additional procurement requirements or subordinate regulations shall be imposed upon grantees by executive agencies unless specifically required by Federal law or executive orders or authorized by the Administrator for Federal Procurement Policy. This prohibition is not applicable to payment conditions issued in accordance with Treasury Circular 1075, individual grantee requirements pursuant to Section 10 of the basic circular or the provisions of this or other OMB circulars.

c. Provisions of current subordinate requirments not conforming to this Attachment shall be rescinded by grantor agencies unless approved by the Office of Federal Procurement Policy (OFPP).

2. Grantee/Grantor Responsibility

a. These standards do not relieve the grantee of any contractual responsibilities under its contracts. The grantee is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements entered in support of a grant. These include but are not limited to source evaluation, protests, disputes, and claims. Executive agencies shall not substitute their judgment for that of the grantee unless the matter is primarily a Federal concern. Violations of law are to be referred to the local, State, or Federal authority having proper jurisdiction.

b. Grantees shall use their own procurement procedures which reflect applicable State and local laws and regulations, provided that procurements for Federal Assistance Programs

conform to the standards set forth in this Attachment and applicable Federal law.

3. Grantee Procurement Improvement

Executive agencies awarding Federal grants or other assistance which require or allow for procurement by the recipients are encouraged to assist recipients in improving their procurement capabilities by providng them with technical assistance training, publications, and other aid.

4. Procurement System Reviews

a. Executive agencies are encouraged to perform reviews of their grantees' procurement systems if a continuing relationship with the grantee is anticipated or a substantial amount of the Federal assistance is to be used for procurement and review of individual contracts is anticipated. The purpose of the review shall be to determine: (1) whether a grantee's procurement system meets the standards prescribed by this Attachment or other criteria acceptable to the OFPP, such provisions of the Model Procurement Code for State and local government; and (2) whether the grantee's procurement system should be certified by the reviewing agency. Such a review will also give an agency an opportunity to give technical assistance to a grantee to remedy its procurement system if it does not fully comply. In addition, such a review may provide a basis for deciding whether the grantee's contracts and related procurement documents should be subject to the grantor's prior approval, as provided by Section 6.

b. In conducting procurement system review, grantor agencies will evaluate a grantee's procurement system in terms of whether it complies with the standards prescribed by this Attachment and represents a fair, efficient and effective procurement system. To the maximum extent feasible, reviewers will rely upon State or local evaluations and analyses performed by agencies or organizations independent of the grantee contracting activity.

c. When a Federal grantor agency completes a procurement review, it shall furnish a report to the grantee, with a copy to OFPP.

d. All agencies should normally rely upon the resultant findings or certification for a period of 24 months before another review is performed.

e. Reviews shall be conducted in accordance with standards and guidelines approved or issued by OFPP.

f. The reviews authorized by Section 6 are waived if a grantee's procurement system is certified.

5. Protest Procedures

a. Grantor agencies may develop an administrative procedure to handle complaints or protests regarding grantee contractor selection actions. The procedure shall be limited as follows:

a. No protest shall be accepted by the grantor agency until all administrative remedies at the grantee level have been exhausted.

b. Review is limited to:

(i) Violations of Federal law or regulations. Violations of State or local law shall be under the jurisdiction of State or local authorities.

(ii) Violations of grantee's protest procedures or failure to review a complaint or protest.

6. Grantor Review of Proposed Contracts

Federal grantor pre-award review and approval of the grantee's proposed contracts and related procurement documents, such as requests for proposal and invitations for bids, is permitted only under the following circumstances:

a The procurement is expected to exceed $10,000 and is to be awarded without competition or only one bid or offer is received in response to solicitation.

b. The procurement expected to exceed $10,000 specifies a "brand name" product; or

c. The grantee's procurement procedures or operation fails to comply with one or more significant aspects of this Attachment. The grantor agency shall notify the grantee in writing, with a copy of such notification to the OFPP.

7. Code of Conduct

Grantees shall maintain a written code or standards of conduct which shall govern the performance of their officers, employees or agents engaged in the award and administration of contracts supported by Federal funds. No employee, officer or agent of the grantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

a. The employee, officer or agent;

b. Any member of his immediate family;

c. His or her partner; or

d. An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award.

The grantee's officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements.

Grantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value.

To the extent permitted by State or local law or regulations, such standards of conduct shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's officers, employees, or agents, or by contractors or their agents.

8. Procurement Procedures

The grantee shall establish procurement procedures which provide that proposed procurement actions shall be reviewed by grantee officials to avoid the purchase of unnecessary or duplicative items. Consideration should be given to consolidation or breaking out to obtain a more economical purchase. Where appropriate, an analysis shall be made of lease versus purchase alternatives, and any other appropriate analysis to determine which approach would be the most economical. To foster greater economy and efficiency, grantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

9. Contracting with Small and Minority Firms, Women's Business Enterprise and Labor Surplus Area Firms

a. It is national policy to award a fair share of contracts to small and minority business firms. Accordingly, affirmative steps must be taken to assure that small and minority businesses are utilized when possible as sources of supplies, equipment, construction and services. Affirmative steps shall include the following:

(1) Including qualified small and minority businesses on solicitation lists.

(2) Assuring that small and minority businesses are solicited whenever they are potential sources.

(3) When economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum small and minority business participation.

(4) Where the requirement permits, establishing delivery schedules which will encourage participation by small and minority business.

(5) Using the services and assistance of the Small Business Administration, the Office of Minority Business Enterprise of the Department of Commerce and the Community Services Administration as required.

(6) If any subcontracts are to be let, requiring the prime contractor to take the affirmative steps in 1 through 5 above.

b. Grantees shall take similar appropriate affirmative action in support of women's business enterprises.

c. Grantees are encouraged to procure goods and services from labor surplus areas.

d. Grantor agencies may impose additional regulations and requirements in the foregoing areas only to the extent specifically mandated by statute or presidential direction.

10. Selection procedures

a. All procurement transactions, regardless of whether by sealed bids or by negotiation and without regard to dollar value, shall be conducted in a manner that provides maximum open and

free competition consistent with this Attachment. Procurement procedures shall not restrict or eliminate competition. Example of what is considered to be restrictive of competition include, but are not limited to: (1) placing unreasonable requirements on firms in order for them to qualify to do business; (2) noncompetitive practices between firms; (3) organizational conflicts of interest; and (4) unnecessary experience and bonding requirments.

b. The grantee shall have written selection procedures which shall provide, as a minimum, the following procedural requirements:

(1) Solicitations of offers, whether by competitive sealed bids or competitive negotiation shall:

(a) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated.

(b) Clearly set forth all requirements which offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(2) Awards shall be made only to responsible contractors that possess the potential ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

11. Method Procurement

Procurement under grants shall be made by one of the following methods, as described herein: (a) small purchase procedures; (b) competitive sealed bids (formal advertising); (c) competitive negotiation; (d) noncompetitive negotiation.

a. Small purchase procedures are those relatively simple and informal procurement methods that are sound and appropriate for a procurement of services, supplies or other property, costing in the aggregate not more than $10,000. Grantees shall comply with State or local small purchase dollar limits under $10,000. If small purchase procedures are used for a procurement under a grant, price or rate quotations shall be obtained from an adequate number of qualified sources.

b. In competitive sealed bids (formal advertising), sealed bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price.

(1) In order for formal advertising to be feasible, appropriate conditions must be present, including, as a minimum, the following:

(a) A complete, adequate and realistic specification or purchase description is available.

(b) Two or more responsible suppliers are willing and able to compete effectively for the grantee's business.

(c) The procurement lends itself to a firm-fixed-price contract, and selection of the successful bidder can appropriately be made principally on the basis of price.

(2) If formal advertising is used for a procurement under a grant the following requirements shall apply:

(a) A sufficient time prior to the date set for opening of bids, bids shall be solicited from an adequate number of known suppliers. In addition, the invitation shall be publicly advertised.

(b) The invitation for bids, including specifications and pertinent attachments, shall clearly define the items or services needed in order for the bidders to properly respond to the invitation.

(c) All bids shall be opened publicly at the time and place stated in the invitation for bids.

(d) A firm-fix-price contract award shall be made by written notice to that responsible bidder whose bid, conforming to the invitation for bids, is lowest. Where specified in the bidding documents, factors such as discounts, transportation costs and life cycle costs shall be considered in determining which bid is lowest. Payment discounts may only be used to determine low bid when prior experience of the grantee indicates that such discounts are generally taken.

(e) Any or all bids may be rejected when there are sound documented business reasons in the best interest of the program.

c. In competitive negotiation, proposals are requested from a number of sources and the Request for Proposal is publicized, negotiations are normally conducted with more than one of the sources submitting offers, and either a fixed-price or cost-reimbursable type contract is awarded, as appropriate. Competitive negotiation may be used if conditions are not appropriate for the use of formal advertising. If competitive negotiation is used for a procurement under a grant, the following requirements shall apply:

(1) Proposals shall be solicited from an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirements of the procurement. The Request for Proposal shall be publicized and reasonable requests by other sources to compete shall be honored to the maximum extent practicable.

(2) The Request for Proposal shall identify all significant evaluation factors, including price or cost where required and their relative importance.

(3) The grantee shall provide mechanisms for technical evaluation of the proposals received, determinations of responsible offerors for the purpose of written or oral discussions, and selection for contract award.

(4) Award may be made to the responsible offeror whose proposal will be most adavantageous to the procuring party, price and other factors considered. Unsuccessful offerors should be notified promptly.

(5) Grantees may utilize competitive negotiation procedures for procurement of architectural/engineering professional services, whereby competitors' qualifications are evaluated and the most qualified competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation.

d. Noncompetitive negotiation is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. Noncompetitive negotiation may be used when the award of a contract is infeasible under small purchase, competitive bidding (formal advertising) or competitive negotiation procedures. Circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following:

(1) The item is available only from a single source;

(2) Public exigency or emergency when the urgency for the requirement will not permit a delay incident to competitive solicitation;

(3) The Federal grantor agency authorizes noncompetitive negotiation; or

(4) After soliciation of a number of sources, competition is determined inadequate.

e. Additional innovative procurement methods may be used by grantees with the approval of the grantor agency. A copy of such approval shall be sent to the OFPP.

12. Contract Pricing

The cost plus a percentage of cost and percentage of construction cost method of contracting shall not be used. Grantees shall perform some form of cost or price analysis in connection with every procurement action including contract modifications. Costs or prices based on estimated costs for contracts under grants shall be allowed only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles.

13. Grantee Procurement Records

Grantees shall maintain records sufficient to detail the significant history of a procurement. These records shall

include, but are not necessarily limited to information pertinent to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the cost or price.

14. Contract Provision

In addition to provisions defining a sound and complete procurement contract, any recipient of Federal grant funds shall include the following contract provisions or conditions in all procurement contracts and subcontracts as required by the provision, Federal law or the grantor agency.

a. Contracts other than small purchases shall contain provisions or conditions which will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate.

b. All contracts in excess of $10,000 shall contain suitable provisions for termination by the grantee including the manner by which it will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

c. All contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees shall contain a provision requiring compliance with Executive Order 11246, entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR Part 60).

d. All contracts and subgrants for construction or repair shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 USC 874) as supplemented in Department of Labor regulations (29 CFR, Part 3). This Act provides that each contractor or subgrantee shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The grantee shall report all suspected or reported violations to the grantor agency.

e. When required by the Federal grant program legislation, all construction contracts in excess of $2,000 awarded by grantees and subgrantees shall include a provision for compliance

with the Davis-Bacon Act (40 USC 276a to a-7) as supplemented by Department of Labor regulations (29 CFR, Part 5). Under this Act contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less often than once a week. The grantee shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The grantee shall report all suspected or reported violations to the grantor agency.

f. Where applicable, all contracts awarded by grantees and subgrantees in excess of $2,000 for construction contracts and in excess of $2,500 for other contracts which involve the employment of mechanics or laborers shall include a provision for compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 USC 327-330) as supplemented by Department of Labor regulations (29 CFR, Part 5). Under Section 103 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of standard workday of 8 hours and a standard workweek of 40 hours. Work in excess of the standard workday or workweek is permissible provided that the worker is compensated at a rate of not less than 1-1/2 times the basic rate of pay for all hours worked in excess of 8 hours in any calendar day or 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health and safety as determined under construction, safety and health standards promulgated by the Secretary of Labor. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

g. The contract shall include notice of grantor agency requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental or demonstration work with respect to any discovery or invention which arises or is developed in the course of or under such contract, and of grantor agency requirements and regulations pertaining to copyrights and rights in data.

h. All negotiated contracts (except those awarded by small purchase procedures) awarded by grantees shall include a

provision to the effect that the grantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract, for the purpose of making audit, examination, excerpts, and transcriptions.

Grantees shall require contractors to maintain all required records for three years after grantees make final payments and all other pending matters are closed.

i. Contracts, subcontracts, and subgrants of amounts in excess of $100,000 shall contain a provision which requires compliance with all applicable standards, orders, or requirements issued under Section 306 of the Clean Air Act (42 USC 1857(h)), Section 508 of the Clean Water Act (33 USC 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR, Part 15), which prohibit the use under non-exempt Federal contracts, grants or loans of facilities included on the EPA List of Violating Facilities. The provision shall require reporting of violations to the grantor agency and to the USEPA Assistant Administrator for Enforcement (EN-329).

j. Contracts shall recognize mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act (P.L. 94-163).

Grantor agencies are permitted to require changes, remedies, changed conditions, access and record retention and suspension of work clauses approved by the Office of Federal Procurement Policy.

15. Contract Administration

Grantees shall maintain a contract administration system ensuring that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

U.S. Department of Housing and Urban Development

PUBLIC AND INDIAN HOUSING

Special Attention of: Public Housing Agencies/Indian Housing Authorities; Regional Administrators; Directors, Offices of Regional Housing; Field Office Managers; Housing Management Division Directors; Chiefs, Assisted Housing Management Branches; Directors, Offices of Indian Housing

Transmittal Handbook No.: 7485.1 REV-2

Issued: December 23, 1983

1. This Transmits

The Public Housing Comprehensive Improvement Assistance Program Handbook 7485.1 REV-2, dated 12/83.

2. Explanation of Material Transmitted:

This Handbook contains the policies and procedures for the Public Housing Comprehensive Improvement Assistance Program (CIAP), for use by HUD Regional and Field Offices, Public Housing Agencies (PHAs), including Indian Housing Authorities, and others involved in the modernization of public housing. These procedures may not be modified without the prior written approval of the Assistant Secretary for Public and Indian Housing. This Handbook incorporates policy clarifications and procedural revisions which the Department has found necessary after additional experience in administering the CIAP. The significant changes are:

a. Provision of definition for term "simple payback period."

b. Deletion of reference to inapplicability of OMB Circular No. A-95 and inclusion of reference to applicability of Executive Order 12372 on intergovernmental review of Federal programs.

c. Provision of instructions on how to calculate prototype cost limitation.

d. Consideration of ongoing maintenance and operating costs in approval of premature replacements.

e. Clarification of requirement for energy audit before approval of homeownership modernization and eligibility of energy audits and energy conservation measures without charge to homebuyer families.

f. Allowance of reimbursement of architectural/engineering fees incurred before program approval if such fees are reasonable and approvable and if PHA is subsequently funded.

Distribution: W-3-1, W-2(H), W-3(H), R-1, R-2, R-3, R-3-1(H), R-3-2, R-3-3, R-6, R-6-1, R-6-2, R-7, R-7-1, R-7-2, R-8, R-8-1, 138-2, 138-7

CHAPTER 9. CONTRACT ADMINISTRATION

Section 1. General

9-1. INTRODUCTION. This Chapter sets forth the requirements for modernization construction contracts and contracts for management improvements. To the maximum extent possible, the requirements of this Chapter shall apply to modernization programs approved before Federal Fiscal Year (FFY) 1982. A Sample Modernization Contract Status Control Log for Field Office use is attached as Appendix 19.

Section 2. Construction and Bid Documents

9-2. PHA PREPARATION. The PHA shall prepare the construction and bid documents as follows:

a. General. The PHA and its architect shall ensure that the construction and bid documents comply with State, tribal or local laws governing the public solicitation of bids. Any modifications required to comply with such laws should be discussed with Regional or Chief Counsel to ensure that such changes are not in conflict with Federal requirements.

b. Competitive Bidding. For each construction or equipment contract over $10,000, the PHA shall conduct formal advertising, except where equipment is to be purchased through the HUD Consolidated Supply Program. For each construction or equipment contract of $10,000 or less, the PHA shall follow the solicitation requirements set forth in the Procurement Handbook 7460.8.

c. Invitation for Bids. The invitation for bids shall be prepared in the form prescribed by the Field Office for public advertising and solicitation of bids. The bid holding period shall be specified.

d. Instructions to Bidders. Form HUD-5369, Instructions to Bidders, shall be used to inform interested contractors of the general bidding requirements, the responsibilities of each party, and the factors to be considered in determining the successful bidder.

(1) Bid Guaranty. For all construction and equipment contracts over $10,000, the bidder shall be required to submit with the bid a bid guaranty not less than 5 percent of the amount of the bid. The bid guaranty may be a certified check, bank draft,

regarding publicizing invitations for bids to Minority Business Enterprises (MBEs). The PHA also shall extend an invitation to contractors who have previously expressed an interest to participate in modernization to the PHA or the Field Office.

c. Bid Period. The PHA shall establish a deadline date for acceptance of bids which allows sufficient time for bidders to evaluate the bid package, estimate costs, and submit their bids to the PHA. The bid period is no longer required to be for 30 calendar days, where appropriate, but shall not be for less than 10 calendar days. In any event, the bid period shall be for at least the number of days required by State or local law. Furthermore, for projects being modernized under a single construction contract, the bid period should be at least 30 calendar days from the date of publication of the initial invitation for bids. However, if an addendum is issued within 7 calendar days of the deadline date, the bid opening shall be postponed for at least 7 calendar days from the date of the addendum.

d. Deposit. The PHA shall require a deposit in an amount that is based on local practice, but at least sufficient to offset the cost of reproducing a copy of the bid package. A deposit is not required for bid packages issued to a builder's exchange or similar building service organization. All deposit checks or drafts shall be made payable to the PHA.

e. Alternate Bids. The PHA should not request alternate bids for major project components (e.g., two different structural systems), "deductive alternatives" or a "base bid with add-ons" (not including alternate materials and equipment to the extent provided in the construction specifications), unless the relative advantage and comparative costs of the alternatives are difficult to determine without going to the competitive bidding process.

f. Addendum to Bid Package. The PHA shall issue changes to the standard bid package in the form of an addendum. The PHA shall not interpret the meaning of bid documents except by addendum. Each addendum shall be numbered sequentially and a copy provided to each bidder of record, to each place where bidding documents are on file and to the Field Office, only where the PHA is required to submit construction and bid documents before advertisement. The addendum also shall specify, if applicable, the revised deadline date for submission of bids.

SB

341

(FILE 2)

PROPOSED SENATE JUDICIARY COMMITTEE SUBSTITUTE
SENATE BILL 341
SECTIONAL ANALYSIS

(Unless otherwise indicated, "commissioner" means commissioner of administration)

SECTION 1. The purposes of the act are outlined to include: simplification, clarification, modernization of the laws; consistency among the branches of government; increased public confidence; fair and equitable treatment of all vendors; increased economy in state procurement; broad-based competition; safeguards for the maintenance of a procurement system of quality and integrity; and elimination and prevention of discrimination in state contracting.

SECTION 2. A new chapter is added to AS 36 entitled "State Procurement Code."

Article 1. Organization of State Procurement.

Sec. 36.30.005. Centralization of procurement of supplies and services for state agencies is under the authority of the commissioner of administration and the chief procurement officer. Procurement of construction and procurements to or disposals from the state equipment fleet and the control over construction and the state equipment fleet is under the commissioner of transportation and public facilities.

Sec. 36.30.010. The chief procurement officer is selected by the commissioner; is responsible for procurement of supplies and services for agencies in the executive branch; is a partially exempt employee; must have a minimum of 5 years in public procurement; and may be removed by the commissioner only for cause. The term of office of the Chief Procurement Officer expires when the term of the governor expires. Duties of the Chief Procurement Officer are enumerated.

Sec. 36.30.015. The commissioner of transportation and public facilities may contract for construction, procurements for the state equipment fleet, and may delegate to another agency the authority to contract for construction, after written determination has been made that the agency is capable of implementing the delegated authority. The commissioner of administration may delegate to an agency the authority to contract for its own supplies and services after a written determination has been made that the agency is capable of implementing the delegated authority.

The Alaska Railroad Corporation must adopt procedures substantially equivalent to the procurement code and regulations adopted by the commissioner.

Sec. 36.30.020. The Legislature must adopt procedures substantially equivalent to the procurement code.

Sec. 36.30.030. The Court System must adopt procedures substantially equivalent to the procurement code.

Sec. 36.30.040. Procurement regulations must be adopted by the commissioner.

Sec. 36.30.050. A list of persons who desire to provide supplies, services or construction items to the state will be established and maintain by the commissioner. Evidence of a valid Alaska business license and a statement of the contractor's qualifications must be submitted to be included on the list. Construction contractors must also submit a valid certificate of registration. The list must be used by the state agencies for small purchases

Sec. 36.30.060. Specification regulations must be adopted by the commissioner. Specifications must promote overall economy for the purposes intended and encourage competition in satisfying the state's needs, and may not be unduly restrictive.

Sec. 36.30.070. Supply management is under the authority of the commissioner and regulations must be adopted which govern management of supplies, surplus supplies and transfer of excess supplies.

Sec. 36.30.080. The department shall lease necessary space, and contract for the lease of space for the use of the state or an agency. A lease or contract for a lease may not be for a period of occupancy greater than 40 years. The department may enter into lease-financing agreements, which are subject to annual appropriation. If the department intends to enter into a lease or lease financing agreement with an annual rent anticipated to exceed $1,000,000, notice must be provided the legislature for approval.

Article 2. Competitive Sealed Bidding.

Sec. 36.30.100. Competitive sealed bidding is the preferred method of contracting. Competitive sealed bidding is not required for certain purchases, including professional services, which are itemized.

Sec. 36.30.110. When competitive sealed bidding is used, an invitation to bid is issued which must include the date

by which the bid must be received, purchase description, and all contractual terms and conditions. Subcontractors must be listed. Evidence of a valid Alaska business license for all bidders and subcontractors must be submitted when responding to the ITB. A bidder for construction contracts must also submit evidence of the bidder's registration under AS 08.18 and evidence of registration for each listed subcontractor.

Sec. 36.30.120. Bid security shall be required for all competitive sealed bidding for construction contracts which exceed an amount established by regulation. Bid security may be required for other types of supplies and services.

Sec. 36.30.130. Public notice of the ITB must be provided 21 days before the date for the opening of the bid, unless otherwise determined in writing by the chief procurement officer, or the commissioner of transportation and public facilities for construction or state equipment bids. Notice of solicitations must be published in the Alaska Administrative Journal.

Sec. 36.30.140. Bid opening must be public, in the presence of witnesses, and relevant information must be recorded, which is open to public inspection. The bids are not open for public inspection until after a notice of intent to award a contract has been issued.

Sec. 36.30.150. The procurement officer must evaluate bids based on the requirements set out in the ITB. The criteria used for the evaluation of an award must be objectively measurable. Criteria may not be used in bid evaluation if they are not set out in the ITB.

Sec. 36.30.160. Bids received after the bid due date indicated on the ITB may not be accepted unless the delay was due to an error of the contracting agency.

Correction or withdrawal of inadvertently erroneous bids before or after bid opening, or cancellation of awards or contracts based on bid mistakes shall be permitted in accordance with regulations and supported by written justification.

Sec. 36.30.170. Awards to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set out in the ITB shall be promptly made. The Alaska bidder preference is retained.

Sec. 36.30.190. Multi-step sealed bidding is allowed when it is considered impractical to initially prepare a definitive purchase description to support an award based on price. Unpriced technical offers are submitted, followed by an ITB limited to the bidders whose offers are determined to be technically qualified under the criteria established.

Article 3. Competitive Sealed Proposals.

Sec. 36.30.200. Contracts may be awarded by competitive sealed proposals when the chief procurement officer, or the commissioner of transportation and public facilities for construction and state equipment fleet contracts, determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the state.

Sec. 36.30.210. Request for proposals must contain the same information required for ITBs. The same notice provisions for ITBs apply for RFPs.

Sec. 36.30.220. Standard overhead rate established by agencies and applicable to contracts for supplies and services, must be included in a RFP.

Sec. 36.30.230. Proposals are to be opened in a manner which avoids disclosure of contents to competing offerors during the process of negotiation. A register of proposals containing the name and address of each offeror shall be prepared and open for public inspection after the award.

Sec. 36.30.240. Discussions with responsible offerors, who submit proposals determined to be reasonably susceptible of being selected for award, may be conducted for the purpose of clarification to assure full understanding of and responsiveness to the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals. Revisions may be permitted after submissions and before the award for the purpose of obtaining best and final offers.

Sec. 36.30.250. A contract under competitive sealed proposals shall be awared to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the state taking into consideration price and the evaluation factors set out in the RFP.

Sec. 36.30.260. A contract awarded under competitive sealed proposals must contain: the amount of the contract; the date for supplies to be delivered or the term for services to be performed; a description of the

services or supplies contracted for; and a certification that sufficient funds are available for the amount of the contract.

Sec. 36.30.270. Contracts are subject to review by the Department of Law.

Article 4. Other Procurement Methods.

Sec. 36.30.300. Sole source procurements may only be awarded if it is determined in writing that there is only one source for the required supply, service or construction. A sole source procurement may not be approved if a reasonable alternative source exists.

Sec. 36.30.310. Emergency procurements may be authorized under emergency conditions when there exists a threat to public health, welfare, or safety, and procurement through competitive sealed bids or competitive sealed proposals is impracticable, or contrary to the public interest, or to protect public or private property. A written determination of the basis for the emergency and for the selection of the particular contractor must be provided.

Sec. 36.30.320. Small procurements which do not exceed an aggregate amount of $5,000 shall be made with competition that is practicable under the circumstances. A contract for professional services that does not exceed $25,000 may be made in accordance with regulations adopted by the commissioner.

Article 5. Contract Formation and Modification.

Sec. 36.30.350. Solicitations may be cancelled or any bids or proposals may be rejected, in whole or in part, or the date for opening bids or proposals may be delayed as may be specified in the solicitation, when it is in the best interest of the state.

Sec. 36.30.360. A written determination of responsibility of a bidder or offeror shall be made by the procurement officer.

Sec. 36.30.365. At least 10 days before the formal award of a contract the procurement officer shall provide to each bidder or offeror notice of intent to award a contract.

Sec. 36.30.370. Any type of contract that will promote the best interests of the state may be used, except that

the use of a cost-plus-a-percentage-of cost contract is prohibited.

Sec. 36.30.380. Except with respect to contracts awarded through competitive sealed bidding or firm fixed-price contracts, a contract type may not be used unless it has been approved in writing by the procurement officer.

Sec. 36.30.390. Unless otherwise provided by law, multi-term contracts are permitted, but subject to availability and appropriation of funds. Written determination must support multi-term contracts.

When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal periods, the contract shall be cancelled. The contractor may only be reimbursed for the reasonable value of any nonrecurring costs incurred, but not amortized in the price of the supplies or services delivered under the contract that are not otherwise recoverable.

Sec. 36.30.400. Cost or pricing data must be submitted and certified by contractors. This does not apply when: the contract price is based on adequate price competition; the contract price is based on established catalogue or market prices; the contract price is set by law or regulation; or it is determined in writing that the requirements of this section are waived and the reasons for waiver are stated in writing.

Sec. 36.30.410. The state has the right to inspect the plant or place of business of a contractor or subcontractor that is related to the performance of a contract awarded or to be awarded by the state.

Sec. 36.30.420. The state may audit books and records of a person who has submitted cost or pricing data or receives a contract.

Sec. 36.30.430. The commissioner shall adopt regulations permitting the inclusion of clauses providing for adjustments in prices, time of performance, or other contract provisions, and appropriate remedies.

Sec. 36.30.460. Standard clauses in state contract may be modified if supported by a written determination that states the circumstances justifying the variation.

Sec. 36.30.470. If the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget or the total contract budget, the procurement officer may not execute the contract modification, change order, or

adjustment in contract price unless sufficient funds are available, or the scope of the project or contract is adjusted to permit the degree of completion that is feasible within the total project budget or total contract budget as it existed before the contract modification, change order, or adjustment in contract price.

Sec. 36.30.480. Cost principle regulations shall be adopted.

Article 6. Procurement Records and Reports.

Sec. 36.30.500. Procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the state archivist.

Sec. 36.30.510. A contract file open for public inspection must be kept by the commissioner and the contracting agency for each contract awarded under competitive sealed proposals.

Sec. 36.30.520. The commissioner shall maintain for at least 5 years a record listing all sole source and emergency procurement contracts. An agency which has delegated procurement authority shall by October 1, of each year, submit records of all sole source and emergency procurement contracts to the commissioner.

Sec. 35.30.530. Procurement information is public except as otherwise provided by law.

Sec. 36.30.540. The commissioner shall biennially report to the legislature concerning procurements by agencies.

Article 7. Legal and Contractual Remedies.

Sec. 36.30.560. An interested party may protest the award of a contract, the proposed award of a contract, or a solicitation for goods, services or construction. The protest shall be filed with the procurement officer of the contracting agency in writing and must contain specified items.

Sec. 36.30.565. Time deadlines for filing protests are specified.

Sec. 36.30.570. Notice of a protest shall immediately be given to the contractor if a contract has been awarded or, if no award has been made, to all interested parties.

Sec. 36.30.575. If a protest is filed before a contract is awarded, the award may be made unless the procurement

officer of the contracting agency determines in writing that: a reasonable probability exists that the protest will be sustained; or stay of the award is not contrary to the best interests of the state.

Sec. 36.30.580. A written decision by the procurement officer of the contracting agency shall be issued within 14 days after a protest has been filed, unless the time is extended up to 26 days for good cause. Notice shall be sent to the protester. If a decision is not made by the due date, the protester may proceed as if the procurement officer had issued a decision adverse to the protester.

Sec. 36.30.585. If the procurement officer sustains a protest the procurement officer shall implement an appropriate remedy.

Sec. 36.30.590. An appeal from a decision of a procurement officer on a protest must be filed with the commissioner within 5 days after the decision is received by the protester.

Sec. 36.30.595. The procurement officer shall immediately give notice of an appeal to the contractor if a contract has been awarded, or, if no award has been made, to all interested parties.

Sec. 36.30.600. If a protest appeal is filed before a contract is awarded and the award was stayed, the filing of the appeal automatically continues the stay until the commissioner of administration or transportation and public facilities makes a written determination that the award of the contract is necessary to protect substantial interests of the state.

Sec. 36.30.605. The procurement officer of the contracting agency shall file a complete report on the protest and decision with the commissioner of administration or transportation and public facilities within 7 days after a protest appeal is filed. The protester and all interested parties that have requested a copy of the appeal shall be furnished one. The protester may file comments on the protest report within 7 days after the report is received. Extensions may be granted.

Sec. 36.30.610. The commissioner of administration or transportation and public facilities shall dismiss a protest appeal before a hearing is held if it is determined in writing that the appeal is untimely. The appropriate commissioner may issue a decision on an appeal without a hearing if the appeal involves questions of law without genuine issues of fact.

Sec. 36.30.615. A hearing on a protest appeal shall be conducted according to AS 36.30.670 and regulations adopted.

Sec. 36.30.620. If a controversy, asserted by a contractor, concerning a contract awarded under this chapter cannot be resolved by agreement, the procurement officer shall, after receiving a written request by the contractor, issue a written decision no more than 90 days after receipt of all necessary information from the contractor, unless the due date is extended for good cause.

The decision shall be sent to the contractor. If a decision is not made by the due date, the contractor may proceed as if the procurement officer had issued a decision adverse to the contractor. If a controversy asserted by the state concerning a contract awarded cannot be resolved by agreement, the matter shall be immediately referred to the commissioner of administration or transportation and public facilities.

Sec. 36.30.625. An appeal from a decision of the procurement officer on a contract controversy may be filed by the contractor with the commissioner of administration or transportation and public facilities. The appeal shall be filed within 14 days after the decision is received by the contractor.

Sec. 36.30.630. A hearing on a contract controversy appealed to the commissioner or referred to the commissioner shall be conducted according to AS 36.30.670 and regulations adopted .

Sec. 36.30.632. The commissioners of administration and transportation and public facilities may delegate responsibilities under Sec. 36.30.590 and Sec. 36.30.630 to the head of the contracting agency.

Sec. 36.30.635. The commissioners of administration and transportation and public facilities may debar or suspend a person from consideration for award of contracts. Notice and opportunity for a hearing are specified.

Sec. 36.30.640. Causes for debarment or suspension are enumerated.

Sec. 36.30.645. The commissioners of administration and transportation and public facilities shall issue a written decision to debar or suspend.

Sec. 36.30.650. A person suspended is entitled to a hearing if the person files a written request for a

hearing within 7 days after receipt of the notice of suspension.

Sec. 36.30.655. The commissioner shall maintain a list of all persons debarred or suspended from consideration for award of contracts.

Sec. 36.30.660. The commissioner of administration or the commissioner of transportation and public facilities may, at any time after a final decision to debar a person, reinstate the person after determining that the cause for which the person was debarred no longer exists or has been substantially mitigated.

A debarred person may request reinstatement. A hearing may be held on a reinstatement petition. A decision on reinstatement shall be made in writing within 7 days after a reinstatement petition is submitted. A decision under this section is not subject to judicial appeal.

Sec. 36.30.665. The commissioner of administration or transportation and public facilities may permit a debarred person to participate in a contract on a limited basis during the debarment period.

Sec. 36.30.670. The commissioner of administration or transportation and public facilities shall act as a hearing officer or appoint a hearing officer for a hearing conducted under this chapter. The provisions of the Administrative Procedure Act do not apply to a hearing conducted under this chapter. The authority of a hearing officer is outlined.

Sec. 36.30.675. If the commissioner of administration or transportation and public facilities is not acting as hearing officer, the hearing officer shall recommend a decision to the appropriate commissioner based on the evidence presented. The recommendation shall include findings of fact and conclusions of law. The appropriate commissioner may affirm, modify or reject the hearing officer's recommendation or take any other appropriate action.

Sec. 36.30.680. A decision by the commissioner of administration is final, and shall be sent within 20 days after a hearing to all parties. A decision by the commissioner of transportation and public facilities involving procurement of construction shall be sent within 90 days after the hearing.

Sec. 36.30.685. A final decision of the commissioner of administration or transportation and public facilities may be appealed to the superior court in accordance with the Alaska Rules of Appellate Procedure.

Sec. 36.30.687. Civil and criminal sanctions are outlined for misrepresentations and fraudulent claims.

Sec. 36.30.690. This chapter and the regulations adopted under it are the exclusive procedures for asserting a claim against the state or an agency arising in relation to a procurement conducted under this chapter.

Sec. 36.30.695. The commissioner of administration may adopt by regulation additional rules of procedure.

Sec. 36.30.699. The definition of interested party is given.

Article 8. Intergovernmental Relations.

Sec. 36.30.700. Cooperative purchasing is authorized between public procurement units or external procurement activities in accordance with an agreement entered into between the participants.

Sec. 36.30.710. Sale, acquisition, or use of supplies among public procurement units or with external procurement activity may be done independent of certain requirements of this chapter.

Sec. 36.30.720. Joint use of facilities is allowable.

Sec. 36.30.730. A public procurement unit may provide personnel, information and technical services to a requesting public procurement unit or external procurement activity.

Sec. 36.30.735. Current Alaska law on restrictions of contracting with or employing experts on radiation hazards is retained.

Sec. 36.30.740. The commissioner may collect information concerning supplies, services or construction being procured or used by state public procurement units.

Sec. 36.30.750. Under a cooperative purchasing agreement, controversies arising between an administering public procurement unit and its bidders, offerors, or contractors shall be resolved in accordance with this chapter.

Sec. 36.30.790. Definitions for this article are provided.

Article 9. General Provisions.

Sec. 36.30.850. This chapter applies to contracts solicited or entered into after January 1, 1987, unless the parties agree to its application to a contract

solicited or entered into before that date. This chapter applies to the disposal of state supplies and every expenditure of public funds irrespective of their sources, except as specified in AS 36.30.915.

This chapter does not apply to: grants; contracts for professional witnesses; contracts of the University of Alaska where the work is to be performed substantially by enrolled students; contracts for medical doctors and dentists; contracts for the purchase of residential child care services under AS 47.40; disposals of land or interest in land; disposals under AS 38.05; contracts for the preparation of ballots under AS 15.15.030; acquisitions or disposals of property and other contracts relating to airports; acquisitions of real property or disposals of obsolete property under AS 19.05.060, 19.05.100, 19.05.110 or 19.05.120; disposals of obsolete material or equipment under AS 35.20.060; or leases of ferry terminal facilities under AS 19.60.010.

Except for AS 36.30.700-36.30.895, this chapter does not apply to contracts between two or more agencies, the state and its political subdivisions, or the state and other governments.

Sec. 36.30.860. Unless displaced by the particular provision of this chapter, all other principles of law and equity shall supplement the provisions of this chapter.

Sec. 36.30.870. Regulations under this chapter shall be adopted in accordance with the Administrative Procedure Act. Regulations applicable to procurements of construction or procurements for or disposal of property of the state equipment fleet shall be adopted by the commissioner of administration only after consultation with the commissioner of transportation and public facilities.

Sec. 36.30.880. This chapter requires all parties involved in the negotiation, performance, or administration of state contracts to act in good faith.

Sec. 36.30.890. If a procurement involves the expenditure of federal funds or federal assistance and there is a conflict between a provision of this chapter or a regulation adopted under a provision, the federal statute or regulation shall prevail.

Sec. 36.30.900. This chapter does not modify, amend, or alter laws regarding preference for Alaska forest products or preference to producers or dealers in Alaska, except as provided in AS 36.30.170(c).

Sec. 36.30.910. This chapter does not prevent purchasing through the general services administration as proviced by law.

Sec. 36.30.920. Suspected anticompetitive practices are to be reported to the attorney general.

Sec. 36.30.930. In addition to penalties prescribed for unethical conduct, civil and criminal penalties are provided for violations of this chapter.

Sec. 36.30.940. The attorney general on behalf of the state shall enforce the provisions of this chapter.

Sec. 36.30.990. Definitions.

Sec. 36.30.995. This chapter may be cited as the State Procurement Code.

SECTION 3 through SECTION 61 amend other Alaska statutes to reflect the provisions of this chapter.

SECTION 62. The commissioner must report to the legislature by December 1, 1987, concerning procurements by state agencies during the first 6 months of 1987.

SECTION 63. The commissioner of administration shall adopt the regulations required under this chapter by January 1, 1987.

SECTION 64. This is the repealer section.

SECTION 65. Section 63 of this Act takes effect immediately.

SECTION 66. Except as provided in sec. 65, this Act takes effect January 1, 1987.

DAVID W. JEWELL
2440 COTTONWOOD
ANCHORAGE, ALASKA 99508

February 4, 1986

Mr. Patrick Rodey
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Dear Senator Rodey:

I am concerned about the state's procurement processes. I have had considerable experience over the past two years with preparing proposals for professional services contracts.

My most recent is the most absurd. I am sending you a copy of the letter I have wrtten the state ombudsman after receiving his report and decision on a complaint I filed. It states, I believe, some of the reasons some of us have such little respect for the state processes.

I will happy to provide more information if you wish to have it.

Sincerely,

David W. Jewell

encl.

DAVID W. JEWELL
2440 Cottonwood
Anchorage, Alaska 99508

February 3, 1986

Mr. John B. Chenoweth, Ombudsman
State of Alaska
3201 C Street, Suite 606
Anchorage, Alaska 99503

Dear Mr. Chenoweth:

I have received your letter of the 28th of January with your findings and Mr. Walton's report of his investigation regarding my complaint against the Department of Corrections (Complaint # A85-0958).

I must confess that I read the material with a rapidly increasing incredulity. I guess the focus of my disbelief is best demonstrated in the comment made by Mr. Walton:

> "Candor and Associates followed the format suggested in the rfp, but Assembly of God did not; I therefore found the Candor proposal clearer and more complete, since each of the subcategories was addressed. The committee agreed in one respect: Candor outscored Assembly of God 15 to 9 in the clarity category, but Assembly of God outscored Candor in completeness 14 to 9."

The judgment made by your office clearly makes the rfp the culprit and not the committee's objectivity or fairness in evaluation.

It does seem to me that if I was able to provide a complete and clear proposal following carefully the requirements of the rfp, obscurity of the rfp is hardly the problem here. Why could I understand it and Mr. Walton, apparently could understand it, but the DOC committee could not?

On this matter, I note that the rfp (item R, p. 3) states that evaluation of the proposal will be carried out by individuals "knowledgeable of the desired professional services requirements."

I also find it fascinating that the staff of DOC was obviously given an opportunity in face to face conversations to defend themselves. I am curious why I was not given a similar opportunity to respond to their defense.

I repeat my original complaint and charge. The DOC committee did not evaluate the proposals as presented in and of themselves but clearly used other information or did not consider all available to them in the written proposals to make their judgments. I find this supported by several items:

1) The question of my involvement in the religious community. My proposal contained my resume which indicated that I was an ordained clergyman of the United Church of Christ, and that I had been, among other things, Executive Director of a religious organization for seven years; not dissimilar to the chaplaincy since it had to do with campus ministry and working with a large group of chaplains, and also that I had taught some fifteen years in theological seminaries. See Mr. Walton's report, page 2.

And yet someone in DOC seemed to suggest that I was not a clergyman or had no involvement in religious activities or organizations.

This was obviously important since Mr. Walton spent an entire section of his report dealing with this issue regarding the rfp's lack of clarity on the clergy requirement when a look at my resume would suggest there was no issue here at all.

My question: did anyone read my proposal? or, if they did, did they understand what they were reading?

2) Back to experience: I find it again interesting that the winning proposal gave no specific information on the individual's experience beyond that in jails. Apparently a general statement with no details that a person has this and that experience is more significant than a detailed listing of actual jobs held and their responsibilities. It appears to me that the specific experience indicated in the winning proposal does not cover all of the relevant experience required by the rfp and that there is no detail of that other experience in the winning proposal. This lack certainly has nothing to do with the quality of the rfp but a lot with the question of the basis upon which the committee gave points. The same issue is operative on the matter of training.

It is common practice in responding to an rfp to note the scoring point structure as a guide to what items in the rfp are most important and therefore should elicit the most care and completeness. In the winning rfp no such attention was given and yet that proposal won. Certainly detailed information gives a better basis for comparison than generalized statements. I am still unclear on what basis the committee gave its points given the disparity in the amount and precision of information available.

Why was this issue not addressed in your judgment? Presumably there is supposed to be a comparison made of information available in order to give point scores regardless of how confusing or vague an rfp is. Why does the proposal with the least information get the highest scores?

3) Incomplete proposal. In my contact with your office I mentioned that every professional contract rfp I have seen over the past two & one-half years has included the Standard Agreement Form for Professional Services Contract with two pages of Appendices spelling out a variety of requirements: among which are liability insurance of whatever forms are required to protect the state. There is no confusion here. Such a document was included in the rfp I received from DOC. As an aside it notes that no contract is operative until approved by the Department of Administration. My complaint included a concern that the winning proposal in this instance had no evidence of compliance with the insurance requirements--and neither DOA nor DOC seemed to be concerned about this hiatus. Note item O on page 3 of the rfp in regard to rfp clarity.

Why was this issue not addressed in your report or Mr. Walton's investigation?

Rfp's also have always included, as did my copy of the one in question, a one page document called, "ASSURANCES", which spells out in 12 items such matters as compliance with the Civil Rights Act of 1964, access of state officials to program records, maintenance of fiscal and other records, and so forth. This document was missing from the winning proposal. Obviously DOA and DOC did not believe that such assurances were necessary although my copy of the rfp clearly indicated they were. See item P on page 3 of the rfp.

Why was this lacunae not addressed by your report nor in the report of the investigation?

All of these items seem to me to be rather objective and easily verifiable in comparing proposals.

I do not feel that I have had a fair hearing by your office any more than I feel that I had a fair hearing from DOC. Nor do I believe that DOA has carried out its mandate to approve contracts according to certain established and public standards.

I find it incomprehensible that the issue of fairness and equal treatment can be determined to have been controverted but not enough to determine that the award could be challenged. You found "inconsistencies in the application of standards," that "one proposer had an opportunity for advance knowledge" [I think Mr. Walton's report and the budget submitted in the proposal demonstrates more than HAD OPPORTUNITY for advanced knowledge], "inconsistencies in applying the criteria did have a significantly negative impact on the scoring of the Candor proposal," and "that the evaluation process was not fair; in fact, I consider this contract evaluation process to be the weakest of the several I examined."

Exactly how do you measure degrees of unfairness and inequity and what do you consider a sufficient degree of one or both to go ahead with a challenge?

You may have closed the case and feel comfortable, I don't. My belief that the dice were loaded remains and your report does nothing to allay that belief, in fact it tends to confirm my perception of how the system works. I see nothing in your recommendations for changing the process that will in any way abrogate the freedom state agencies have to play games in awarding contracts.

Sincerely,

David W. Jewell

MEMORANDUM State of Alaska

TO: The Honorable Jim Robison
Commissioner
Department of Labor

DATE: June 9, 1983

FILE NO: 366-625-83

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

By: Jonathan B. Rubini
Assistant Attorney General
Government Affairs - Juneau

SUBJECT: Applicability of Title 36 to ASHA (AS 18.55.110)

You have asked whether AS 18.55.110 generally exempts the Alaska State Housing Authority (ASHA) from the prevailing wage requirements of the Little-Davis Bacon Act, AS 36.05. And, if AS 18.55.110 provides only a partial exemption, you also ask whether Title 36 applies to the proposal to construct 40 units of senior citizen housing in Fairbanks.

I

We have previously opined that ASHA is a "state agency" within the ambit of Title 36. 1981 Inf. Op. Att'y Gen. (Sept. 22; J66-473-81). See also Alaska State Housing Authority v. Dixon, 496 P.2d 649 (Alaska 1972). As you note, the prior opinion did not address AS 18.55.110, which provides:

> COOPERATION WITH AND AID OF FEDERAL GOVERNMENT. The authority may do all things necessary or desirable to cooperate with or act as agent for the federal government, or to secure financial aid for housing projects for veterans of World War II and other citizens of the state, provided that those projects may not be undertaken unless an acute shortage of housing exists. With respect to those projects, the authority may not be subject to limitations, restrictions or requirements of other laws, except those relating to land acquisition, prescribing or limiting the procedure or action to be taken in the development or administration of any buildings, property, public works, undertakings or projects of municipal or public corporations or agencies of the state.

[redacted]

BACK-UP

It is our view that AS 18.55.110 should not be interpreted in so broad a fashion as to render state law inapplicable in almost any instance where federal funds are applied toward the development of a project. Though not explicitly addresssing the scope of AS 18.55.110, the Dixon court stated that there is "no express exclusion of ASHA from the APA." 496 P.2d at 651. Consequently, interpreting AS 18.55.110 to provide a general exemption is not easily reconcilable with the analytic framework in Dixon. Furthermore, basic tenets of statutory construction require an interpretation of AS 18.55.110 which harmonizes AS 18.55.110 and Title 36. We note, in this regard, that the definitional scope of the Little Davis-Bacon Act, set out at AS 36.95.010, was amended as recently as 1978, presumably with knowledge that ASHA had been consistently viewed as a "state agency."

Rather than providing a broad exemption simply because a project receives federal assistance, we believe the more probable legislative intent was to provide an explicit statutory exemption in instances where the application of state law would jeopardize the receipt of federal assistance. (An analagous statutory exemption is established under AS 35.15.040.) By the statute's own terms, the focus of the exemption is "to secure [federal] financial aid for housing projects." If the receipt of federal assistance is not substantially impaired by the application of state law, there would seem to be no basis for the exemption. In many instances, state or local law can apply concurrently with federal law. The restricted interpretation of AS 18.55.110 is therefore consistent with the general rule that federal law need be exclusive only where the application of other law would thwart the objectives of federal law. See U.S. Const. art. IV.

Clearly, AS 18.55.110 provides an exemption whenever federal law requires the preemption of state or local laws. The more difficult inquiry is whether the exemption extends to those instances where the federal preemption is not legally mandated, but where ASHA is notified that federal funding would nonetheless be jeopardized were state or local law applicable. We believe that the absence of an explicit statutory or regulatory basis requiring the exemption of state or local law does not necessarily preclude the applicability of AS 18.55.110. To impose the statutory exemption only where a preemption of state or local law is explicit would belie the plain legislative intent to promote the receipt of federal funds. Indeed, to read the exemption to apply only where federal funds preempts state or local law, the constitutional prerequisite would render AS 18.55.110 superfluous. Consequently, we interpret AS 18.55.110 as exempting the

application of state or local law when a federal funding entity, properly exercising its discretion, notifies ASHA in writing that the receipt of federal funds would be jeopardized were state or local law deemed applicable. Moreover, to assure the coordinated implementation of state law, we would suggest that ASHA provide a written report, which includes the rationale and evidentiary basis for invocation of the statutory exemption, to the state agency responsible for the enforcement or implementation of the state law in dispute.

II

Since we interpret AS 18.55.110 to provide only a limited exemption, we next address whether Title 36 wage stipulations should apply to the Fairbanks facility.

The proposed project budget, which did not include the cost of Title 36 wages, estimated that the cost to provide the 40 units of elderly housing in Fairbanks would be $4,492,010. Of that amount, four million dollars is to be obtained through a grant from the Department of Community and Regional Affairs (DCRA) 1/, and the balance from federal funds provided by the United States Department of Housing and Urban Development (HUD). In addition to the limited federal assistance available to pay the construction costs, the completed project qualifies for a substantial operation subsidy from HUD. (HUD's rent subsidy program subsidizes over a 40-year period the difference between a fixed percentage of an eligible tenant's income and the fair market rental value.)

We are advised by the area office of HUD that their current program to promote the development and operation of senior citizen facilities does not impose an absolute ceiling on project costs. We are further advised that HUD does not assert that the federal prevailing wage requirements preempt state law. Typically, state prevailing wage requirements can supplant federal minimum wages on projects funded in part with federal money. See 1980 Inf. Op. Atty Gen. (August 21; J66-544-80) (citation of relevant Solicitor of Labor opinion letters).

In the immediate context, however, a novel question is raised due to the fact that different types of wage indexes are

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1/ The DCRA grant is the maximum grant allowed by state regulation, 19 AAC 85.092(5).

respectively employed by HUD and the state. HUD proposes use of a "residential construction" wage index on the Fairbanks project, while the state has only a single, "commercial construction" wage index. While estimates vary, the estimated cost of applying Title 36 to the Fairbanks project is between $300,000 -- $500,000. By letter of May 11, 1983, as supplemented by letter of May 16, 1983, copies of which are attached, HUD advised ASHA that it will not participate in any projects, including the Fairbanks project, where "excessive" state prevailing wage rates apply. "Excessive," here, refers at the least to instances where the federal minimum wage is determined by reference to an applicable "residential construction" rate, while Title 36 wage rates reference a "commercial construction" index. All three projects planned for construction during the 1983 construction season -- Fairbanks, Wasilla, Sitka -- present comparable discrepancies between federal and state prevailing wage indexes.

The letters of May 11 and 16 indicate that HUD views the imposition of state prevailing wages established under a "commercial construction" index as excessive where a federal "residental construction" index has been developed. 2/ Since the letters provide the requisite written notification that the receipt of federal funds would be jeopardized were Title 36 prevailing wage requirements applicable, ASHA may assert the exemption established under AS 18.55.110. 3/

2/ We note, though, that HUD's asserted authority to decline participation in an otherwise qualified project solely due to the application of what are viewed as "excessive" state prevailing wages is not beyond question. We have not been directed to any specific statutory or regulatory authority to inform the determination of what constitutes an "excessive" state prevailing wage. Typically, HUD participation is limited to those projects which satisfy defined cost limitations. The general rule in Alaska is that the eligible project cannot exceed $92,200/unit. However, since the Fairbanks facility exceeds the $92,200 limitation, even without the Title 36 wages, we believe that the state would be in a difficult posture were it to argue that HUD acted unreasonably in determining not to participate in the Fairbanks project due to the application of "excessive" state prevailing wages.

3/ The discussion in this opinion assumes that HUD's use of a "residential" wage index on the Fairbanks facility is proper. Whether it is appropriate to employ a "residential" wage index

Our final observation is that the question of whether Title 36 wage rates apply to housing projects which are jointly funded by both the state and HUD raises a myriad of complex legal and policy concerns. Unfortunately, as long as there remains a broad discrepancy between the prevailing wage rates established by the different scales, and as long as the HUD program does not impose articulable cost limitations, there can be no clear and decisive legal resolution. Ultimately, it is a policy decision whether to insist that Title 36 applies, and to risk the denial of federal assistance. We do note, though, that were the state to establish a "residential construction" wage rate, the prospect of continued conflict would be substantially diminished.

If we can be of further assistance, feel free to call.

JBR/jb

cc: Richard Lyon, Commissioner
Department of Commerce and Economic Development

Kevin Bruce
Special Assistant
Office of the Governor

Julia Tucker
General Counsel, ASHA

Susan Olsen
Area Counsel, HUD

Bob Landau
Assistant Attorney General
Anchorage

3/ (continued)

to a four-story facility with an elevator built to commercial specifications, as we are advised is descriptive of the Fairbanks facility, is beyond the scope of this opinion. ASHA, of course, may pursue whatever administrative or judicial avenues are available to raise this issue. If ASHA were to pursue a review of the wage determination, during the pendency of the review, it would be impossible to assess whether the exemption afforded under AS 18.55.110 is applicable.

SB 341

ALASKA STATE HOUSING AUTHORITY, Appellant,

v.

Edna DIXON, and other low-rent tenants similarly situated, Appellees.

No. 1529.

Supreme Court of Alaska.

May 5, 1972.

Declaratory judgment action by State Housing Authority seeking a ruling that the Administrative Procedure Act is not applicable to the Authority. On motions by both parties for summary judgment, the Superior Court, Third Judicial District, Edward V. Davis, J., granted summary judgment to defendants, and the Authority appealed. The Supreme Court, Boney, C. J., held that the State Housing Authority was bound to adhere to provisions of the Administrative Procedure Act, where conclusion was required that the Authority was an instrumentality of the State within the Department of Commerce, as evidenced by fact that, inter alia, the Authority was created as a "public corporate authority" within the Department of Commerce, the Authority was required to submit annual reports to the Department of Commerce, and where, as an instrumentality of the State within the Department of Commerce, the Authority came within the meaning of "state agency" as that term was used and defined in the Administrative Procedure Act, and the Authority's separate corporate nature does not detract from this conclusion.

Affirmed.

Boochever, J., not participating.

States ⇐84

State Housing Authority was bound to adhere to provisions of the Administrative Procedure Act, where conclusion was required that the Authority was an instrumentality of the State within the Department of Commerce, as evidenced by fact that, inter alia, the Authority was created as a "public corporate authority" within the Department of Commerce, the Authority was required to submit annual reports to the Department of Commerce, and where, as an instrumentality of the State within the Department of Commerce, the Authority came within the meaning of "state agency" as that term was used and defined in the Administrative Procedure Act, and the Authority's separate corporate nature does not detract from this conclusion. AS 18.55.030, 18.55.270, 44.62.010–44.62.650, 44.62.640(a) (4).

Donna Page, Anchorage, for appellant.

John Reese, Alaska Legal Services Corp., Anchorage, for appellees.

Before BONEY, C. J., and RABINOWITZ, CONNOR and ERWIN, JJ.

BONEY, Chief Justice.

This case presents the single issue of whether or not the Alaska Administrative Procedure Act[1] (hereinafter, the APA) applies to the Alaska State Housing Authority (hereinafter, ASHA).

In July, 1970, the Board of Directors of ASHA resolved to amend its Statement of Policies to conform them to recent changes of law. Preliminary drafts were prepared and a public meeting was held on October 22, 1970, to solicit recommendations and comments.

A second public meeting, scheduled for November 9, 1970, was cancelled when ASHA was requested by Alaska Legal Services Corporation, representing a group of tenants, to hold public hearings in conformity with the APA. ASHA refused and filed a complaint seeking a declaratory judgment that the APA is not applicable to ASHA. Both parties moved for summary judgment. The superior court granted summary judgment to Dixon, holding that

1. AS 44.62.010–650.

ASHA is a state agency within the meaning of the APA and that the proposed Statement of Policies was a regulation subject to the APA.

From that judgment, ASHA has brought this appeal.

Under the approach taken by this court in DeArmond v. Alaska State Development Corp.[2] and Walker v. Alaska State Mortgage Ass'n,[3] we conclude that ASHA is an instrumentality of the state within the Department of Commerce.[4] The fol-

2. 376 P.2d 717 (Alaska 1962). The plaintiff there appealed from a denial of his request for a judgment declaring unconstitutional the act creating the Alaska State Development Corp. (hereinafter, ASDC).

Among the various constitutional provisions alleged by the plaintiff as having been violated by the act creating ASDC was article III, section 22, of the Alaska Constitution, which states:

> All executive and administrative offices, departments, and agencies of the state government and their respective functions, powers, and duties shall be allocated by law among and within not more than twenty principal departments, so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may be established by law and need not be allocated within a principal department.

The court held that ASDC was an instrumentality of the state within the Department of Commerce, emphasizing the following factors in reaching its decision: (1) the Commissioner of Commerce is on the board of directors of ASDC; (2) the other six members of that board are appointed by the governor and serve at his pleasure; (3) the board of directors submits an annual report to the governor and the legislature; (4) ASDC's financial records are audited annually by the legislative auditor; (5) the act creating ASDC specifically provides that the "corporation is an instrumentality of the state within the Department of Commerce, but has a legal existence independent of and separate from the state." The court noted that this separate existence is true for all corporations.

The court upheld the constitutionality of the act creating ASDC.

3. 416 P.2d 245 (Alaska 1966). A taxpayer there unsuccessfully attacked as unconstitutional the legislation providing for the creation of the Alaska State Mortgage Association (hereinafter, ASMA). Most of the taxpayer's attacks were the same as those made on ASDC in *DeArmond*.

The court rejected the taxpayer's argument that article III, section 22, of the Alaska Constitution, note 2 *supra*, had been violated. The court reaffirmed its adherence to the principles stated in *DeArmond*, and emphasized the following factors: (1) the act creates ASMA as "a public corporation and government instrumentality within the Department of Commerce, but having a legal existence independent of and separate from the state . . . ." (2) ASMA is required to submit a comprehensive annual report to the governor and the legislature; (3) ASMA is subject to an annual audit by the legislative auditor; (4) the minutes of every meeting of ASMA are sent to the governor; (5) the Commissioner of Commerce serves on the board of directors of ASMA; (6) at the time that the litigation arose the other four members of the board were the executive director of ASHA and three of the board members of ASHA [now the other four are all members of the board of ASHA]; (7) the board members serve at the pleasure of the governor. The court again stated that the fact that the challenged body had an existence separate from the state was of no help to the party attacking the constitutionality of the creation of that body for such separateness is of the nature of the corporate structure.

The court upheld the constitutionality of the legislation creating ASMA.

4. ASHA refers us to Bridges v. Alaska Housing Authority, 349 P.2d 149 (Alaska 1959), as authority for the proposition that ASHA is not a state agency. There, the Alaska Housing Authority, the territorial predecessor to ASHA, used a declaration of taking in an eminent domain proceeding. The property owner appealed, arguing that the use of a declaration of taking was by statutory authorization only and that such authorization had not been granted to the Alaska Housing Authority. This court agreed with the property owner. The power to use a declaration of taking had been extended by the territorial legislature to the territory and to first class cities. The first state legislature also extended the power to school and public utility districts but refused to go any further. The court concluded that the legislation authorizing the Housing Authority to take by eminent domain did not include a grant of the power to use a declaration of taking and that the Housing Authority did

lowing factors parallel those stressed in those cases: (1) ASHA is created as a "public corporate authority" [5] "within the Department of Commerce;" [6] (2) the Commissioner of Commerce is a member of the board of directors of ASHA; [7] (3) the other four members of that board,[8] and of course the Commissioner of Commerce,[9] are appointed by the governor and serve at his pleasure; (4) ASHA is required to submit several annual reports to the Department of Commerce.[10] As an instrumentality of the state within the Department of Commerce, ASHA comes within the meaning of "state agency" as that term is used and defined in the APA:

> "[S]tate agency" means a department, office, agency, or other organizational unit of the executive branch, except one expressly excluded by law, but does not include an agency in the judicial or legislative department of the state government.[11]

There being no express exclusion of ASHA from the APA, we conclude that ASHA is bound to adhere to the provisions of the APA. ASHA's separate corporate nature does not detract from this conclusion.[12] The legislature may have had a special reason for choosing the corporate vehicle; *e. g.*, to insulate the state from potential liabilities. Moreover, as Davis has pointed out:

> An administrative agency may be called a commission, board, authority, bureau, office, officer, administrator, department, corporation, administration, division, or agency. Nothing of substance hinges in the choice of name . . . .[13]

We therefore conclude that the APA should apply to ASHA.

The decision of the superior court is affirmed.

BOOCHEVER, J., not participating.

Henry Allen THOMPSON, Appellant,
v.
STATE of Alaska, Appellee.
No. 1339.

Supreme Court of Alaska.
May 4, 1972.

Proceeding on second application for postconviction relief. After remand, the Superior Court, Third Judicial District, Anchorage, James M. Fitzgerald, J., denied relief, and applicant appealed. The Supreme Court, Boney, C. J., held that state Supreme Court case, decided subsequent to first postconviction application, in which majority of justices specifically rejected application of test in earlier case as to which punishments are cruel and unusual in violation of State and Federal Constitutions did not produce intervening change in law so as to constitute sufficient excuse

not come within any legislation granting that power to enumerated bodies. The court specifically stated that the Housing Authority "is not the Territory or State of Alaska."

We conclude that the case merely stands for the proposition that ASHA is not identical with the state. Dixon does not contend that ASHA is anything but "a subordinate corporate authority created by the state." ASHA's reliance on *Bridges* is therefore misplaced.

5. AS 18.55.030.

6. AS 18.55.020.

7. *Id.*

8. AS 39.05.060.

9. AS 39.05.020–030.

10. AS 18.55.270, 18.55.430, 18.55.640.

11. AS 44.62.640(a) (4).

12. *Cf.* Walker v. Alaska State Mortgage Ass'n, 416 P.2d 245, 250 (Alaska 1966); DeArmond v. Alaska State Development Corp., 376 P.2d 717, 724 (Alaska 1962).

13. 1 K. Davis, Administrative Law § 1.01, at 1 (1958).

1/15/86

SB-3c(1)

TESTIMONY OF HENRY J. HICKEY

I believe I bring a unique perspective to the consideration of this Legislation. A review of my pertinent experience is appropos.

1948 - 1954 Sales Assistant, Westinghouse Electric Corporation, Tacoma, Washington charged with quotation and bid preparation responsibility for invitations issued by State of Washington Department of Administration Purchasing Division, U.S. Army, Ft. Lewis, McChord Air Force Base and eleven additional publicly owned utilities and municipal governments.

1954 - 1959 Sales Engineer, Westinghouse Electric Corporation, Tacoma, Washington. Direct sales responsibility for the above accounts plus equipment specification responsibility for the State of Washington, Dept. of Highways, Dept. of Architecture and Engineering as well as the same responsibility for the above Federal and local government accounts.

1959 - 1973 Manager of Sales and Operations, Northern Supply, Inc.,Anchorage. Northern was a major statewide distributor of construction equipment, mine, mill supplies, tools, electrical equipment and supplies. In this position I had total sales and marketing responsibility for all product lines in all categories. In this role I was engaged in working with the State of Alaska Dept. of Highways of the development of equipment specifications and the preparation of competitive bids for a broad range of road and airport maintenance equipment. During these years we were a major supplier of construction equipment to the State and other political sub-divisions. We sold and serviced equipment from Hyder to Barrow and from Prudhoe Bay to several locations on the Aleutian Chain. Our equipment built the majority of the Spine Road System which now serves the Prudhoe Field. In short, I was intimately involved in specification preparation, bidding, evaluating, and servicing of a broad range of road construction and maintenance equipment.

1973 - 1978 Branch Manager, Supply Division Westinghouse Electric Corp. Supply Division, Anchorage.

1978 - To Date Deputy Purchasing Officer 1978 and 1979. December 1979 to date Purchasing Officer Municipality of Anchorage.

Prior to my original association with Westinghouse in 1948, I worked for and with my father who was associated with the heavy

truck and equipment business in western Washington. One of his major accounts was the State of Washington. One of the first jobs I performed was the servicing of equipment my father was delivering to the State of Washington, so I feel I literally grew up being directly associated with the equipment business.

In my later roll with Westinghouse as a Sales Engineer at Northern Supply I acquired a broad knowledge of construction specifications for both buildings and civil works. In the process, I became intimately familiar with the contracting procedures utilized by government as well as with the private sector customers. From this particular background and my continued association with construction contract bidding with the Municipality, I feel I have the broadest possible knowledge of this important facet of procurement as well.

With this total background then I have reviewed the proposed text of the Legislation.

At the outset of these observations I must advise you the following are my **personal opinions.** They are not in any way the official position of the Municipality of Anchorage.

I offer these opinions as a 26 year resident of Alaska, as a 26 year taxpayer in Alaska and one who abhors the average citizen's accelerating distrust of the integrity of government.

As a prerequisite to considering the establishment of the head of a procurement agency, the Legislative agency must realize that to be effective the procurement head must be **to the greatest extent possible, independent** from **all influence** which might affect their **objective judgment.**

The procurement head **must** and I repeat **must** be able to review in a dispassionate manner as possible their procurement decisions.

To focus on this point you would'nt permit judges to serve at the pleasure of the Attorney General, but the proposed Legislation expects the Procurement Officer to serve at the pleasure of the Commissioner who may not know the very rudiments of procurement practices.

Our strong Governor form of government obviously limits the other options available. At the very least:

1. The Procurement Officer must be appointed by the Governor and confirmed by the Legislature.

2. The Procurement Officer must report to and be responsible only to the Governor - **not through any Commissioner.**

3. Preferably the Procurement Officer could be removed only for cause with the concurrence of the Legislature.

Section 36.30.005 must, to be effective, be restructured to reflect the above minimum requirements.

Section 36.30.015 Executive Branch Agencies as drafted smacks of a deal.

It is absolutely purile for the law to delegate this authority to anyone. The authority to delegate should be granted to the Procurement Officer but any Procurement Officer worth their salt would never delegate complete purchasing authority to the agency preparing the specifications. The record of the D.O.T and its predecessor agencies is checkered with instances of imprudent specifications.

Personally, in my dealings with the Division of Equipment I was the victim of a concerted attempt to manipulate specifications to exclude me and my firm from a major equipment award.

The only thing that stopped this travesty was that the then President of the Senate saw the error and used his good offices to effect a fair decision.

I will be happy to provide a detailed account of the individuals involved in this scenario if you wish to confirm the validity of my statement.

I don't think I need to advise you that as written the delegation of authority is the core of a running joke in D.O.T. "Boy we really put one over on the committee."

Additionally, there is absolutely no question that the bill as written is a "fox in the hen house" approach to equipment procurement.

Similarily, Legislative delegation of authority for construction is equally imprudent. The designers, those who contract for design and those who administer and or oversee the administration of construction contracts cannot - and have not - been impartial in the bidding processes related to Public Works construction bidding. Sweetheart deals have been cut.

The intelligent way to avoid these improprieties is to assign by Legislation the construction bidding responsibility to the Procurement Officer.

The only other area I found to need correction is Section 36.30.100. An addition should be made to this section to add the specific authority to procure an item without competition for experimental purposes. At first blush it might appear that Section 36.30.300 - sole source procurements could be used for this purpose, strong arguments can however be made and sustained that such is not the case.

In summary, many, many hours of effort have gone into this Legislation. Everyone agrees the aim of this new Legislation is to avoid a repetition of the circus held last summer.

The Bill as written won't do it.

If it is not changed as outlined above I recommend it not be enacted. **The present law is better.**

I am sure you don't want to be back here five years from now to 'redo' this section of the code. You have an opportunity to do it correctly now!

You are the Legislators - throw out the deals!

If you don't do it now I predict you will be rewriting this Legislation within five years to correct 'imprudent' actions by procurement amateurs.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

April 3, 1985

MEMORANDUM

TO: Representative John Sund

ATTN: Kitty Rodriguez

FROM: Mark Torgerson MT
Legislative Analyst

RE: Set-Aside Laws for Sheltered Workshops
Research Request 85-265

You asked for information on set-aside laws for sheltered workshops--specifically, whether Alaska and other states have such laws, and how these laws are enacted.

State set-aside laws (or state use laws) for sheltered workshops establish preferential bidding or noncompetitive purchase of commodities and services by state government from sheltered workshops. These workshops, which are usually operated by nonprofit organizations, provide job training for disabled persons with varying degrees of handicaps. This training includes establishing interviewing skills, improving work habits, and increasing job productivity. In addition, some workshops produce commodities for sale to the public or private sector.

Forty-three states have set-aside laws, and these laws vary in scope. Some encourage state agencies and municipalities to purchase the sheltered workshops' products or services. Washington has such a law. Others, such as Florida, require state purchase of available products or services from the workshops.

Alaska does not have a set-aside statute for sheltered workshops. Alaska Statute 37.05.230(8) simply provides that the State's competitive bidding process does not "apply to the purchase of products or services manufactured or provided by a sheltered workshop." According to Dr. Robert Gregovich, Program Coordinator for Developmental Disabilities with the Department of Health and Social Services, the statute is ineffective because it does not provide State agencies with clear guidelines on utilization of products or services from the workshops. Mark O'Brien, a representative from the Division of General Services, stated that the statute is vague, and it neither encourages or mandates State use of workshop products.

[redacted]

SHELTERED WORKSHOPS

Enacting a Set-Aside Law in Alaska

If the legislature enacts a set-aside law, the content of the law could range from a brief one-sentence statement encouraging State agency use of workshop products, to a comprehensive law requiring State and local use of available products. Two states--Washington and Florida--provide examples of permissive and mandatory laws.

Washington's laws, enacted in 1974 and 1975, encourage state agencies and municipalities "to purchase products and/or services manufactured or provided by sheltered workshops and programs of the department of social and health services which operate facilities serving the handicapped and disadvantaged" (RCW 43.19.520 and RCW 39.23.005). These purchases "shall be at the fair market price of such products and services as determined by the division of purchasing of the department of general adminstration" (RCW 43.19.530 and RCW 39.23.010). Procurement contracts for workshop items are usually negotiated through the Washington Association of Rehabilitation Facilities (WARF) a nonprofit organization. Washington Association of Rehabilitation Facilities provides technical assistance to individual workshops and markets products and services to the state.

Florida's set-aside law, passed by the legislature in 1974, requires state agencies to purchase qualified workshop products and services. Workshops submit their products and services to an eight-member commission within the Department of General Services. The commission establishes a procurement list containing workshop items approved for purchase by public agencies. The commission determines which products and services are suitable for procurement after it reviews feasibility studies conducted by a central nonprofit agency. In making this determination, the commission must consider the impact of a proposed item on private enterprise, and whether the proposed product can be manufactured at a reasonable level of quality for a reasonable price to the state. Those products and services approved by the council are placed on the procurement list which is distributed to all purchasing agencies in the state. As products are needed, the purchasing agencies place orders through a central nonprofit agency which facilitates the allocation of all orders.

Representatives of Washington and Florida stated that their programs have been successful in marketing disabled persons' products and services to the state. Charles Harles, a director with the National Association of Rehabilitation Facilities (NARF), said that NARF considers both programs a success. In addition, Mr. Harles stated that the successful set-aside laws usually provide for a central, nonprofit organization to coordinate the marketing of products between the state and the individual workshops. Moreover, Mr. Harles asserted that the most successful set-aside laws are those which mandate state use of workshop products and services.

Attached to this memorandum are copies of set-aside laws in Florida, Washington, Idaho, and Oregon. A copy of AS 37.05.230 is also attached.

I hope that this information is valuable to you. Please call me if you need additional information.

MT

Attachments

ETCA
The Employment and Training Center of Alaska
A Rehabilitation Industry

2330 Nichols Street
Anchorage, AK 99508-3495
(907) 279-6617

Judith E. Berger
Employment and Training
Center of Alaska
2330 Nichols Street
Anchorage, Alaska 99508
(907) 279-6617

SB 341 PUBLIC HEARING
February 15, 1986, Anchorage, Alaska
Public Testimony

My name is Judy Berger and I am with the Employment and Training Center of Alaska, a sheltered workshop.

First of all, I would like to state that I am completely in support of the entire text of Senate Bill 341. It is refreshing to read a proposed law which is both concise in its language and clear in its intent.

Of particular interest to me is the section under Article No. 2, Competitive Sealed Bidding, General Policy, Sec. 36.30.100, B, Item 4, (Page 8 of the Document), where it is stated that competitive sealed bidding is not required "for the purchase of products or services manufactured or produced by a sheltered workshop."

I heartily support the intention of this exception to normal bidding procedures. It is obvious that our Legislators, and, more specifically, the authors and supporters of this bill, are well informed about both the employment needs of adults with disabilities, and the cost benefits to the State of Alaska when these needs are met through gainful employment as opposed to direct financial aid programs. Clearly, the employment of a disabled individual is preferential to the all encompassing, life-long financial support of a disabled person.

However, I would like to bring to your attention a very specific problem with regard to this pending legislation. If this law is passed, as it is written, the Section on Sheltered Workshops will probably never be utilized. Not because it is a bad law but because the administration will not have clearly defined procedures for administering it.

Let me clarify. As you know, the present Law, Alaska Statute 37.05.230, Section 8, also states that competitive bidding is not required of a sheltered workshop. It is a law that has been on the books now for many years and it is a law that is totally ineffective! Why? Because the administrators, the people from the various departments of government who are in a position to request bids for products and services do not know how to interpret it!

As lawmakers you may take pride in these administrators. They are cautious. They are careful. What does it mean that a Sheltered Workshop does not have to bid on a project? Can an administrator give all the work of their department to a sheltered workshop? Or, are they allowed to give only a certain percentage of their work to a sheltered workshop? Is there a dollar amount attached to the work they give to a workshop. . . say $5,000.00 per year or $25,000.00. . . or $100,000.00 per year? Will administrators be accused of giving too much to a workshop?

Certainly, administrators will not be chastised for giving too little, which has been the case over the years. But, who can blame them for being cautious? If they give a workshop a tiny piece of the pie, who will notice? If they give a workshop a substantial piece of the pie, who will scream?

In all fairness, there have been administrators who have utilized the present statute and sent work to sheltered workshops without competitive bids. But, in almost every instance, that work was sent to the workshop under the following circumstances. The price of the product was low and the turn-around time was immediate. Even under those conditions, the administrator generally felt a little nervous. After all, they realized that they were interpreting the law without the benefit of having procedures by which they could operate. This is clearly risky business! At any time, someone could ask them exactly why they did not use normal bidding procedures, and, without procedures to justify their actions, they could find themselves in very hot water!

Consequently, almost all of our work at The Employment and Training Center of Alaska is acquired through competitive bidding. Fortunately, we have survived the competitive bidding process because we take pride in cost consciousness, and, because we are a non-profit organization, we do not seek the normal profit margins.

However, with the State's economy tightening due to declining oil revenues, we recognize that the market for products and services will grow increasingly more competitive; and, like any other small business in Alaska, we may very well suffer the consequences. The difference is, although we are very much like a small business, we are so with a pertinent social obligation.

We employ people with disabilities. We employ the disadvantaged - the very people who, without our support are likely to return to institutions at a cost to the people of Alaska which is approximately ten (10) times that of our vocational/employment services at The Employment and Training Center of Alaska; or, more precisely, at a cost of almost $100,000 per year, per individual, at an institution in Alaska as opposed to $10,000 per year, per individual, at The Employment and Training Center of Alaska.

Clearly, it benefits the State to allow workers with disabilities to earn a portion of their incomes through non-competitive bidding procedures. Besides eliminating the costs for institutionalizing these individuals on a State level, revenues are realized on a Federal level. Employment means taxes paid to the Federal government and diminished Social Security payments to people with disabilities.

The problem is, who is going to see to it that the intent of the law is realized? As lawmakers, it is incumbent upon you to not only make the law, but at least to some degree, interpret it for the benefit of our administrators.

Therefore, I request that either you add more specific guidelines to the section of Senate Bill 341 regarding Sheltered Workshops, or that procedures for utilizing the law be made clear to the administrators who will eventually interpret and decide the circumstances under which a Sheltered Workshop may actually receive work from the State of Alaska without going through formal bidding procedures.

Thank you.

Specific Recommendations:

A. That procedures be written which clearly state how an administrator may utilize the services and/or products of a "sheltered workshop" (qualified non-profit organization) without using formal bidding procedcures; and,

B. That those procedures further state that a "sheltered workshop" (qualified non-profit organization), may receive up to 35 percent of the work normally put out for bid by any individual State Department or entity thereof.

Respectfully submitted,

Judith E. Berger
Marketing Director

JEB:mjb
(02-18-86)

ETCA
The Employment and Training Center of Alaska
A Rehabilitation Industry

2330 Nichols Street
Anchorage, AK 99508-3495
(907) 279-6617

February 18, 1986

The Honorable Pat Rodey
Alaska State Senate
Pouch V (MS 3100)
Juneau, Alaska 99811

Dear Senator Rodey:

I respectfully submit that the following changes be made on the pending legislation, Senate Bill 341:

1. *Page Nine (9), Line Three (3):*

   DELETE: "Sheltered Workshop"
   ADD: "Qualified Non-Profit Organization".

2. *Page Nine (9), Lines Eight (8) through Twelve (12),*

   DELETE: Entire definition of sheltered workshop.
   ADD: (C) A qualified non-profit organization means a program serving persons with physical or mental disabilities that constitute substantial handicaps to employment with the specific objective increasing employment opportunities for these people.

Rationale for making these changes are as follows:

Exclusive focus toward sheltered workshops, defined as a "place", is discrepant with federal law and current employment initiatives for persons with substantial handicaps. The current federal initiative is toward integrated employment outside the sheltered workshop setting.

Public Law 98-527;, the Developmental Disabilities Act of 1984, identifies employment-related activities as a priority area through 1987, and includes a specific right to employment in

the most integrated setting for persons with developmental disabilities. President Reagan also charged the Department of Health and Human Services to direct a program to strengthen private sector job opportunities for the severely disabled. Under Commissioner Jean Elder, Ph.D., the "Employment Initiative" is changing the delivery of employment-related services away from places called sheltered workshops to providing these services at locations within the private sector. Agencies serving persons with severe disabilities definitely need work from the State to provide meaningful employment. However, this work will not necessarily be done at a place called a sheltered workshop but rather at a variety of locations where workers with disabilities can interact with non-disabled citizens. A good example is janitorial services. These cannot be performed at the sheltered workshop; rather, a crew of workers with disabilities organized by the non-profit agency must go to the State buildings to provide these services.

Respectfully,

Karen M. Ward

Karen M. Ward
Executive Director

KMW:JEB:mjb

ETCA
The Employment and Training Center of Alaska
A Rehabilitation Industry

2330 Nicholls Street
Anchorage, AK 99508-3495
(907) 279-6617

The Employment and Training Center of Alaska (ETCA) is in complete support of the Governor's Council for the Handicapped and Gifted's recommendations to the Fourteenth Alaska Legislature as specified in their 1986 Priority Services information pamphlet.

Of particular importance to The Employment and Training Center of Alaska is the Council's recommendation for FY87 which "supports inclusion of the designated grants in the base operating budget as well as increases for vocational, residential, and family support services, and a cost of living adjustment for the community service providers. (Emphasis added). These community service increases should be offset by cost-savings realized by reduction of a unit at Harborview in both the current and FY87 fiscal years." See "Cost Benefit" breakdown below:

Recommended FY87 increases impacting ETCA:

Vocational Services	*281.6*
Cost of Living Increase	*273.9*
FY87 Total	*555.5*

COST/BENEFIT
COMMUNITY-BASED VOCATIONAL SERVICES

COST OF CURRENT PROGRAM (Employing 106 workers with disabilities)	*$ 911,025*
LESS FEDERAL TAXES, FICA (Paid back to the Government)	*$ (39,269)*
LESS SUPPLEMENTAL SOCIAL SECURITY BENEFITS (Reduced to the worker as a result of employment)	*$ (31,200)**
TOTAL PUBLIC COST OF CURRENT PROGRAM	*$ 840,556*
TOTAL COST OF ALTERNATIVE PROGRAM (Harborview, at $100,000 per person)	*$10,600,000*
LESS TOTAL PUBLIC COST OF CURRENT PROGRAM	*$ (840,556)*
TOTAL PUBLIC SAVINGS (For employing 106 workers with disabilities)	*$ 9,759,444*
FINANCIAL BENEFIT TO WORKER WITH DISABILITY (Discretionary income injected into local economy)	*$ 246,330*

**Conservative figure, only reflects those workers no longer receiving benefits as result of employment. Data collection currently in progress to document reductions to workers still receiving some benefits.*

Sec. 36.30.170. CONTRACT AWARD AFTER BID

The definition of "Alaska bidder" continues to follow standards that are not effective if it is the intent to promote and foster resident hire and businesses of Alaska. A stronger definition, which in our opinion would pass scrutinty, might be:

1) holds a current Alaska business license;

2) submits a bid or a response to a request for proposals for goods, services, or construction under the name appearing on the person's or firm's current Alaska business license;

3) has maintained a place of business within the state staffed by the bidder or a direct employee of the bidder for a period of six months immediately preceding the date of the bid;

4) is incorporated as a domestic corporation of Alaska, or is a sole proprietership or partnership whose principal(s) are bonafide residents of Alaska;

5) derives at least 50 percent of income within the state of Alaska;

6) if a joint venture, is composed entirely of ventures that qualify under (1)-(5) of this subsection.

Please note that these provisions should also apply to request for proposals which was omitted in the current draft of the bill.

The purpose of the proposed act might also contain a provision for Alaska bidders.

(6.1) foster and promote resident hire and Alaska businesses providing goods and services to the state;

Sec. 36.30.320. SMALL PROCUREMENTS

The limit of $5,000 per aggregate dollar amount that defines a small procurement is low for many cases of professional services contracting. That amount has been in place for several years now. If for no other reason than inflation, it should be raised to $6,000. However, for reasons of mere practicality and efficiency, an amount of $10,000 would be more realistic.

Item (b) delineates that professional services contracts of up to $25,000 may be awarded under regulations adopted by the commissioner and that not more than $25,000 in contracts per person (firm) may be awarded by an agency within a 12 month period.

The 12 month period would be better stated as "state fiscal year" (July 1-June 30). More importantly, however, the dollar limit per agency, per year just doesn't fit many contractual situations where a firm, within a fiscal year, performs many bonafide separate and different services for a department or agency which exceed the limit in total.

We would recommend that item b(2) be removed in its entirety. Item (d) would appear to provide the protection the state is seeking, along with the fact that a departmental commissioner must also sign the contract.

Sec. 36.30.210. REQUEST FOR PROPOSALS

The use of the RFP process in the selection of consultants for professional services contracts, such as date processing systems analysis and programming is, by and large, an expensive, time consuming exercise in presenting an appearance of propriety to the selection process. There are many reasons for this.

a) The description of services desired is often so vague that it is difficult or impossible for a vendor to respond or for any reasonable evaluation criteria to be established by the state.

b) Evaluation factors are usually so vague or generic that the evaluation process can be biased for almost any reason so long as a "reasonable basis" can be stated for that evaluation. A "reasonable basis" can always be found. In other words, evaluation criteria is rarely objective, it is almost always subjective.

c) In some cases, a demonstrated and specific knowledge and experience level is not merely needed, it is imperative. When that occurs, a restricted RFP process can be used or a "sole source" award granted. However, in the many cases where generic experience, such as "systems analysis and programming on state data center compatible computer systems and software" is needed, the evaluation of the quality and depth of that experience becomes highly subjective.

That subjectivity is then entrusted to an evaluation team for assignment of points. However, in most cases the team members are hardly qualified to make such an evaluation and fall back on the "glossy" resumes' or other material included in a vendors proposal. Occassionally, a single team member who is qualified makes the evaluation for the team at large. Whoever took that team member to lunch last, or perhaps uses even potentially more dangerous forms of persuasion, may then prevail.

d) The single specific objective evaluation criteria is cost. But it has been absolutely amazing the low weighting factor that is assigned to it and also the lack of any intelligent means by which a point assignment is given to cost. As an example: Cost has a 25% weighting factor. 10 points are assigned to cost. There are 4 proposals and three have responsive costs. One is eliminated because it is an obvious "low-ball" offering.

Vendor 'A' proposes $85,000
Vendor 'B' proposes $57,000
Vendor 'C' proposes $72,000

A typical state evaluation might give vendor 'B'-10 points; 'C'-9 points; and, 'A'-8 points. A more fair evaluation would be to mathmatically give vendor 'B'-10 points; 'C'-7.9 points; and, 'A'-6.7 points.

e) As stated in item a, above, the description of services desired must be more specific in RFPs. If it is not, then several things result:

1. A vendor doesn't know what the state wants and the proposal becomes a costly guess.

2. A vendor may easily have proposed at a significantly lower cost if the factors were known. This could make a sizable cost savings to the state and certainly be more fair to vendors in general.

3. Evaluation of cost cannot be made objectively. It is forced to be made on a subjective and relative basis.

SB 341 could be stronger and more specific regarding Request for Proposal procurements. Suggested wording might be:

a) .....must contain the date by which the proposal must be received, and must contain a specific description of the supplies, construction services, or professional services to be provided under contract,.....

b) A request for proposals must contain that information necessary for an offeror to submit a proposal, and upon which an objective evaluation of proposals may be made.

c) A request for proposals must contain references to any information or material that cannot be reasonably included with the request. No agency may withhold from review by a prospective offeror any information or material not of a proprietary or confidential nature, regardless of whether referenced in the request for proposal.

d) A request for proposals must contain the factors and their relative importance by which proposals received will be evaluated. Such factors must be realistically objective and based on the specific description of supplies, construction services, or professional services included in the request for proposals. Price shall be not less than 40 percent of total evaluation criteria and be evaluated as follows:

1. The price must be judged as realistic and not a deliberate attempt at undercutting.

2. The responsible and responsive low price offeror shall receive the maximum price evaluation point assignment.

3. All other responsible and responsive offerors shall receive a mathmatically proportionate price evaluation point assignment by dividing the low price by the offerors price and multiplying the result by the maximum price evaluation point assignment.

PRESENTATION TO THE

SENATE JUDICIARY COMMITTEE

STATE OF ALASKA

FEBRUARY 11, 1986

ERROL D. CHAMPION
S.E. ALASKA OPERATIONS MANAGER
N C MACHINERY CO.

MR. CHAIRMAN
MEMBERS OF THE SENATE JUDICIARY COMMITTEE
LADIES AND GENTLEMEN:

THANK YOU FOR THE OPPORTUNITY TO SPEAK ON SB341 THIS AFTERNOON. I WILL KEEP MY REMARKS BRIEF AND SPEAK TO THE ISSUE OF MY CONCERN WHICH IS ASKING THAT THE LIFE CYCLE COSTING METHOD BECOME THE STANDARD PURCHASING PHILOSOPHY OF THE STATE OF ALASKA.

I AM ASSOCIATED WITH N C MACHINERY CO., THE CATERPILLAR DEALER IN ALASKA, AND WILL BE USING CONSTRUCTION EQUIPMENT AS EXAMPLES. BUT THE SAME OBSERVATIONS AND FACTS WOULD APPLY TO TYPEWRITERS, COMPUTERS, TRUCKS, BOATS -- JUST ABOUT EVERYTHING PURCHASED BY THE STATE.

LIFE CYCLE COSTING IS NOT A NEW TERM AND HAS BEEN USED FROM TIME TO TIME BY VARIOUS PUBLIC AGENCIES. THE PRIVATE SECTOR HAS USED LIFE CYCLE COSTING AS THEIR PREFERRED PURCHASING PHILOSOPHY FOR MANY YEARS. IN OUR HIGHLY COMPETITIVE SOCIETY, INITIAL PRICE IS ONLY THE FIRST OF SEVERAL FACTORS THAT SHOULD BE USED TO DETERMINE THE VALUES OF ANY ASSET. HOWEVER, LOOKING BEYOND INITIAL PRICE IS SOMETHING THE STATE OF ALASKA HAS NOT ATTEMPTED ON A CONSISTENT BASIS, OR AS A MATTER OF POLICY AND REGULATION. THE DESIRE OF ALL RESIDENTS IS TO EXTEND THE PURCHASING POWER OF EVERY TAX DOLLAR. LIFE CYCLE COSTING IS A PROVEN LOGICAL PROCEDURE THAT WILL ALLOW THAT TO OCCUR.

LET'S LOOK AT SOME OF THE COMPONENTS OF LIFE CYCLE COSTS. FIRST IS THE INITIAL PRICE OF A PRODUCT. THE INITIAL PRICE IS USUALLY REFERRED TO LOWEST RESPONSIVE BIDDER AND IS THE PRESENT METHOD USED BY THE STATE FOR MOST PURCHASES.

BUT WHAT ABOUT OPERATIONAL COSTS? MAINTENANCE COSTS? PRODUCTIVITY? AVAILABILITY? DEALER SUPPORT? DISPOSAL VALUE? USEFUL OR PRODUCTIVE LIFE?

MANUFACTURERS CAN DO MANY THINGS TO MEET LOW BID, BUT THERE ARE NO FREE LUNCHES -- IF THE INITIAL PRICE IS LOWER THAN EVERYONE ELSE'S, THEN WHERE IS THE SAVINGS COMING FROM? MAINTENANCE? USEFUL LIFE? DISPOSAL VALUE? CORNERS HAD TO BE CUT AND THE END RESULT IS THE SIMPLE FACT THAT LOW BID ON INITIAL PRICE IS A VERY POOR WAY TO PURCHASE GOODS. NO AMOUNT OF SPECIFICATION WRITING WILL GUARANTEE THE BUYER THAT THEY ARE PURCHASING THE BEST PRODUCT MADE. MANUFACTURERS CAN EASILY WORK AROUND SPECS IF NEEDED, AND IF SPECS BECOME TOO TIGHT, BIDDERS COULD BE REMOVED AND THE PRODUCT BECOME A SOLE SOURCE ITEM.

WITH THE SOPHISTICATION IN OUR SOCIETY'S ABILITY TO MONITOR AND RETAIN INFORMATION, ALL OWNERS SHOULD MAINTAIN DATA BASES THAT CONTAIN INFORMATION ON FUELS, LUBRICANTS, REPLACEMENTS PARTS, PRODUCT AVAILABILITY, SUPPORT SERVICES, AND DISPOSAL VALUE. THIS DATA BASE COULD EASILY REVEAL THE TRUE OWNERSHIP COSTS AND THUS PRODUCE LIFE CYCLE COSTING AS A METHOD OF PROCUREMENT.

TODAY I WILL LEAVE YOU WITH SOME BACKGROUND INFORMATION ON EQUIPMENT WHICH DEMONSTRATES MORE CLEARLY THE SUBJECT OF LIFE CYCLE COSTING . . . . . .

THE FIRST EXAMPLE IS A COMPARISON OF EQUIPMENT INVESTMENT ANALYSIS. THIS PROGRAM IS WIDELY ACCEPTED IN THE PRIVATE SECTOR AS A PROVEN METHOD OF DETERMINING OWNERSHIP COSTS AND POTENTIAL ASSET VALUE OVER THE LIFE OF A PRODUCT.

THIS E I A HAS BEEN PREPARED FOR YOUR COMMITTEE BY ELIMINATING ALL TAX AND INVESTMENT FINANCING INCENTIVES. IT IS A STRAIGHT-FORWARD EXAMPLE OF 5 PRODUCTS -- ALL WITH DIFFERENT SELLING PRICES ON THE FIRST PAGE. AFTER LOOKING AT SELLING PRICE, PLEASE NOTE THE EFFECTS OF DIFFERENT RESALE VALUES: THE RANGE IS FROM 55% TO 15%.

ON PAGE 6, THE E I A EXAMINES HOURLY OPERATING COSTS, AVAILABILITY, REPAIRS AND REPLACEMENT COSTS OF WEAR ITEMS. THIS TYPE OF INFORMATION IS AVAILABLE ON MANY PRODUCTS, AND THE DATA BASE COULD BE EXPANDED TO INCLUDE ALL PRODUCTS PURCHASED BY THE STATE.

PAGE 7 SUMMARIZES THE ANALYSIS AND PRESENTS A VERY CLEAR PICTURE OF WHAT ACTUALLY HAPPENS AT THE END OF THE 10 YEAR LIFE. IN THIS CASE, PRODUCT "C" HAS AN $18,787 ADVANTAGE OVER PRODUCT "A", WHICH IN ITSELF HAS AN ADVANTAGE OVER PRODUCTS "B", "D", & "E". IF YOU WILL LOOK BACK TO THE INITIAL SELLING PRICE, NOTE THAT BOTH "A" AND "C" HAVE THE HIGHEST PRICE. WHICH MACHINE WOULD THE STATE HAVE PURCHASED UNDER OUR CURRENT LOWEST QUALIFIED BIDDER PROCEDURE?

IF SB341 CONTAINS THE REQUIREMENT FOR LIFE CYCLE COSTING, THE PURCHASING DECISION WOULD BE DIFFERENT, AND AT A FAR GREATER SAVINGS TO THE STATE OVER THE 10 YEAR PERIOD. THE GRAPH ON PAGE 8 WAS

PREPARED TO QUICKLY RECAP THE FACT THAT THE PRODUCT WITH THE HIGHEST ASSESSED VALUE IS THE BEST CHOICE FOR THE STATE, NOT THE LOW BID.

THE GRAPHS ON PAGES 9 THROUGH 12 REFLECT THE RESALE PRICES OF CONSTRUCTION EQUIPMENT BASED ON PUBLIC AUCTIONS ACROSS THE U.S. I HAVE INCLUDED THESE CHARTS TO GIVE EACH OF YOU AN IDEA, AS WELL AS SUPPORT FOR THE STATEMENT, THAT THERE IS A MAJOR DIFFERENCE IN PRODUCT VALUE AT THE TIME OF RESALE. THIS INFORMATION IS AVAILABLE ON AN ON-GOING, UPDATED BASIS, AND COULD EASILY BE INCLUDED IN THE PURCHASING DECISION.

IN SUMMARY, I HAVE NOT PREPARED SPECIFIC WORDING CHANGES TO SB 341 AS I KNOW STAFF IS WORKING ON THIS SUBJECT. MY PRESENTATION TO YOU TODAY IS TO PROVIDE YOU WITH CONCRETE DATA AND INFORMATION THAT CLEARLY DEMONSTRATES THE BENEFITS OF LIFE CYCLE COSTING.

GOVERNMENTS HAVE TRADITIONALLY USED LOWEST BID BECAUSE IT LOOKS GOOD TO THE TAXPAYERS AT THE BEGINNING. BUT WHEN THE FACTS ARE IN, LOWEST INITIAL BID IS USUALLY ON A PRODUCT THAT WINDS UP COSTING THE TAXPAYERS FAR TOO MUCH IN REPAIRS, LACK OF EFFICIENCY, PRODUCTION AND RESALE. I URGE YOUR COMMITTEE TO ENDORSE LIFE CYCLE COSTING AS THE STANDARD METHOD OF PURCHASING BY THE STATE OF ALASKA.

THANK YOU.

EQUIPMENT
INVESTMENT
ANALYSIS

PREPARED FOR.... State of Alaska

DATE..... February 11,1986

BASIC INFORMATION	UNIT #1	UNIT #2	UNIT #3	UNIT #4	UNIT #5
MODEL	A	B	C	D	E
*SELLING PRICE	125000	112000	135000	98000	91000
*DOWN PAYMENT(Z)	0	0	0	0	0
*TRADE-IN	0	0	0	0	0
TOTAL.....	0	0	0	0	0
*BOOK VAL OF TRADE	0	0	0	0	0
UNPAID BALANCE	125000	112000	135000	98000	91000
*OWNERSHIP PERIOD	10	10	10	10	10
*RESALE VALUE Z	55	32	30	20	15
EST MARKET VALUE	68750	35840	40500	19600	13650
*FINANCE PD(MOS.)	0	0	0	0	0
*SIMPLE INT RATE	0	0	0	0	0
*INS & LOCAL TAX Z	0	0	0	0	0
*INV TAX CREDIT Z	0	0	0	0	0
*CAP COST RECOV Z	0	0	0	0	0
*OPT(1=YES,0=NO)	0	0	0	0	0
RESIDUAL (BK) VAL	100	100	100	100	100
*CO. TAX BRACKET Z	0	0	0	0	0
TOTAL CASH PAIDOUT					
Down Pat/Trade	0	0	0	0	0
Unpaid Balance	125000	112000	135000	98000	91000
Interest	0	0	0	0	0
Ins & Local Tax	0	0	0	0	0
TOTAL.....	125000	112000	135000	98000	91000
TOTAL TAX SAVINGS					
INV TAX CREDIT					
Adjust Tax Basis	125000	112000	135000	98000	91000
Tax credit...	0	0	0	0	0
CAP COST RECOVERY					
Normal Tax Basis	125000	112000	135000	98000	91000
Optional Basis	0	0	0	0	0
Cost Recovery..	0	0	0	0	0
Interest	0	0	0	0	0
Ins & Local Tax	0	0	0	0	0
TOTAL.....	0	0	0	0	0
NET RESALE A/TAXES					
Est Market Value	68750	35840	40500	19600	13650
Book Value	125000	112000	135000	98000	91000
Added Income	-56250	-76160	-94500	-78400	-77350

Income Tax Due	0	0	0	0	0
RESALE PROFIT..	68750	35840	40500	19600	13650
TOTAL OWNING COST					
Total Cash Pat	125000	112000	135000	98000	91000
Total Tax Svgs	0	0	0	0	0
Resale Profit	68750	35840	40500	19600	13650
AFTER TAX OWNING COST	56250	76160	94500	78400	77350
ADVANTAGE/ (-DISADVANTAGE)		-19910	-38250	-22150	-21100

EXPENSE REVENUE PROFITABILITY ANALYSIS

#ANNUAL SCHD HOURS	1000	1000	1000	1000	1000
#AVAILABILITY	95	90	90	85	80
HRLY OPERATE COST					
FUEL					
#Hourly Usage	8.00	7.80	8.25	8.40	8.80
#Price/Gallon	$1.25	$1.25	$1.25	$1.25	$1.25
HRLY FUEL COST	$10.00	$9.75	$10.31	$10.50	$11.00
#LUB.OIL,FIL,GRS	$1.15	$1.25	$1.30	$1.40	$1.55
UNDERCARRIAGE					
#"I" Factor		0	0	0	0
#"A" Factor		0	0	0	0
#"Z" Factor		0	0	0	0
#Basic Factor					
HOURLY COST.....	$0.00	$0.00	$0.00	$0.00	$0.00
TIRES					
#Est Life (Hrs)	3000	3000	3000	3000	3000
#Replace Cost	9000	9000	9000	9000	9000
HOURLY COST.....	$2.05	$2.00	$2.00	$1.94	$1.88
REPAIRS					
#Ext Life Mult.	0.00	0.00	0.00	0.00	0.00
#Basic Factor					
HOURLY COST.....	$2.10	$2.50	$2.60	$2.45	$2.75
#SPEC ITEMS $/HR	$5.00	$5.00	$5.00	$5.00	$5.00
#OPERATOR WAGES	$35.00	$35.00	$35.00	$35.00	$35.00
TOTAL HOURLY OPERATING COST..	$55.30	$55.50	$56.21	$56.29	$57.18
OPERATING EXPENSE SUMMARY					
ANNUAL SCHD HRS	1000	1000	1000	1000	1000
AVAILABILITY	95	90	90	85	80
ANNUAL OPER HRS	950	900	900	850	800
HRLY OPER COST	$55.30	$55.50	$56.21	$56.29	$57.18
ANNUAL OP COST	$52,537.50	$49,950.00	$50,591.25	$47,847.50	$45,740.00
OWNERSHIP PERIOD	10	10	10	10	10
TOTAL OPERATING					

EXPENSE.....	$525,375.00	$499,500.00	$505,912.50	$478,475.00	$457,400.00
REVENUE POTENTIAL					
#HRLY PRODUCTION					
ANNUAL OPER HRS	950	900	900	850	800
ANN PRODUCTION	0	0	0	0	0
#UNIT PRICE/YD,TN		$^.00	$0.00	$0.00	$0.00
ANNUAL REVENUE	$0.00	$0.00	$0.00	$0.00	$0.00
OWNERSHIP PERIOD	10	10	10	10	10
TOTAL REVENUE					
POTENTIAL.....	0	0	0	0	0
PROFITABILITY					
SUMMARY					
REV POTENTIAL	$0.00	$0.00	$0.00	$0.00	$0.00
OPER EXPENSE	$525,375.00	$499,500.00	$505,912.50	$478,475.00	$457,400.00
TAXABLE INCOME	($525,375.00)	($499,500.00)	($505,912.50)	($478,475.00)	($457,400.00)
TAXES DUE ON INC	$0.00	$0.00	$0.00	$0.00	$0.00
NET INCOME A/TAX	($525,375.00)	($499,500.00)	($505,912.50)	($478,475.00)	($457,400.00)
MACHINE OWN COST	$54,250.00	$76,160.00	$94,500.00	$78,400.00	$77,350.00
NET PROFIT					
POTENTIAL.....	($581,625.00)	($575,660.00)	($600,412.50)	($556,875.00)	($534,750.00)
ADVANTAGE/					
(-DISADVANTAGE)		$5,965.00	($18,787.50)	$24,750.00	$46,875.00

RESET VALVE TO CHAMBER

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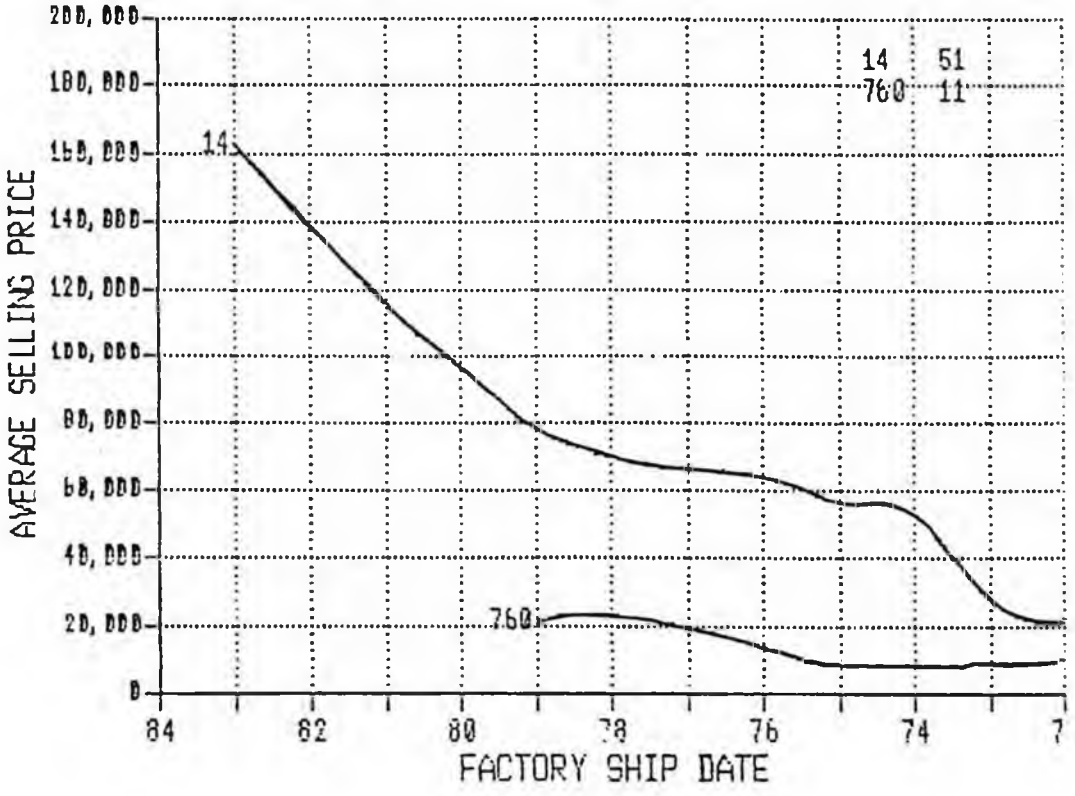
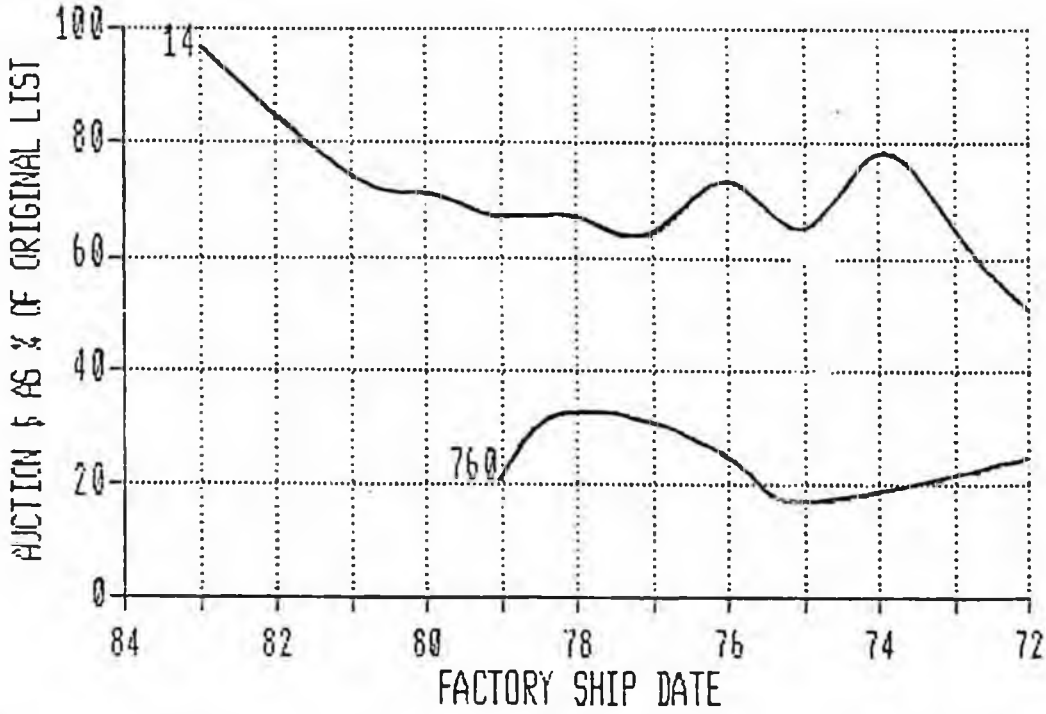
USED EQUIPMENT PRICES

BASED ON PRICES OF MACHINES SOLD AT 138 FORKE BROS., MILLER & MILLER, AND RITCHIE BROS. AUCTIONS IN 34 STATES AND 5 CANADIAN PROVINCES DURING 1984





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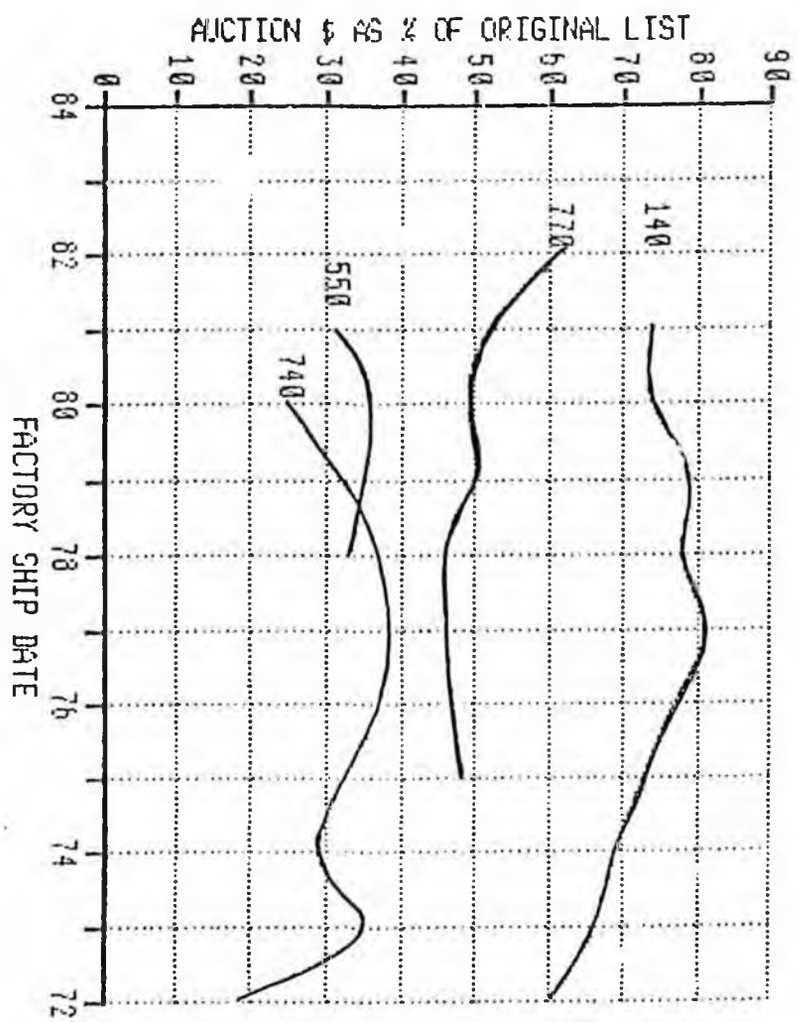

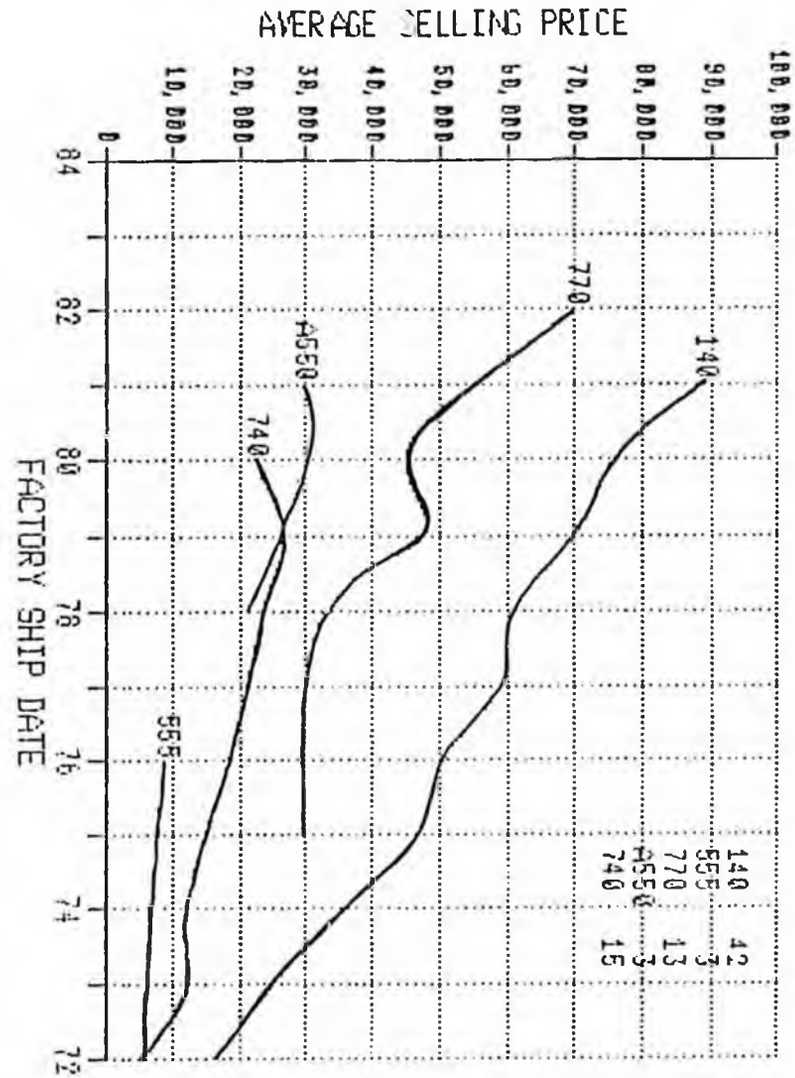

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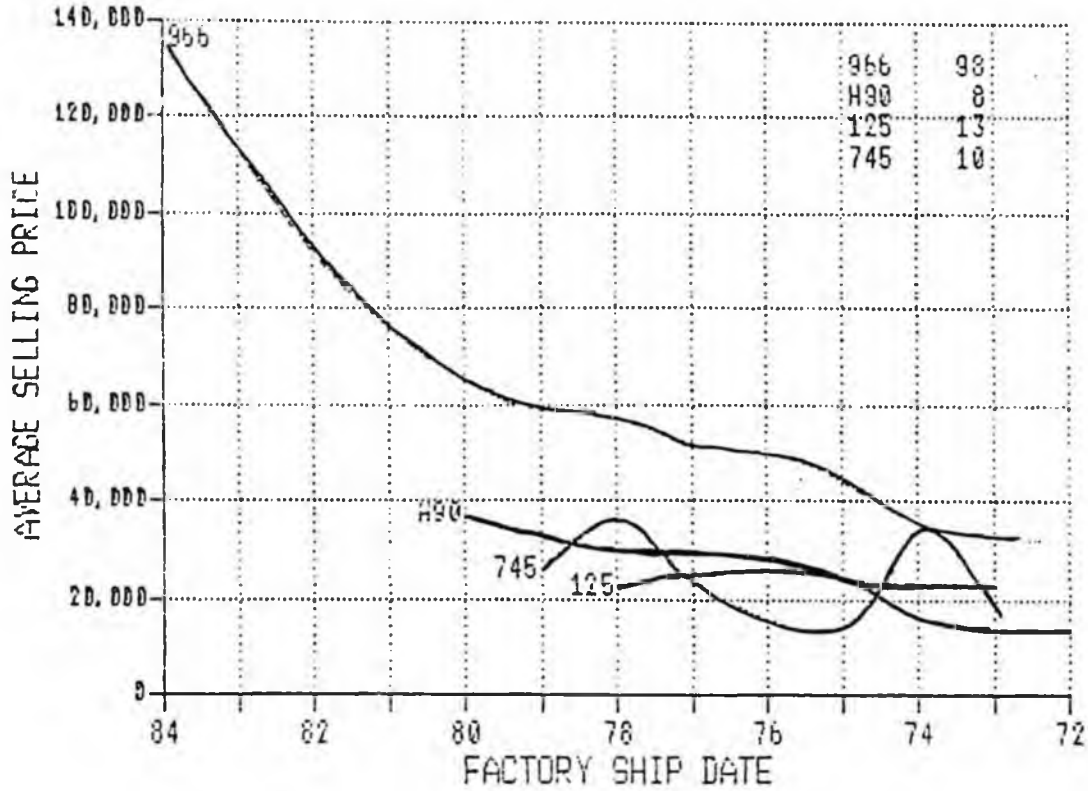
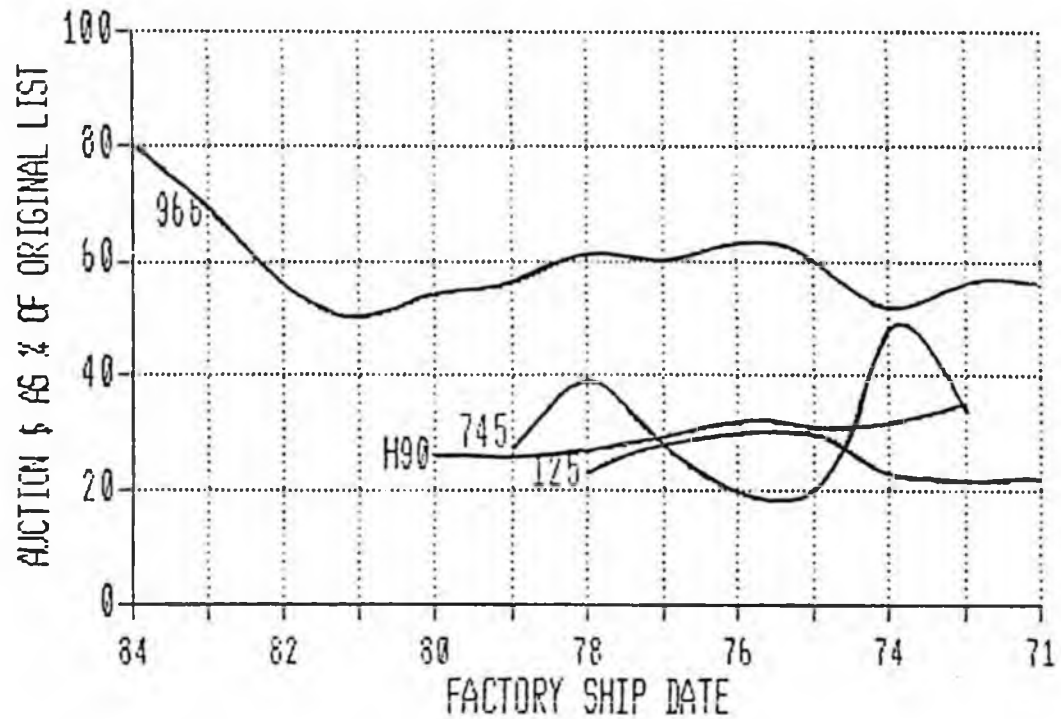
966

USED EQUIPMENT PRICES

BASED ON PRICES OF MACHINES SOLD AT 138 FORKE BROS., MILLER & MILLER, AND RITCHIE BROS. AUCTIONS IN 34 STATES AND 5 CANADIAN PROVINCES DURING 1984





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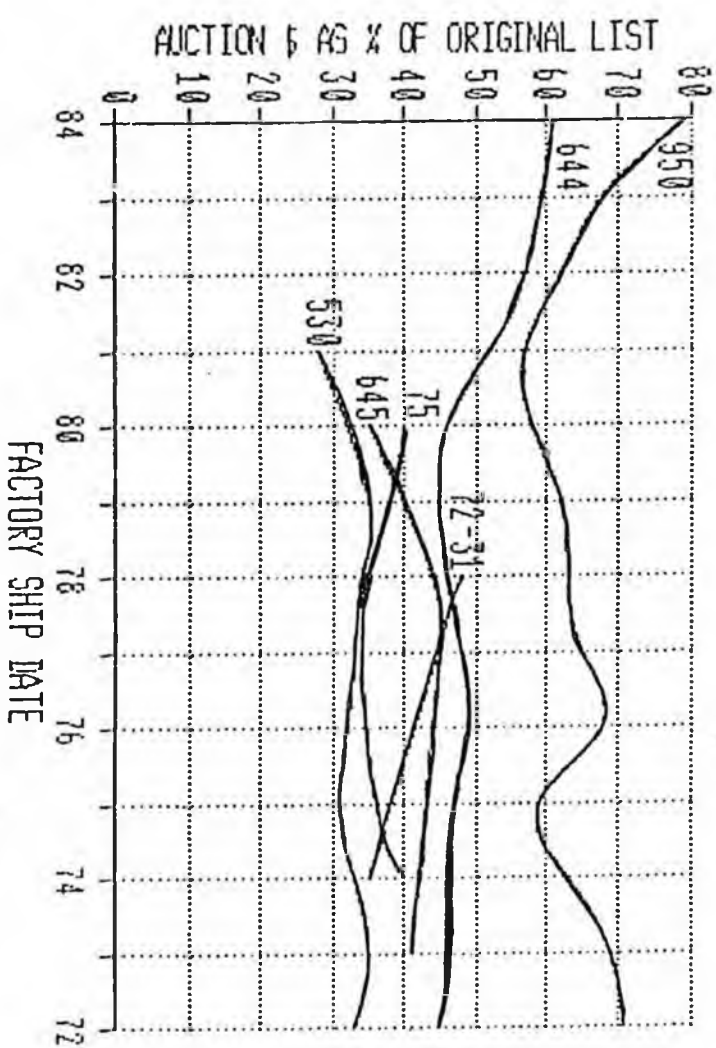

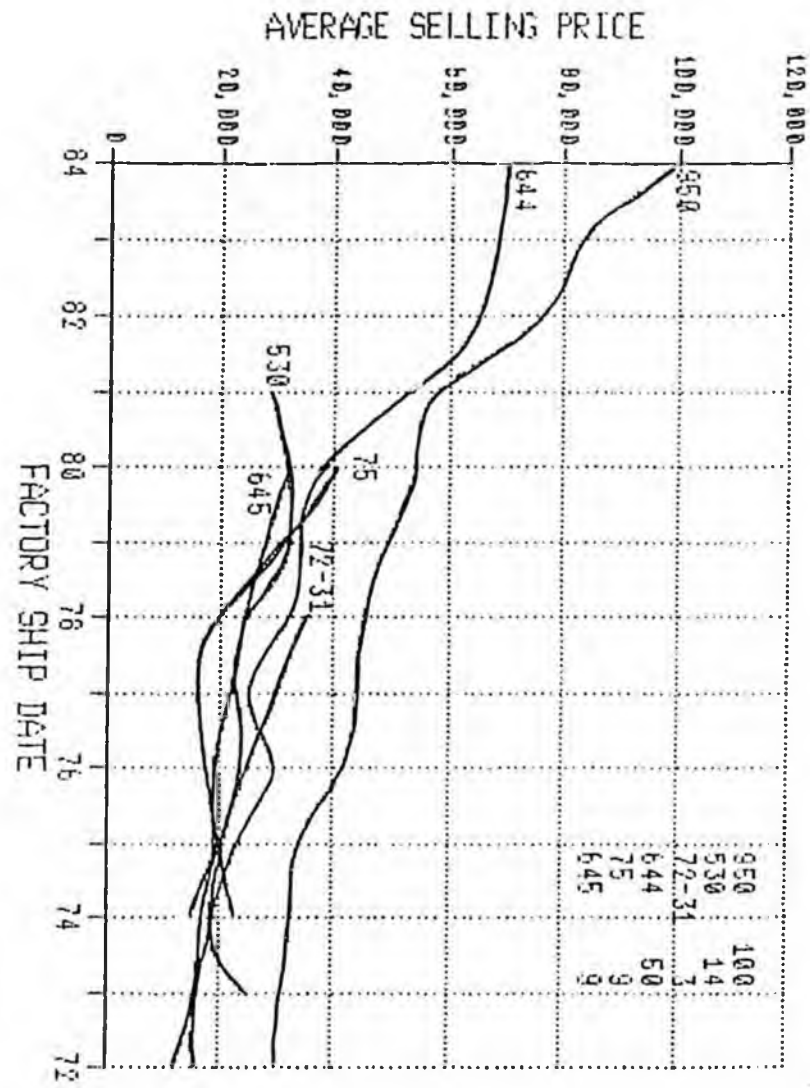

950

TESTIMONY OF

ALASKA CHAPTER

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

TO

THE SENATE SELECT INTERIM COMMITTEE

ON

PROCUREMENT PRACTICES AND PROCEDURES

December 5, 1985

COMMENTS ON "WORK DRAFT"

ON

PROCUREMENT PRACTICES AND PROCEDURES ACT

AGC-Alaska on behalf of our over 800 member firms appreciates the opportunity to comment on this draft bill. We also appreciate the time and effort of the chairman and staff in developing the draft bill. Following our general comments are some more specific comments relating to particular sections of the draft bill.

In general the committee should be applauded for using as a basis "The Model Procurement Code for State and Local Governments" published by the American Bar Association. The thousands of hours and different perspectives represented by that document cannot easily be duplicated. For the same reason deviations from the "Model Procurement Code" (MPC) should be scrutinized.

One major deviation from the MPC is the elimination of the State Procurement Policy Office. As stated in the MPC commentary at page 9:

> A major conceptual basis of the Code, the separation of policymaking and operational functions, is best achieved through the establishment of an independent policy body such as the [State] Procurement Policy Office suggested above. This Section provides for placement of the Policy Office either as an independent entity within the executive branch of the government or within an existing department of government such as General Services, Finance, or Administration. Placement in the

executive branch as a separate entity is the preferred arrangement as it would further ensure the professional integrity of this important policymaking body, and appropriately elevate the entire procurement process in the public sector.

Under the MPC it is the Policy Office's responsibility to promulgate regulations. Under the draft bill the Commissioner of Administration, i.e. central Procurement Officer will promulgate regulations.

The principal of vesting the regulatory function in a policy office without line authority over individual procurement actions is fundamental to the MPC. Elimination of the Policy Office no longer separates the policy making from the day to day operation of the procurement process.

Perhaps the most important aspect of procurement requiring the separation of procurement policy from day to day procurement operation is the promulgation of regulations providing for adjustments in price, time of performance or other contract provisions. Utilization of a state policy office can insure the development of fair construction contract provisions. Fair construction documents avoid litigation and encourage reputable contractors to bid projects. Often times, tunnel vision by unenlightened public procurement officials bring about contract provisions which unfairly allocate risk and increase litigation between the parties.

In drafting the MPC the drafters obviously discussed this problem and arrived at the solution expressed in MPC § 2-101 and § 5-401. Requiring the

Procurement Policy Office to address contract provisions relating to changes, variations in estimated quantities and different site conditions provides for broad input on this important policy related contract provision. Accordingly, AGC-Alaska recommends the creation of a Procurement Policy Office comprised of three members who have demonstrated sufficient business and professional experience (see MPC § 2-101(1) & (2) [Alternative A].

Our second comment relates to the overall structure of the draft bill. The MPC recognizes construction as unique to the procurement process and devotes a separate article (Article 5) to the procurement of construction and related services. The work draft does not devote a separate article to construction; instead the work draft normally prefaces some article as relating only to construction.

This is a mere difference of opinion in drafting techniques; however, the special attention devoted to construction procurement by the drafters of the MPC is lost in the work draft. Additionally, the work draft may cause confusion to procurers and procurees as presently written. For example, work draft Sections 36.30.430-460 are not limited to construction while the MPC limits those provisions to construction procurement.

Two other broad areas bear discussion at this time. One is the appropriateness of centralizing <u>all</u> procurement activity in the chief procurement office and then providing the discretionary ability to delegate that authority to Department of Transportation and Public Facilities (DOT/PF) for construction of highways and public works. A mandatory delegation of procurement authority with a required consistency with the Procurement

Practices Act and its Regulations may be more beneficial to all affected parties. Construction procurement is unique and DOT/PF has experience as a construction procurer.

The other area relates to the magnitude of procurement, especially construction procurement, made with state dollars by political subdivisions of the state and other "grant" recipients. AGC-Alaska strongly recommends that this committee propose legislation requiring any grant or appropriation recipient to utilize procurement practices consistent with this Procurement Practices and Procedure Act and its regulations.

Section by Section Comments and Recommendations

Section 1 (Similar to MPC § 1-101)

Recommendation: Eliminate Subsection (9). [p. 92 ln. 1-5]

Comments: AGC-Alaska fails to understand the rationale for the inclusion of affirmative action language in a procurement act. AGC-Alaska is opposed to any special preference procurement program based on race, size, sex, residency or any other factor irrelevant to the contractors ability to perform. The best way to ensure discriminatory free procurement is competitive sealed bidding. Any other method allows for possible discrimination.

Section 36.30.005 (Similar to MPC § 2-301)

Recommendation: Modify by providing for a "Policy Office" as in the MPC

Comments: See previous general comments on "Policy Office"

Section 36.30.010 (Similar to MPC § 2-202)

Recommendation 1: In (b) [p. 93; ln. 15] provide a mandatory delegation to DOT/PF for the construction of highways and public works subject to this act and its regulations. The definition of "public works" should be expanded beyond "fixed works constructed or maintained by the DOT/PF" as currently defined in AS 35.25.020.

Comment: DOT/PF is in the business of construction procurement and has experience with construction procurement under similar provisions. See Title 35.

Recommendation 2: Delete references to commisioner adopting regulations

in (b)(c)(d) and refer to Policy Office.

Sections 36.30.020 and 36.30.020

Recommendation: Delete "construction." Add new section transferring authority to contract for construction of public works for legislature or court system to DOT/PF subject to this act and its regulations.

Comments: The court system and the legislature are not in the business of procuring construction.

Section 36.30.035 [New]

Recommendation: Add new section requiring any grant or appropriation recipient to adopt procedures to govern the procurement of supplies and services that are substantially equivalent to the procedures prescribed by this chapter. Require DOT/PF to contract for construction of any public work for any grant recipient.

Comment: Procurement problems are not limited to state government. If state dollars are spent by others then similar safeguards on procurement with those state dollars should be instituted.

Section 36.30.040

Recommendation 1: Replace (a) with language authorizing policy office to adopt regulations. (See MPC § 2-101 and 2-102).

Comment: See earlier comments.

Recommendation 2: Eliminate discrimination and affirmative action language in (b)(13).

Comment: See comments to Section 1.

Section 36.30.60 (Source MPC § 4-201 & § 4-202)

Recommendation: Provide that policy office has authority to promulgate regulations governing the preparation, maintenance, and content of specifications for supplies, services and construction.

Section 36.30.070 (Source MPC § 8-101; § 8-201)

Recommendation: Provide that Policy Office adopts regulations

Section 36.30.100 (Similar to MPC § 3-201)

Comment: AGC-Alaska supports competitive sealed bidding.

Section 36.30.110

Recommendation: Delete (b) in its entirety.

Comment: Requiring subcontractors to be named in the bid and requiring inclusion of evidence of each subcontractor's valid Alaska business license demonstrates a clear lack of understanding of the construction bid process. The inclusion of such a provision will lead to increased costs and increased litigation.

Prior to selection of a subcontractor a primary contractor must evaluate a bid and the scope of work quoted in the sub-bid. the prime must then check on insurance; bonding capability and qualification of the subcontractor; and finally the prime must insure that the labor policy is compatible with any labor agreements to which the prime contractor may be signatory. All this takes time. Bids are not recieved until shortly before bid time; and the activity level at a prime contractor's office while receiving this information (mostly by phone) is phenomenal.

Requiring the prime contractor to list subs prior to investigation and evaluation of the sub could create contractual obligations between a prime and a sub where later investigation or evaluation by the prime contractor would result in selection of a different subcontractor.

This proposed requirement is similar to requiring the purchasing officer to award a contract within two minutes of opening the bids.

The requirement for evidence of valid Alaska business licenses for subcontractors to be submitted with the bid is unreasonable. Some specialty subcontractors may not be available locally. In any event the requirement is hardly consistent with taking bids over a phone.

Section 36.30.120 (Similar to MPC § 301)

Recommendation: Amount of security and waiver of security should be set by the Policy Office not the commissioner. All regulations should come from the Policy Office. Since this is applicable to construction only, put this section in a separate article.

Comments: To avoid confusion and emphasize the unique nature of construction procurement a separate article should exist, as in the MPC, for construction. See MPC Article 5.

Section 36.30.130 (Source MPC § 3.202(3))

Recommendation: Require publication in a statewide newspaper of general circulation calculated to reach prospective bidders.

Section 36.30.150 (Source MPC § 3-202(6))

Comment & Recommendation: AGC-Alaska fails to understand the qualifying language "unless the delay was due to an error of a state employee directly responsible for opening the bids" contained in (a). This may lead to increased bid protests and accordingly we recommend deleting the language.

Section 36.30.170 (Source MPC § 3-202(7))

Recommendation 1: Delete lines 8 through 12 of page 13.

Comment: Conform to MPC.

Recommendation 2: Subsection (e) is unclear and the line between responsiveness and responsibility is blurred by the language. Delete (e) and define "responsive" and "responsible" in accordance with MPC § 3-101(6) & (7).

> (6) Responsive Bidder or Offeror means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.
>
> (7) Responsive Bidder means a person who has submitted a bid which conforms in all material aspects to the Invitation for Bids.

Section 36.30.190 & 36.30.200

Comment: AGC-Alaska agrees that multistep sealed bidding and competitive sealed proposals may not be used for construction.

Section 36.30.300

Recommendation: Add the following language "sole source procurements may not be used for construction."

Section 36.30.350 (Similar to MPC § 3-301).

Section 36.30.360 (Similar to MPC § 3-401).

Section 36.30.370 (Similar to MPC § 3-501).

Section 35.30.380 (Similar to MPC § 3-502).

Section 36.30.390 (Similar to MPC § 3-503).

Section 36.30.400 (Similar to MPC § 3-403)

Section 36.30.410 (Similar to MPC § 3-601)

Section 36.30.420 (Similar to MPC § 3-602)

Section 36.30.430 (Source MPC § 5-401 and § 6-101)

Comment and Recommendation 1: Many of the provisions of this section relate only to construction contracts. To avoid confusion the MPC separated construction contracts and supply and service contracts. See MPC § 5-401 and § 6-101. AGC-Alaska recommends following the separation utilized by the MPC.

Recommendation 2: Delete (5) pg. 25 ln. 1-3.

Comment: See comments to Section 36.30.110.

Section 36.30.440 (Source MPC § 5-401 and § 6-101)

Comment: Subsection (a)(5) contains an inappropriate designation of the commissioner and is inconsistent with legal remedies contained in Section 36.30.620, et seq. Under Section 440 the commissioner makes the unilateral determination if there is no mutual agreement and then makes the final decision on any appeal pursuant to Section 680. Due process appears to be lacking.

Section 36.30.470 (Similar to MPC § 5-402)

Comment and Recommendation: This provision relates only to construction contracts and should be in a separate article for construction procurement as in the MPC.

Section 36.30.460 (Similar to MPC § 7-101)

Section 36.30.560 (MPC § 9-101)

Section 36.30.565 (MPC § 9-101)

Comment: Subsection (a) may increase rather than decrease litigation of bid protests because determinations will have to be made concerning whether the impropriety was "apparent" before the bid opening. A similar increase in litigation may result from the insertion of subsection (c).

Section 36.30.580

Recommendation: Advise protestant of right to appeal.

Section 36.30.590

Recommendation 1: Utilize Procurement Appeals Board rather than the commissioner. See MPC § 9-501.

Recommendation 2: 5 days to file an appeal is too short; a minimum of 10 is recommended.

Section 36.30.620

Recommendation: 30 days to issue decision is sufficient time.

Section 36.30.625, 630, 632, 635, 645, 650, 660, and 670

Comment: Where in the work draft does the purchasing officer make the decision which is appealed in this section?

Recommendation: Authority needs to be given to someone to resolve contract controversies. See MPC § 9-103. Appeal can then be made from this decision. Appeal should be to Procurement Appeals Board. (See MPC § 9-103)

Section 36.30.630-650

Recommendation 1: Appeal should be to Procurement Appeals Board.

Recommendation 2: Add remedies, interest. and waiver of sovereign immunity sections contained in MPC § 9-202; § 9203, § 9-301, and § 9-401.

Section 35.30.900

Recommendation: Eliminate subsection (1).

Comment: See comments to Section 36.30.035.

Alaska Chapter

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
HEADQUARTERS • 3201 Spenard Road • Anchorage, Alaska • P.O. Box 4-2500 • Anchorage, Alaska 99509
BRANCH OFFICES • Fairbanks • Juneau • Soldotna — William E. Schneider, Executive Director

TESTIMONY OF

ALASKA CHAPTER

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

TO

SENATE JUDICIARY COMMITTEE

ON

PROCUREMENT PRACTICES AND PROCEDURES
SB 341

FEBRUARY 15, 1986

AGC-Alaska on behalf of our over 800 member firms appreciates the opportunity to comment on SB 341. Following our general comments are some more specific comments relating to particular sections of the bill.

In general, we applaude the legislature and drafters for using "The Model Procurement Code for State and Local Governments" published by the American Bar Association as a basis. The thousands of hours and different perspectives represented by that document cannot easily be duplicated. For the same reason deviations from the "Model Procurement Code" (MPC) should be scrutinized.

One deviation from the MPC of great concern to the AGC is the required naming of subcontractors at bid submittal. The impact of this proposed requirement would be substantial. Accordingly, we have addressed our concerns on that issue separately.

Another major deviation from the MPC is the elimination of the State Procurement Policy Office. As stated in the MPC commentary at page 9:

> A major conceptual basis of the Code, the separation of policymaking and operational functions, is best achieved through the establishment of an independent policy body such as the [State] Procurement Policy Office suggested above. This Section provides for placement of the Policy Office either as an independent entity within the executive branch of the government or within an existing department of government such as General Services, Finance, or Administration. Placement in the executive branch as a separate entity is the preferred arrangement as it would further ensure the professional integrity of this important

policymaking body, and appropriately elevate the entire procurement process in the public sector.

Under the MPC it is the Policy Office's responsibility to promulgate regulations. Under the bill the Commissioner of Administration, i.e. central Procurement Officer will promulgate regulations.

The principal of vesting the regulatory function in a policy office without line authority over individual procurement actions is fundamental to the MPC. Elimination of the Policy Office no longer separates the policy making from the day to day operation of the procurement process.

Perhaps the most important aspect of procurement requiring the separation of procurement policy from day to day procurement operation is the promulgation of regulations providing for adjustments in price, time of performance or other contract provisions. Utilization of a state policy office can insure the development of fair construction contract provisions. Fair construction documents avoid litigation and encourage reputable contractors to bid projects. Often times, tunnel vision by unenlightened public procurement officials bring about contract provisions which unfairly allocate risk and increase litigation between the parties.

In drafting the MPC the drafters obviously discussed this problem and arrived at the solution expressed in MPC § 2-101 and § 5-401. Requiring the Procurement Policy Office to address contract provisions relating to changes, variations in estimated quantities and different site conditions provides for broad input on this important policy related contract provision. Accordingly,

AGC-Alaska recommends the creation of a Procurement Policy Office comprised of three members who have demonstrated sufficient business and professional experience. (See MPC § 2-101(1) & (2) [Alternative A].

Our second comment relates to the overall structure of the bill. The MPC recognizes construction as unique to the procurement process and devotes a separate article (Article 5) to the procurement of construction and related services. The bill does not devote a separate article to construction; instead SB 341 normally prefaces an article as relating only to construction.

This is a mere difference of opinion in drafting techniques; however, the special attention devoted to construction procurement by the drafters of the MPC is lost in SB 341.

One other broad area bears discussion at this time. A significant portion of public construction in Alaska is procured with state dollars by political subdivisions of the state and other "grant" recipients. AGC-Alaska strongly recommends that this committee propose legislation requiring any grant or appropriation recipient to utilize procurement practices consistent with this Procurement Practices and Procedure Act and its regulations.

Section by Section Comments and Recommendations

Section 1 (Similar to MPC § 1-101)

Recommendation: Eliminate Subsection (9). [p. 2 ln. 1-5]

Comments: AGC-Alaska fails to understand the rationale for the inclusion of affirmative action language in a procurement act. AGC-Alaska is opposed to any special preference procurement program based on race, size, sex, residency or any other factor irrelevant to the contractors ability to perform. The best way to ensure discriminatory free procurement is competitive sealed bidding. Any other method allows for possible discrimination.

Section 36.30.005 (Similar to MPC § 2-301)

Recommendation: Modify by providing for a "Policy Office" as in the MPC additionally the bill should be modified to reflect this fundamental change.

Comments: See previous general comments on "Policy Office"

Section 36.30.015

Recommendation: Delete (e)

Comment: The Alaska Railroad Corporation should abid by the same procurement code and regulations as the rest of the state.

Sections 36.30.020 and 36.30.030

Recommendation: Delete "construction." Add new section transferring

authority to contract for construction of public works for legislature or court system to DOT/PF subject to this act and its regulations.

Comments: The court system and the legislature are not in the business of procuring construction and the function should be transferred to DOT/PF. This will avoid arguments over the "substantial similarity" of procedures adopted by legislative counsel or the Supreme Court.

Section 36.30.035 [New]

Recommendation: Add new section requiring any grant or appropriation recipient to adopt procedures to govern the procurement of supplies and services that are substantially equivalent to the procedures prescribed by this chapter. Require DOT/PF to contract for construction of any public work for any grant recipient.

Comment: Procurement problems are not limited to state government. If state dollars are spent by others then similar safeguards on procurement with those state dollars should be instituted.

Section 36.30.110

See separate comments.

Section 36.30.130 (Source MPC § 3.202(3))

Recommendation: Require publication in a statewide newspaper of general circulation calculated to reach prospective bidders.

Section 36.30.160 (Source MPC § 3-202(6))

Comment & Recommendation: AGC-Alaska fails to understand the qualifying language "unless the delay was due to an error of a state employee

directly responsible for opening the bids" contained in (a). This may lead to increased bid protests and accordingly we recommend deleting the language.

Section 36.30.190 & 36.30.200

Comment: AGC-Alaska contests that multistep sealed bidding and competitive sealed proposals should not be used for construction. The prohibition should be stated in the document.

Section 36.30.300

Recommendation: Add the following language "sole source procurements may not be used for construction."

Comments: Fairness and public accountability requires competitive bidding.

Section 36.30.430 (Source MPC § 5-401 and § 6-101)

Comment and Recommendation 1: Many of the provisions of this section relate only to construction contracts. To avoid confusion the MPC separated construction contracts and supply and service contracts. See MPC § 5-401 and § 6-101. AGC-Alaska recommends following the separation utilized by the MPC.

Section 36.30.580

Recommendation: Advise protestant of right to appeal.

Section 36.30.590

Recommendation 1: Utilize Procurement Appeals Board rather than the

commissioner. See MPC § 9-501.

Recommendation 2: 5 days to file an appeal is too short; a minimum of 10 is recommended.

Section 36.30.620(b)

Recommendation: 30 days instead of 90 days to issue a decision.

Comment: 30 days to issue decision is sufficient time.

Section 36.30.625

Recommendation: Extend time to appeal to 10 days.

Comment: A reasonable time to file an appeal is 10 days.

Section 36.30.630-650

Recommendation 1: Appeal should be to Procurement Appeals Board.

Recommendation 2: Add remedies, interest. and waiver of sovereign immunity sections contained in MPC § 9-202; § 9203, § 9-301, and § 9-401.1

ProcureBill.1d

LIFE CYCLE COSTING

"THE OTHER SIDE OF THE COIN"

Submitted to:

Senate Judiciary Committee
State of Alaska

MARTIN J. JINDRA
DRESSER INDUSTRIES, INC.

March 10, 1986

	UNIT 1	UNIT 2	UNIT 3	UNIT 4	UNIT 5
Price	125,000	112,000	135,000	98,000	91,000
Est. Market Value	-68,750	-35,840	-40,500	-19,600	-13,650
Owning Cost	56,250	76,160	94,500	78,400	77,350
Price	125,000	112,000	135,000	98,000	91,000
PV of Est. Mkt. Value*	-42,206	-22,002	-24,863	-12,032	-8,380
PV Owning Cost	82,794	89,998	110,137	85,968	82,620
Per Hour Op. Costs	55.30	55.50	56.21	56.29	57.18
Availability	900 Hrs/Yr	900 Hrs/Yr	900 Hrs/Yr	900 Hrs/Yr	900 Hrs/Yr
Per Year Cost	49,770	49,950	50,589	50,661	51,462
10 Year Cost	497,700	499,500	505,890	506,610	514,620
Total Own. & Op. Costs	580,494	589,498	616,027	592,578	597,240
Opportunity Costs:					
Excess Price Paid:	34,000	21,000	44,000	7,000	0
x 2.1589**	73,402	45,336	94,991	15,112	0
Excess + Interest	73,402	45,336	94,991	15,112	0
Less Excess	-34,000	-21,000	-44,000	-7,000	-0
Opportunity Costs	39,402	24,336	50,991	8,112	0
Total Costs:***					
Owning & Op. Costs	580,494	589,498	616,027	592,578	597,240
Opportunity Costs	39,402	24,336	50,991	8,112	0
	619,896	613,834	667,018	600,690	597,240
Disadvantage	(22,656)	(16,594)	(69,778)	(3,450)	(0)

NOTES:

* Present value calculated by discounting future estimated market value by the factor of .6139. This assumes an inflation rate of 5% over the 10 year period.

** The factor of 2.1589 is derived by assuming an investment interest rate of 8%, compounded annually over the 10 year time period. The excess amount of money spent for the higher priced machine is multiplied by the compounding factor to determine the growth of the money. The excess amount of money spent (or principal) is subtracted out to determine the potential interest foregone.

*** The total costs are the sum of (a) the purchase price less the present value of the estimated resale; and (b) the total operating costs over the 10 year time period. These sums represent the actual cash outlays to the public agency, not net profit potential. Clearly, the alternative which costs the most puts the public agency at the greatest disadvantage.

MJJ:sc
3-6-86

Alaska State Legislature

Representative Mike Davis

Pouch V
Juneau, Alaska 99811
(907) 465-4930/4941

Interim Office:
P.O. Box 81435
Fairbanks, Alaska 99708

TO: Senator Pat Rodey, Chairman, Judiciary Committee

FROM: Rep. Mike Davis

DATE: March 6, 1986

RE: SB 341-An Act relating to state procurement practices and procedures; and providing for an effective date.

Attached please find a letter originally addressed to Senator Jan Faiks who at the time was working on the draft for wha would become SB 341, the procurement bill. The letter is from a constituent of mine who also forwarded a copy to my office.

The issue that Mr. Miller brought up, that the lowest bidder may not be the best qualified to perform a very specialized and potentially dangerous service, is a valid one. I think it unfortunate that this was not addressed when the bill was initially drafted.

I hope that you will consider Mr. Miller's comments when the Senate Judiciary Committee takes up this bill. I would encourage you to consult with some of the knowledgeable professionals in the Alaska Department of Fish and Game. I am certain they will concur that there is a need for flexibility in the procurement of this type of service.

CARIBOU AIR SERVICE

DENNIS C. MILLER

P.O. Box 2648
Fairbanks, AK 99707 (907) 479-2189

Senator Jan Faiks
1024 W. 6th Ave Suite 305
Anchorage, AK 99501

December 16, 1985

Dear Senator Faiks,

On October 30, 1985, I spoke to Jens Zehbe about a serious reservation I have about the draft state procurement practices bill. I wanted to share these concerns with you, and to document them via memos written within the Alaska Department of Fish and Game.

I spoke to Jens about the critical need to provide an exception within the procurement bill for Alaska Department of Fish and Game technicians and biologists when they are procuring specialized aircraft charter services for fish and wildlife survey work. Being forced to fly with the lowest bidder is an untenable and potentially life endangering situation.

It is my understanding that ADF&G biologists have the highest fatality rate of any group of state employees. This is a result of aircraft accidents while performing sometimes hazardous survey work. The enclosed memos speak effectively to that point, and I urge that you personally take the time to read each of them carefully. We are not talking here about state offices buying office machines, or about a paving contract - human lives are literally at stake, In the draft procurement bill I can find no exception or allowance for this reality.

I am a professional pilot. Caribou Air Service was formed three years ago, with myself as the only pilot. More than 90% of my business is flying highly specialized fish and wildlife survey work for state and federal agencies. I have been fortunate enough to be one of the very few pilots(less than five) in the Interior with whom ADF&G biologists feel comfortable flying. As a pilot, I can certainly confirm that much of the wildlife survey flying I do is indeed potentially life engdangering. I know if I were the passenger on many survey flights I would refuse to participate unless I could fly with one of those few pilots in the Interior I knew specialized in such work.

As some of the enclosed memos point out, in most instances forcing biologists to fly with the lowest bidder would in reality cost the state more money, to say nothing of the safety factors involved. An example: Last week I flew a moose survey where we located 30 radio collared moose. Because of my years of radio tracking experience I was able to fly directly to each animal.

The flight took 6.5 hours or $806.00 at my current rate of $124.00/hr. Lets assume the biologist was forced to fly with a low bidder at $120.00/hr. I can guarantee you, and any biologist will confirm, that an inexperienced survey pilot would take at least 2 minutes longer per moose, resulting in a flight of 7.5 hours at $120.00/hr, or $900.00 total. The current draft procurement bill would have cost the state an additional $94.00 and potentially put the biologist's life in jeopardy. On a spawning salmon survey, missing one bend in a stream would seriously compromise the data being collected, and would mean an additional 1-2 minutes to re-fly the bend, and there are <u>hundreds</u> of bends on one typical flight.

As for myself and Caribou Air Service, I am making a living(albeit a meager one) providing highly specialized wildlife survey work. I plan to continue to be available for this work for the forseeable future. I cannot afford, however, to be forced into a "rate war" to make sure I am the lowest bidder to comply with a state procurement code that doesn't provide for the facts and emotions stated herein and in the enclosed memos.

Those very few of us who specialize in wildlife survey flying are in business for ourselves. When a biologist calls for a flight he knows who he will get for a pilot. There is no pilot turnover when you are in business for yourself, by yourself. As you may be aware, there is an extremely high rate of pilot turnover in the air taxi business in general, certainly a contributing factor to the high accident rate in Alaska. Forcing ADF&G biologists to expose themselves to inexperienced pilots because of a low bid restriction is ill advised at best, life threatening at worst.

It is imperative that there be an exception for aerial survey work in the state procurement bill. As stated above and in the enclosed memos, it is easy to document and confirm that money is actually saved by flying with experienced survey pilots, even if their hourly rates may be a few dollars higher. We must be allowed to stay in business to provide critical, highly specialized wildlife survey flying. Furthermore, ADF&G biologists must be allowed to choose their own pilots, unrestricted by a procurement code that in reality can endanger their lives and at the same time cost the state more money.

This past year you spent a considerable amount of time on the impeachment proceedings. A man's career was at stake. Now you are dealing with an issue where human lives are potentially at stake. An exception must be made in the procurement bill allowing ADF&G bilogists to choose their own pilots for critical survey work.

I am sure you are inundated with memos in the course of your work. I urge you to take whatever time is necessary to read the enclosed, however. You may contribute to saving a state employee's life.

If I can provide any more information, please contact me.

Sincerely,

Dennis Miller

cc: Representative Mike Davis
Don Collingsworth, Commissioner, ADF&G
Dick Bishop, Regional Supervisor, ADF&G

ETCA
The Employment and Training Center of Alaska
A Rehabilitation Industry

2330 Nichols Street
Anchorage, AK 99508-3495
(907) 279-6617

March 3, 1986

Senator Rodey
Attn: Suzanne LaPierre
P. O. Box V
Juneau, AK 99811

Dear Suzanne:

Thank you for meeting with me to discuss Senate Bill 341 and its potential impact on "Sheltered Workshops" (which we hope will eventually be referred to as "qualified non-profit agencies for persons with disabilities").

Overall, the information exchange I had with you and others was most beneficial. You'll note that I've included a much more thorough batch of "follow-through" literature for your perusal.

Most specifically, I refer you to a new piece of information on the kind of procedures we would like to see used for administering the non-bidding clause for qualified non-profits.

After spending some time with a few administrative officials, it occurred to me that I needed to do some research on various other state laws and procedures for administering a "non-bid" process.

And so, the fruits of my labor are attached! Do hope you can have some influence with the Administrators who will be putting the procedures/regulations together. I suspect that I had very little influence in that area. Now I understand why you encouraged me to make very specific recommendations!

Again, thank you for your time. I am anxious to see the end results of this Bill. If it could put a few more disabled folks to work, we'd all be greatly appreciative.

In the meantime, if you could keep me posted on the status of the Bill as it passes through committees, goes to Public Hearing, etc., I would be most pleased. Feel free to give me a call.

Best,

Judith E. Berger
Marketing Director

JEB:bc

ETCA
The Employment and Training Center of Alaska
A Rehabilitation Industry

2330 Nichols Street
Anchorage, AK 99508-3495
(907) 279-6617

REGARDING SENATE BILL 341

"An Act relating to State Procurement Practices," Section 36.30.100, General Policy, (B), (4); "Competitve Sealed bidding is not required for the purchase of products or services manufactured or provided by a sheltered workshop."

I respectfully submit that the following procedures/regulations be considered for inclusion into the text of Senate Bill 341.

*(Idaho "State Use Law"
67-2319
Idaho Council for Purchases)*

1. The Department of General Services and Supply shall designate a procurement Officer or Committee whose responsibility it will be to promote the purchase by state agencies of products and services produced by qualified non-profit agencies for persons with disabilities.

(Oregon Law .279.845, (2))

2. The Department of General Services and Supply shall establish and publish a list of sources or potential sources of products produced by any qualified non-profit agency for persons with disabilities and the services provided by any such agency which are suitable for procurement by public agencies pursuant to (Alaska Statute 37.05.230/or Senate Bill 341). This procurement list and revisions thereof shall be distributed to all public procurement officers.

(Washington Law (RCW-3923.005, 39.23.020, 43.19.520, 43.19.530)

3. The Fair Market Price of a service or product provided by a qualified non-profit agency for persons with disabilities will be determined by the Department of General Services and Supply. To determine the Fair Market Price of such products or services, General Services and Supply shall use the last comparable bid on the products and/or services or in the alternative, the last price paid for the products and/or services. The increased cost of labor, materials and other documented costs since the last comparable bid or the last price paid are additional cost factors which shall be considered in determining Fair Market Price. Upon establishment of the Fair Market Price as provided for in this section, General Services and Supply is hereby empowered to negotiate directly with

the qualified non-profit agency for persons with disabilities for the purchase of the products and services.

(National Industries for the Severely Handicapped/Fair Market Pricing Policies, Sept., 1985)

A. Establishing Fair Market Prices on Products.

1. The initial price for a product which has been recently procured by General Service and Supply shall be the median of those bids for that product which are not more than 35% above the award price, or the award price increased by 5%, whichever is greater. When the qualified nonprofit agency for persons with disabilities is a current or most recent contractor for the product, the initial price shall be the average of (1) the median of the bids which are not more than 35% above the award price and (2) the award price, or the award price increased by 5%, whichever is greater.

2. The initial price proposed by the qualified non-profit agency for persons with disabilities for a product which has not been recently procured by the General Service and Supply, but which is comparable to a product that the General Service and Supply has recently procured or to one sold commercially, shall be evaluated using the bids for the comparable General Service and Supply product or the prices for the comparable commercial product, adjusted to reflect the differences between the products being compared. Commercial prices will be used for evaluation only when there are no recently comparable products procured by the General Service and Supply.

3. The initial price for a product which is significantly different from products procured by the General Service and Supply or those sold commercially will be based on the qualified non-profit agency for persons with disabilities' costs to produce the product.

B. Establishing Fair Market Prices on Services.

1. The initial price for a service, when the service is currently being procured competitively, shall be the median of those bids on the most recent solicitation for the service which are not more than 35% above the award price, or the award price increased by 5%, whichever is greater. When the qualified nonprofit agency for persons with disabilities is a current contractor for the service, the initial price shall be the average

of (1) the median of the bids which are not more than 35% above the award price and (2) the award price, or the award price increased by 5%, whichever is greater.

2. *The price determined in 1. above shall be adjusted to reflect any differences in wage rates, any changes in scope of conditions, and any limitations prescribed by regulations.*

3. *The price for a service, when there is no current procurement of the service by General Service and Supply, shall be based on the cost to provide the service.*

(Oregon Law 279.845.(2))

4. In furthering the purposes of (Alaska Statute 37.05.230/Senate Bill 341), it is the intent of the Legislative Assembly that there be close cooperation between the department, public contracting agencies and qualified non-profit agencies for persons with disabilities. The department, on behalf of public contracting agencies and qualified non-profit agencies for persons with disabilities is authorized to enter into such contractural agreements, cooperative working relationships or other arrangements as may be determined to be necessary for effective coordination and efficient realization of the objectives of (Alaska Statute/Senate Bill 341) and any other law requiring procurement of products or services.

A. *Legal and Contractural remedies for non-competitive bidders will be in accordance with the laws governing competitive bidders and no rights are waived by qualified non-profit agencies for persons with disabilities with regards to grievance procedures, protests, appeals, hearings, or controversies; et al.*

Rationale for including these procedures/regulations are based on the various laws sited at the beginning of each regulation,

The laws of Oregon, Idaho and Washington all direct that qualified non-profit agencies for persons with disabilities be given "preference" for bidding on state procurement activities; some require a "set aside" of a certain portion of the work; and Florida requires all work go to Sheltered Workshops first.

The breadth of regulations range from a special government council being set up to oversee and administer all state procurement activities to indicating full participation by every procurement officer in their state.

To our knowledge, the recommendations here would accomplish the intent of our present law (Alaska Statute 37.05.230) and would greatly enhance the effectiveness of the pending Senate Bill 341.

Thank you for your consideration.

Judith E. Berger
Marketing Director

JEB:bc

ETCA
The Employment and Training Center of Alaska
A Rehabilitation Industry

2330 Nichols Street
Anchorage, AK 99508-3495
(907) 279-6617

REGARDING SENATE BILL 341

"An Act relating to State Procurement Practices", Article 2, Competitive Sealed Bidding, Section 36.30.100, General Policy, (B) Item (4) and (C) (Page 9, Lines 2 - 3, and Lines 8 - 12).

I respectfully submit that the following changes be made on the pending legislation, Senate Bill 341:

1. *Page Nine (9), Line Three (3):*

   DELETE: "Sheltered Workshop"
   ADD: "Qualified Non-Profit Organization".

2. *Page Nine (9), Lines Eight (8) through Twelve (12),*

   DELETE: Entire definition of sheltered workshop.
   ADD: (C) A qualified non-profit organization means a program serving persons with physical or mental disabilities that constitute substantial handicaps to employment with the specific objective increasing employment opportunities for these people.

Rationale for making these changes are as follows:

Exclusive focus toward sheltered workshops, defined as a "place", is discrepant with federal law and current employment initiatives for persons with substantial handicaps. The current federal initiative is toward integrated employment outside the sheltered workshop setting.

Public Law 98-527;, the Developmental Disabilities Act of 1984, identifies employment-related activities as a priority area through 1987, and includes a specific right to employment in

the most integrated setting for persons with developmental disabilities. President Reagan also charged the Department of Health and Human Services to direct a program to strengthen private sector job opportunities for the severely disabled. Under Commissioner Jean Elder, Ph.D., the "Employment Initiative" is changing the delivery of employment-related services away from places called sheltered workshops to providing these services at locations within the private sector. Agencies serving persons with severe disabilities definitely need work from the State to provide meaningful employment. However, this work will not necessarily be done at a place called a sheltered workshop but rather at a variety of locations where workers with disabilities can interact with non-disabled citizens. A good example is janitorial services. These cannot be performed at the sheltered workshop; rather, a crew of workers with disabilities organized by the non-profit agency must go to the State buildings to provide these services.

E-T-C-A
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Judith E. Berger
Employment and Training
Center of Alaska
2330 Nichols Street
Anchorage, Alaska 99508
(907) 279-6617

SB 341 PUBLIC HEARING
February 15, 1986, Anchorage, Alaska
Public Testimony

My name is Judy Berger and I am with the Employment and Training Center of Alaska, a sheltered workshop.

First of all, I would like to state that I am completely in support of the entire text of Senate Bill 341. It is refreshing to read a proposed law which is both concise in its language and clear in its intent.

Of particular interest to me is the section under Article No. 2, Competitive Sealed Bidding, General Policy, Sec. 36.30.100, E, Item 4, (Page 8 of the Document), where it is stated that competitive sealed bidding is not required "for the purchase of products or services manufactured or produced by a sheltered workshop."

I heartily support the intention of this exception to normal bidding procedures. It is obvious that our Legislators, and, more specifically, the authors and supporters of this bill, are well informed about both the employment needs of adults with disabilities, and the cost benefits to the State of Alaska when these needs are met through gainful employment as opposed to direct financial aid programs. Clearly, the employment of a disabled individual is preferential to the all encompassing, life-long financial support of a disabled person.

However, I would like to bring to your attention a very specific problem with regard to this pending legislation. If this law is passed, as it is written, the Section on Sheltered Workshops will probably never be utilized. Not because it is a bad law but because the administration will not have clearly defined procedures for administering it.

Let me clarify. As you know, the present Law, Alaska Statute 37.05.230, Section 8, also states that competitive bidding is not required of a sheltered workshop. It is a law that has been on the books now for many years and it is a law that is totally ineffective! Why? Because the administrators, the people from the various departments of government who are in a position to request bids for products and services do not know how to interpret it!

As lawmakers you may take pride in these administrators. They are cautious. They are careful. What does it mean that a Sheltered Workshop does not have to bid on a project? Can an administrator give all the work of their department to a sheltered workshop? Or, are they allowed to give only a certain percentage of their work to a sheltered workshop? Is there a dollar amount attached to the work they give to a workshop. . . say $5,000.00 per year or $25,000.00. . . or $100,000.00 per year? Will administrators be accused of giving too much to a workshop?

Certainly, administrators will not be chastised for giving too little, which has been the case over the years. But, who can blame them for being cautious? If they give a workshop a tiny piece of the pie, who will notice? If they give a workshop a substantial piece of the pie, who will scream?

In all fairness, there have been administrators who have utilized the present statute and sent work to sheltered workshops without competitive bids. But, in almost every instance, that work was sent to the workshop under the following circumstances. The price of the product was low and the turn-around time was immediate. Even under those conditions, the administrator generally felt a little nervous. After all, they realized that they were interpreting the law without the benefit of having procedures by which they could operate. This is clearly risky business! At any time, someone could ask them exactly why they did not use normal bidding procedures, and, without procedures to justify their actions, they could find themselves in very hot water!

Consequently, almost all of our work at The Employment and Training Center of Alaska is acquired through competitive bidding. Fortunately, we have survived the competitive bidding process because we take pride in cost consciousness, and, because we are a non-profit organization, we do not seek the normal profit margins.

However, with the State's economy tightening due to declining oil revenues, we recognize that the market for products and services will grow increasingly more competitive; and, like any other small business in Alaska, we may very well suffer the consequences. The difference is, although we are very much like a small business, we are so with a pertinent social obligation.

We employ people with disabilities. We employ the disadvantaged - the very people who, without our support, are likely to return to institutions at a cost to the people of Alaska which is approximately ten (10) times that of our vocational/employment services at The Employment and Training Center of Alaska; or, more precisely, at a cost of almost $100,000 per year, per individual, at an institution in Alaska as opposed to $10,000 per year, per individual, at The Employment and Training Center of Alaska.

Clearly, it benefits the State to allow workers with disabilities to earn a portion of their incomes through non-competitive bidding procedures. Besides eliminating the costs for institutionalizing these individuals on a State level, revenues are realized on a Federal level. Employment means taxes paid to the Federal government and diminished Social Security payments to people with disabilities.

The problem is, who is going to see to it that the intent of the law is realized? As lawmakers, it is incumbent upon you to not only make the law, but at least to some degree, interpret it for the benefit of our administrators.

Therefore, I request that either you add more specific guidelines to the section of Senate Bill 341 regarding Sheltered Workshops, or that procedures for utilizing the law be made clear to the administrators who will eventually interpret and decide the circumstances under which a Sheltered Workshop may actually receive work from the State of Alaska without going through formal bidding procedures.

Thank you.

Specific Recommendations: (See attached).

Respectfully submitted,

Judith E. Berger
Marketing Director

JEB:bc

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A Rehabilitation Industry

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The Employment and Training Center of Alaska (ETCA) is in complete support of the Governor's Council for the Handicapped and Gifted's recommendations to the Fourteenth Alaska Legislature as specified in their 1986 Priority Services information pamphlet.

Of particular importance to The Employment and Training Center of Alaska is the Council's recommendation for FY87 which "supports inclusion of the designated grants in the base operating budget as well as increases for vocational, residential, and family support services, and a cost of living adjustment for the community service providers. (Emphasis added). These community service increases should be offset by cost-savings realized by reduction of a unit at Harborview in both the current and FY87 fiscal years." See "Cost Benefit" breakdown below:

Recommended FY87 increases impacting ETCA:

Vocational Services	*281.6*
Cost of Living Increase	*273.9*
FY87 Total	*555.5*

COST/BENEFIT
COMMUNITY-BASED VOCATIONAL SERVICES

COST OF CURRENT PROGRAM (Employing 106 workers with disabilities)	*$ 911,025*
LESS FEDERAL TAXES, FICA (Paid back to the Government)	*$ (39,269)*
LESS SUPPLEMENTAL SOCIAL SECURITY BENEFITS (Reduced to the worker as a result of employment)	*$ (31,200)**
TOTAL PUBLIC COST OF CURRENT PROGRAM	*$ 840,556*
TOTAL COST OF ALTERNATIVE PROGRAM (Harborview, at $100,000 per person)	*$10,600,000*
LESS TOTAL PUBLIC COST OF CURRENT PROGRAM	*$ (840,556)*
TOTAL PUBLIC SAVINGS (For employing 106 workers with disabilities)	*$ 9,759,444*
FINANCIAL BENEFIT TO WORKER WITH DISABILITY (Discretionary income injected into local economy)	*$ 246,330*

**Conservative figure, only reflects those workers no longer receiving benefits as result of employment. Data collection currently in progress to document reductions to workers still receiving some benefits.*

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Patrick M. Rodey
Senator

Alaska State Legislature

Senate

1024 W. 6th Avenue, Suite 308
Anchorage, Alaska 99501
(907) 276-6731

During Session:
Pouch V
Juneau, Alaska 99811
(907) 465-3717

March 6, 1986

Ms. Marsha Trump
Office of Senator Ted Stevens
U.S. Senate
Senate Hart Office Building
Room 522
Washington, D.C. 20510

Re: Status of ASHA under Alaska SB 341

Dear Ms. Trump:

Pursuant to our telephone conversation of earlier today, enclosed please find the following: a copy of SB 341 clipped at the relevant sections; the Alaska Supreme Court decision in ASHA v. Dixon, 496 P.2d 649 (1972); and a June 9,1983 Attorney General's opinion construing AS 18.55.110 to exempt ASHA from the requirements of Alaska law if compliance would jeopardize its federal funding.

I hope these documents are responsive to your concerns. If I can be of any further assistance to you, please do not hesitate to call me.

Very truly yours,

Suzanne S. La Pierre
Senate Judiciary Counsel

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : CS for SB 341
Title : State Procurement Code

Sponsor : Senate Judiciary Committee
Requestor : _____
Date of Request : _____

FISCAL DETAIL

Agency Affected : Env. Conservation
BRU : Administration

Components : Administrative Services

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		37.9	39.4	41.0	42.6	44.4
TRAVEL		5.0	5.2	5.4	5.6	5.9
CONTRACTUAL		5.0	5.2	5.4	5.6	5.9
SUPPLIES						
EQUIPMENT		1.5	--	--	--	--
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		49.5	49.8	51.8	53.8	56.2
CAPITAL		--	--	--	--	--
REVENUE		--	--	--	--	--

FUNDING : (Thousands of Dollars)

GENERAL FUND		49.5	49.8	51.8	53.8	56.2
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME		1	1	1	1	1
PART-TIME		--				
TEMPORARY		--				

ANALYSIS : Attach a separate page if necessary

This bill codifies many procedures and practices presently addressed in the Administrative Manual, a variety of memos and procedures and ad hoc decisions. Practices, particularly for professional services contracts,

Prepared by : W.A. Publicover — Phone : 465-2676
Division : Administrative Services — Date : 1-30-86

Approved by Commissioner : Bill Ross — Date : 3-22-86
Agency : Environmental Conservation

Distribution (by Agency preparing fiscal note) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

10/25/85

Position Title	No. of Positions	Range/Step	Barg. Unit	Gov.	Approv.	Disapp.
Administrative Assistant II	1	14	GGU			
Time Status / **Staff Months** / **RP Number**	**Location**	**Election District**				
Full / 12 /	Juneau	4				

Type of Expenditure		Amount
1	2	3
Salary	28.4	
Benefits	9.5	
Premium Pay	--	
Other	--	
Total Personal Services		37.9
Travel		5.0
Contractual		5.0
Commodities		
Equipment		1.5
Other		
Total Cost		49.4

Receipt Code	Funding Source		
	Federal Receipts	1002	
	G. F. Match	1003	
	General Funds	1004	49.4
	I-A Receipts	1005	
	Program Receipts	1028	
	CIP Receipts	1061	
	Other		

For B&M Use Only
Key Number __ __ - __ __ - __ __ - __ __ - __ __

Justification

The new State Procurement Code will place tighter controls on contracts for professional services. The Department typically has over 40 active contracts valued at over $2 million. While our professional staff defines the project scope and technical details, the procedural aspects of contracting are dispersed among the divisions. This allows inconsistencies, dilutes accountability, and hampers effective communications with the Department of Administration.

The Administrative Assistant will be the Department's expert on competitive sealed proposals. The position would be the focus for procedural aspects of RFPs, selection, and contract administration. The position will develop and standardize wording, provide a single point link to Department of Administration, advise on alternate procurement methods, maintain a contract tracking system, process payments, chair the contract closing committee, conduct training sessions or arrange for training, monitor the contract approval process, assist in handling protests, arrange official files and record retention schedules and maintain departmental contract procedures. The costs for this position are:

100	salary & benefits	37.9	300	postage for public notices	5.0
200	travel to regional offices to train field staff	5.0	400	Calculator, workstation	1.5

Request For New Position

Agency: Environmental Conservation
BRU: Administration
Component: Administrative Services

Revised Date

FY 87

vary from department to department. This bill and implementing regulations will increase fairness and accountability through uniform requirements for all areas of procurement.

Environmental Conservation regularly has over 40 open contracts worth over $2 million. Presently, we have an Accounting Technician II who works part time on these contracts. He provides technical advice on contract preparation, tracks the contracts through the approval process, processes payments and chairs the contract closing committee. In the past we have had problems with inadequate RFPs, public notices and similar technical flaws. The bill will establish much tighter standards for the technical quality of competitive sealed proposals and will greatly increase the Department's accountability. In particular, the new law will require:

- evidence of Alaska Business Licenses from offerors and subcontractors
- public notice 21 days before opening proposals
- that all contractors on the bidders list must be notified by mail
- that register of offerors must be kept
- determination of responsibility
- notice of intent to award 10 days before the award
- retention of records including each proposal
- that agency procurement officers decide on protested awards and contract controversy

These new responsibilities will increase our workload beyond the present half-time position. New requirements mandate a single source to assist in drafting RFPs and contacts and to act as agency expert in the procedural aspects of professional services contracts.

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: 03-26-86

REQUEST

Bill/Resolution No.: CS for SB 341 (SUD)
Title: An act relating to the State procurement practices and procedures; and providing for an effective date.
Sponsor: Senate Rules
Requestor: Senate Finance
Date of Request:

FISCAL DETAIL

Agency Affected: Administration
BRU: General Services & Supply
Components: Purchasing

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
OPERATING						
PERSONAL SERVICES		222.7	445.5	460.5	475.5	490.9
TRAVEL		10.0				
CONTRACTUAL		189.0	38.0	43.0	38.0	43.0
SUPPLIES						
EQUIPMENT		72.0				
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING						
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		493.7	483.5	503.5	513.5	533.9
FEDERAL FUNDS						
OTHER						
TOTAL		493.7	483.5	503.5	513.5	533.9

POSITIONS:

FULL-TIME		9	9	9	9	9
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Attached

Prepared By: Robert J. Link
Division: General Services & Supply
Phone: 465-2250
Date: 03-26-86

Approved by Commissioner: Eleanor Andrews
Date: 03-26-86
Agency: Department of Administration

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Rev. 11/8/85

1/11D2/0205-05/2

Senate Bill No. 341

FISCAL NOTE ANALYSIS:

A. REGULATIONS-PROCEDURES DEVELOPMENT AND TRAINING = $135,000

The bill will create the need for a complete revision of the chapter 15 of the Administrative Code. This revision will be accomplished through a professional legal services contract. to write the regulations and conduct the required public hearings and is estimated to cost $55,000 (see detail below).

The bill will create the need for a complete revision of the Policy and Procedures Manual for the contracting section of the Division of General Services and Supply. This revision will be accomplished through a professional services contract with an associate attorney. The cost of this contract plus the necessary printing is estimated to be $25,000 (see detail below) .

Since the bill will completely revise the statute, and subsequently the administrative code and the policy and procedures manual of the division, we estimate that it will be necessary to train approximately 310 state employees in the newly required procedures. This will be accomplished through a professional services contract with an instructor plus printing and travel for an amount estimated to be (see detail below) $55,000.

Legal services contract for regulations: $100.00/hr x 83hr/month x 6 months = $50,000.

Para-legal Contract for Policy and Procedures Manual: $40.00/hr x 83hr/month x 6 months = $20,000.

Instructors Contract: Develop training modules at $60/hr x 525hrs = $31,500 + train 310 people x $50/person = $15,500 for a total of $47,000

Printing of the Policy and Procedures Manual: 200 manuals x $25 = $5000

Printing of the Training Materials: 400 training guides x $7.50 = $3000

Travel for public hearings in four locations: 2 people x $385/airfare + $240/perdiem x 4 locations = $5000

Travel for training in four locations: 2 people x

$385/airfare + $240/perdiem x 4 locations = $5000
Total $135,000

The Department of Transportation has also budgeted for training and procedures development. The amounts which they have budget are to provide for procedures and training in the procurement of construction and its related activities. The amounts budget by General Services are for procurements not related to construction.

B. BIDDERS LIST = $45,000

Lists of contractors to provide goods and services must be developed and maintained. These lists must be used and made available for use by all branches of state government. Department of Administration, Division of General Services and Supply is responsible for developing, maintaining, and making the lists available for use by all branches of state government. This will be accomplished through a professional services data processing contract. The cost of this contract is estimated to be a $40,000 one-time contractual expense.

A person who wishes to be on the contractors list must have a valid Alaska business license and pay a biennial fee. The fees will be received and processed by the administrative support staff. We estimate that the cost of receiving and processing the fees will be $5,000. This is equal to 312 hours of an administrative support technicians time at $16.01 per hour. This is a biennial contractual expense since the administrative support staff is budgeted for by purchasing, but once the funds are received they are transferred to the Division of Administrative Services. The Division of General Services and Supply then contracts with the Division of Administrative Services for administrative support. This is a biennial contractual expense of $5,000.

C. Workload Impact = $313,700

The Division of General Services currently has 13 purchasing agents. It is anticipated that the increased work load (see detail description on the New Position Request Form) will require the addition of 9 new purchasing agents.

9 positions x $49,503 salary and benefits, purchasing agent III, range 18A = $445,527 (because the bill goes into effect in January) = $222,763 personal services

increase in FY87. $445,527 personal services increase in FY88. We estimate that this cost will increase each succeeding fiscal year due to merit increases.

Each of the 9 new purchasing agent positions will required by the bill will need approximately $8,000 in equipment (systems furniture and micro-computers). $8,000 x 9 = $72,000. This is a one-time equipment expense.

The cost of printing and advertising bids will increase from $46,100 to $81,120. An annual increase of $35,020.

$46,100 : 704 = $65 x 1248 = $81,120
- $46,100 = $35,020

The cost of mailing bids will increase from $3,800 to $6,739. An annual increase of $2,939.

$3,800 : 704 = $5.40 x 1248 = $6,739
- $3,800 = $2,939

D. SUMMARY

1. Personal Services $222,763

   9 positions x $49,503 salary and benefits, purchasing agent III, range 19A = $445,527 (because the bill goes into effect in January) = $222,763 personal services increase in FY87.

2. Travel $10,000

   Travel for public hearings in four locations: 2 people x $385/airfare + $240/perdiem x 4 locations = $5000

   Travel for training in four locations: 2 people x $385/airfare + $240/perdiem x 4 locations = $5000

3. Contractual Services $189,000

   Legal services contract for regulations: $100.00/hr x 83hr/month x 6 months = $50,000.

   Para-legal Contract for Policy and Procedures Manual: $40.00/hr x 83hr/month x 6 months = $20,000.

   Instructors Contract: Develop training modules at $60/hr x 525hrs = $31,500 + train 310 people x $50/person = $15,500 for a total of $47,000

   Printing of the Policy and Procedures Manual: 200 manuals x $25 = $5000

   Printing of the Training Materials: 400 training guides x $7.50 = $3000

   Data processing contract for bidders List = $40,000

   Maintenance secretarial support of bidders list = $5,000.

   The cost of printing and advertising bids will increase from $46,100 to $81,120. An annual increase of $35,020. for an FY 87 (6 months) of $15,510.

   The cost of mailing bids will increase from $3,800 to $6,739. An annual increase of $2,939 for an FY 87 (6 months) amount of $1470.

4. Equipment $72,000

   Equipment for the 9 new purchasing agent positions will be $8,000 x 9 = $72,000

Position Title	No. of Positions	Range/Step	Barg. Unit	Gov.	Approv.	Disapp.
Purchasing Agent III	9	18A	GGU			
Time Status	**Staff Months**	**RP Number**	**Location**	**Election District**	**Leg.**	
Full-time	6		Juneau/Anch			

Type of Expenditure		Amount
1	2	3
Salary	168,106	
Benefits	54,657	
Premium Pay		
Other		
Total Personal Services		222,763
Travel		
Contractual		
Commodities		
Equipment		72,000
Other		
Total Cost		294,763

Receipt Code	Funding Source		Amount
	Federal Receipts	1002	
	G. F. Match	1003	
	General Funds	1004	
	I-A Receipts	1005	
	Program Receipts	1028	
	CIP Receipts	1061	
	Other		

For D&M Use Only
Key Number ___ ___ - ___ ___ - ___ ___ - ___ ___ - ___ ___

Justification

Sec. 36.30.300

Under the new bill goods and services may be procured without competitive sealed bids only after a written determination has been made by the commissioner that there is only one source for the required goods or services. Current law permits the commissioner to limit bid solicitation or to waive bidding requirements when a finding is made that it is in the best interest of the State to do so.

We estimate an average of 680 acquisitions per year are being purchased under the bid waiver provision of the current law. Purchases made under a bid waiver require 20 percent of the work of a purchase made under a competitive sealed bid.

For planning purposes, we consider one average competitive sealed bid to be equal to one Work Unit and five bid waivers to be one Work Unit. During the past fiscal year the Division of General Services & Supply processed 704 competitive sealed bids (704 Work Units) and 680 bid waiver requests (680 ÷ 5) = 136 Work Units). The sum of these activities equals 840 Work Units for the division or 60 Work Units per year for each of 14 purchasing agents. [704 + 136 (680 ÷ 5) = 840 ÷ 60 = 14] Since this data base was compiled the staff has been reduced by one (1) position to a total of 13 purchasing agents.

Of the bid waivers sampled, only 20 percent meet the sole source or emergency requirement of the new bill. This means that we will have to accomplish the additional 80 percent work necessary to make these purchases as competitive sealed bids. This will create an additional 544 Work Units (680 x .8 = 544). This amount and the remaining 27.2 Work Units (bid waivers, 136 ÷ 5 = 27.2) will be added to the 704 competitive sealed bids we are currently doing. The sum of this equals 1,275 Work Units for the division. At a production rate of 60 Work Units per year for

1/1D1/0210-03/1

Request For New Position

Agency Department of Administration
BRU General Services & Supply
Component Purchasing

FY 87

each purchasing agent it will require 21.25 purchasing agents to accomplish The 1,275 Work Units.

However, the pre-bid opening and post-bid opening protest/appeal procedures described in Sec. 36.30.560 through 36.30.605 are not required under existing law. For the period December 1, 1984, through December 1, 1985, 61 protests were received under the current law. We estimate that we will receive approximately 130 protests and appeals per year under the new bill. We estimate that the time required to respond to each of these protest/appeals will be equivalent to three (3) Work Units per year. Thus, each purchasing agent's annual Work Unit production will be reduced from 60 Work Units to 57 Work Units because of the time diverted to responding to protests/appeals. This means that it will require 22.36 purchasing agents to accomplish the 1,275 Work Units.

[704 + 544 (680 x .8) + 27.2 (136 ÷ 5) = 1,275 ÷ 57 = 22.36]

22.36 purchasing agents required under the new bill
13 current purchasing agents
9.36 additional purchasing agent positions required

Nine (9) positions x $49,503 salary and benefits, Purchasing Agent III, range 18A = $445,527 ÷ 2 (because the bill goes into effect in January) = $222,763 personal services increases in FY 87. $445,527 personal services increase in FY 88.

Five (5) of these positions will be located in Juneau and four (4) in Anchorage.

SB 341

Alaska State Legislature
Senate

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

SENATE SELECT INTERIM COMMITTEE ON
PROCUREMENT PRACTICES AND PROCEDURES

January 13, 1986

Senator Don Bennett, President
Alaska State Senate
Pouch V
Juneau, Alaska 99811

Dear Mr. President:

Pursuant to Senate Resolution Number 6, a Senate Select Interim Committee on Procurement Practices and Procedures was appointed. The Committee was composed of the following Senators: Jan Faiks, Chairman, Jalmar Kerttula, Vice-Chairman, Rick Halford, Joe Josephson, Edna DeVries and Fred Zharoff. Attorney General Hal Brown participated as an ex-officio member.

The Committee has completed its duties, which included reviewing and investigating the Grand Jury recommendations concerning the Alaska statutes governing state procurement and a code of ethics for the executive branch. In addition, the Committee held eight public hearings based in Anchorage, Fairbanks and Barrow, at which numerous witnesses participated and presented additional information regarding state procurement and ethics. Four of the public hearings were teleconferenced statewide. A mailing list of over 300 interested people was compiled, with updated information relayed periodically.

A task force composed of state procurement personnel worked at length and presented recommendations to the Committee. Five formal task force meetings were held and many administrative briefings, directed by the Department of Administration, reached personnel throughout the executive branch. The Committee greatly appreciated the efforts of Attorney General Hal Brown, Assistant Attorney General Jim Baldwin, Deputy Commissioner Marsha Hubbard, and Bob Link, Director of General Services and Supplies, who worked diligently to make this effort a success.

The following findings and recommendations are based on consistent testimony presented to the Committee during its review.

PROCUREMENT

FINDING #1: Existing procurement statutes and regulations are inconsistent, inadequate, outdated and sporadically scattered throughout our laws. An overabundance of the rules pertaining to state purchasing are contained in internal agency policy and procedure manuals, which are not readily available to the public. These factors have caused confusion among those who contract or wish to contract with the state. According to the Department of Law, there has been a dramatic increase in litigation concerning contract disputes because of the fact that the state does not have a comprehensive procurement law.

RECOMMENDATION: Based on these factors, the Committee believes that comprehensive procurement laws and regulations should be enacted.

FINDING #2: The Legislature, Court System, Executive Branch, University of Alaska, and Alaska Railroad Corporation operate differently and independently in the manner in which procurements are made. The Alaska Railroad Corporation has independent authority under AS 42.20.100 to ensure that the procurement procedures of the Corporation meet accepted railroad industry standards. The Executive Branch has moved away from centralized procurement practices and procedures. The Department of Administration has delegated purchasing authority to agencies which have been nonresponsive in enacting basic purchasing regulations. The lack of a uniform and centralized system has produced a system which is incoherent and confusing to the public.

RECOMMENDATION: All laws and regulations pertaining to procurement should be substantially equivalent, while maintaining the integrity of the separate branches of the government. Procurement within the Executive Branch should be more centralized. Any delegation of purchasing authority to an agency should be made only after written determination that the agency is capable of implementing the delegated authority.

FINDING #3: Bid specifications, solicitations and award criteria are not always clearly written or referenced in the information reviewed by potential bidders. The process by which the issuing agency evaluates and accepts or rejects bids is uncertain. This has created confusion and frustration for those who wish to contract with the state.

RECOMMENDATION: Evaluation procedures and performance criteria should be clearly described and identified in all solicitations.

FINDING #4: The use of noncompetitive procurement methods, such as sole source contracts, has not always been adequately justified, demonstrated or documented. This has caused the public to be skeptical of the state procurement system.

RECOMMENDATION: Noncompetitive procurement methods should be limited, and used only after written determination is made that clearly defined criteria for such methods have been met. The Legislature should receive reports of all sole source and emergency contract awards.

FINDING #5: The appeals process has been criticized because of the lack of information concerning the procedures. The time limits imposed for an appeal are too rigid to allow sufficient preparation by the protestor.

RECOMMENDATION: A clear, comprehensive and uniform appeals procedure, with adequate timelines, should be adopted.

FINDING #6: Persons who are not licensed to do business in the state have been awarded contracts. This has caused a great amount of frustration among those who are licensed, yet unsuccessful bidders.

RECOMMENDATION: All bidders should have an Alaska business license at the time of bid.

FINDING #7: Concern has been expressed that access to state contracting is complicated and difficult. The lack of information or understanding of the procedures is viewed as a barrier to doing business with the state.

RECOMMENDATION: The contractors' list should be utilized by all state agencies and branches of government. This list should be current and easily available for users.

FINDING #8: Public procurement is a highly technical process and involves millions of state dollars annually. Expertise is required to make the process work efficiently and effectively.

RECOMMENDATION: Procurement personnel should be adequately trained and supervised. The Chief Procurement Officer should have substantial experience in public procurement, and should be adequately insulated from political pressure.

Based on the recommendations of the Grand Jury, public testimony and state personnel, the Committee is forwarding the attached bill and sectional analysis relating to state procurement practices and procedures. This bill is based on the Model Procurement Code (MPC) which was adopted by the American Bar Association's House of Delegates. The Code represents over five years of intensive effort directed by a Coordinating Committee which is a joint committee of the

Section of Public Contract Law and the Section of Urban, State and Local Government Law.

The Model Procurement Code provides the framework for creating a complete purchasing system at any level of government. Specifically the Code contains: (1) the statutory principles and policy guidance for managing and controlling the procurement of supplies, services, and construction for public purposes; and (2) administrative and judicial remedies for the resolution of controversies relating to public contracts.

The following jurisdictions have adopted modified versions of the Code: Kentucky (1979), Arkansas (1979), Louisiana (1980), Utah (1980), Maryland (1981), South Carolina (1981), Colorado (1982), Indiana (1982), Virginia (1983), Territory of Guam (1983), New Mexico (1984), and Arizona (1984). Local governments or agencies have also adopted versions of the Code, including the Municipality of Anchorage.

The Committee believes that the proposed procurement code will provide a comprehensive law which addresses the deficiencies of the existing system, and therefore we recommend it to you for approval.

ETHICS

Senate Resolution 6 also directed the Committee to "review, investigate and render advice with respect to the Grand Jury recommendations concerning a code of ethics for the executive branch and employee awareness of ethical obligations".

The Committee held two meetings in which it reviewed current statutes pertaining to conflict of interest and ethical behavior for state employees. The Committee also reviewed legislation introduced in the 13th Legislature that would have established an ethics code for the executive branch. Of particular interest was Senate Bill 501 that was introduced by the Governor in 1984 and extensively reviewed by the Senate State Affairs Committee. This bill became the basis from which the Committee began its deliberations.

During these deliberations, the Administration informed the Committee that they had already drafted and were nearing completion on an ethics bill to be introduced by the Governor. After some discussion and review of the draft legislation, it was felt no purpose would be served by the introduction of competing pieces of legislation on this important issue. Therefore, the Senate Select Interim Committee on Procurement Practices and Procedures agreed to defer to the Governor and not introduce an ethics bill.

The Committee would like to thank the Administration for all its invaluable assistance in working on an ethics code for

the executive branch. The Attorney General, Hal Brown, provided the Committee with the able assistance of his Special Assistant, Randall Burns and Assistant Attorney General, Susan Cox without whom our task would have been much more difficult.

Respectfully submitted,

Senator Jan Faiks,
Chairman

Senator Jalmar Kerttula
Vice-Chairman

Senator Edna DeVries

Senator Rick Halford

Senator Joe Josephson

Senator Fred Zharoff

March 3, 1986

The Honorable Pat Rodey
Senator
Alaska State Senate
P.O. Box V
Juneau, AK 99811

Re: SB 341

Dear Senator Rodey:

I would like to thank you, as Chairman of the Senate Judiciary Committee, and the other committee members for receiving our comments on the State Procurement Code. As the written transcripts of last week's testimony will not be available for the committee's review before this week's action on the bill, I wanted to reiterate our request for exemption from this legislation. The bill, as proposed, will substantially impact the Alaska State Housing Authority (ASHA) in the following areas:

1. Increase the duration of vacancies between tenant occupancy to insure new State procedures are being followed;

2. Create a corresponding increase in waiting lists for public housing, as tenants will not be moved into vacated units as rapidly as they now are;

3. Reduce federal funds to ASHA based on intricate funding formulas that consider vacant unit turnover and occupancy levels;

4. Require increased personnel in management, maintenance and accounting for which the federal government will not pay;

5. Jeopardize ASHA's status as a "public housing authority" for continued receipt of federal funds at a time of federal cutbacks. These funds will revert to Seattle, Portland or San Francisco rather than stay in Alaska.

Committee members are urged to read the attached letter from the Legislature's own auditors in regard to ASHA wherein the separate status of this agency is noted. To maintain ASHA other than as a separate legal entity of the State will cause jeopardy to federal housing funds and severely limit our abilities to leverage monies.

TELEPHONE (907) 562-2813 BOX 100080 ANCHORAGE, ALASKA 99510

Application of the exemption afforded by ASHA's present enabling legislation (AS 18.55.110) has been significantly narrowed by opinion of the Attorney General dated June 9, 1983. Under this opinion, ASHA would be required to get a case-by-case exemption for each procurement made under any one of the several HUD-funded housing programs administered by ASHA. Unless HUD policies, when in conflict with state law, are recognized as controlling, ASHA's ability to provide housing services within the state will be limited to the state funding available through the Department of Community and Regional Affairs or other state-supported housing programs. We also fear that, absent specific exemption under SB 341, the already limited application of AS 18.55.10 will become unavailable under the doctrine of repeal by implication since the Procurement Bill specifically gives precedence to federal law and regulation only.

We think that the responsible public policy position in this matter is to exempt ASHA from this bill.

Sincerely,

ALASKA STATE HOUSING AUTHORITY

Barbara Morse-Quinn
Executive Director

BMQ/smr

Enclosure

cc: Senate Judiciary Committee Members
ASHA Board Members

STATE OF ALASKA

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

AUDIT DIVISION
POUCH W
JUNEAU, ALASKA 99811-3300

RECEIVED
ASHA

FEB 28 '86

February 25, 1986

Route
Route
Route
File

Mr. Wayre I. Tucker
Office of Inspector General
Western Regional Office
P.O. Box 5400
Albuquerque, NM 87115

Dear Mr. Tucker:

In your February 14, 1986 letter, you inquired about the audit coverage of certain federal funds expended by the Alaska Department of Commerce and Economic Development (DCED). Specifically, your concerns centered around Alaska State Housing Authority (ASHA) which is an independent, quasi-corporation that is related to DCED only in an administrative way as specified by State statute. Because of this operational separation, we exclude ASHA from our State Department audit of DCED.

A public accounting firm audits ASHA of which you have received a copy of their 1984 combined financial statements. The auditor's opinion references a scope exclusion which includes, "and certain federally subsidized activities." This exclusion relates to federally subsidized Department of Housing and Urban Development (HUD) programs referenced in Note 1 to the financial statements.

The HUD programs are audited by the same public accounting firm (Coopers and Lybrand) but are done so on a two-year cycle. The last audit report we received by this office was for the two years ended 3/31/84, and entitled "Examination of Financial Statements and Supplementary Data of: Annual Contribution Contracts, Preliminary Loan Contract, Section 8, S-014E."

If you haven't received a copy of this report, I would suggest you contact Mr. Paul Harris of ASHA. Furthermore, you may consider contacting HUD directly regarding federal compliance audit coverage of ASHA.

If we can be of further assistance, feel free to contact me.

Sincerely,

Merle R. Jonson
Deputy Legislative Auditor
Division of Legislative Audit

cc: Paul Harris, ASHA

SB 341

MEMORANDUM State of Alaska

TO: The Honorable Jim Robison
Commissioner
Department of Labor

DATE: June 9, 1983

FILE NO: 366-625-83

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

By: Jonathan B. Rubini
Assistant Attorney General
Government Affairs - Juneau

SUBJECT: Applicability of Title 36 to ASHA (AS 18.55.110)

You have asked whether AS 18.55.110 generally exempts the Alaska State Housing Authority (ASHA) from the prevailing wage requirements of the Little-Davis Bacon Act, AS 36.05. And, if AS 18.55.110 provides only a partial exemption, you also ask whether Title 36 applies to the proposal to construct 40 units of senior citizen housing in Fairbanks.

I

We have previously opined that ASHA is a "state agency" within the ambit of Title 36. 1981 Inf. Op. Att'y Gen. (Sept. 22; J66-473-81). See also Alaska State Housing Authority v. Dixon, 496 P.2d 649 (Alaska 1972). As you note, the prior opinion did not address AS 18.55.110, which provides:

> COOPERATION WITH AND AID OF FEDERAL GOVERNMENT. The authority may do all things necessary or desirable to cooperate with or act as agent for the federal government, or to secure financial aid for housing projects for veterans of World War II and other citizens of the state, provided that those projects may not be undertaken unless an acute shortage of housing exists. With respect to those projects, the authority may not be subject to limitations, restrictions or requirements of other laws, except those relating to land acquisition, prescribing or limiting the procedure or action to be taken in the development or administration of any buildings, property, public works, undertakings or projects of municipal or public corporations or agencies of the state.

It is our view that AS 18.55.110 should not be interpreted in so broad a fashion as to render state law inapplicable in almost any instance where federal funds are applied toward the development of a project. Though not explicitly addresssing the scope of AS 18.55.110, the Dixon court stated that there is "no express exclusion of ASHA from the APA." 496 P.2d at 651. Consequently, interpreting AS 18.55.110 to provide a general exemption is not easily reconcilable with the analytic framework in Dixon. Furthermore, basic tenets of statutory construction require an interpretation of AS 18.55.110 which harmonizes AS 18.55.110 and Title 36. We note, in this regard, that the definitional scope of the Little Davis-Bacon Act, set out at AS 36.95.010, was amended as recently as 1978, presumably with knowledge that ASHA had been consistently viewed as a "state agency."

Rather than providing a broad exemption simply because a project receives federal assistance, we believe the more probable legislative intent was to provide an explicit statutory exemption in instances where the application of state law would jeopardize the receipt of federal assistance. (An analagous statutory exemption is established under AS 35.15.040.) By the statute's own terms, the focus of the exemption is "to secure [federal] financial aid for housing projects." If the receipt of federal assistance is not substantially impaired by the application of state law, there would seem to be no basis for the exemption. In many instances, state or local law can apply concurrently with federal law. The restricted interpretation of AS 18.55.110 is therefore consistent with the general rule that federal law need be exclusive only where the application of other law would thwart the objectives of federal law. See U.S. Const. art. IV.

Clearly, AS 18.55.110 provides an exemption whenever federal law requires the preemption of state or local laws. The more difficult inquiry is whether the exemption extends to those instances where the federal preemption is not legally mandated, but where ASHA is notified that federal funding would nonetheless be jeopardized were state or local law applicable. We believe that the absence of an explicit statutory or regulatory basis requiring the exemption of state or local law does not necessarily preclude the applicability of AS 18.55.110. To impose the statutory exemption only where a preemption of state or local law is explicit would belie the plain legislative intent to promote the receipt of federal funds. Indeed, to read the exemption to apply only where federal funds preempts state or local law, the constitutional prerequisite would render AS 18.55.110 superfluous. Consequently, we interpret AS 18.55.110 as exempting the

application of state or local law when a federal funding entity, properly exercising its discretion, notifies ASHA in writing that the receipt of federal funds would be jeopardized were state or local law deemed applicable. Moreover, to assure the coordinated implementation of state law, we would suggest that ASHA provide a written report, which includes the rationale and evidentiary basis for invocation of the statutory exemption, to the state agency responsible for the enforcement or implementation of the state law in dispute.

II

Since we interpret AS 18.55.110 to provide only a limited exemption, we next address whether Title 36 wage stipulations should apply to the Fairbanks facility.

The proposed project budget, which did not include the cost of Title 36 wages, estimated that the cost to provide the 40 units of elderly housing in Fairbanks would be $4,492,010. Of that amount, four million dollars is to be obtained through a grant from the Department of Community and Regional Affairs (DCRA) 1/, and the balance from federal funds provided by the United States Department of Housing and Urban Development (HUD). In addition to the limited federal assistance available to pay the construction costs, the completed project qualifies for a substantial operation subsidy from HUD. (HUD's rent subsidy program subsidizes over a 40-year period the difference between a fixed percentage of an eligible tenant's income and the fair market rental value.)

We are advised by the area office of HUD that their current program to promote the development and operation of senior citizen facilities does not impose an absolute ceiling on project costs. We are further advised that HUD does not assert that the federal prevailing wage requirements preempt state law. Typically, state prevailing wage requirements can supplant federal minimum wages on projects funded in part with federal money. See 1980 Inf. Op. Atty Gen. (August 21; J66-544-80) (citation of relevant Solicitor of Labor opinion letters).

In the immediate context, however, a novel question is raised due to the fact that different types of wage indexes are

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1/ The DCRA grant is the maximum grant allowed by state regulation, 19 AAC 85.092(5).

respectively employed by HUD and the state. HUD proposes use of a "residential construction" wage index on the Fairbanks project, while the state has only a single, "commercial construction" wage index. While estimates vary, the estimated cost of applying Title 36 to the Fairbanks project is between $300,000 -- $500,000. By letter of May 11, 1983, as supplemented by letter of May 16, 1983, copies of which are attached, HUD advised ASHA that it will not participate in any projects, including the Fairbanks project, where "excessive" state prevailing wage rates apply. "Excessive," here, refers at the least to instances where the federal minimum wage is determined by reference to an applicable "residential construction" rate, while Title 36 wage rates reference a "commercial construction" index. All three projects planned for construction during the 1983 construction season -- Fairbanks, Wasilla, Sitka -- present comparable discrepancies between federal and state prevailing wage indexes.

The letters of May 11 and 16 indicate that HUD views the imposition of state prevailing wages established under a "commercial construction" index as excessive where a federal "residental construction" index has been developed. 2/ Since the letters provide the requisite written notification that the receipt of federal funds would be jeopardized were Title 36 prevailing wage requirements applicable, ASHA may assert the exemption established under AS 18.55.110. 3/

2/ We note, though, that HUD's asserted authority to decline participation in an otherwise qualified project solely due to the application of what are viewed as "excessive" state prevailing wages is not beyond question. We have not been directed to any specific statutory or regulatory authority to inform the determination of what constitutes an "excessive" state prevailing wage. Typically, HUD participation is limited to those projects which satisfy defined cost limitations. The general rule in Alaska is that the eligible project cannot exceed $92,200/unit. However, since the Fairbanks facility exceeds the $92,200 limitation, even without the Title 36 wages, we believe that the state would be in a difficult posture were it to argue that HUD acted unreasonably in determining not to participate in the Fairbanks project due to the application of "excessive" state prevailing wages.

3/ The discussion in this opinion assumes that HUD's use of a "residential" wage index on the Fairbanks facility is proper. Whether it is appropriate to employ a "residential" wage index

Our final observation is that the question of whether Title 36 wage rates apply to housing projects which are jointly funded by both the state and HUD raises a myriad of complex legal and policy concerns. Unfortunately, as long as there remains a broad discrepancy between the prevailing wage rates established by the different scales, and as long as the HUD program does not impose articulable cost limitations, there can be no clear and decisive legal resolution. Ultimately, it is a policy decision whether to insist that Title 36 applies, and to risk the denial of federal assistance. We do note, though, that were the state to establish a "residential construction" wage rate, the prospect of continued conflict would be substantially diminished.

If we can be of further assistance, feel free to call.

JBR/jb

cc: Richard Lyon, Commissioner
Department of Commerce and Economic Development

Kevin Bruce
Special Assistant
Office of the Governor

Julia Tucker
General Counsel, ASHA

Susan Olsen
Area Counsel, HUD

Bob Landau
Assistant Attorney General
Anchorage

3/ (continued)

to a four-story facility with an elevator built to commercial specifications, as we are advised is descriptive of the Fairbanks facility, is beyond the scope of this opinion. ASHA, of course, may pursue whatever administrative or judicial avenues are available to raise this issue. If ASHA were to pursue a review of the wage determination, during the pendency of the review, it would be impossible to assess whether the exemption afforded under AS 18.55.110 is applicable.

SB

341

(FILE 3)

BILL CONTACT/ACTION

DATE	CONTACT/ACTION
1/14	Judy Eckholm - Leg Digest - wants to
	be notified of hearing - 586-3118
2/5	Evol Chumpion, opponents made for DC
	[illegible] bill testify 2/11 wants time
	opponents to testify also - told him after [illegible]
	[illegible] 789-0491
2/12	Sharon Martin wants to be
	notified when called/moved 6-9518
2/13	DC. Mackinnon in Washington called
	wants dad Anderson to testify
	in favor on 2/15
2/21	Please notify Marie Iverson when
	bill up in committee (7253)
2/24	Barbara Morse Quinn called - will
	testify 2/27/86 (ASHA)
3/5	notified of 3/6 meeting:
	Jim Burdon, Dave Rasmussen, Judy
	Eckholm, Mike Geiver, Marie Iverson
	Wendy Redman. Tried Sharon Martin
	4 times - busy
3/6	Diane - send letter of intent / ballot Dave
	when prepared

BILL CONTACT/ACTION

DATE	CONTACT/ACTION
3/14	Suzanne will monitor re: Change
	of hearing FR 3/20 TO 3/16
3/17	Monitored Suzanne [illegible]

CRAIG TAYLOR EQUIPMENT COMPANY

733 E. Whitney Road
Anchorage, Alaska 99501-1694
(907) 276-5050

March 11, 1986

Senator Pat Rodey
Chairman, Senate Judiciary Committee
Pouch Y
Juneau, AK 99811

Dear Senator:

We are unalterably opposed to total cost bidding. We represent well over fifty light and heavy industrial and construction equipment manufacturers. We contribute sizeable investments in facilities, employment and taxes to and for the state of Alaska. We concur with the ideas expressed in the enclosed letter and urge you to rule out total cost bidding in proposed Bill No. 341 regarding state procurement. In the event that you do not think this is possible we urge you to adopt language such as the following:

A contract based on Total or Life Cycle costing may be awarded only when the Chief Procurement Officer or, for construction contracts or procurements for the state equipment fleet, the comissioner of transportation and public facilities determines in writing that it promotes overall economy for the purposes for which it was intended, that it encourages competition, that it is not unduly restrictive and that it is in the best interests of the state.

Thank you very much for your consideration in this matter.

Signature	Title	Company
[signature]	V.P.	Craig Taylor Equipment
[signature]	V.P.	Bradley Equipt Inc.
Morry Hollowell	President	Yukon Equipment, Inc.

Signature | Sales Manager | Construction Machinery Inc.
Signature | Title | Company

Signature | Asst. Mgr. | Howard Company Corp
Signature | Title | Company

Enclosures

cc: Senators Tim Kelly
Jan Faiks
Rick Halford
Robert Ziegler

CRAIG TAYLOR EQUIPMENT COMPANY

733 E. Whitney Road
Anchorage, Alaska 99501-1694
(907) 276-5050
Sales · Service · Rentals

November 18, 1985

Mr. Frank Turpin
Alaska Railroad
Pouch 7-2111
Anchorage, AK 99510-7069

Dear Frank:

The total cost bidding concept was developed quite some time ago by one manufacturer who felt, because of a perceived difference in quality, that he did not have to participate in deeper discounts for governmental bids. At that time there may have been other manufacturers who built machines just to meet minimum bid specifications and were therefore inherently cheaper. These machines that were being purchased through low bid by governmental agencies were not necessarily being purchased by the general contractors back then. But since the basic function of most governmental agencies is for repair and maintenance rather than new construction, there was a viable reason to purchase the less expensive machine.

With the advent of tighter specification writing added to the fact that general contractors were not purchasing the cheaper machines, those manufacturers have been either forced out of business or else forced to build a higher quality, market-accepted machine. Marginal manufacturers will probably always come and go, but with the sophistication of the State's bidding procedures already in place; ie. prequalification, tight bid specs, thorough warranty specs, nonperformance penalties, these manufacturers will always be weeded out.

A total cost bid is one in which all costs (purchase price, repairs, maintenance) for a given period of time, and the residual or salvage value at the end of that time, are guaranteed at the time of purchase. The bid is usually bonded to ensure the performance of the vendor. The only benefit to the customer of the total cost bid over a well prepared low bid package is that costs, although higher, are known for budgetary purposes. The vendor on the other hand, realizes higher profits, restricted competition, and higher product support revenues.

The drawbacks to the customer are several. He will end up paying tens of thousands of dollars more in a total cost bid especially when the time value of money between the date of sale and date of buy-back (as much as five years later) is considered. Add to this the price of the bid bond and then the fact that the bid, which is evaluated based on the guaranteed buy-back price, does not require the agency to sell the machine back. If the repurchase option is not exercised then a tremendous premium has been paid. It is estimated that only as few as five to ten percent of the machines sold under a total cost bid are repurchased. The agency's maintenance costs will increase due to the

rigid requirements for strict adherence to maintenance responsibilities written into most of these bids. While promoted as a valid protection for the dealer, much subjectivity could enter into the equipment evaluation at the end of the period, especially if the agency's maintenance records are not complete or are inaccurate. Considerable latitude exists for conflict between the agency and supplier with the very good possibility that the repurchase guarantee may be voided on maintenance technicalities. A by-product of the maintenance requirement is that the agency is locked into one supplier. There can be no substitute filters or oils, etc. used during the life of the contract.

The dealer is faced with several drawbacks also. He is faced with a contingent liability that he must live with for the life of the contract. This, of course, reduces the dealer's bonding capacity and borrowing capacity needed for a liquid financial position. He may end up with a machine that has to be remarketed. And he may have guessed wrong about inflation keeping the value of the buy-back high. Or he may have given an inflated price for the buy-back gambling that few agencies ever enforce the repurchase clause. Introducing the bidder's highly speculative resale valuation into the bid process affords the less scrupulous bidder an opportunity to manipulate the net value to his advantage although he may have no incentive or reasonable expectation of having to fulfill his promise to repurchase.

The biggest drawback in this type of bid for both buyer and seller is that there are too many loopholes, too many contingencies subject to negotiation. There is no way to objectively evaluate a total cost bid. These contingencies and loopholes create numerous opportunities for collusion or for deal making.

Isn't it odd that with all the various commodities the state of Alaska purchases; from pencil sharpeners, to office machines, to cars and trucks, to heavy equipment, to ferry boats, only one manufacturer is a proponent of total cost bidding? If there was any validity in the concept at all then its use would be widespread. But as it is, there are no federal agencies and only a very small minority of other governmental agencies that use this concept. It seems to me that the few who use this method have simply caved in to intense marketing pressure rather than going with their common sense. It is only old fashioned, out-moded thinking in this time of world-wide economic competition that would lead someone to believe that any one brand or product might be superior as to quality and characteristics. Once upon a time this might have been true. But in this day and age it is nothing but a fairy tale. Don't get caught up in this type of thinking and don't pay more for those products trying to live on past reputations.

Sincerely,

John P. Snow
Vice President

cc: Senator Jan Faiks
Commisioner Richard Knapp
Commissioner Loren Lounsbury
John Reynolds, ARR Purchasing
Darrell Methvin, State Equipment Fleet
Keith Nelson, State Equipment Fleet

Office of the Attorney General
STATE OF SOUTH DAKOTA

Mark V. Meierhenry
Attorney General

February 4, 1986

MEMORANDUM

TO: All States Attorneys

FROM: Mark V. Meierhenry, Attorney General

RE: TOTAL COST BIDDING

Enclosed please find an Official Opinion just issued from this office concerning total cost bidding. Our office has received a number of complaints from the Auditor General's Office and from private citizens concerning abuses in implementing a total cost bidding procedure by counties, cities and townships. In the Official Opinion I determined that the total cost bidding procedure as currently used by many counties, municipalities and townships was in violation of the competitive bidding procedures. This Opinion may affect not only future biddings by your county but also previous bids and contracts entered into for heavy equipment and other goods and services.

I would suggest that you review the opinion, your county's current bidding procedures, and discuss the matter with your Commissioners to avoid problems in the future.

If you have any questions, please feel free to contact this office.

MVM:JPH:bn

STATE OF SOUTH DAKOTA

OFFICE OF

THE ATTORNEY GENERAL

February 4, 1986

Mr. Maurice C. Christiansen
Auditor General
435 South Chappelle
Pierre, South Dakota 57501-3292

OFFICIAL OPINION NO. 86-01

Total cost bidding

Dear Mr. Christiansen:

You have requested an official opinion from this office in regard to the following factual situation:

FACTS:

The Auditor General's Office has encountered numerous situations during the past year where local governmental entities have been implementing a "total cost" bidding procedure for the purchase of heavy equipment. Using this total cost bidding procedure, the local government entity is requesting bids which are evaluated by netting at face value: (1) the initial purchase price of the equipment, plus; (2) the guaranteed maximum repair cost for a period specified by the government entity, less; (3) a guaranteed minimum repurchase price at the end of the specified time period.

With the above factual statement, the Auditor General's office has also enclosed several recent sets of bid specifications used by local government entities attempting to implement a total cost bidding procedure. Some of the specifications submitted did not require a performance bond or allowed a "corporate guarantee" in lieu of the performance bond, and establishes a procedure where only the face value of the bid items addressed above were to be considered.

Based upon the above facts, you have asked the following question:

QUESTION:

> Does the total cost bidding procedure as currently being used by local governmental entities violate the competitive bidding provisions of SDCL Ch. 5-18 or SDCL Ch. 5-21?

Total cost bidding describes a bidding procedure whereby a public entity seeks bids from a potential seller, based upon the total costs of ownership, in addition to the initial purchase price. This is the sole cost basis for governmental purchases under traditional bidding procedures. One of my predecessors in AGR 1965-1966, page 211, using the term "guaranteed bidding," determined that the concept of total cost bidding did not violate the competitive bidding provisions of SDCL Ch. 5-18. I concur with my predecessor's determination that total cost bidding, if properly implemented by the public entity, does not violate the competitive provisions of SDCL Ch. 5-18 or Ch. 5-21. It is my opinion, however, upon review of "total cost bidding procedures" currently used by the local government entities, that the principles of competitive bidding are being violated.

The South Dakota Supreme Court in Gridley v. Engelhart, 322 N.W.2d 3, 7 (S.D. 1982), stated:

> Bid specifications as they pertain to public contracts must be sufficiently definite and precise so as to afford a basis for bids and they must be free of restrictions the effect of which would stifle competition. Such specifications must be sufficiently detailed upon all essential elements so as to afford a basis for full and fair competitive bidding upon a common standard.

The flaw in the local governmental entities current total cost specifications is that these specifications totally ignore the time value of money which, in my opinion, is an essential element in total cost bidding. It does not take an expert financial analyst to determine that a dollar today is not the same as a dollar three or seven years in the future. The reason for this is that a dollar today can be invested so that it is worth more at a future date. A total cost bidding procedure that takes present dollars and future dollars and nets them at face value to determine the low bid compares dollars of different present value. This netting of face values has the effect of mixing apples and oranges which, in my opinion, makes it impossible for a local government entity, as well as potential bidders, to determine what is the "lowest responsible bid."

This netting of dollars at face value also could result in potential abuses where the actual value of the equipment at the date of purchase is no longer relevant.

For purposes of illustration, I present the following example: A local government entity is seeking the purchase of a flatbed truck. The local government entity uses a total cost bidding procedure and wants guaranteed repairs for five years with a guaranteed repurchase price. Suppliers "A," "B" and "C" have products that meet the county's general specifications for the flatbed truck and all are responsible bidders. Bids are received and opened with the following results:

	Dollars Bid		
	A	B	C
Initial price	$20,000	$25,000	$35,000
Plus maximum repairs	9,000	4,000	2,500
Subtotal	$29,000	$29,000	$37,500
Less repurchase guarantee	10,000	18,000	30,000
Total Cost	$19,000	$11,000	$ 7,500

The local government entity could currently invest money in C.D.'s at an investment rate of 8%. If the value of money was included in the specifications and the bids were reviewed in present value terms the bid results would be as follows:

Initial price	$20,000	$25,000	$35,000
Plus maximum repairs[1]	7,187.4	3,194.4	1,996.5
Subtotal	$27,187.4	$28,194.4	$36,996.5
Less repurchase guarantee[2]	6,810.	12,258.	20,430.
Total Cost	$20,377.4	$15,936.4	$16,566.5

---

1 3.993--Present value of an annuity of $1.00 per year for 5 years discounted at 8% and assumes repairs of equal amounts each year.

2 .681--Present value of $1.00 due at the end of 5 years discounted at 8%.

Under a traditional bidding procedure where only the initial price is considered, the truck from Supplier "A" would have been purchased by the local government entity. Under a "total cost" bidding procedure using dollars at face value as currently used by the local governments, Supplier "C" would be awarded the bid although Supplier "C's" initial purchase price was the greatest, the total cost at face value was less than either Supplier "A" or "B." But, once the value of the dollar is added, Supplier "B" would now become the lowest responsible bidder. When one looks at all costs of the local government entity, Supplier "B" provides the best total value if the entity wishes to use the total cost approach.

It is, therefore, my opinion, that if a local government entity decides to use a total cost bidding procedure to comply with the competitive bidding provisions of SDCL Ch. 5-18, the local government entity must include in the bid specifications the current investment rate which the local government entity could invest funds. This ensures that the potential bidders and the local government entity have a uniform basis to compare the bid proposals submitted by the various potential suppliers.

In addition, though it is not a violation of SDCL Ch. 5-18, it is my opinion that a prudent local government entity, in order to guarantee future performance of the total cost contract, should require a potential bidder to submit a performance bond in accordance with SDCL Ch. 5-21. When a supplier enters into a contract based upon a total cost bid, that supplier has a contingent liability to the local government entity for the costs of repairs for the term of the contract and the guaranteed re-purchase price. Without a performance bond, the local government entity has no guarantee that the terms of the contract will be fully performed. Currently, some government entities are requiring a performance bond with their total cost bid while other local government entities are not requiring a performance bond or allowing that a "corporate guarantee" be submitted in lieu of performance bond. A corporate guarantee adds no additional security to future performance of the contract. Any corporation that enters into a contract with a local government entity for future services or products is getting that corporation's guarantee. Only a performance bond or submission of actual collateral or security to the local government entity will provide additional security in case the bidder is awarded a contract and is financially incapable of performing all of its terms.

Total cost bidding, if used properly, can reduce the amount of monies a local governmental entity needs to expend for the purchase and use of equipment. Unless properly implemented, however, the total cost bid

procedures may result in the county needlessly expending additional funds for goods and services without added benefits.

Respectfully submitted,

MARK V. MEIERHENRY
ATTORNEY GENERAL

MVM:JPH:db

Trinity Equipment Company

P.O. Box 8486
Randol Mill Road & Loop 820 Fort Worth, Texas 76112
Telephone (817) 451-8094

Equipment Spec. Writing Services
Mr. T.C. Webster

February 21, 1984

City of Fort Worth
1000 Throckmorton
Fort Worth, Texas 76101

Attn: Mr. Robert Herchert
City Manager

Subject: Purchasing Practices now employed by the City of Fort Worth (i.e. Guaranteed Repurchase).

Dear Sir:

For the past several years the City of Fort Worth has employed a policy of purchasing heavy equipment utilizing a Guaranteed Repurchase clause to determine award of contracts for purchase of that equipment.

In the past we have participated in this procedure and have been the successful bidder on several occasions, however, our company has discontinued this type of bidding for various reasons.

Firstly, we will not bid the repurchase guaranty because at present we have guaranteed repurchase agreements to the City of F . Worth in effect on twenty-four (24) pieces of equipment totaling some $580,000.00. This appears on our company's financial statement as a contingent liability, reducing our borrowing capacity, our bonding capacity and various other capacities requiring a more liquid financial statement.

Secondly, we do not choose to bid the repurchase guaranty because we feel it is not an advantage to either the buyer or the seller. As written, your Repurchase Guaranty does not provide an option for the seller. The seller guarantees to repurchase, but the City does not guarantee to sell the equipment back to the seller. In addition, the City will pay a premium price for the equipment under this program since bonding is required and costs for the bond will most assuredly be added to the sale price of the machine. The bidder must consider the cost of the bond in determining his sale price. At the present time a performance bond costs us $20.00 per thousand per year. On that basis a guaranteed repurchase bond in the amount of $30,000.00 for five years would cost $3,000.00 which would be added to the cost of the machine.

As an observation on the above, let me offer an example of purchases made prior to this bidding practice which may show the questionable value of Repurchase Guaranty. In 1973, we sold the City of Fort Worth eight (8) four-wheel drive end loaders for $16,240.28 each. One of these units was offered as a trade-in on your invitation to bid opened February 2, 1984. One of our competitors offered the City $13,500.00 for this loader. This is an 83% recovery of the original purchase price after ten (10) years of use by the city. On the bids just opened on February 2, 1984 for this same type of equipment, the best Repurchase Guaranty received by the City was only 75% of the purchase price after five (5) years of use, and the apparent successful bidder only guaranteed 71% of his original sale price.

In summary, in our opinion, not only is the City paying a premium price for their equipment, it is also giving an advantage to the larger equipment manufacturer by limiting participation by smaller dealers. In 1982 there were some fourteen (14) bidders on four-wheel drive end loaders in response to your invitation to bid. In 1983 only ten (10) bidders and this year only six (6) bidders responded (5 bid the Guaranteed Repurchase). If a survey were conducted, I believe you would find that the Guaranteed Repurchase clause would be the reason for the reduction in the number of bids received by the City.

We have enjoyed our association in a business relationship with the City of Fort Worth and believe our equipment has served the City well over the years. We regret that we cannot compete for your equipment needs under the current purchasing procedures.

Sincerely

TRINITY EQUIPMENT COMPANY

James E. Thrasher
City Salesman

JET/ph

Midwest Industrial Equipment Co.

Hwy. 2 West — Box 5010
Grand Forks, North Dakota 58201 — Phone 772-4842

May 29, 1984

Honorable Commissioners
Polk County, MN

Gentlemen:

Midwest Industrial Equipment Co. will not be bidding the re-purchase portion of the county's motor grader bid. We hope that this decision does not deny us the opportunity to be part of the competitive bidding process.

At John Deere we try to make the best equipment available today. We are willing to stand behind our equipment because we feel that the quality of the machines will help sell itself without having to add costly guarantees. Our name and reputation depend on it.

One of the reasons for not bidding the re-purchase section is the added cost to the county. Most counties can't afford to have a five year turnover of machines. Even if they could, a county machine is still in excellent condition after five years. Because of the county maintenance programs, county machines have a trade-in value that could be as high or higher, depending on inflation, than a five year old re-purchase price. If you have to pay X amount more for a machine at the purchase, you should get that amount, plus interest, when the machine is sold or traded.

Example: A machine costing $10,000 more now should be worth, at 8% interest:

$10,800.00 after 1st year
11,664.00 after 2nd year
12,597.12 after 3rd year
13,604.89 after 4th year
14,693.28 after 5th year

I know it's been said that the extra cost to the county is our excuse for not bidding the re-purchase. It's not an excuse. We feel we have a responsibility to our community. This years survey by Fortune Magazine backs this up. They ranked John Deere Corporation first in five of eight categories. One of our first place categories was community responsibility.

At John Deere we're not satisfied to keep up with the competition. We are the innovators of many modern equipment designs and fuctions that you see. The John Deere 770A motor grader is designed to offer our customers the most up to date, efficient, and reliable grader possible.

I sincerely hope that I am given the opportunity to explain the many qualities and benefits, to the county, of the John Deere 770A motor grader.

Sincerely,

Darrell Utzinger,
Sales Representative

SKAGIT COUNTY PUBLIC WORKS DEPARTMENT

County Administration Building, Room 203, 2nd & Kincaid Streets, Mount Vernon, Washington 98273

W. Eugene Sampley, P.E.
Director

John B. Ensley
Assistant Director

(206) 336-9400

Charles Tewalt
Superintendent
Operations Division

(206) 755-9531

February 27, 1985

Board of County Commissioners
Skagit County Admin Building
Mount Vernon, WA 98273

Re: Bid Award Recommendation:
Motor Grader

Gentlemen:

Two bidders submitted a total of four proposals to furnish one new latest model motor grader, as follows:

Millbrook Equipment Company	JOHN DEERE Model 770A	$ 81,045.30
N C Machinery Co.	CATERPILLAR Model 140G	$105,350.00
N C Machinery Co. (Alternate #1)	CATERPILLAR Model 140G	$110,725.00
N C Machinery Co. (Alternate #2)	CATERPILLAR Model 130G	$ 96,750.00

All units meet equipment features specifications except for the N C Machinery's CATERPILLAR Model 130G which does not meet the horsepower requirement.

Specifications called for this motor grader to be awarded to the lowest or best bid based on a life cycle cost method. Millbrook did not meet the requirement to submit guaranteed repair expenses and a guaranteed repurchase price. N C Machinery did not submit a valid bid deposit in the form of a surety bond, cash, cashier's check or certified check in the amount of 5% of the amount of their bid proposal.

Although the Board reserves the right to waive minor irregularities in the bidding, cost analyses shown in Attachment "A" support the contention that a life cycle cost approach will not be in the County's best interests on this bid award when the time value of money is considered.

I recommend that all bids be rejected. I further recommend that a new call for bids in which life cycle cost is not used be initiated.

Sincerely,

W. EUGENE SAMPLEY, P.E.
Public Works Director

ATTACHMENT "A"

MOTOR GRADER TIME VALUE OF MONEY ANALYSES

Assumptions: 1) That the County has $105,350 available to spend

2) That the average interest rate value of money over the next six years will be 10%

OR

3) That the average interest rate value of money over the next six years will be 8.5%

* *

	N C MACHINERY	MILLBROOK
Current out-of-pocket cost:	$105,350	$81,045
Less guaranteed trade-in amount:	(80,000)	
Less estimated trade-in amount:		(40,000)
Six-year cost of ownership without considering that trade-in money is not available for six years:	$ 25,350	$41,045

* *

Current out-of pocket cost:	$105,350	$81,045
Less guaranteed trade-in amount of $80,000 discounted for six years at 10%:	(45,158)	
Less estimated trade-in amount of $40,000 discounted for six years at 10%:		(22,579)
Interest earned on $24,305 "unspent" money available for investment for six years at 10%:		(14,583)
Comparative cost of ownership in 1985 dollars:	$60,192	$43,883

* *

Current out-of pocket cost:	$105,350	$81,045
Less guaranteed trade-in amount of $80,000 discounted for six years at 8.5%:	(49,036)	
Less estimated trade-in amount of $40,000 discounted for six years at 8.5%:		(24,518)
Interest earned on $24,305 "unspent" money available for investment for six years at 8.5%:		(12,396)
Comparative cost of ownership in 1985 dollars:	$ 56,314	$44,131

TRINITY
EQUIPMENT COMPANY

P.O. Box 8486
Randall Mill Rd. & Loop 820
Ft. Worth, Texas 76112
817/451-6094

17 April 1984

Tarrant County
Purchasing Department
100 West Weatherford Street
Fort Worth, Texas 76102

Attn: Roy Edwards

Dear Roy:

Per your letter concerning Repurchase bids, we have, as a matter of policy, discontinued bidding a guaranteed repurchase agreement on equipment for the following reasons:

1. We feel this practice is of benefit to neither the seller or the purchaser and results in added expense to the county and ultimately the tax payer.

2. It becomes a contingent liability on our financial statement reducing our bonding capacity, borrowing capacity, and other capacities needed for a liquid financial position.

3. Only one distributor promotes this program. That distributor is Catepillar and the program was written by Catepillar as a marketing tool for their benefit (not the benefit of the County). If John Deere were to come out with a program such as this, you can bet it would favor John Deere and not the County.

4. The program as written by Catepillar has a number of so-called loopholes whereby the seller can void the repurchase agreement if certain conditions are not met.

5. Good business dictates policies. We would be foolish to offer to repurchase a piece of equipment for more than that equipment would be worth on the open market at a given time. In turn, the County would be foolish to exercise a repurchase agreement that would give them less than the equipment was worth. So you may have paid a premium price for which you receive no benefit if you do not exercise the repurchase agreement.

6. No one knows or can forsee the future, yet under the Guaranteed Repurchase Clause you are asking us to bid on a piece of equipment NOW that will not be available for a number of years. Also, we must guarantee to repurchase but you do not guarantee to sell to us at the end of the agreement.

7. Why is a guaranteed repurchase asked for on heavy equipment only? Why not on automobiles, trucks, business machines, etc.? We feel the policy is discriminatory.

Taken in total the above reasons, could you blame our organization for our policy of not bidding guaranteed repurchase? We have enjoyed our business relationship with the County and feel our equipment has given satisfactory service and good residual value. We can see no advantage to a guaranteed Repurchase clause in your bidding procedure.

Sincerely,

TRINITY EQUIPMENT COMPANY

James E. Thrasher
Assistant Manager

GUARANTEED BUY-BACK RESPONSE

There are many problems with the concept of guaranteed buy-back of Governmental equipment. It is very difficult to project resale value in five years time because of the many variables involved through such a program. These variables are no less evident if you require the bidder to speculate as to resale value by making his own projection. He is, in fact, in a worse position to judge that resale value as he will have no control over the use of the equipment by the Agency. As a result, the repurchase guarantee mechanism only serves to distort the bidding process, particularly in light of the fact that repurchase is a mere option the Governmental Agency may never exercise and, therefore, deserves little or no weight during bid evaluation.

The experience of many Agencies has been that a higher return is realized through disposal of equipment at public sale. Introducing the bidder's highly speculative resale valuation into the bid process affords the less scrupulous bidder an opportunity to manipulate the net value to his bid advantage although he may have no intention or reasonable expectation of having to fulfill his promise to repurchase. A performance bond to assure repurchase at the end of the life cycle would not protect the Agency from such intangibles as poor performance during the life of the equipment or the maintenance and downtime required for an inferior piece of equipment.

HOWARD COOPER CORPORATION

PARTS ORDERING INFORMATION

DRESSER & WABCO

ORDER DESCRIPTION	CODE	PENALTY	CUT OFF
STOCK ORDER			
EMERGENCY	03	—	2:00
CRITICAL	04	5%	
SHIP TOMORROW	13	—	AFTER 2:00
FPO	1 ORDER A WEEK FREIGHT PREPAID	500.00 min.	5 day ship

LINK BELT	SHIPPED BY	PENALTY
RUSH ORDER	3 WORKING DAYS	5%
EMERGENCY ORDER	24 HOURS	10%

HOWARD COOPER CORPORATION

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LINK BELT	SHIPPED BY	PENALTY
RUSH ORDER	3 WORKING DAYS	5%
EMERGENCY ORDER	24 HOURS	10%

Total Cost Bidding Disputed

28 October 1985 - Daily Oklahoman

By Randy Ellis

Controversy rages among state equipment dealers over a new bidding procedure promoted by Albert Equipment Co. of Tulsa.

The procedure is labeled "otal cost bidding,' and Albert Equipment Co. officials say it is "an idea whose time has come."

Other dealers disagree. They say it "inflates equipment prices" and "opens the door to all types of collusion."

Two northeastern Oklahoma counties opened bids for motor graders last week using the new procedure.

In both cases, Albert Equipment Co. was the only bidder and its bids were $20,000 to $35,000 higher than the state Central Purchasing Department paid for comparably equipped machinery bought through conventional bidding procedures.

For the extra $20,000 to $35,000, the counties get extended warranty coverage and guaranteed repurchase prices from the dealer.

Pawnee County commissioners are scheduled to vote Thursday on whether to accept Albert Equipment Co.'s bid, while Osage County commissioners face a similar vote Monday.

Albert Equipment Co., which sells the Caterpillar machinery line, has spent more than a year urging county commissioners and state officials to adopt total cost bidding.

The Tulsa Caterpillar dealer contends the new bidding method is superior to accepting the "lowest compliant bid" because it requires vendors to incorporate maintenance costs and resale value into bids.

Other vendors refused to bid under the new procedure, contending it is a Pandora's box.

"We think it has a lot of loopholes in it that over a period of time would promote collusion," said Buzz McDonald, sales manager for C.L. Boyd Co. Inc. "Anything that would promote collusion, we're against."

Total cost bidding is similar to conventional bidding in that it requires each vendor to submit a sealed bid containing a proposed sales price.

But, it differs from conventional bidding by requiring vendors to also bid amounts that they will guarantee to pay for the repurchase of their equipment at the end of one, two or three years with normal wear and tear. The purchaser has the option of exercising the buy-back provision or keeping the equipment after each of the first three years.

The bid is awarded to the vendor which bids to buy its equipment back at the end of the first year at a price which is closest to the original sales price it has bid.

If a vendor had assurances from a county commissioner that the buy-back option would not be exercised, he could afford to inflate the sales price and then bid a buy-back price of just a few dollars less, McDonald said.

The colluding vendor would be the winning bidder, even though his sales price might be tens of thousands of dollars higher than the sales price bid by other contractors.

"It's just one way of getting around the competitive bidding process, said John Stotts, sales coordinator for Midwestern Equipment.

Lynn Sliger, sales manager for L.B. Smith, Inc., said Caterpillar officials created the total cost bidding program.

"They deliberately wrote everybody else out," Sliger said, adding that small companies don't have the resources to participate in the program. They would have to hire additional maintenance employees and vehicles to make sure counties were properly taking care of their equipment.

"I don't think anybody's going to bid it except Caterpillar dealers," he said. "After all, they're the ones that set it up. It's their program.

Jim Kromphardt, governmental sales consultant for Caterpillar Tractor Co., promoted the total cost bidding program in behalf of Albert Equipment Co. at a meeting of county commissioners last month.

"Pressure to buy based on the lowest price is always present, but seldom will it result in the best long-term savings," he said.

Kromphardt argued that accepting the low bid on a road grader might save a buyer money now, but in the long run could cost more because a cheaper piece of equipment would require more repairs, have higher operating costs and lower resale value.

Dean Shaw, branch manager for Dresser Industries, Inc. of Oklahoma City, countered that Caterpillar Tractor Co. is just one of several companies that manufacture good equipment.

"We like to bid upfront where everything is spelled out," he said. "This particular method has too many contingencies subject to negotiations."

"Our firm will not bid it," he said.

A bill that would authorize total cost bidding statewide was introduced last session by state Rep. David Riggs, D-Sand Springs.

Riggs elected not to bring it up on the House floor after state Central Purchasing officials expressed reservations about its use. Riggs left open the possibility that he might reintroduce the bill next session.

John Johnson, director of purchasing for the state, said he has problems with total cost bidding because it makes it extremely difficult to objectively compare bids and opens the door for collusion.

"There are a heck of a lot of temptations that come to pass with this bidding method," Johnson said. "I'm not accusing any commissioner of being dishonest, but there are too many loopholes — too many places that could be subject to abuse."

Former Kingfisher County Commissioner Billy L. Lightle, one of more than 200 county commissioners and equipment and materials suppliers convicted in a federal kickback probe, concurred with Johnson's assessment of the dangers.

"This is a can of worms," he said in an interview at the El Reno federal correctional institute.

Lightle said he didn't want to accuse anyone of bid rigging, but said total cost bidding would eliminate competition from small equipment companies and create numerous opportunities for collusion.

"There can be some deals made on it very easily," Lightle said.

Osage and Pawnee Counties were the first to begin testing the new bidding procedure.

In Osage County, commissioners opened bids Oct. 21 for three 135 horse power motor graders.

Albert Equipment Co. submitted bids of $94,003, $94,263 and $94,313 for the three Caterpillar 12G graders. Nine other vendors submitted "no bids."

As part of its bid, Albert Equipment Co. submitted guaranteed repurchase prices of $91,325 at the end of one year, $88,325 at the end of two years and $85,325 at the end of three years. The same repurchase prices were submitted for each graders.

Two days later, the state Central Purchasing Department opened conventional bids for four 150 horse power motor graders. Four companies submitted bids, which ranged from $58,374 each to $62,340 each. Bid forms were sent out to four Caterpillar dealers, but they did not respond.

In Pawnee County, experience with total cost bidding was similar.

Once again, Albert Equipment Co. was the only bidder. This time, it submitted a $73,26[illegible] bid for a 125 horse power Caterpillar grader, and bid that it would guarantee to repurchase the grader for $69,000 at the end of the first year, $65,000 after the second year and $61,000 after the third year.

When the state opened conventional bids for three comparable 125 horse power graders this week, it received four bids — including a low bid of $53,042 per grader. Again, the state sent out bid forms to Caterpillar dealers, but they were not returned.

Osage County Commissioner Fred Jordan indicated his county would probably buy at least one grader from Albert Equipment Co.

"I'm quite sure we're going to buy at least one or maybe three," Jordan said.

Jordan said he is a strong supporter of total cost bidding, despite the fact it would cost his county $35,000 more for a 135-horse power grader than other counties are paying for 150 horse power graders.

For the extra $35,000, the county receives guaranteed repurchase prices, an extended warranty of 5,000 hours or 36 months and a guarantee that the company will supply a substitute machine or pay $100 a day if the machine is inoperable for more than 48 hours.

"They've got to believe in their equipment to do it," Jordan said.

Sylvia Riney, purchasing agent for Pawnee County, said she and the Pawnee County commissioners are still studying Albert Equipment Co.'s bid and trying to decide if total cost bidding is a good idea.

"It has its good points and its bad points," she said.

"There are a heck of a lot of temptations that come to pass with this bidding method. I'm not accusing any commissioner of being dishonest, but there are too many loopholes — too many places that could be subject to abuse."

-- John Johnson, state purchasing director

DARR
EQUIPMENT CO.
P.O. Box 20737 Dallas, Texas 75220-0737
(214) 721-2000

RECEIVED
MAY 25 1984
CITY OF FORT WORTH

May 23, 1984

Mr. T.C. Webster
Technical Services Coordinator
Equipment Services Division
City of Fort Worth

Mr. Webster:

In regards to actual values or trade-in prices that Darr Equipment Company offered on equipment number 624-0035 930, S/N 41K09092 for $29,500.00 and equipment number 624-0033 930, S/N 41K08992 for $23,500.00, we offer the following response.

Darr Equipment Company Repurchase Guarantee states that machines will be returned to Darr with only normal wear and tear on them. When we inspected these machines, there were some major mechanical deficiencies, and as a result, we put the assessed value somewhat lower than the guaranteed repurchase.

Should the City decide to repair or have Darr Equipment Company repair these deficiencies, then the original repurchase price would certainly be in order.

Sincerely,

Dean Hertenstein
Used Equipment Sales Manager

DH/kt

Apr. 84 (Renville County Mn.)

County board wrestles with road grader matter

By Geno Klecker
Government Reporter

Representatives from a heavy machinery firm in the Twin Cities told Renville County commissioners last week that they will be financially unable to honor a buy back agreement signed with the county five years ago. The agreement was part of a purchase contract in which the county highway department bought a new Champion motor grader from the firm, Borchert-Ingersoll.

Under terms of the agreement the Twin City firm would buy back the grader at the end of a five-year period at a set price of $85,900.

The two company representatives told board members that if the firm would be held to the buy back agreement it could force the company to seek protection under the bankruptcy laws. Tight economic conditions have put a severe strain on the firm's operations, the two men said, and as a result the usual number of employees carried by the firm has been severely cut.

They admitted the firm had similar agreements with other counties but did not elaborate.

The men did, however, offer several alternatives for the commissioners' consideration. But county attorney Tom Simmons requested that details of the offers not be made public at this time in the event litigation resulted over the matter.

As a result of this matter, bids taken last month for a new motor grader were all rejected as the county had planned to use the buy back money toward purchase of the new machine.

Commissioners took no action but chose to study the alternative proposals before contacting the firm again.

"On deals like this I understand it is customary for the firm to furnish a performance bond," commissioner Lester Fredrickson observed. "But for some reason we don't have one. Does anyone know the reason why?"

No one answered Fredrickson's question.

"Somebody must have goofed," he added. "I wonder who?"

Simmons explained to the board that a bond would have acted like an insurance policy guaranteeing the county its money in the event the firm couldn't pay. It's not required, he added, but is a good business practice.

State Representative Gaylin DenOuden told commissioners at their meeting last week that a bill clearing the way for the transfer of part of Birch Coulee park northeast of Morton had cleared both houses of the state legislature recently and would be signed by the governor soon.

In addition to the land transfer, the bill also provides for the payment of $10,000 to the county to be used for park restoration and improvement, according to DenOuden.

The 80-acre park is owned by the Minnesota Historical Society and plans are to restore the higher, prairie portion of the park to its original appearance at the time of the battle back in the 1860's.

Society representatives met last fall with commissioners and made the offer of the 25 acres and the cash, if approved by the legislature. The commissioners were, at the time, somewhat cool to the idea but indicated to the society that they would probably accept the property as another county park, with the payment of $10,000 for improvements.

The society already pays the county for maintenance of the entire park. No action will be taken until after another meeting with society representatives expected soon.

In other business, the board accepted and opened bids from five area insurance firms. The bids were sought as the result of recommendations made by an insurance consulting firm employed by the county to study insurance needs and costs.

Bids will be handed to the firm for tabulation and study, and action will be taken in the near future based on the consultant's recommendations.

The board also took action on three county drainage ditch projects.

-- Commissioner Pat Kubesh was appointed inspector as the result of a petition to clean a small portion of County Ditch 106A in Palmyra Township.

-- Set June 5 as the hearing date on a petition to improve a portion of County Ditch 113B in Troy Township.

-- Appointed an engineer to do a study on the need for a partial cleanout of County Ditch 63 in Bird Island and Kingman Townships.

AGENDA FOR DISCUSSION OF SB341

1. Review major changes to SB 341 since 3/5/86 draft.

2. Proposed amendments:

   a.) Written justification for use of life cycle costing.

   b.) Subcontractors - i) alter time in which general contractors must name subcontractors and, ii) provide that listing of a subcontractor does not create an implied contract.

3. Public testimony.

MAJOR CHANGES TO CS SB 341 SINCE 3/5/86 DRAFT

1.	Sec 1. Purpose.	Amendment suggested by the court system re: consistent procurement practices for all branches of state government.
2.	Sec 36.30.030	Court system amendment re: nature of its procurement practices.
3.	Sec 36.30.200	Amendment restricting the use of competitive sealed proposals in construction context.
4.	Sec 36.30.270	Incorporates SB 204 concerning architectural, engineering and land surveying services into SB 341.
5.	Sec 36.30.362	Requires written justification for contracts awarded to non-residents.
6.	Sec 36.30.850(b)(12)	Excludes Fish and Game non-point-to-point flights from the bill.
7.	Sec 40.	Amends AS 37.05.316 concerning grants to remove "contract" language.

AMENDMENT #1

Offered in the SENATE By the Judiciary Committee

TO: CSSB 341(Jud)

Page 14, line 4:

Add: "A contract based on total or life cycle costing may be awarded only when the chief procurement officer or, for construction contracts or procurements for the state equipment fleet, the commissioner of the department of transportation and public facilities, determines in writing at the time of contract solicitation that the contract promotes overall economy for the purposes intended, encourages compteititon, is not unduly restrictive, and is in the best interests of the state."

A M E N D M E N T

TO: Proposed CS for SB 341(Jud)
Dated: March 5, 1986

Page 10, line 17 & 18

Sec. 36.30.115. SUBCONTRACTORS. (a) Within 72 [24] hours after the opening of bids, the apparent low [EACH] bidder shall submit a list of subcontractors the bidder proposes to use in the performance of the contract.

Page 11, line 7, a new section to read:

(c) The listing of a subcontractor by a prime contractor is not an expressed or implied acceptance of a subcontractor's bid by a prime contractor.

Renumber following sections accordingly.

A.G.C. (3/7/86)

STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

OFFICE OF THE COMMISSIONER

BILL SHEFFIELD, GOVERNOR

POUCH Z
JUNEAU, ALASKA 99811
PHONE: (907) 465-3900

March 3, 1986

Ms. Resa Jerrel
Associated General Contractors
134 No. Franklin Street
Juneau, Alaska 99801

Dear Ms. Jerrel:

Let me begin by saying thank you for working with my staff and others to find a good, workable procurement process for the State of Alaska. It is in all of our best interests to find workable solutions which serves our State and the various groups, both contractors and subcontractors.

As we agreed, in Senate Bill No. 341, State Procurement, the Department offered an amendment to Section 36.30.110, Invitation to Bid, which would require prime contractors to list their subcontractors immediately following the bid opening. We construe "immediately" to mean 72 hours. This amendment would greatly simplify our bid openings and encourage more bidders to participate.

The requirement of listing subcontractors within 72 hours, and we mean 72 hours, should help the problem of bid shopping for subcontractable work. The proper place for the time requirement is in the regulations and we will see that the 72 hour requirement is literally included.

We are also working on other issues important to the subcontracting community, which are outside the scope of the procurement bill, such as prompt payment. These will be addressed in our Standard Specifications.

We thank you again for your cooperative efforts and looking forward to working with you to see this bill through the legislative process.

Sincerely,

R. J. Knapp
Commissioner

cc: Sponsor
Committee Members

25A-T1LH

It is best to clarify the language in the law instead of having to spend time and money to have the court system clarify what the legislature intended. The California statute on page 375 list a court decision:

> In the absence of an agreement to the contrary listing of a subcontractor in a prime bid on a public improvement project is not an implied acceptance of the subcontractor's bid by the general contractor, but is in response to statutory command and cannot reasonably be construed as an expressed acceptance. Southern Cal. Acoustice Co. v Holder (C.V.), Inc. 1969

The above type of litigation can be prevented by the inclusion of the following language:

> The listing of a subcontractor by a prime contractor is not an expressed or implied acceptance of a subcontractor's bid by a prime contractor.

Received on scanner from Liz in anchorage for SB341 packets. 3/11 1CB 12:30

CRAIG TAYLOR EQUIPMENT COMPANY

733 E. Whitney Road
Anchorage, Alaska 99501-1894
(907) 276-5050

[redacted]

SB 341
Committee
File

March 11, 1986

Senator Pat Rodey
Chairman, Senate Judiciary Committee
Pouch Y
Juneau, AK 99811

Dear Senator:

We are unalterably opposed to total cost bidding. We represent well over fifty light and heavy industrial and construction equipment manufacturers. We contribute sizeable investments in facilities, employment and taxes to and for the state of Alaska. We concur with the ideas expressed in the enclosed letter and urge you to rule out total cost bidding in proposed Bill No. 341 regarding state procurement. In the event that you do not think this is possible we urge you to adopt language such as the following:

A contract based on Total or Life Cycle costing may be awarded only when the Chief Procurement Officer or, for construction contracts or procurements for the state equipment fleet, the comissioner of transportation and public facilities determines in writing that it promotes overall economy for the purposes for which it was intended, that it encourages competition, that it is not unduly restrictive and that it is in the best interests of the state.

Thank you very much for your consideration in this matter.

Signature	Title	Company
[signature]	V.P.	Craig Taylor Equipment
[signature]	V.P.	Fraley Equipment Inc.
Morry Hollowell	President	Yukon Equipment, Inc.

Signature | Sales Manager | Construction Machinery, Inc.
Title | Company

Signature | Product Mgr. | Howard Cooper Corp
Title | Company

Enclosures

cc: Senators Tim Kelly
Jan Faiks
Rick Halford
Robert Ziegler

CRAIG TAYLOR EQUIPMENT COMPANY

733 E. Whitney Road
Anchorage, Alaska 99501-1694
(907) 276-5050
Sales · Service · Rentals

November 18, 1985

Mr. Frank Turpin
Alaska Railroad
Pouch 7-2111
Anchorage, AK 99510-7069

Dear Frank:

The total cost bidding concept was developed quite some time ago by one manufacturer who felt, because of a perceived difference in quality, that he did not have to participate in deeper discounts for governmental bids. At that time there may have been other manufacturers who built machines just to meet minimum bid specifications and were therefore inherently cheaper. These machines that were being purchased through low bid by governmental agencies were not necessarily being purchased by the general contractors back then. But since the basic function of most governmental agencies is for repair and maintenance rather than new construction, there was a viable reason to purchase the less expensive machine.

With the advent of tighter specification writing added to the fact that general contractors were not purchasing the cheaper machines, those manufacturers have been either forced out of business or else forced to build a higher quality, market-accepted machine. Marginal manufacturers will probably always come and go, but with the sophistication of the State's bidding procedures already in place; ie. prequalification, tight bid specs, thorough warranty specs, nonperformance penalties, these manufacturers will always be weeded out.

A total cost bid is one in which all costs (purchase price, repairs, maintenance) for a given period of time, and the residual or salvage value at the end of that time, are guaranteed at the time of purchase. The bid is usually bonded to ensure the performance of the vendor. The only benefit to the customer of the total cost bid over a well prepared low bid package is that costs, although higher, are known for budgetary purposes. The vendor on the other hand, realizes higher profits, restricted competition, and higher product support revenues.

The drawbacks to the customer are several. He will end up paying tens of thousands of dollars more in a total cost bid especially when the time value of money between the date of sale and date of buy-back (as much as five years later) is considered. Add to this the price of the bid bond and then the fact that the bid, which is evaluated based on the guaranteed buy-back price, does not require the agency to sell the machine back. If the repurchase option is not exercised then a tremendous premium has been paid. It is estimated that only as few as five to ten percent of the machines sold under a total cost bid are repurchased. The agency's maintenance costs will increase due to the

rigid requirements for strict adherence to maintenance responsibilities written into most of these bids. While promoted as a valid protection for the dealer, much subjectivity could enter into the equipment evaluation at the end of the period, especially if the agency's maintenance records are not complete or are inaccurate. Considerable latitude exists for conflict between the agency and supplier with the very good possibility that the repurchase guarantee may be voided on maintenance technicalities. A by-product of the maintenance requirement is that the agency is locked into one supplier. There can be no substitute filters or oils, etc. used during the life of the contract.

The dealer is faced with several drawbacks also. He is faced with a contingent liability that he must live with for the life of the contract. This, of course, reduces the dealer's bonding capacity and borrowing capacity needed for a liquid financial position. He may end up with a machine that has to be remarketed. And he may have guessed wrong about inflation keeping the value of the buy-back high. Or he may have given an inflated price for the buy-back gambling that few agencies ever enforce the repurchase clause. Introducing the bidder's highly speculative resale valuation into the bid process affords the less scrupulous bidder an opportunity to manipulate the net value to his advantage although he may have no incentive or reasonable expectation of having to fulfill his promise to repurchase.

The biggest drawback in this type of bid for both buyer and seller is that there are too many loopholes, too many contingencies subject to negotiation. There is no way to objectively evaluate a total cost bid. These contingencies and loopholes create numerous opportunities for collusion or for deal making.

Isn't it odd that with all the various commodities the state of Alaska purchases; from pencil sharpeners, to office machines, to cars and trucks, to heavy equipment, to ferry boats, only one manufacturer is a proponent of total cost bidding? If there was any validity in the concept at all then its use would be widespread. But as it is, there are no federal agencies and only a very small minority of other governmental agencies that use this concept. It seems to me that the few who use this method have simply caved in to intense marketing pressure rather than going with their common sense. It is only old fashioned, out-moded thinking in this time of world-wide economic competition that would lead someone to believe that any one brand or product might be superior as to quality and characteristics. Once upon a time this might have been true. But in this day and age it is nothing but a fairy tale. Don't get caught up in this type of thinking and don't pay more for those products trying to live on past reputations.

Sincerely,

John P. Snow
Vice President

cc: Senator Jan Faiks
Commisioner Richard Knapp
Commissioner Loren Lounsbury
John Reynolds, ARR Purchasing
Darrell Methvin, State Equipment Fleet
Keith Nelson, State Equipment Fleet

Office of the Attorney General
STATE OF SOUTH DAKOTA

Mark V. Meierhenry
Attorney General

February 4, 1986

MEMORANDUM

TO: All States Attorneys

FROM: Mark V. Meierhenry, Attorney General

RE: TOTAL COST BIDDING

Enclosed please find an Official Opinion just issued from this office concerning total cost bidding. Our office has received a number of complaints from the Auditor General's Office and from private citizens concerning abuses in implementing a total cost bidding procedure by counties, cities and townships. In the Official Opinion I determined that the total cost bidding procedure as currently used by many counties, municipalities and townships was in violation of the competitive bidding procedures. This Opinion may affect not only future biddings by your county but also previous bids and contracts entered into for heavy equipment and other goods and services.

I would suggest that you review the opinion, your county's current bidding procedures, and discuss the matter with your Commissioners to avoid problems in the future.

If you have any questions, please feel free to contact this office.

MVM:JPH:bn

STATE OF SOUTH DAKOTA

OFFICE OF

THE ATTORNEY GENERAL

February 4, 1986

Mr. Maurice C. Christiansen
Auditor General
435 South Chappelle
Pierre, South Dakota 57501-3292

OFFICIAL OPINION NO. 86-01

Total cost bidding

Dear Mr. Christiansen:

You have requested an official opinion from this office in regard to the following factual situation:

FACTS:

The Auditor General's Office has encountered numerous situations during the past year where local governmental entities have been implementing a "total cost" bidding procedure for the purchase of heavy equipment. Using this total cost bidding procedure, the local government entity is requesting bids which are evaluated by netting at face value: (1) the initial purchase price of the equipment, plus; (2) the guaranteed maximum repair cost for a period specified by the government entity, less; (3) a guaranteed minimum repurchase price at the end of the specified time period.

With the above factual statement, the Auditor General's office has also enclosed several recent sets of bid specifications used by local government entities attempting to implement a total cost bidding procedure. Some of the specifications submitted did not require a performance bond or allowed a "corporate guarantee" in lieu of the performance bond, and establishes a procedure where only the face value of the bid items addressed above were to be considered.

Based upon the above facts, you have asked the following question:

QUESTION:

> Does the total cost bidding procedure as currently being used by local governmental entities violate the competitive bidding provisions of SDCL Ch. 5-18 or SDCL Ch. 5-21?

Total cost bidding describes a bidding procedure whereby a public entity seeks bids from a potential seller, based upon the total costs of ownership, in addition to the initial purchase price. This is the sole cost basis for governmental purchases under traditional bidding procedures. One of my predecessors in AGR 1965-1966, page 211, using the term "guaranteed bidding," determined that the concept of total cost bidding did not violate the competitive bidding provisions of SDCL Ch. 5-18. I concur with my predecessor's determination that total cost bidding, if properly implemented by the public entity, does not violate the competitive provisions of SDCL Ch. 5-18 or Ch. 5-21. It is my opinion, however, upon review of "total cost bidding procedures" currently used by the local government entities, that the principles of competitive bidding are being violated.

The South Dakota Supreme Court in Gridley v. Engelhart, 322 N.W.2d 3, 7 (S.D. 1982), stated:

> Bid specifications as they pertain to public contracts must be sufficiently definite and precise so as to afford a basis for bids and they must be free of restrictions the effect of which would stifle competition. Such specifications must be sufficiently detailed upon all essential elements so as to afford a basis for full and fair competitive bidding upon a common standard.

The flaw in the local governmental entities current total cost specifications is that these specifications totally ignore the time value of money which, in my opinion, is an essential element in total cost bidding. It does not take an expert financial analyst to determine that a dollar today is not the same as a dollar three or seven years in the future. The reason for this is that a dollar today can be invested so that it is worth more at a future date. A total cost bidding procedure that takes present dollars and future dollars and nets them at face value to determine the low bid compares dollars of different present value. This netting of face values has the effect of mixing apples and oranges which, in my opinion, makes it impossible for a local government entity, as well as potential bidders, to determine what is the "lowest responsible bid."

This netting of dollars at face value also could result in potential abuses where the actual value of the equipment at the date of purchase is no longer relevant.

For purposes of illustration, I present the following example: A local government entity is seeking the purchase of a flatbed truck. The local government entity uses a total cost bidding procedure and wants guaranteed repairs for five years with a guaranteed repurchase price. Suppliers "A," "B" and "C" have products that meet the county's general specifications for the flatbed truck and all are responsible bidders. Bids are received and opened with the following results:

	Dollars Bid		
	A	B	C
Initial price	$20,000	$25,000	$35,000
Plus maximum repairs	9,000	4,000	2,500
Subtotal	$29,000	$29,000	$37,500
Less repurchase guarantee	10,000	18,000	30,000
Total Cost	$19,000	$11,000	$ 7,500

The local government entity could currently invest money in C.D.'s at an investment rate of 8%. If the value of money was included in the specifications and the bids were reviewed in present value terms the bid results would be as follows:

Initial price	$20,000	$25,000	$35,000
Plus maximum repairs[1]	7,187.4	3,194.4	1,996.5
Subtotal	$27,187.4	$28,194.4	$36,996.5
Less repurchase guarantee[2]	6,810.	12,258.	20,430.
Total Cost	$20,377.4	$15,936.4	$16,566.5

---

1 3.993--Present value of an annuity of $1.00 per year for 5 years discounted at 8% and assumes repairs of equal amounts each year.

2 .681--Present value of $1.00 due at the end of 5 years discounted at 8%.

Under a traditional bidding procedure where only the initial price is considered, the truck from Supplier "A" would have been purchased by the local government entity. Under a "total cost" bidding procedure using dollars at face value as currently used by the local governments, Supplier "C" would be awarded the bid although Supplier "C's" initial purchase price was the greatest, the total cost at face value was less than either Supplier "A" or "B." But, once the value of the dollar is added, Supplier "B" would now become the lowest responsible bidder. When one looks at all costs of the local government entity, Supplier "B" provides the best total value if the entity wishes to use the total cost approach.

It is, therefore, my opinion, that if a local government entity decides to use a total cost bidding procedure to comply with the competitive bidding provisions of SDCL Ch. 5-18, the local government entity must include in the bid specifications the current investment rate which the local government entity could invest funds. This ensures that the potential bidders and the local government entity have a uniform basis to compare the bid proposals submitted by the various potential suppliers.

In addition, though it is not a violation of SDCL Ch. 5-18, it is my opinion that a prudent local government entity, in order to guarantee future performance of the total cost contract, should require a potential bidder to submit a performance bond in accordance with SDCL Ch. 5-21. When a supplier enters into a contract based upon a total cost bid, that supplier has a contingent liability to the local government entity for the costs of repairs for the term of the contract and the guaranteed re-purchase price. Without a performance bond, the local government entity has no guarantee that the terms of the contract will be fully performed. Currently, some government entities are requiring a performance bond with their total cost bid while other local government entities are not requiring a performance bond or allowing that a "corporate guarantee" be submitted in lieu of performance bond. A corporate guarantee adds no additional security to future performance of the contract. Any corporation that enters into a contract with a local government entity for future services or products is getting that corporation's guarantee. Only a performance bond or submission of actual collateral or security to the local government entity will provide additional security in case the bidder is awarded a contract and is financially incapable of performing all of its terms.

Total cost bidding, if used properly, can reduce the amount of monies a local governmental entity needs to expend for the purchase and use of equipment. Unless properly implemented, however, the total cost bid

procedures may result in the county needlessly expending additional funds for goods and services without added benefits.

Respectfully submitted,

MARK V. MEIERHENRY
ATTORNEY GENERAL

MVM:JPH:db

TRINITY
EQUIPMENT COMPANY

P.O. Box 8486
Randall Mill Rd & Loop 820
Ft. Worth, Texas 76112
817/451-6094

17 April 1984

Tarrant County
Purchasing Department
100 West Weatherford Street
Fort Worth, Texas 76102

Attn: Roy Edwards

Dear Roy:

Per your letter concerning Repurchase bids, we have, as a matter of policy, discontinued bidding a guaranteed repurchase agreement on equipment for the following reasons:

1. We feel this practice is of benefit to neither the seller or the purchaser and results in added expense to the county and ultimately the tax payer.

2. It becomes a contingent liability on our financial statement reducing our bonding capacity, borrowing capacity, and other capacities needed for a liquid financial position.

3. Only one distributor promotes this program. That distributor is Catepillar and the program was written by Catepillar as a marketing tool for their benefit (not the benefit of the County). If John Deere were to come out with a program such as this, you can bet it would favor John Deere and not the County.

4. The program as written by Catepillar has a number of so-called loopholes whereby the seller can void the repurchase agreement if certain conditions are not met.

5. Good business dictates policies. We would be foolish to offer to repurchase a piece of equipment for more than that equipment would be worth on the open market at a given time. In turn, the County would be foolish to exercise a repurchase agreement that would give them less than the equipment was worth. So you may have paid a premium price for which you receive no benefit if you do not exercise the repurchase agreement.

6. No one knows or can forsee the future, yet under the Guaranteed Repurchase Clause you are asking us to bid on a piece of equipment NOW that will not be available for a number of years. Also, we must guarantee to repurchase but you do not guarantee to sell to us at the end of the agreement.

7. Why is a guaranteed repurchase asked for on heavy equipment only? Why not on automobiles, trucks, business machines, etc.? We feel the policy is discriminatory.

Taken in total the above reasons, could you blame our organization for our policy of not bidding guaranteed repurchase? We have enjoyed our business relationship with the County and feel our equipment has given satisfactory service and good residual value. We can see no advantage to a guaranteed Repurchase clause in your bidding procedure.

Sincerely,

TRINITY EQUIPMENT COMPANY

James E. Thrasher
Assistant Manager

Trinity Equipment Company

P.O. Box 8486
Randol Mill Road & Loop 820 Fort Worth, Texas 76112
Telephone (817) 451-8094

Equipment Spec. Writing Services — Mr. T.C. Webster

February 21, 1984

City of Fort Worth
1000 Throckmorton
Fort Worth, Texas 76101

Attn: Mr. Robert Herchert
City Manager

Subject: Purchasing Practices now employed by the City of Fort Worth (i.e. Guaranteed Repurchase).

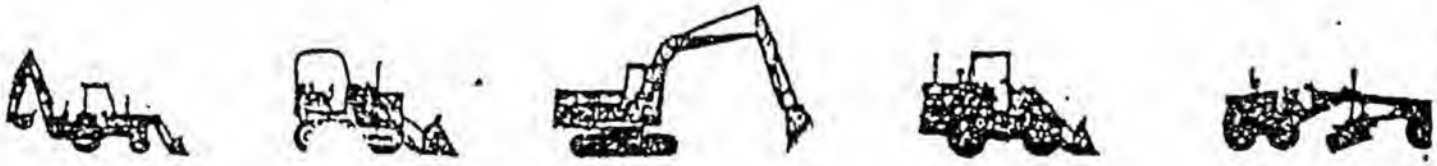
Dear Sir:

For the past several years the City of Fort Worth has employed a policy of purchasing heavy equipment utilizing a Guaranteed Repurchase clause to determine award of contracts for purchase of that equipment.

In the past we have participated in this procedure and have been the successful bidder on several occasions, however, our company has discontinued this type of bidding for various reasons.

Firstly, we will not bid the repurchase guaranty because at present we have guaranteed repurchase agreements to the City of Fort Worth in effect on twenty-four (24) pieces of equipment totaling some $580,000.00. This appears on our company's financial statement as a contingent liability, reducing our borrowing capacity, our bonding capacity and various other capacities requiring a more liquid financial statement.

Secondly, we do not choose to bid the repurchase guaranty because we feel it is not an advantage to either the buyer or the seller. As written, your Repurchase Guaranty does not provide an option for the seller. The seller guarantees to repurchase, but the City does not guarantee to sell the equipment back to the seller. In addition, the City will pay a premium price for the equipment under this program since bonding is required and costs for the bond will most assuredly be added to the sale price of the machine. The bidder must consider the cost of the bond in determining his sale price. At the present time a performance bond costs us $20.00 per thousand per year. On that basis a guaranteed repurchase bond in the amount of $30,000.00 for five years would cost $3,000.00 which would be added to the cost of the machine.



As an observation on the above, let me offer an example of purchases made prior to this bidding practice which may show the questionable value of Repurchase Guaranty. In 1973, we sold the City of Fort Worth eight (8) four-wheel drive end loaders for $16,240.28 each. One of these units was offered as a trade-in on your invitation to bid opened February 2, 1984. One of our competitors offered the City $13,500.00 for this loader. This is an 83% recovery of the original purchase price after ten (10) years of use by the city. On the bids just opened on February 2, 1984 for this same type of equipment, the best Repurchase Guaranty received by the City was only 75% of the purchase price after five (5) years of use, and the apparent successful bidder only guaranteed 71% of his original sale price.

In summary, in our opinion, not only is the City paying a premium price for their equipment, it is also giving an advantage to the larger equipment manufacturer by limiting participation by smaller dealers. In 1982 there were some fourteen (14) bidders on four-wheel drive end loaders in response to your invitation to bid. In 1983 only ten (10) bidders and this year only six (6) bidders responded (5 bid the Guaranteed Repurchase). If a survey were conducted, I believe you would find that the Guaranteed Repurchase clause would be the reason for the reduction in the number of bids received by the City.

We have enjoyed our association in a business relationship with the City of Fort Worth and believe our equipment has served the City well over the years. We regret that we cannot compete for your equipment needs under the current purchasing procedures.

Sincerely

TRINITY EQUIPMENT COMPANY

James E. Thrasher
City Salesman

JET/ph

Midwest Industrial Equipment Co.

Hwy. 2 West — Box 5010
Grand Forks, North Dakota 58201 -- Phone 772-4842

May 29, 1984

Honorable Commissioners
Polk County, MN

Gentlemen:

Midwest Industrial Equipment Co. will not be bidding the re-purchase portion of the county's motor grader bid. We hope that this decision does not deny us the opportunity to be part of the competitive bidding process.

At John Deere we try to make the best equipment available today. We are willing to stand behind our equipment because we feel that the quality of the machines will help sell itself without having to add costly guarantees. Our name and reputation depend on it.

One of the reasons for not bidding the re-purchase section is the added cost to the county. Most counties can't afford to have a five year turnover of machines. Even if they could, a county machine is still in excellent condition after five years. Because of the county maintenance programs, county machines have a trade-in value that could be as high or higher, depending on inflation, than a five year old re-purchase price. If you have to pay X amount more for a machine at the purchase, you should get that amount, plus interest, when the machine is sold or traded.

Example: A machine costing $10,000 more now should be worth, at 8% interest:

$10,800.00 after 1st year
11,664.00 after 2nd year
12,597.12 after 3rd year
13,604.89 after 4th year
14,693.28 after 5th year

I know it's been said that the extra cost to the county is our excuse for not bidding the re-purchase. It's not an excuse. We feel we have a responsibility to our community. This years survey by Fortune Magazine backs this up. They ranked John Deere Corporation first in five of eight categories. One of our first place catogories was community responsibility.

At John Deere we're not satisfied to keep up with the competition. We are the innovators of many modern equipment designs and fuctions that you see. The John Deere 770A motor grader is designed to offer our customers the most up to date, efficient, and reliable grader possible.

SKAGIT COUNTY PUBLIC WORKS DEPARTMENT

County Administration Building, Room 203, 2nd & Kincaid Streets, Mount Vernon, Washington 98273

W. Eugene Sampley, P.E.
Director

John B. Ensley
Assistant Director

(206) 336-9400

Charles Tewalt
Superintendent
Operations Division

(206) 755-9531

February 27, 1985

Board of County Commissioners
Skagit County Admin Building
Mount Vernon, WA 98273

Re: Bid Award Recommendation:
Motor Grader

Gentlemen:

Two bidders submitted a total of four proposals to furnish one new latest model motor grader, as follows:

Millbrook Equipment Company	JOHN DEERE Model 770A	$ 81,045.30
N C Machinery Co.	CATERPILLAR Model 140G	$105,350.00
N C Machinery Co. (Alternate #1)	CATERPILLAR Model 140G	$110,725.00
N C Machinery Co. (Alternate #2)	CATERPILLAR Model 130G	$ 96,750.00

All units meet equipment features specifications except for the N C Machinery's CATERPILLAR Model 130G which does not meet the horsepower requirement.

Specifications called for this motor grader to be awarded to the lowest or best bid based on a life cycle cost method. Millbrook did not meet the requirement to submit guaranteed repair expenses and a guaranteed repurchase price. N C Machinery did not submit a valid bid deposit in the form of a surety bond, cash, cashier's check or certified check in the amount of 5% of the amount of their bid proposal.

Although the Board reserves the right to waive minor irregularities in the bidding, cost analyses shown in Attachment "A" support the contention that a life cycle cost approach will not be in the County's best interests on this bid award when the time value of money is considered.

I recommend that all bids be rejected. I further recommend that a new call for bids in which life cycle cost is not used be initiated.

Sincerely,

W. EUGENE SAMPLEY, P.E.
Public Works Director

ATTACHMENT "A"

MOTOR GRADER TIME VALUE OF MONEY ANALYSES

Assumptions: 1) That the County has $105,350 available to spend

2) That the average interest rate value of money over the next six years will be 10%

OR

3) That the average interest rate value of money over the next six years will be 8.5%

* *

	N C MACHINERY	MILLBROOK
Current out-of-pocket cost:	$105,350	$81,045
Less guaranteed trade-in amount:	(80,000)	
Less estimated trade-in amount:		(40,000)
Six-year cost of ownership without considering that trade-in money is not available for six years:	$ 25,350	$41,045

* *

Current out-of pocket cost:	$105,350	$81,045
Less guaranteed trade-in amount of $80,000 discounted for six years at 10%:	(45,158)	
Less estimated trade-in amount of $40,000 discounted for six years at 10%:		(22,579)
Interest earned on $24,305 "unspent" money available for investment for six years at 10%:		(14,583)
Comparative cost of ownership in 1985 dollars:	$60,192	$43,883

* *

Current out-of pocket cost:	$105,350	$81,045
Less guaranteed trade-in amount of $80,000 discounted for six years at 8.5%:	(49,036)	
Less estimated trade-in amount of $40,000 discounted for six years at 8.5%:		(24,518)
Interest earned on $24,305 "unspent" money available for investment for six years at 8.5%:		(12,396)
Comparative cost of ownership in 1985 dollars:	$ 56,314	$44,131

GUARANTEED BUY-BACK RESPONSE

There are many problems with the concept of guaranteed buy-back of Governmental equipment. It is very difficult to project resale value in five years time because of the many variables involved through such a program. These variables are no less evident if you require the bidder to speculate as to resale value by making his own projection. He is, in fact, in a worse position to judge that resale value as he will have no control over the use of the equipment by the Agency. As a result, the repurchase guarantee mechanism only serves to distort the bidding process, particularly in light of the fact that repurchase is a mere option the Governmental Agency may never exercise and, therefore, deserves little or no weight during bid evaluation.

The experience of many Agencies has been that a higher return is realized through disposal of equipment at public sale. Introducing the bidder's highly speculative resale valuation into the bid process affords the less scrupulous bidder an opportunity to manipulate the net value to his bid advantage although he may have no intention or reasonable expectation of having to fulfill his promise to repurchase. A performance bond to assure repurchase at the end of the life cycle would not protect the Agency from such intangibles as poor performance during the life of the equipment or the maintenance and downtime required for an inferior piece of equipment.

HOWARD COOPER CORPORATION

PARTS ORDERING INFORMATION

DRESSER & WABCO

ORDER DESCRIPTION	CODE	PENALTY	CUT OFF
STOCK ORDER			
EMERGENCY	03	—	2:00
CRITICAL	04	5%	
SHIP TOMORROW	13		AFTER 2:00
FPO	1 ORDER A WEEK FREIGHT PREPAID	500.00 min.	5 day ship

LINK BELT	SHIPPED BY	PENALTY
RUSH ORDER	3 WORKING DAYS	5%
EMERGENCY ORDER	24 HOURS	10%

HOWARD COOPER CORPORATION

PARTS ORDERING INFORMATION

DRESSER & WABCO

ORDER DESCRIPTION	CODE	PENALTY	CUT OFF
STOCK ORDER			
EMERGENCY	03	—	2:00
CRITICAL	04	5%	
SHIP TOMORROW	13		AFTER 2:00
FPO	1 ORDER A WEEK FREIGHT PREPAID	500.00 min.	5 day ship

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HOWARD COOPER CORPORATION

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FPO	1 ORDER A WEEK FREIGHT PREPAID	500.00 min.	5 day ship

LINK BELT	SHIPPED BY	PENALTY
RUSH ORDER	3 WORKING DAYS	5%
EMERGENCY ORDER	24 HOURS	10%

Total Cost Bidding Disputed

28 October 1985 - Daily Oklahoman

"There are a heck of a lot of temptations that come to pass with this bidding method. I'm not accusing any commissioner of being dishonest, but there are too many loopholes — too many places that could be subject to abuse."

— John Johnson, state purchasing director

By Randy Ellis

Controversy rages among state equipment dealers over a new bidding procedure promoted by Albert Equipment Co. of Tulsa.

The procedure is labeled "total cost bidding," and Albert Equipment Co. officials say it is "an idea whose time has come."

Other dealers disagree. They say it "inflates equipment prices" and "opens the door to all types of collusion."

Two northeastern Oklahoma counties opened bids for motor graders last week using the new procedure.

In both cases, Albert Equipment Co. was the only bidder and its bids were $20,000 to $35,000 higher than the state Central Purchasing Department paid for comparably equipped machinery bought through conventional bidding procedures.

For the extra $20,000 to $35,000, the counties get extended warranty coverage and guaranteed repurchase prices from the dealer.

Pawnee County commissioners are scheduled to vote Thursday on whether to accept Albert Equipment Co.'s bid, while Osage County commissioners face a similar vote Monday.

Albert Equipment Co., which sells the Caterpillar machinery line, has spent more than a year urging county commissioners and state officials to adopt total cost bidding.

The Tulsa Caterpillar dealer contends the new bidding method is superior to accepting the "lowest compliant bid" because it requires vendors to incorporate maintenance costs and resale value into bids.

Other vendors refused to bid under the new procedure, contending it is a Pandora's box.

"We think it has a lot of loopholes in it that over a period of time would promote collusion," said Buzz McDonald, sales manager for C.L. Boyd Co. Inc. "Anything that would promote collusion, we're against."

Total cost bidding is similar to conventional bidding in that it requires each vendor to submit a sealed bid containing a proposed sales price.

But, it differs from conventional bidding by requiring vendors to also bid amounts that they will guarantee to pay for the repurchase of their equipment at the end of one, two or three years with normal wear and tear. The purchaser has the option of exercising the buy-back provision or keeping the equipment after each of the first three years.

The bid is awarded to the vendor which bids to buy its equipment back at the end of the first year at a price which is closest to the original sales price it has bid.

If a vendor had assurances from a county commissioner that the buy-back option would not be exercised, he could afford to inflate the sales price and then bid a buy-back price of just a few dollars less, McDonald said.

The colluding vendor would be the winning bidder, even though his sales price might be tens of thousands of dollars higher than the sales price bid by other contractors.

"It's just one way of getting around the competitive bidding process, said John Stotts, sales coordinator for Midwestern Equipment.

Lynn Sliger, sales manager for L.B. Smith, Inc., said Caterpillar officials created the total cost bidding program.

"They deliberately wrote everybody else out," Sliger said, adding that small companies don't have the resources to participate in the program. They would have to hire additional maintenance employees and vehicles to make sure counties were properly taking care of their equipment.

"I don't think anybody's going to bid it except Caterpillar dealers," he said. "After all, they're the ones that set it up. It's their program.

Jim Kromphardt, governmental sales consultant for Caterpillar Tractor Co., promoted the total cost bidding program in behalf of Albert Equipment Co. at a meeting of county commissioners last month.

"Pressure to buy based on the lowest price is always present, but seldom will it result in the best long-term savings," he said.

Kromphardt argued that accepting the low bid on a road grader might save a buyer money now, but in the long run could cost more because a cheaper piece of equipment would require more repairs, have higher operating costs and lower resale value.

Dean Shaw, branch manager for Dresser Industries, Inc. of Oklahoma City, countered that Caterpillar Tractor Co. is just one of several companies that manufacture good equipment.

"We like to bid upfront where everything is spelled out," he said. "This particular method has too many contingencies subject to negotiations."

"Our firm will not bid it," he said.

A bill that would authorize total cost bidding statewide was introduced last session by state Rep. David Riggs, D-Sand Springs.

Riggs elected not to bring it up on the House floor after state Central Purchasing officials expressed reservations about its use. Riggs left open the possibility that he might reintroduce the bill next session.

John Johnson, director of purchasing for the state, said he has problems with total cost bidding because it makes it extremely difficult to objectively compare bids and opens the door for collusion.

"There are a heck of a lot of temptations that come to pass with this bidding method," Johnson said. "I'm not accusing any commissioner of being dishonest, but there are too many loopholes — too many places that could be subject to abuse."

Former Kingfisher County Commissioner Billy L. Lightle, one of more than 200 county commissioners and equipment and materials suppliers convicted in a federal kickback probe, concurred with Johnson's assessment of the dangers.

"This is a can of worms," he said in an interview at the El Reno federal correctional institute.

Lightle said he didn't want to accuse anyone of bid rigging, but said total cost bidding would eliminate competition from small equipment companies and create numerous opportunities for collusion.

"There can be some deals made on it very easily," Lightle said.

Osage and Pawnee Counties were the first to begin testing the new bidding procedure.

In Osage County, commissioners opened bids Oct. 21 for three 135 horse power motor graders.

Albert Equipment Co. submitted bids of $94,003, $94,263 and $94,313 for the three Caterpillar 12G graders. Nine other vendors submitted "no bids."

As part of its bid, Albert Equipment Co. submitted guaranteed repurchase prices of $91,325 at the end of one year, $88,325 at the end of two years and $85,325 at the end of three years. The same repurchase prices were submitted for each graders.

Two days later, the state Central Purchasing Department opened conventional bids for four 150 horse power motor graders. Four companies submitted bids, which ranged from $58,374 each to $62,340 each. Bid forms were sent out to four Caterpillar dealers, but they did not respond.

In Pawnee County, experience with total cost bidding was similar.

Once again, Albert Equipment Co. was the only bidder. This time, it submitted a $73,260 bid for a 125 horse power Caterpillar grader, and bid that it would guarantee to repurchase the grader for $69,000 at the end of the first year, $65,000 after the second year and $61,000 after the third year.

When the state opened conventional bids for three comparable 125 horse power graders this week, it received four bids — including a low bid of $53,042 per grader. Again, the state sent out bid forms to Caterpillar dealers, but they were not returned.

Osage County Commissioner Fred Jordan indicated his county would probably buy at least one grader from Albert Equipment Co.

"I'm quite sure we're going to buy at least one or maybe three," Jordan said.

Jordan said he is a strong supporter of total cost bidding, despite the fact it would cost his county $35,000 more for a 135-horse power grader than other counties are paying for 150 horse power graders.

For the extra $35,000, the county receives guaranteed repurchase prices, an extended warranty of 5,000 hours or 36 months and a guarantee that the company will supply a substitute machine or pay $100 a day if the machine is inoperable for more than 48 hours.

"They've got to believe in their equipment to do it," Jordan said.

Sylvia Riney, purchasing agent for Pawnee County, said she and the Pawnee County commissioners are still studying Albert Equipment Co.'s bid and trying to decide if total cost bidding is a good idea.

"It has its good points and its bad points," she said.

DARR
EQUIPMENT CO.
P.O. Box 20737 Dallas, Texas 75220-0737
(214) 721-2000

RECEIVED
MAY 25 1984
CITY OF FORT WORTH
EQUIPMENT
SERVICES

May 23, 1984

Mr. T.C. Webster
Technical Services Coordinator
Equipment Services Division
City of Fort Worth

Mr. Webster:

In regards to actual values or trade-in prices that Darr Equipment Company offered on equipment number 624-0035 930, S/N 41K09092 for $29,500.00 and equipment number 624-0033 930, S/N 41K08992 for $23,500.00, we offer the following response.

Darr Equipment Company Repurchase Guarantee states that machines will be returned to Darr with only normal wear and tear on them. When we inspected these machines, there were some major mechanical deficiencies, and as a result, we put the assessed value somewhat lower than the guaranteed repurchase.

Should the City decide to repair or have Darr Equipment Company repair these deficiencies, then the original repurchase price would certainly be in order.

Sincerely,

Dean Hertenstein
Used Equipment Sales Manager

DH/kt

Apr. '84 (Renville County Mn.)

County board wrestles with road grader matter

By Gene Klecker
Government Reporter

Representatives from a heavy machinery firm in the Twin Cities told Renville County commissioners last week that they will be financially unable to honor a buy back agreement signed with the county five years ago. The agreement was part of a purchase contract in which the county highway department bought a new Champion motor grader from the firm, Borchert-Ingersoll.

Under terms of the agreement the Twin City firm would buy back the grader at the end of a five-year period at a set price of $65,900.

The two company representatives told board members that if the firm would be held to the buy back agreement it could force the company to seek protection under the bankruptcy laws. Tight economic conditions have put a severe strain on the firm's operations, the two men said, and as a result the usual number of employees carried by the firm has been severely cut.

They admitted the firm had similar agreements with other counties but did not elaborate.

The men did, however offer several alternatives for the commissioners' consideration. But county attorney Tom Simmons requested that details of the offers not be made public at this time in the event litigation resulted over the matter.

As a result of this matter, bids taken last month for a new motor grader were all rejected as the county had planned to use the buy back money toward purchase of the new machine.

Commissioners took no action but plan to study the alternative proposals before contacting the firm again.

"On deals like this I understand it is customary for the firm to furnish a performance bond," commissioner Lester Fredrickson observed. "But for some reason we don't have one. Does anyone know the reason why?"

No one answered Fredrickson's question.

"Somebody must have goofed," he added. "I wonder who?"

Simmons explained to the board that a bond would have acted like an insurance policy guaranteeing the county its money in the event the firm couldn't pay. It's not required, he added, but is a good business practice.

State Representative Gaylin DenOuden told commissioners at their meeting last week that a bill clearing the way for the transfer of part of Birch Coulee park northeast of Morton had cleared both houses of the state legislature recently and would be signed by the governor soon.

In addition to the land transfer, the bill also provides for the payment of $10,000 to the county to be used for park restoration and improvement, according to DenOuden.

The 80-acre park is owned by the Minnesota Historical Society and plans are to restore the higher, prairie portion of the park to its original appearance at the time of the battle back in the 1860's.

Society representatives met last fall with commissioners and made the offer of the 25 acres and the cash, if approved by the legislature. The commissioners were, at the time, somewhat cool to the idea but indicated to the society that they would probably accept the property as another county park, with the payment of $10,000 for improvements.

The society already pays the county for maintenance of the entire park. No action will be taken until after another meeting with society representatives expected soon.

In other business, the board accepted and opened bids from five area insurance firms. The bids were sought as the result of recommendations made by an insurance consulting firm employed by the county to study insurance needs and costs.

Bids will be handed to the firm for tabulation and study, and action will be taken in the near future based on the consultant's recommendations.

The board also took action on three county drainage ditch projects.

-- Commissioner Pat Kubesh was appointed inspector as the result of a petition to clean a small portion of County Ditch 106A in Palmyra Township.

-- Set June 5 as the hearing date on a petition to improve a portion of County Ditch 113B in Troy Township.

-- Appointed an engineer to do a study on the need for a partial cleanout of County Ditch 63 in Bird Island and Kingman Townships.

SB341

ALASKA CHAPTER
THE AMERICAN INSTITUTE OF ARCHITECTS
P.O. BOX 10-3563 • ANCHORAGE, ALASKA 99510

December 16, 1985

Ray Gillespie
Governors Office
Pouch A
Juneau, Alaska 99811

Dear Mr. Gillespie:

As requested by Sharon Macklin, our Legislative Affairs Consultants, we are enclosing draft legislation that the A/E profession requests be included in the State of Alaska Model Procurement Code presently being considered.

This draft is an excerpt from Senate Bill 204 as submitted during the Fourteenth Legislature and consists of language that results from compromises between our profession and the State of Alaska, Department of Administration and the Department of Transportation and Public Facilities.

Thank you for the opportunity to provide input on this issue.

Sincerely Yours,

Barley H. Hightower, AIA
President, Alaska Chapter/AIA

bh

cc: Richard Ritter

COMPLIANCE OF CONTRACTS WITH PROFESSIONAL REGISTRATION REQUIREMENTS. The state or a political subdivision of the state may not award for architectural, engineering, or land surveying services to:

- an individual who is not registered, in accordance with State Statue, to perform the architectural, engineering, or land surveying services required by the contract;

- a partnership that is not qualified, in accordance with State Statue, to provide the architectural, engineering, or land surveying services required by the contract; or

- a corporation that is not authorized, in accordance with State Statue, to offer the architectural, engineering, or land surveying services required by the contract.

ARCHITECTURAL, ENGINEERING, AND LAND SURVEYING CONTRACTS

(a.) State Agencies shall negotiate a contract with the most qualified and suitable firm or person of demonstrated competence for architectural, engineering, or land surveying services. The state agency shall award a contract for those services at fair and reasonable compensation as determined by the state agency, after consideration of the estimated value of the services to be rendered, and the scope, complexity, and professional nature of the services.

(b.) If negotiations with the most qualified and suitable firm or person under (a.) of this section are not successful, the state agency shall negotiate a contract with other qualified persons or firms of demonstrated competence, in order of public ranking. The state agency may reject all or part of a proposal.

(c.) The requirements of this section does not apply to contracts awarded in a situation of public necessity if the person responsible for execution of the contract on behalf of the state agency certifies in writing that a situation of public necessity exists.

(d.) Notwithstanding the other provisions of this section, a state agency may include price as a factor in selecting architectural, engineering, and land surveying services when, in the judgment of the state agency, the scope, nature, and amount of services required are sufficiently defined to reasonably enable firms and individuals making proposals to compete with a substantially equal understanding and interpretation of the services required. In order to include price as a factor in selection, the state agency shall involve in the evaluation of the proposals at least one person who is registered in the state to perform the architectural, engineering, or land surveying services that are the primary services to be provided by the contract.

(e) The consideration of price under (d) of this section as a factor in the selection of architectural, engineering, and land surveying services may not exceed 20 percent of the scoring formula used in evaluating proposals. The state agency shall base the evaluation of price on a previously established schedule that objectively correlates price with points scored.

(f) This section does not apply to a contract that incorporates both design and construction services.

Alaska State Legislature

CO-CHAIRMAN
FINANCE COMMITTEE

907-465-3740

JAN FAIKS
POUCH V
CAPITOL BUILDING
JUNEAU, ALASKA 99811

Senate

December 18, 1985

Senator Pat Rodey
1024 West 6th Avenue
Anchorage, Alaska 99501

Dear Senator Rodey:

After numerous public hearings this interim, the Senate Select Interim Committee on Procurement Practices and Procedures has now completed work on draft legislation that would rewrite the State's procurement laws. I have enclosed a copy of the draft bill which will be introduced at the start of the upcoming legislative session. In addition, I have also enclosed a sectional analysis that I have found to be quite useful in understanding all aspects of this legislation.

The Senate Select Interim Committee on Procurement Practices and Procedures is still working on a draft ethics code for the executive branch. It is our intention to meet one more time in order to recommend proposed legislation. Although no date or time has yet been finalized, that meeting will take place during the week preceding the start of the session in Juneau.

Should you have any questions or comments about either of these proposed bills, please do not hesitate to give me a call in Anchorage at 274-6611.

Sincerely,

Jan Faiks
Senator

JF:jz

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : SB 341
Title : An Act Relating to State Procurement Practices

Sponsor : Senate Interim Committee
Requestor : Governor
Date of Request : 1/23/86

FISCAL DETAIL

Agency Affected : Dept. of Natural Resources
BRU : Management & Administration

Components : Administrative Services

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		31.0	32.5	34.1	35.8	37.6
TRAVEL		2.5	1.5	1.5	1.5	1.5
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		33.5	34.0	35.6	37.3	39.1
CAPITAL						
REVENUE						

FUNDING : (Thousands of Dollars)

GENERAL FUND		33.5	34.0	35.6	37.3	39.1
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME		1	1	1	1	1
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

See Attached Sheet

Prepared by : Christopher Rutz/Contracts Officer
Division : Management
Phone : 465-2424
Date : 1/30/86

Approved by Commissioner : [signature] Deputy
Agency : Natural Resources
Date : 1/30/86

Distribution (by Agency preparing fiscal note) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

10/25/85

Attachment to Department of Natural Resources Fiscal Note for SB341

Personel Service

Cost are computed for a range 10 supply technician, based in Juneau, with a 5% COLA increase per year. This position would support the contracting and supply staff and enable the Department to fulfill as outlined in the bill as well as provide procurement training for department employees.

Travel

These cost are estimated at four trips to Anchorage/Fairbanks to provide training the year the bill is to be implemented and three trips the following years in order to maintain a active procurement training program and provide for participation in contract protests, writing, and bid openings, when necessary.

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. Senate Bill 341
Title : State Procurement Code

Sponsor : The Rules Committee
Requestor :
Date of Request :

FISCAL DETAIL

Agency Affected : Env. Conservation
BRU : Administration

Components : Administrative Services

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		37.9	39.4	41.0	42.6	44.4
TRAVEL		5.0	5.2	5.4	5.6	5.9
CONTRACTUAL		5.0	5.2	5.4	5.6	5.9
SUPPLIES						
EQUIPMENT		1.5	--	--	--	--
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		49.5	49.8	51.8	53.8	56.2
CAPITAL		--	--	--	--	--
REVENUE		--	--	--	--	--

FUNDING : (Thousands of Dollars)

GENERAL FUND		49.5	49.8	51.8	53.8	56.2
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME		1	1	1	1	1
PART-TIME		--				
TEMPORARY		--				

ANALYSIS : Attach a separate page if necessary

This bill codifies many procedures and practices presently addressed in the Administrative Manual, a variety of memo's and procedures and ad hoc decisions. Practices, particularly for professional services contracts,

Prepared by : W.A. Publicover — Phone : 465-2676
Division : Administrative Services — Date : 1-30-86

Approved by Commissioner : Bill Woods — Date : 1-31-86
Agency : Environmental Conservation

Distribution (by Agency preparing fiscal note) :
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

10/25/85

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. Senate Bill 341

vary from department to department. This bill and implementing regulations will increase fairness and accountability through uniform requirements for all areas of procurement.

Environmental Conservation regularly has over 40 open contracts worth over $2 million. Presently, we have an Accounting Technician II who works part time on these contracts. He provides technical advice on contract preparation, tracks the contracts through the approval process, processes payments and chairs the contract closing committee. In the past we have had problems with inadequate RFPs, public notices and similar technical flaws. The bill will establish much tighter standards for the technical quality of competitive sealed proposals and will greatly increase the Department's accountability. In particular, the new law will require:

- evidence of Alaska Business Licenses from offerors and subcontractors
- public notice 21 days before opening proposals
- that all contractors on the bidders list must be notified by mail
- that register of offerors must be kept
- determination of responsibility
- notice of intent to award 10 days before the award
- retention of records including each proposal
- that agency procurement officers decide on protested awards and contract controversy

These new responsibilities will increase our workload beyond the present half-time position. New requirements mandate a single source to assist in drafting RFPs and contacts and to act as agency expert in the procedural aspects of professional services contracts.

Position Title	No. of Positions	Range/Step	Barg. Unit	Gov.	Approv.	Disapp.
Administrative Assistant II	1	14	GGU			

Time Status	Staff Months	RP Number	Location	Election District	Leg.		
Full	12		Juneau	4			

Type of Expenditure		Amount
1	2	3
Salary	28.4	
Benefits	9.5	
Premium Pay	--	
Other	--	
Total Personal Services		37.9
Travel		5.0
Contractual		5.0
Commodities		
Equipment		1.5
Other		
Total Cost		49.4

Receipt Code	Funding Source		
	Federal Receipts	1002	
	G. F. Match	1003	
	General Funds	1004	49.4
	I-A Receipts	1005	
	Program Receipts	1028	
	CIP Receipts	1061	
	Other		

For B&M Use Only
Key Number __ __ - __ __ - __ __ - __ __ - __ __

Justification

The new State Procurement Code will place tighter controls on contracts for professional services. The Department typically has over 40 active contracts valued at over $2 million. While our professional staff defines the project scope and technical details, the procedural aspects of contracting are dispersed among the divisions. This allows inconsistencies, dilutes accountability, and hampers effective communications with the Department of Administration.

The Administrative Assistant will be the Department's expert on competitive sealed proposals. The position would be the focus for procedural aspects of RFPs, selection, and contract administration. The position will develop and standardize wording, provide a single point link to Department of Administration, advise on alternate procurement methods, maintain a contract tracking system, process payments, chair the contract closing committee, conduct training sessions or arrange for training, monitor the contract approval process, assist in handling protests, arrange official files and record retention schedules and maintain departmental contract procedures. The costs for this position are:

100	salary & benefits	37.9	300	postage for public notices	5.0
200	travel to regional offices to train field staff	5.0	400	Calculator, workstation	1.5

Request For New Position

Agency: Environmental Conservation
BRU:
Component:

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Revised Date

FY 87

OVERVIEW OF SENATE JUDICIARY COMMITTEE
MAJOR CHANGES TO SB 341

1. Section 36.30.005(c) The University of Alaska is subject to the requirements of SB 341, but it has the authority to issue its own regulations implementing the chapter in conformance with state APA requirements.

2. Section 36.30.010 The term of the Chief procurement officer is four years as opposed to automatically expiring with the governor's term.

3. Section 36.30.015 The department of administration may not delegate the authority to dispose of surplus supplies to any agency.

4. Section 36.30.030 This provision has been modified to provide that the administrative director of courts shall adopt procedures governing the procurement of supplies, services, professional services and construction by the judicial branch. The procedures shall be based upon the competitive principles established under SB 341, but must be adapted to the special needs of the judicial branch as determined by the administrator of courts.

5. Section 36.30.040(b) This section addresses the areas in which the commissioner shall adopt regulations. It has been expanded to include the authority to adopt regulations concerning (1) conditions under which an agency may use the services of an employment program as defined under section 36.30.100(c) and (2) a bidder's or offeror's duties under 36.30.115 and 36.30.210 with respect to subcontractors.

6. Section 36.30.050(d) A provision is added which requires that lists maintained by the commissioner shall be used in providing notice of intent to make a small procurement to Alaska bidders as defined under 36.30.170(c).

7. Section 36.30.100(b)(3)&(c) The provision has been amended to provide that competitive sealed bidding procedures need not be utilized for the purchase of products or services manufactured or provided by an "employment program" which is defined to include a non-profit program designed to increase employment opportunities for individuals with physical or mental disabilities that constitute substantial handicaps to employment.

8. Section 36.30.115 This is a new section dealing with the responsibilities and duties of a contractor with respect to the subcontractors he proposes

to use in performance of a contract. It provides that within 48 hours after the opening of bids, each bidder will submit a list of the subcontractors proposed to be used in the performance of a contract and further provides those conditions under which a bidder may replace a listed subcontractor. Paragraph (e) of this section provides that a bidder who violates the section may either have his contract cancelled or, after notice and a hearing, be assessed a penalty in an amount not exceeding 10% of the value of the subcontract at issue.

9. Section 36.30.120(b) The paragraph provides that bid security must be a bond provided by a surety company in an amount equal to at least 10% of the amount of the bid if the bid does not exceed $100,000 or 10% of the first $100,000 and 5% of the amount of the bid over $100,000 if the bid exceeds $100,000, up to a maximum of $200,000 in security.

10. Section 36.30.130 The section is amended to provide that notice of an invitation to bid shall be published in the Alaska Administrative Journal. Paragraph (b) of the section further provides that if the state fails to substantially comply with the notice requirements of the section, the state is liable for the damages caused by that failure.

11. Section 36.30.150(b) This new paragraph provides that a contract based on total or life cycle costs may be awarded only when the chief procurement officer or the commissioner of transportation and public facilities, if appropriate, determines in writing at the time of contract solicitation that the contract promotes overall economy for the purposes intended, encourages competition, is not unduly restrictive, and is in the best interests of the state.

12. Section 36.30.170 Paragraph (b) of this section provides that a contract based on solicited bids shall be awarded to the lowest responsive and responsible "Alaska bidder" if the bid is not more than 5% higher than the lowest non-resident bidder's. The paragraph further delineates the qualifications a person must possess in order to be an "Alaska bidder." Paragraph (c) of the section provides that an Alaska bidder who also qualifies as an "employment program," as defined under 36.30.100(c), shall be awarded a contract based on solicited bids if it is the lowest responsible and responsive bidder with a bid that is not more than 10% higher than the lowest bid of a non-resident. Original paragraph (d) of this section, excluding construction contracts in excess of $5,000 from the Alaska bidder preference, has been deleted.

13. Section 36.30.200 Paragraph (a) is modified to provide that construction may only be procured by competitive sealed proposals under conditions specified in new paragraph (c) of this section. Paragraph (c) provides that when the chief procurement officer determines that it is advantageous to the state, a procurement officer may issue a request for proposals requesting the submission of offers to provide construction in accordance with a design provided by the offeror. The paragraph further provides that the request for proposals shall require that each proposal submitted contain a single price that includes the design and construction.

14. Section 36.30.210 This section is modified to provide that an offeror must list the subcontractors he proposes to use in the performance of the contract within 48 hours after the date by which the proposals must be received. In addition, paragraph (d) of the section provides that the duties of bidders under section 36.30.115(b) - (e) with respect to subcontractors apply to competitive sealed proposals.

15. Section 36.30.230 This section provides that the register of proposals, and the proposals themselves, are open for public inspection after the notice of intent to award a contract is issued under section 36.30.365.

16. Section 36.30.240 This section is amended to provide that discussions with responsible offerors submitting proposals determined to be reasonably susceptable of being selected for award are excluded from application of the Alaska Open Meetings Law as specified in AS 44.62.310.

17. Section 36.30.250 In new paragraph (b), the procurement officer is directed to take into account, in accordance with regulations of the commissioner, whether the offeror qualifies as an Alaska bidder under section 36.30.170(b) or is offering the services of an employment program as defined in section 36.30.100(c), in determining whether a proposal is advantageous to the state.

18. Section 36.30.270 This is a new section which incorporates the substance of the provisions of SB 204 relating to architectural, engineering and land surveying contracts. The major difference between this section and SB 204 is that section 270 applies only to procurement practices of executive agencies, specifically excluding those practices as undertaken by the court system or the legislature.

19. Section 36.30.320 Paragraph (b) provides that a contract for professional services not exceeding $25,000 may be made under regulations adopted by the commissioner

for small procurements. Under paragraph (e) of this section, notice of small procurements shall be provided to Alaska bidders designated by the commissioner under section 36.30.050(d).

20. Section 36.30.340 This section now applies to all contracts governed by the procurement code rather than solely to those negotiated under the competitive sealed bid method.

21. Section 36.30.362 This is a new section requiring the procurement officer to issue a written statement explaining his actions should he award a contract to a person who does not reside or maintain a place of business in Alaska, if the supplies, services, professional services or construction which is the subject of the contract could have been obtained from in-state sources.

22. Section 36.30.510 This section requires that a contract file open for inspection by the public shall be kept by the commissioner and the contracting agency for each contract awarded under the competitive sealed proposal procedure. A file kept by the commissioner shall contain a summary of the information in the file of the contracting agency.

23. Section 36.30.540 Paragraphs (4) and (5) of this section provide that the commissioner's biennial report to the legislature concerning agency procurements shall include a list of all procurements made from both out-of-state and in-state sources, with the exception of small procurements as specified in section 36.30.320.

24. Section 36.30.850(b) This section now includes an exemption for contracts of the department of fish and game for non-point-to-point flights requiring specialized flying and piloting skills.

25. Section 36.30.930 The civil penalty for violation of the chapter now applies to a person who contracts for a purchase of supplies, equipment for the state fleet, services, professional services or construction in a manner the person knows to be contrary to the requirements of this chapter or the regulations adopted under this chapter. The person is liable for all costs and damages to the state arising out of the violation.

26. Section 36.30.990 This section deals with definitions of terms as used in the bill. Under paragraph (1), "agency" is now defined to exclude the University of Alaska, a regional native housing authority created under AS 18.55.996 and a regional electrical authority created under AS 18.57.020. Under paragraph (10), the term "grant" is defined to include the furnishing by the state of

assistance to a person to support a program authorized by law, but it does not include an award whose primary purpose is to procure an end-product for a state agency, whether in the form of supplies, services, professional services or construction.

27. Section 10. Under this section, AS 18.55.100 is amended by providing a new subsection which, among other things, specifies that to the extent AS 36.30 conflicts with the responsibilities of ASHA under AS 18.55.110, the provisions of AS 18.55.110 shall prevail.

28 Section 40. Under this section, AS 37.05.316 is amended to delete reference to the term "contract" in favor of the word "grant."

PROPOSED PROCUREMENT LEGISLATION
SECTIONAL ANALYSIS
DRAFT #3

(Unless otherwise indicated, "commissioner" means commissioner of administration)

SECTION 1. The purposes of the act are outlined to include: simplification, clarification, modernization of the laws; consistency among the branches of government; increased public confidence; fair and equitable treatment of all vendors; increased economy in state procurement; broad-based competition; safeguards for the maintenance of a procurement system of quality and integrity; and elimination and prevention of discrimination in state contracting.

SECTION 2. A new chapter is added to AS 36 entitled "State Procurement Code."

Article 1. Organization of State Procurement.

Sec. 36.30.005. Centralization of procurement of supplies and services for state agencies is under the authority of the commissioner of administration and the chief procurement officer. Procurement of construction and procurements to or disposals from the state equipment fleet and the control over construction and the state equipment fleet is under the commissioner of transportation and public facilities.

Sec. 36.30.010. The chief procurement officer is selected by the commissioner; is responsible for procurement of supplies and services for agencies in the executive branch; is a partially exempt employee; must have a minimum of 5 years in public procurement; and may be removed by the commissioner only for cause. The term of office of the Chief Procurement Officer expires when the term of the governor expires. Duties of the Chief Procurement Officer are enumerated.

Sec. 36.30.015. The commissioner of transportation and public facilities may contract for construction, procurements for the state equipment fleet, and may delegate to another agency the authority to contract for construction, after written determination has been made that the agency is capable of implementing the delegated authority. The commissioner of administration may delegate to an agency the authority to contract for its own supplies and services after a written determination has been made that the agency is capable of implementing the delegated authority.

not covered now

The Alaska Railroad Corporation must adopt procedures substantially equivalent to the procurement code and regulations adopted by the commissioner.

Sec. 36.30.020. The Legislature must adopt procedures substantially equivalent to the procurement code.

Sec. 36.30.030. The Court System must adopt procedures substantially equivalent to the procurement code.

Sec. 36.30.040. Procurement regulations must be adopted by the commissioner.

Sec. 36.30.050. A list of persons who desire to provide supplies, services or construction items to the state will be established and maintain by the commissioner. Evidence of a valid Alaska business license and a statement of the contractor's qualifications must be submitted to be included on the list. Construction contractors must also submit a valid certificate of registration. The list must be used by the state agencies, Legislative Council, the Court System, and the Alaska Railroad Corporation.

Sec. 36.30.060. Specification regulations must be adopted by the commissioner. Specifications must promote overall economy for the purposes intended and encourage competition in satisfying the state's needs, and may not be unduly restrictive.

Sec. 36.30.070. Supply management is under the authority of the commissioner and regulations must be adopted which govern management of supplies, surplus supplies and transfer of excess supplies.

Sec. 36.30.080. The department shall lease necessary space, and contract for the lease of space for the use of the state or an agency. A lease or contract for a lease may not be for a period of occupancy greater than 40 years. The department may enter into lease-financing agreements, which are subject to annual appropriation. If the department intends to enter into a lease or lease financing agreement with an annual rent anticipated to exceed $1,000,000, notice must be provided the legislature for approval.

Article 2. Competitive Sealed Bidding.

Sec. 36.30.100. Competitive sealed bidding is the preferred method of contracting. Competitive sealed bidding is not required for certain purchases, including professional services, which are itemized.

Sec. 36.30.110. When competitive sealed bidding is used, an invitation to bid is issued which must include the date

by which the bid must be received, purchase description, and all contractual terms and conditions. Subcontractors must be listed. Evidence of a valid Alaska business license for all bidders and subcontractors must be submitted when responding to the ITB. A bidder for construction contracts must also submit evidence of the bidder's registration under AS 08.18 and evidence of registration for each listed subcontractor.

Sec. 36.30.120. Bid security shall be required for all competitive sealed bidding for construction contracts which exceed an amount established by regulation. Bid security may be required for other types of supplies and services.

Sec. 36.30.130. Public notice of the ITB must be provided 21 days before the date for the opening of the bid, unless otherwise determined in writing by the chief procurement officer, or the commissioner of transportation and public facilities for construction or state equipment bids. Notice must be mailed to all active prospective contractors on the bid list, and other forms of notice are allowable when practicable.

Sec. 36.30.140. Bid opening must be public, in the presence of witnesses, and relevant information must be recorded, which is open to public inspection. The bids are not open for public inspection until after a contract is awarded.

Sec. 36.30.150. The procurement officer must evaluate bids based on the requirements set out in the ITB. The criteria used for the evaluation of an award must be objectively measurable. Criteria may not be used in bid evaluation if they are not set out in the ITB.

Sec. 36.30.160. Bids received after the bid due date indicated on the ITB may not be accepted unless the delay was due to an error of a state employee directly responsible for opening the bids.

Correction or withdrawal of inadvertently erroneous bids before or after bid opening, or cancellation of awards or contracts based on bid mistakes shall be permitted in accordance with regulations and supported by written justification.

Sec. 36.30.170. Awards to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set out in the ITB shall be promptly made. The Alaska bidder preference is retained.

Sec. 36.30.190. Multi-step sealed bidding is allowed when it is considered impractical to initially prepare a definitive purchase description to support an award based on price. Unpriced technical offers are submitted, followed by an ITB limited to the bidders whose offers are determined to be technically qualified under the criteria established.

contracts received by law?

Article 3. Competitive Sealed Proposals.

Sec. 36.30.200. Contracts may be awarded by competitive sealed proposals when the chief procurement officer, or the commissioner of transportation and public facilities for construction and state equipment fleet contracts, determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the state.

Sec. 36.30.210. Request for proposals must contain the same information required for ITBs. The same notice provisions for ITBs apply for RFPs.

Sec. 36.30.220. Standard overhead rate established by agencies and applicable to contracts for supplies and services, must be included in a RFP.

Sec. 36.30.230. Proposals are to be opened in a manner which avoids disclosure of contents to competing offerors during the process of negotiation. A register of proposals containing the name and address of each offeror shall be prepared and open for public inspection after the award.

Sec. 36.30.240. Discussions with responsible offerors may be conducted for the purpose of clarification to assure full understanding of and responsiveness to the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals. Revisions may be permitted after submission and before the award for the purpose of obtaining best and final offers.

Sec. 36.30.250. A contract under competitive sealed proposals shall be awared to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the state taking into consideration price and the evaluation factors set out in the RFP.

Sec. 36.30.260. A contract awarded under competitive sealed proposals must contain: the amount of the contract; the date for supplies to be delivered or the term for services to be performed; a description of the

services or supplies contracted for; and a certification that sufficient funds are available for the amount of the contract.

Sec. 36.30.270. Contracts are subject to review by the Department of Law.

Article 4. Other Procurement Methods.

Sec. 36.30.300. Sole source procurements may only be awarded if it is determined in writing that there is only one source for the required supply, service or construction. A sole source procurement may not be approved if a reasonable alternative source exists.

Sec. 36.30.310. Emergency procurements may be authorized under emergency conditions when there exists a threat to public health, welfare, or safety, and procurement through competitive sealed bids or competitive sealed proposals is impracticable, or contrary to the public interest, or to protect public or private property. A written determination of the basis for the emergency and for the selection of the particular contractor must be provided.

Sec. 36.30.320. Small procurements which do not exceed an aggregate amount of $5,000 shall be made with competition that is practicable under the circumstances. A contract for professional services that does not exceed $25,000 may be made in accordance with regulations adopted by the commissioner.

Article 5. Contract Formation and Modification.

Sec. 36.30.350. Solicitations may be cancelled or any bids or proposals may be rejected, in whole or in part, or the date for opening bids or proposals may be delayed as may be specified in the solicitation, when it is in the best interest of the state.

Sec. 36.30.360. A written determination of responsibility of a bidder or offeror shall be made by the procurement officer.

Sec. 36.30.365. At least 10 days before the formal award of a contract the procurement officer shall provide to each bidder or offeror notice of intent to award a contract.

Sec. 36.30.370. Any type of contract that will promote the best interests of the state may be used, except that

the use of a cost-plus-a-percentage-of cost contract is prohibited.

Sec. 36.30.380. Except with respect to contracts awarded through competitive sealed bidding or firm fixed-price contracts, a contract type may not be used unless it has been approved in writing by the procurement officer.

Sec. 36.30.390. Unless otherwise provided by law, multi-term contracts are permitted, but subject to availability and appropriation of funds. Written determination must support multi-term contracts.

When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal periods, the contract shall be cancelled. The contractor may only be reimbursed for the reasonable value of any nonrecurring costs incurred, but not amortized in the price of the supplies or services delivered under the contract that are not otherwise recoverable.

Sec. 36.30.400. Cost or pricing data must be submitted and certified by contractors. This does not apply when: the contract price is based on adequate price competition; the contract price is based on established catalogue or market prices; the contract price is set by law or regulation; or it is determined in writing that the requirements of this section are waived and the reasons for waiver are stated in writing.

Sec. 36.30.410. The state has the right to inspect the plant or place of business of a contractor or subcontractor that is related to the performance of a contract awarded or to be awarded by the state.

Sec. 36.30.420. The state may audit books and records of a person who has submitted cost or pricing data or receives a contract.

Sec. 36.30.430. The commissioner shall adopt regulations permitting the inclusion of clauses providing for adjustments in prices, time of performance, or other contract provisions, and appropriate remedies.

Sec. 36.30.460. Standard clauses in state contracts may be modified if supported by a written determination that states the circumstances justifying the variation.

Sec. 36.30.470. If the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget or the total contract budget, the procurement officer may not execute the contract modification, change order, or

adjustment in contract price unless sufficient funds are available, or the scope of the project or contract is adjusted to permit the degree of completion that is feasible within the total project budget or total contract budget as it existed before the contract modification, change order, or adjustment in contract price.

Sec. 36.30.480. Cost principle regulations shall be adopted.

Article 6. Procurement Records and Reports.

Sec. 36.30.500. Procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the state archivist.

Sec. 36.30.510. A contract file open for public inspection must be kept by the commissioner and the contracting agency for each contract awarded under competitive sealed proposals.

Sec. 36.30.520. The commissioner shall maintain for at least 5 years a record listing all sole source and emergency procurement contracts. An agency which has delegated procurement authority shall by October 1, of each year, submit records of all sole source and emergency procurement contracts to the commissioner.

Sec. 35.30.530. Procurement information is public except as otherwise provided by law.

Sec. 36.30.540. The commissioner shall biennially report to the legislature concerning procurements by agencies.

Article 7. Legal and Contractual Remedies.

Sec. 36.30.560. An interested party may protest the award of a contract, the proposed award of a contract, or a solicitation for goods, services or construction. The protest shall be filed with the procurement officer of the contracting agency in writing and must contain specified items.

Sec. 36.30.565. Time deadlines for filing protests are specified.

Sec. 36.30.570. Notice of a protest shall immediately be given to the contractor if a contract has been awarded or, if no award has been made, to all interested parties.

Sec. 36.30.575. If a protest is filed before a contract is awarded, the award may be made unless the procurement

officer of the contracting agency determines in writing that: a reasonable probability exists that the protest will be sustained; or stay of the award is not contrary to the best interests of the state.

Sec. 36.30.580. A written decision by the procurement officer of the contracting agency shall be issued within 14 days after a protest has been filed, unless the time is extended up to 26 days for good cause. Notice shall be sent to the protester. If a decision is not made by the due date, the protester may proceed as if the procurement officer had issued a decision adverse to the protester.

Sec. 36.30.585. If the procurement officer sustains a protest the procurement officer shall implement an appropriate remedy.

Sec. 36.30.590. An appeal from a decision of a procurement officer on a protest must be filed with the commissioner within 5 days after the decision is received by the protester.

Sec. 36.30.595. The procurement officer shall immediately give notice of an appeal to the contractor if a contract has been awarded, or, if no award has been made, to all interested parties.

Sec. 36.30.600. If a protest appeal is filed before a contract is awarded and the award was stayed, the filing of the appeal automatically continues the stay until the commissioner of administration or transportation and public facilities makes a written determination that the award of the contract is necessary to protect substantial interests of the state.

Sec. 36.30.605. The procurement officer of the contracting agency shall file a complete report on the protest and decision with the commissioner of administration or transportation and public facilities within 7 days after a protest appeal is filed. The protester and all interested parties that have requested a copy of the appeal shall be furnished one. The protester may file comments on the protest report within 7 days after the report is received. Extensions may be granted.

Sec. 36.30.610. The commissioner of administration or transportation and public facilities shall dismiss a protest appeal before a hearing is held if it is determined in writing that the appeal is untimely. The appropriate commissioner may issue a decision on an appeal without a hearing if the appeal involves questions of law without genuine issues of fact.

Sec. 36.30.615. A hearing on a protest appeal shall be conducted according to AS 36.30.670 and regulations adopted.

Sec. 36.30.620. If a controversy, asserted by a contractor, concerning a contract awarded under this chapter cannot be resolved by agreement, the procurement officer shall, after receiving a written request by the contractor, issue a written decision no more than 90 days after receipt of all necessary information from the contractor, unless the due date is extended for good cause.

The decision shall be sent to the contractor. If a decision is not made by the due date, the contractor may proceed as if the procurement officer had issued a decision adverse to the contractor. If a controversy asserted by the state concerning a contract awarded cannot be resolved by agreement, the matter shall be immediately referred to the commissioner of administration or transportation and public facilities.

Sec. 36.30.625. An appeal from a decision of the procurement officer on a contract controversy may be filed by the contractor with the commissioner of administration or transportation and public facilities. The appeal shall be filed within 5 days after the decision is received by the contractor.

Sec. 36.30.630. A hearing on a contract controversy appealed to the commissioner or referred to the commissioner shall be conducted according to AS 36.30.670 and regulations adopted .

Sec. 36.30.632. The commissioners of administration and transportation and public facilities may delegate responsibilities under Sec. 36.30.590 and Sec. 36.30.630 to the head of the contracting agency.

Sec. 36.30.635. The commissioners of administration and transportation and public facilities may debar or suspend a person from consideration for award of contracts. Notice and opportunity for a hearing are specified.

Sec. 36.30.640. Causes for debarment or suspension are enumerated.

Sec. 36.30.645. The commissioners of administration and transportation and public facilities shall issue a written decision to debar or suspend.

Sec. 36.30.650. A person suspended is entitled to a hearing if the person files a written request for a

hearing within 7 days after receipt of the notice of suspension.

Sec. 36.30.655. The commissioner shall maintain a list of all persons debarred or suspended from consideration for award of contracts.

Sec. 36.30.660. The commissioner of administration or the commissioner of transportation and public facilities may, at any time after a final decision to debar a person, reinstate the person after determining that the cause for which the person was debarred no longer exists or has been substantially mitigated.

A debarred person may request reinstatement. A hearing may be held on a reinstatement petition. A decision on reinstatement shall be made in writing within 7 days after a reinstatement petition is submitted. A decision under this section is not subject to judicial appeal.

Sec. 36.30.665. The commissioner of administration or transportation and public facilities may permit a debarred person to participate in a contract on a limited basis during the debarment period.

Sec. 36.30.670. The commissioner of administration or transportation and public facilities shall act as a hearing officer or appoint a hearing officer for a hearing conducted under this chapter. The provisions of the Administrative Procedure Act do not apply to a hearing conducted under this chapter. The authority of a hearing officer is outlined.

Sec. 36.30.675. If the commissioner of administration or transportation and public facilities is not acting as hearing officer, the hearing officer shall recommend a decision to the appropriate commissioner based on the evidence presented. The recommendation shall include findings of fact and conclusions of law. The appropriate commissioner may affirm, modify or reject the hearing officer's recommendation or take any other appropriate action.

Sec. 36.30.680. A decision by the commissioner of administration is final, and shall be sent within 20 days after a hearing to all parties. A decision by the commissioner of transportation and public facilities involving procurement of construction shall be sent within 90 days after the hearing.

Sec. 36.30.685. A final decision of the commissioner of administration or transportation and public facilities may be appealed to the superior court in accordance with the Alaska Rules of Appellate Procedure.

Sec. 36.30.690. This chapter and the regulations adopted under it are the exclusive procedures for asserting a claim against the state or an agency arising in relation to a procurement conducted under this chapter.

Sec. 36.30.695. The commissioner of administration may adopt by regulation additional rules of procedure.

Sec. 36.30.699. The definition of interested party is given.

Article 8. Intergovernmental Relations.

Sec. 36.30.700. Cooperative purchasing is authorized between public procurement units or external procurement activities in accordance with an agreement entered into between the participants.

Sec. 36.30.710. Sale, acquisition, or use of supplies among public procurement units or with external procurement activity may be done independent of certain requirements of this chapter.

Sec. 36.30.720. Joint use of facilities is allowable.

Sec. 36.30.730. A public procurement unit may provide personnel, information and technical services to a requesting public procurement unit or external procurement activity.

Sec. 36.30.735. Current Alaska law on restrictions of contracting with or employing experts on radiation hazards is retained.

Sec. 36.30.740. The commissioner may collect information concerning supplies, services or construction being procured or used by state public procurement units.

Sec. 36.30.750. Under a cooperative purchasing agreement, controversies arising between an administering public procurement unit and its bidders, offerors, or contractors shall be resolved in accordance with this chapter.

Sec. 36.30.790. Definitions for this article are provided.

Article 9. General Provisions.

Sec. 36.30.850. This chapter applies to contracts solicited or entered into after January 1, 1987, unless the parties agree to its application to a contract

solicited or entered into before that date. This chapter applies to the disposal of state supplies and every expenditure of public funds irrespective of their sources, except as specified in AS 36.30.915.

This chapter does not apply to: grants; contracts for professional witnesses; contracts of the University of Alaska where the work is to be performed substantially by enrolled students; contracts for medical doctors and dentists; contracts for the purchase of residential child care services under AS 47.40; disposals of land or interest in land; disposals under AS 38.05; contracts for the preparation of ballots under AS 15.15.030; acquisitions or disposals of property and other contracts relating to airports; acquisitions of real property or disposals of obsolete property under AS 19.05.060, 19.05.100, 19.05.110 or 19.05.120; disposals of obsolete material or equipment under AS 35.20.060; or leases of ferry terminal facilities under AS 19.60.010.

Except for AS 36.30.700-36.30.895, this chapter does not apply to contracts between two or more agencies, the state and its political subdivisions, or the state and other governments.

Sec. 36.30.860. Unless displaced by the particular provision of this chapter, all other principles of law and equity shall supplement the provisions of this chapter.

Sec. 36.30.870. Regulations under this chapter shall be adopted in accordance with the Administrative Procedure Act. Regulations applicable to procurements of construction or procurements for or disposal of property of the state equipment fleet shall be adopted by the commissioner of administration only after consultation with the commissioner of transportation and public facilities.

Sec. 36.30.880. This chapter requires all parties involved in the negotiation, performance, or administration of state contracts to act in good faith.

Sec. 36.30.890. If a procurement involves the expenditure of federal funds or federal assistance and there is a conflict between a provision of this chapter or a regulation adopted under a provision, the federal statute or regulation shall prevail.

Sec. 36.30.900. This chapter does not modify, amend, or alter laws regarding preference for Alaska forest products or preference to producers or dealers in Alaska, except as provided in AS 36.30.170(c).

Sec. 36.30.910. This chapter does not prevent purchasing through the general services administration as proviced by law.

Sec. 36.30.920. Suspected anticompetitive practices are to be reported to the attorney general.

Sec. 36.30.930. In addition to penalties prescribed for unethical conduct, civil and criminal penalties are provided for violations of this chapter.

Sec. 36.30.940. The attorney general on behalf of the state shall enforce the provisions of this chapter.

Sec. 36.30.990. Definitions.

Sec. 36.30.995. This chapter may be cited as the State Procurement Code.

SECTION 3 through SECTION 61 amend other Alaska statutes to reflect the provisions of this chapter.

SECTION 62. The commissioner must report to the legislature by December 1, 1987, concerning procurements by state agencies during the first 6 months of 1987.

SECTION 63. The commissioner of administration shall adopt the regulations required under this chapter by January 1, 1987.

SECTION 64. This is the repealer section.

SECTION 65. Section 63 of this Act takes effect immediately.

SECTION 66. Except as provided in sec. 65, this Act takes effect January 1, 1987.

Alaska State Legislature

SENATOR
ARLISS STURGULEWSKI
Chairman, Senate Resources Committee
Vice Chairman, Senate Health, Education and Social Services Committee
Member, Senate Community and Regional Affairs Committee

295 SHELDON JACKSON STREET
ANCHORAGE, ALASKA 99501

Willis Justice
POUCH V
JUNEAU, ALASKA 99811
(907) 465-3818

Senate

MEMORANDUM

January 21, 1986

TO: Senator Pat Rodey

FROM: Senator Arliss Sturgulewski

RE: SB 341 "An Act relating to state procurement practices and procedures; and providing for an effective date."

Pat, this memo will confirm our earlier discussion regarding SB 204 "An Act relating to contracts for architectural, engineering, and land surveying services; and providing for an effective date" which was introduced by myself and co-sponsored by you. I feel it is entirely appropriate to fold SB 204 into SB 341 as it obviously is an important part of overall state procurement practices. I will be happy to work with you personally on this issue.

Although Senator Faiks plans to schedule SB 204 for a hearing next week, I still feel it is important to include SB 204 in SB 341. I would welcome your testimony on SB 204. The exact date of the hearing is uncertain at this time but I will advise you as soon as I know the date and time of the meeting.

Memorandum

Alaska Court System

TO: Arthur H. Snowden, II
Administrative Director

DATE : March 6, 1986

FROM: Karla L. Forsythe
Staff Counsel

SUBJECT: SB 341 - State Procurement Practices

I have reviewed the latest work draft (dated February 26, 1986) of SB 341.

As you know, I worked closely with court system purchasing staff over the past two years to develop comprehensive procurement guidelines for the court system based on the Model Procurement Code. Although the guidelines reflect the Code's competitive principles, they have been drafted to accommodate the specific needs of the judiciary as a separate branch of government.

I am concerned that passage of SB 341 would require revision of the guidelines we worked so hard to develop. This concern is based upon two provisions of SB 341. Section 1 (2) (page 1, line 14) states that one of the purposes of the act is to make as consistent as possible the procurement practices among the branches of state government. Additionally, under proposed section 36.30.030 (page 5, lines 16-20) the court system is required to adopt its own procedures which must be substantially equivalent to the procedures described in SB 341.

Court system guidelines do not deviate in spirit or concept from the proposed legislation. However, many details have been drafted with the needs of the judiciary in mind, and therefore differ from the proposed bill. I am concerned that court system procedures will be challenged on the grounds that they are not "substantially equivalent" or "as consistent as possible" with executive branch practices.

I suggest the following amendments:

1. Change section 1, paragraph (2) to provide that one of the purposes of the act is to:

   "establish consistent procurement principles for all branches of state government".

2. Change proposed section 36.30.030 to provide:

   The administrative director shall adopt procedures to govern the procurement of supplies, services, professional services, and construction by the judicial branch. Procedures must be based on the competitive principles established under this act, and shall be adapted to the special needs of the judiciary as determined by the administrative director of courts.

ALASKA COURT SYSTEM

Proposed amendments to SB 341

1. Section 1, paragraph (2) (page 1, line 14):

   (2) establish consistent procurement principles for all branches of state government.

2. Section 36.30.030 (page 5, lines 16-20):

   The administrative director of courts shall adopt procedures to govern the procurement of supplies, services, professional services, and construction by the judicial branch. Procedures must be based on the competitive principles established by this act, and shall be adapted to the special needs of the judiciary as determined by the administrative director of courts.

This language is analagous to AS 22.20.037 relating to court system personnel rules, which provides:

(a) Judicial employees shall be employed subject to classification and wage plans based on the merit principle and adopted to the special needs of the judiciary, as determined by the administrative director of courts. Except as otherwise provided by law, all employees of the Alaska court system and the Judicial Council are subject to the general state laws regarding leave, retirement and travel."

A separate page containing these proposed amendments is attached.

KF/kl

Alaska Public
Employees Association APEA
~~State Headquarters: 240 N. Franklin, Juneau, AK 99801 (907) 586-2334~~
210 Ferry Way, Suite 200, Juneau, AK 99801
(907)586-2334

February 6, 1986

Senator Pat Rodey
Chairman, Senate Judiciary Committee
Pouch V
Juneau, AK 99811

RE: Senate Procurement Bill (SB 341)

Dear Senator Rodey:

On behalf of the membership of the Alaska Public Employees Association (APEA), I would like to comment on one section of the bill on state procurement practices prepared by the Senate Select Interim Committee on Procurement Practices and Procedures (SB 341) which I understand your committee will be considering soon. APEA sees the bill on the whole as a positive step toward finer procurement practices. However, it does contain one provision that we see as far more onerous on procurement employees than is necessary to reach the bill's goals.

That provision is proposed AS 36.30.930(1), which subjects state procurement personnel to heavy potential liability if they act in a manner contrary to the statutes. Certainly such liability is appropriate if the violation is intentional or knowing; we have no problem with AS 36.30.930(2), which makes intentional or knowing acts felonious. However, if the violations are in good faith, even if negligent, no personal liability should attach. No other statute comes to mind that imposes personal liability on an employee for a merely negligent act - this is traditionally a risk assumed by the state, who as employer chooses whom works for it. If the negligent act is sufficiently egregious, the state can discipline the employee. But personal liability is not appropriate.

Personal liability is especially inappropriate in this context, because this bill is such a sweeping overhaul of past practices. A procurement officer may commit a technical violation of the law - contacting too few vendors, for instance - which is consistent with previous practices for many years. Yet under

proposed AS 36.30.930(1), this officer, acting in good faith and in consonance with years of past practice, is now open to heavy financial penalties. This is not right.

To take an extreme example, consider the recent litigation over the downtown parking garage in Juneau. The city attorney and the city council, acting in what they saw as the city's best interests, followed a common construction procurement practice in contracting for the garage. However, this practice was a technical violation of the city charter. The result was litigation costs and construction delay expenses of several hundred thousand dollars. Should the city attorney and council members be held personally liable? No - if they were, it would be well nigh impossible to fill jobs. But proposed AS 36.30.930(1) would allow liability.

The solution as we see it is simple - use the "knowing and intentional" language of proposed AS 36.30.930(2) (the criminal section) in subsection (1) as well. Then liability will be limited to cases where it is appropriate.

Thank you for your kind attention to our comments.

Very truly yours,

Cherie

Cherie Shelley
Executive Director

CS/kg

Alaska State Legislature

SENATOR
ROBERT H ZIEGLER SR
307 BAWDEN STREET
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Senate

MEMBER
SENATE JUDICIARY COMMITTEE

SELECT COMMITTEE ON LEGISLATIVE ETHICS

WESTERN STATES LEGISLATIVE
FORESTRY TASK FORCE

EXECUTIVE COMMITTEE
WESTERN LEGISLATIVE CONFERENCE
COUNCIL OF STATE GOVERNMENTS

ALTERNATE MEMBER
NATIONAL CONFERENCE OF STATE LEGISLATURES
STATE AND FEDERAL ASSEMBLY
COMMITTEE ON
FEDERAL TAXATION, TRADE AND ECONOMIC DEVELOPMENT

February 10, 1986

All Members
Senate Judiciary Committee
Alaska State Legislature
Juneau, Alaska

Dear Jan and Gentlemen:

As of the moment of dictation, it appears as if the Judiciary Committee contemplates throwing a Superior Court Judge for Ketchikan into Senator Kerttula's bill.

For your files, I have enclosed a letter of justification which pretty well points out the need for the additional judge.

Regards,

Robert H. Ziegler, Sr.

Enclosure

Trial Courts
State of Alaska

FIRST JUDICIAL DISTRICT
415 MAIN STREET
ROOM 206
KETCHIKAN, ALASKA 99901
(907) 225-9875

KRISTEN CARLISLE
AREA COURT ADMINISTRATOR

January 30, 1986

The Honorable Robert H. Ziegler, Sr.
Alaska Senate
P.O. Box V
Juneau, Alaska 99811 (Mail Stop 3100)

The Honorable John Sund
Alaska House of Representatives
P.O. Box V
Juneau, Alaska 99811 (Mail Stop 3100)

The Honorable Robin L. Taylor
Alaska House of Representatives
P.O. Box V
Juneau, Alaska 99811 (Mail Stop 3100)

Re: Ketchikan Judgship Position

Dear Senator Ziegler, Representatives Sund and Taylor:

The growing need for an additional Superior Court Judge in the Ketchikan Trial Courts has been more apparent in the past five years. Presiding Judge Thomas E. Schulz and I feel that it has now reached a critical situation and are requesting your support in obtaining an additional position for a Superior Court Judge in Ketchikan.

I have gathered some statistical information to support our request. I will be happy to share the sources of this information with you if you wish.

Ketchikan Gateway Borough and the Outer Ketchikan Census Division have experienced a 15% population increase in 1984 over 1980. Total population for the area is 17,357. If the rate of increase remains constant for the next five years the population will be 19,960 by 1990. This compares with a current estimated

population for the Juneau area of 25,964. Juneau has had two Superior Court Judges for appoximately 10 years.

During the period of 1980 to 1984 there was a 41% increase in the estimated local workforce despite slow downs in the local pulp mill and fishing industries. The State will be constructing a Ferry Maintenance Facility in Ketchikan next year which is estimated to create up to 200+ new jobs in the area. If the long pending mining ventures planned for the Ketchikan area actually commence, the population and workforce estimates will, of course, be increased significantly.

The 1985 Bar roster shows there are 39 attorneys practicing in Ketchikan which is a 39% increase over 1980. There is also a 44% increase in the number of police/troopers in the area. Ketchikan's total of 46 law enforcement personnel compares with 43 law enforcement personnel in Juneau.

The Ketchikan jury costs have increased 163% over FY 1981. It's total FY'85 costs of $65,575 is 10% higher than Juneau at $59,739. The increase in jury trials has had a major impact on the processing of cases on a timely basis through the Ketchikan Trial Courts. Superior Court case filings excluding all probate and domestic relation cases, have increased 70% in the last five years. These types of cases require a great deal of pre-trial and motion activity and therefore have a significant impact on the court operations and the judge's time.

Ketchikan has had the caseload of more than one Superior Court Judge for the last several years. To meet this increased demand, Ketchikan has used a very high rate of visiting or retired judges appointed on a pro tem basis. In 1983 Ketchikan received the assistance of a visiting or pro tem judge for approximately 126 days, and in 1984 130 days. This is approximately 60% of a Full Time Equivalent (FTE) judge. In 1985 and in 1986, these figures are expected to be much higher because of a long murder case that is being tried in Ketchikan. The Wrangell/Petersburg Superior Court Judge has spent an average of two weeks a month in Ketchikan for the past several years in order to assist Judge Schulz with the growing caseload. The caseloads in Wrangell and Petersburg are also growing and the demands on that judge's time have significantly increased. While the use of pro tem and visiting judges has allowed us to function, it is very dependent on the schedules of those judges. Retired judges work when their schedule permits, and are not always available when required. Although we have had very good relations with Judges Henry C. Keene, Jr. and Thomas B. Stewart, both retired First District Judges, their personal lives and retirement plans sometimes take precedence over the needs of the Ketchikan Trial Courts. It is difficult to assign them a regular

caseload and they have been used most often on an emergency basis.

Primarily due to the increase in jury trials and motion practice, Judge Schulz's bench time has increased tremendously in the last several years. He is also the Presiding Judge for the district which requires significant administrative duties. In order to keep up with these demands, Judge Schulz has continually worked long hours and weekends. Even with this, it has become impossible for the Ketchikan Trial Courts to accommodate anything out of the ordinary. For instance, in 1985 a civil case projected to last 10 days ended up lasting nine weeks. In addition, the murder case of State vs John Kenneth Peel has required an inordinate amount of special attention. While these cases are not routine, the Ketchikan Trial Courts operates on a very narrow margin and anything unusual seriously to disrupt the timely disposition of other cases.

It is hoped that this information will assist you in obtaining the necessary backing for another Superior Court judgship position in Ketchikan. Judge Schulz and I wish to thank you for your continued support and would be glad to supply any other information that you may deem necessary.

Sincerely,

Kristen Carlisle

Kristen Carlisle
Area Court Administrator

KC:cwt

cc: Presiding Superior Court Judge Thomas E. Schulz
Representative Johne Binkley

Alaska State Legislature

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ROBERT H. ZIEGLER, SR.
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COMMITTEE ON
FEDERAL TAXATION, TRADE AND ECONOMIC DEVELOPMENT

January 29, 1986

Senator Pat Rodey, Chairman
Senate Judiciary Committee
Alaska State Legislature
Juneau, Alaska

Re: SB 341.

Dear Pat:

Attached hereto are a copy of my letter to Senator Faiks of January 24th and the material to which I referred in that letter.

Senator Faiks indicated to me that she did her job and she doesn't much care what happens to the bill now that it's been introduced.

In a word, the subject matter is not near and dear her heart.

If you want to talk to the involved Juneau citizen, I'll have him get in touch with your office.

Regards,

Robert H. Ziegler, Sr.

Enclosures

Alaska State Legislature

SENATOR
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307 BAWDEN STREET
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January 24, 1986

Senator Jan Faiks, Co-Chair
Senate Finance Committee
Alaska State Legislature
Juneau, Alaska

Re: SB 341

Dear Jan:

I carry no brief one way or the other (at this time) for SB 341. However, I concede the subject matter is near and dear your heart.

I have enclosed some comments recently given me by a friend here in Juneau. He is more than willing to discuss these comments with you, should that be your desire, but he was reluctant to stick his nose into your business unless requested so to do.

A great deal of what he has to say makes sense to me.

Regards,

Robert H. Ziegler, Sr.

Enclosure

Sec. 36.30.210. REQUEST FOR PROPOSALS

The use of the RFP process in the selection of consultants for professional services contracts, such as date processing systems analysis and programming is, by and large, an expensive, time consuming exercise in presenting an appearance of proprietry to the selection process. There are many reasons for this.

a) The description of services desired is often so vague that it is difficult or impossible for a vendor to respond or for any reasonable evaluation criteria to be established by the state.

b) Evaluation factors are usually so vague or generic that the evaluation process can be biased for almost any reason so long as a "reasonable basis" can be stated for that evaluation. A "reasonable basis" can always be found. In other words, evaluation criteria is rarely objective, it is almost always subjective.

c) In some cases, a demonstrated and specific knowledge and experience level is not merely needed, it is imperative. When that occurs, a restricted RFP process can be used or a "sole source" award granted. However, in the many cases where generic experience, such as "systems analysis and programming on state data center compatible computer systems and software" is needed, the evaluation of the quality and depth of that experience becomes highly subjective.

That subjectivity is then entrusted to an evaluation team for assignment of points. However in most cases the team members are hardly qualified to make such an ev. uation and fall back on the "glossy" resumes' or other material included in a vendors proposal. Occassionally, a single team member who is qualified makes the evaluation for the team at large. Whoever took that team member to lunch last, or perhaps uses even potentially more dangerous forms of persuasion, may then prevail.

d) The single specific objective evaluation criteria is cost. But it has been absolutely amazing the low weighting factor that is assigned to it and also the lack of any intelligent means by which a point assignment is given to cost. As an example: Cost has a 25% weighting factor. 10 points are assigned to cost. There are 4 proposals and three have responsive costs. One is eliminated because it is an obvious "low-ball" offering.

Vendor 'A' proposes $85,000
Vendor 'B' proposes $57,000
Vendor 'C' proposes $72,000

A typical state evaluation might give vendor 'B'-10 points; 'C'-9 points; and, 'A'-8 points. A more fair evaluation would be to mathmatically give vendor 'B'-10 points; 'C'-7.9 points; and, 'A'-6.7 points.

e) As stated in item a, above, the description of services desired must be m re specific in RFPs. If it is not, then several things result:

1. A vendor doesn't know what the state wants and the proposal becomes a costly guess.

2. A vendor may easily have proposed at a significantly lower cost if the factors were known. This could make a sizable cost savings to the state and certainly be more fair to vendors in general.

3. Evaluation of cost cannot be made objectively. It is forced to be made on a subjective and relative basis.

SB 341 could be stronger and more specific regarding Request for Proposal procurements. Suggested wording might be:

a) .....must contain the date by which the proposal must be received, [and must contain a specific] description of the supplies, construction services, or professional services to be provided under contract,.....

b) A request for proposals must contain that information necessary for an offeror to submit a proposal, [and upon which an objective evaluation of proposals may be made.]

[c) A request for proposals must contain references to any information or material that cannot be reasonably included with the request. [No agency may withhold from review by a prospective offeror any information or material not of a proprietary or confidential nature, regardless of whether referenced in the request for proposal.]

[d) A request for proposals must contain the factors and their relative importance by which proposals received will be evaluated. Such factors must be realistically objective and based on the specific description of supplies, construction services, or professional services included in the request for proposals. Price shall be not less than 40 percent of total evaluation criteria and be evaluated as follows:

1. The price must be judged as realistic and not a deliberate attempt at undercutting.

2. The responsible and responsive low price offeror shall receive the maximum price evaluation point assignment.

3. All other responsible and responsive offerors shall receive a mathmatically proportionate price evaluation point assignment by dividing the low price by the offerors price and multiplying the result by the maximum price evaluation point assignment.

30.170. CONTRACT AWARD AFTER BID

definition of "Alaska bidder" continues to follow standards that are not
e if it is the intent to promote and foster resident hire and businesses of
A stronger definition, which in our opinion would pass scrutinty, might be:

holds a current Alaska business license;

submits a bid [or a response to a request for proposals] for goods, services, or construction under the name appearing on the person's [or firm's] current Alaska business license;

has maintained a place of business within the state [staffed by the bidder or a direct employee of the bidder] for a period of six months immediately preceding the date of the bid;

[is incorporated as a domestic corporation of Alaska, or is a sole proprietership or partnership whose principal(s) are bonafide residents of Alaska;]

[derives at least 50 percent of income within the state of Alaska;]

if a joint venture, is composed entirely of ventures that qualify under (1)-(5) of this subsection.

ase note that these provisions should also apply to request for proposals which
ced in the current draft of the bill.

purpose of the proposed act might also contain a provision for Alaska bidders.

.1) foster and promote resident hire and Alaska businesses providing goods services to the state;]

Sec. 36.30.320. SMALL PROCUREMENTS

The limit of $5,000 per aggregate dollar amount that defines a small procurement is low for many cases of professional services contracting. That amount has been in place for several years now. If for no other reason than inflation, it should be raised to $6,000. However, for reasons of mere practicality and efficiency, an amount of $10,000 would be more realistic.

Item (b) delineates that professional services contracts of up to $25,000 may be awarded under regulations adopted by the commissioner and that not more than $25,000 in contracts per person (firm) may be awarded by an agency within a 12 month period.

The 12 month period would be better stated as "state fiscal year" (July 1-June 30). More importantly, however, the dollar limit per agency, per year just doesn't fit many contractual situations where a firm, within a fiscal year, performs many bonafide separate and different services for a department or agency which exceed the limit in total.

We would recommend that item b(2) be removed in its entirety. Item (d) would appear to provide the protection the state is seeking, along with the fact that a departmental commissioner must also sign the contract.

Chapter 2

SUBLETTING AND SUBCONTRACTING

Sec.
4100. Short title.
4100.5. Application of chapter.
4101. Legislative finding; bid shopping and bid peddling.
4102. Renumbered.
4103. Preservation of rights and remedies.
4104. Identification of subcontractors by bidders.
4105. Circumvention of identification requirements.
4106. Failure to specify subcontractor; performance of work; subcontracting after award.
4106.5. Renumbered.
4107. Substitution of subcontractors; consent; assignment of subcontract; subcontracting after award.
4107.2. Carpeting; specifying labor subcontractor in bid.
4107.5. Clerical error in listing subcontractor; objections by listed subcontractor; substitution of intended subcontractor.
4108. Subcontractors' performance bonds.
4109. Conditions under which subcontract permitted after failure to designate subcontractor in bid.
4110. Violation of chapter as contract violation; hearing; cancellation; penalty.
4111. Violation of chapter as grounds for discipline.
4112. Contractor's noncompliance not defense in action by subcontractor.
4113. Subcontractor; prime contractor.

Cross References

Contractors License Law, see Business and Professions Code § 7000 et seq.
State purchases and services, see § 14780 et seq.

Law Review Commentaries

Bid shopping and peddling in the subcontract construction industry. (1970) 18 U.C.L.A.Law Rev. 229.

§ 4100. Short title

This chapter may be cited as the "Subletting and Subcontracting Fair Practices Act."

(Stats.1943, c. 134, p. 980, § 4100. Amended by Stats.1949, c. 1453, p. 2535, § 1; Stats.1963, c. 2125, p. 4411, § 1.)

Historical Note

The 1949 amendment declared that the chapter did not apply to contracts for the construction, improvement or repair of "streets or highways, including bridges". Previously the section declared that the chapter did not apply to contracts for the

construction, improvement or repair of "State highways, including bridges, nor to city or county projects financed in whole or in part with motor vehicle fuel funds".

The 1963 amendment rewrote this section to read as it now appears.

Provisions formerly contained in this section prior to the 1963 amendment are now contained in § 4100.5.

Derivation: Stats.1941, c. 1283, p. 3220, § 1.

Forms

See West's California Code Forms, Government.

Library References

Municipal Corporations ⇐326 et seq.
States ⇐90 et seq.

C.J.S. Municipal Corporations § 1142 et seq.
C.J.S. States §§ 154, 155, 160.

Notes of Decisions

Construction and application 1
Purpose 2

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1. Construction and application

Where electrical contractor's mistaken bid was due to failure of its estimator to take into account that he was dealing with half-size plans although estimator knew plans were half-size and general contractor was not aware of mistake until ten minutes before bids were opened, general contractor was entitled to recover from electrical contractor the additional monies which general contractor was required to pay to have work performed by another electrical contractor after electrical contractor which submitted bid refused to perform in accordance with bid. Saliba-Kringlen Corp. v. Allen Engineering Co. (1971) 92 Cal.Rptr. 799, 15 C.A.3d 95.

2. Purpose

The purpose of Subletting and Subcontracting Fair Practices Act was not limited to providing the awarding authority with opportunity to approve substitute subcontractors, but also to protect the public and subcontractors from the evils attendant upon practices of bid shopping and bid peddling subsequent to the award of prime contract for a public facility. Southern California Acoustics Co. v. C. V. Holder, Inc. (1969) 79 Cal.Rptr. 319, 456 P.2d 975, 71 C.2d 719.

§ 4100.5. Application of chapter

With the exclusion of that portion of work covering street lighting and traffic signals, this chapter does not apply to the balance of contracts for the construction, improvement or repair of streets or highways, including bridges.

(Added by Stats.1963, c. 2125, p. 4411, § 2. Amended by Stats.1972, c. 834, p. 1488, § 1.)

Historical Note

The 1972 amendment inserted the exclusion of work covering street lighting and traffic signals and inserted the words "the balance of" preceding "contracts".

The provisions now contained in this section were formerly contained in § 4100 prior to the 1963 amendment.

Library References

Municipal Corporations ⇐326 et seq.
States ⇐90 et seq.

C.J.S. Municipal Corporations § 1142.
C.J.S. States §§ 154, 155, 160.

Notes of Decisions

1. In general

Bid shopping is not against public policy when done by general contractor awarded contract for construction of freeway. Saliba-Kringlen Corp. v. Allen Engineering Co. (1971) 92 Cal.Rptr. 709, 15 C.A.3d 95.

§ 4101. Legislative finding; bid shopping and bid peddling

The Legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration, and repair of public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils.

(Added by Stats.1963, c. 2125, p. 4411, § 4.)

Historical Note

Former § 4101, enacted by Stats.1943, c. 134, p. 981, § 4101, amended by Stats. 1945, c. 1350, p. 2576, § 1, was renumbered § 4103 and amended by Stats.1963, c. 2125, p. 4411, § 4.

Library References

Municipal Corporations ⟸326 et seq.
States ⟸90 et seq.

C.J.S. Municipal Corporations § 1142 et seq.
C.J.S. States §§ 154, 155, 160.

Notes of Decisions

In general 1
Definitions 3
Purpose 2

---

1. In general

Where prime contractor utilized mason's bid in compiling its total bid for construction project, but inadvertently failed to schedule mason on list of subcontractors in bid, prime contractor could not be held liable to mason under Subletting and Subcontracting Fair Practices Act, absent detrimental reliance on part of mason. C. L. Smith Co., Inc. v. Roger Ducharme, Inc. (1977) 135 Cal.Rptr. 483, 65 C.A.3d 725.

2. Purpose

Purpose of this Act is to prevent practices of bid shopping and bid peddling in connection with public works projects. Bay Cities Paving & Grading, Inc. v. Hensel Phelps Const. Co. (1976) 128 Cal.Rptr. 632, 56 C.A.3d 361.

The purpose of subletting and subcontracting fair practices act was not limited to providing the awarding authority with opportunity to approve substitute subcontractors, but also to protect the public and subcontractors from the evils attendant upon practices of bid shopping and bid peddling subsequent to the award of prime contract for a public facility. Southern California Acoustics Co. v. C. V. Holder, Inc. (1969) 79 Cal.Rptr. 319, 456 P.2d 975, 71 C.2d 719.

3. Definitions

"Bid shopping", practice sought to be prevented by this Act, is use of lowest bid already received by general or prime contractor to pressure other subcontractors into submitting even lower bids. Bay Cities Paving & Grading, Inc. v. Hensel Phelps Const. Co. (1976) 128 Cal.Rptr. 632, 56 C.A.3d 361.

§ 4102. Renumbered § 4104 and amended by Stats.1963, c. 2125, p. 4411, § 5

§ 4103. Preservation of rights and remedies

Nothing in this chapter limits or diminishes any rights or remedies, either legal or equitable, which:

(a) An original or substituted subcontractor may have against the prime contractor, his successors or assigns.

(b) The State or any county, city, body politic, or public agency may have against the prime contractor, his successors or assigns, including the right to take over and complete the contract.

(Formerly § 4101, enacted by Stats.1943, c. 134, p. 981, § 4101. Amended by Stats.1945, c. 1380, p. 2576, § 1. Renumbered § 4103 and amended by Stats.1963, c. 2125, p. 4411, § 4.)

Historical Note

The 1945 amendment, throughout the section, referred to the "general contractor" instead of to the "contractor", and in subd. (b), it deleted "public corporation" from the list of political bodies.

The 1945 amendatory act contained the following provision: "If any provision of this act, or the application thereof to any person or circumstance, is held invalid, the remainder of the act and the application of such provisions to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

The 1963 amendment substituted "prime" for "general" preceding "contractor" in both subdivisions.

Former § 4103, enacted by Stats.1943, c. 134, p. 981, § 4103, amended by Stats. 1945, c. 1380, p. 2576, § 2, was renumbered § 4106 and amended by Stats.1963, c. 2125, p. 4412, § 7.

Derivation: Stats.1941, c. 1283, p. 3230, § 1.

Library References

Municipal Corporations ⇨326 et seq.
States ⇨90 et seq.

C.J.S. Municipal Corporations § 1142 et seq.
C.J.S. States §§ 154, 155, 160.

Notes of Decisions

1. In general

Where general contractors awarded prime contracts formally solicit bid from subcontractor using another subcontractor's bid in computing prime bid, there is "bid chiseling" forbidden by Bid Listing Law. People v. Inland Bid Depository (1965) 41 Cal.Rptr. 236, 232 C.A.2d 851.

§ 4104. Identification of subcontractors by bidders

Any officer, department, board or commission taking bids for the construction of any public work or improvement shall provide in the specifications prepared for the work or improvement or in the general conditions under which bids will be received for the doing of the work incident to the public work or improvement that any person

making a bid or offer to perform the work, shall, in his bid or offer, set forth:

(a) The name and the location of the place of business of each subcontractor who will perform work or labor or render service to the prime contractor in or about the construction of the work or improvement, or a subcontractor licensed by the State of California who, under subcontract to the prime contractor, specially fabricates and installs a portion of the work or improvement according to detailed drawings contained in the plans and specifications, in an amount in excess of one-half of 1 percent of the prime contractor's total bid.

(b) The portion of the work which will be done by each such subcontractor under this act. The prime contractor shall list only one subcontractor for each such portion as is defined by the prime contractor in his bid.

(Formerly § 4102, enacted by Stats.1943, c. 134, p. 981, § 4102. Amended by Stats.1945, c. 1380, p. 2576, § 2. Renumbered § 4104 and amended by Stats.1963, c. 2125, p. 4411, § 5; Stats.1971, c. 376, p. 743, § 1; Stats.1971, c. 1584, p. 3195, § 1.)

Historical Note

The 1945 amendment, in subd. (a), required the name and location of the "place of business" of each subcontractor instead of the name and location of the "mill, shop, or office". Reference was made to the "general contractor" instead of to the "contractor". The percentage restriction was added. In subd. (b), reference was made to work to be done by each "such" subcontractor "under this act".

For partial validity provision of the 1945 act, see Historical Note under § 4103.

The 1963 amendment added the second sentence of subd. (b) relating to the listing of subcontractors.

The 1971 amendments inserted in subd. (a) subcontractors licensed by the state who, under subcontract to the prime contractor, specially fabricate and install a portion of the work or improvement according to detailed drawings contained in the plans and specifications.

Former § 4104, enacted by Stats.1943, c. 134, p. 981, § 4101, amended by Stats. 1945, c. 1380, p. 2576, § 4, was renumbered § 4107 and amended by Stats.1963, c. 2125, p. 4412, § 8.

Derivation: Stats.1941, c. 1283, p. 3230, § 1.

Cross References

Carpeting, sublet of subcontract, see § 11072.

Library References

Municipal Corporations ⇐332.
States ⇐98.

C.J.S. Municipal Corporations § 1151.
C.J.S. States §§ 160 to 167

Notes of Decisions

Acceptance of bids 2
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1. Construction and application

A public body has neither the power nor the obligation at the time of or after awarding the prime contract, to substitute a California subcontractor in place of an

out-of-state subcontractor whose bid is not more than 5 per cent lower than the California subcontractor under §§ 4107, 4331 and this section. 18 Ops.Atty.Gen. 185.

2. Acceptance of bids

In absence of an agreement to the contrary listing of subcontractor in prime bid for public school construction was not an implied acceptance of subcontractor's bid by general contractor, since the listing by general contractor of subcontractors he intends to retain is in response to statutory command and cannot reasonably be construed as an expression of acceptance. Southern California Acoustics Co. v. C. V. Holder, Inc. (1969) 79 Cal.Rptr. 319, 456 P.2d 975, 71 C.2d 719.

3. Designation of subcontractors

Prime contractor, which was to excavate, by designating both itself and paving subcontractor on same line in designation of subcontractors for paving and excavating violated this Act. Bay Cities Paving & Grading, Inc. v. Hensel Phelps Const. Co. (1970) 128 Cal.Rptr. 682, 50 C.A.3d 301.

Where it was agreed that subcontractor was to pave and prime contractor was to excavate and prime contractor was willing to allow subcontractor to pave but subcontractor refused unless it was also awarded excavation work, there was no benefit or bargain to be recovered by subcontractor; thus it was not entitled to recover from prime contractor which had violated this section by, in designating subcontractors, listing both itself and subcontractor on same line without differentiating the work to be done by each. Id.

This section does not require a prime contractor to list in his bid hardware suppliers who deliver packaged, finished hardware to the job site to be installed by someone other than the supplier. 49 Ops.Atty.Gen. 15, 2-7-67.

4. Existence of subcontract

Where prime contractor received unsolicited oral bid for masonry work from mason, figures submitted were used by prime contractor in compiling its total bid, after prime contractor was awarded prime contract, it sent to mason a form of subcontract agreement for purpose of determining terms and conditions of its offer of performance, there was exchange of writings which led to preparation of document which was finally sent to mason, who signed it and returned it to prime contractor, but prime contractor never signed it and informed mason that it could not proceed with masonry work because, through prime contractor's inadvertence, mason had not been scheduled as subcontractor on bid proposal submitted to owner and therefore could not be legally utilized on project, no subcontract existed between parties. C. L. Smith Co., Inc. v. Roger Dincharme, Inc. (1977) 135 Cal.Rptr. 483, 65 C.A.3d 735.

Where subcontractor did not rely on any promise by school construction general contractor but only on the listing of subcontractors required by this section and on restriction on general contractor's right to change its listed subcontractors without consent of school district under § 4107, and general contractor neither accepted subcontractor's offer, nor made any promise or offer to subcontractor intended to induce action or forbearance of a definite and substantial character, subcontractor had no cause of action for breach of contract against general contractor which obtained school district's consent to change of subcontractors. Southern California Acoustics Co. v. C. V. Holder, Inc. (1969) 79 Cal.Rptr. 319, 456 P.2d 975, 71 C.2d 719.

A mistake, through which corporation subcontracting to do steel work on junior high school auditoriums and connecting shelters for construction of which another corporation aware of such mistake, had general contract with school district, seemingly agreed to perform for $97,760 for work reasonably worth at least $117,000 because of failure to exclude from subcontract steel decking specifically excluded in subcontractor's oral bids, was so essential and fundamental that parties' minds never met on subcontract as executed and subcontractor was entitled to rescission thereof. Bruzzell Const. Co. v. G. J. Weisbrod Inc. (1955) 285 P.2d 989, 131 C.A.2d 278.

5. Bid chiseling

Where general contractors awarded prime contracts formally solicit lower bid from subcontractor using another subcontractor's bid in computing prime bid, there is "bid chiseling" forbidden by Bid Listing Law. People v. Inland Bid Depository (1965) 41 Cal.Rptr. 208, 233 C.A.2d 851.

§ 4105. Circumvention of identification requirements

Circumvention by a general contractor who bids as a prime contractor of the requirement under Section 4104 for him to list his sub-

contractors, by the device of listing another contractor who will in turn sublet portions constituting the majority of the work covered by the prime contract, shall be considered a violation of this chapter and shall subject such prime contractor to the penalties set forth in Sections 4110 and 4111.

(Added by Stats.1963, c. 2125, p. 4411, § 6.)

Historical Note

Former § 4105, enacted by Stats.1943, c. 134, p. 981, § 4105, amended by Stats.1945, c. 1380, p. 2577, § 5, was renumbered § 4109 and amended by Stats.1963, c. 2125, p. 4413, § 10.

Library References

Municipal Corporations ⟨@=475.
States ⟨@=109.

C.J.S. Municipal Corporations § 1205 et seq.
C.J.S. States §§ 151, 153, 174 to 176.

§ 4106. Failure to specify subcontractor; performance of work; subcontracting after award

If a prime contractor fails to specify a subcontractor or if a prime contractor specifies more than one subcontractor for the same portion of work to be performed under the contract in excess of one-half of 1 percent of the prime contractor's total bid, he agrees that he is fully qualified to perform that portion himself, and that he shall perform that portion himself.

If after award of contract such prime contractor shall, except as provided for in Sections 4107 or 4109, subcontract any such portion of the work, such prime contractor shall be subject to the penalties named in Section 4111.

(Formerly § 4103, enacted by Stats.1943, c. 134, p. 981, § 4103. Amended by Stats.1945, c. 1380, p. 2576, § 3. Renumbered § 4106 and amended by Stats.1963, c. 2125, p. 4412, § 7.)

Historical Note

The 1945 amendment referred to "general contractor" instead of to "contractor" and added the percentage limitation.

For partial validity provision of the 1945 act, see Historical Note under § 4102.

The 1963 amendment rewrote the section which previously read: "If a general contractor fail to specify a subcontractor for any portion of the work to be performed under the contract in excess of one-half of one per cent (1/2%) of the general contractor's total bid, he agrees to perform that portion himself."

Former § 4106, enacted by Stats.1943, c. 134, p. 981, § 4106, amended by Stats.1945, c. 1380, p. 2577, § 4, was renumbered § 4110 and amended by Stats.1963, c. 2125, p. 4413, § 11.

Derivation: Stats.1941, c. 1248, p. 3229.

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1 In general

Where prime contractor omitted certain person's bid in computing his total bid for the construc-

rion project, but inadvertently failed to schedule mason on list of subcontractors in bid, prime contractor could not be held liable to mason under Subletting and Subcontracting Fair Practices Act, absent detrimental reliance on part of mason. C. L. Smith Co., Inc., v. Roger Ducharme, Inc. (1977) 135 Cal.Rptr. 486, 65 C.A.3d 735.

2. Standing

Where subcontractor was not designated or intended to perform excavation work on public contract, it had no standing to contest whether or not prime contractor improperly retained a subcontractor to perform that work. Bay Cities Paving & Grading, Inc. v. Hensel Phelps Const. Co. (1976) 128 Cal.Rptr. 632, 56 C.A.3d 361.

§ 4106.5. Renumbered § 4111 and amended by Stats.1963, c. 2125, p. 4413, § 12

§ 4107. Substitution of subcontractors; consent; assignment of subcontract; subcontracting after award

No prime contractor whose bid is accepted shall:

(a) Substitute any person as subcontractor in place of the subcontractor listed in the original bid, except that the awarding authority, or its duly authorized officer, may, except as otherwise provided in Section 4107.5, consent to the substitution of another person as a subcontractor:

(1) When the subcontractor listed in the bid after having had a reasonable opportunity to do so fails or refuses to execute a written contract, when such written contract, based upon the general terms, conditions, plans and specifications for the project involved or the terms of such subcontractor's written bid, is presented to him by the prime contractor,

(2) When the listed subcontractor becomes bankrupt or insolvent, or

(3) When the listed subcontractor fails or refuses to perform his subcontract, or

(4) When the listed subcontractor fails or refuses to meet the bond requirements of the prime contractor as set forth in Section 4108, or

(5) When the prime contractor demonstrates to the awarding authority, or its duly authorized officer, subject to the further provisions set forth in Section 4107.5, that the name of the subcontractor was listed as the result of an inadvertent clerical error, or

(6) When the listed subcontractor is not licensed pursuant to the Contractors License Law, or

(7) When the awarding authority, or its duly authorized officer, determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with

the plans and specifications, or that the subcontractor is substantially delaying or disrupting the progress of the work.

Prior to approval of the prime contractor's request for such substitution the awarding authority, or its duly authorized officer, shall give notice in writing to the listed subcontractor of the prime contractor's request to substitute and of the reasons for such request. Such notice shall be served by certified or registered mail to the last known address of such subcontractor. The listed subcontractor who has been so notified shall have five working days within which to submit written objections to the substitution to the awarding authority. Failure to file such written objections shall constitute the listed subcontractor's consent to the substitution.

If written objections are filed, the awarding authority shall give notice in writing of at least five working days to the listed subcontractor of a hearing by the awarding authority on the prime contractor's request for substitution.

(b) Permit any such subcontract to be voluntarily assigned or transferred or allow it to be performed by anyone other than the original subcontractor listed in the original bid, without the consent of the awarding authority, or its duly authorized officer.

(c) Other than in the performance of "change orders" causing changes or deviations from the original contract, sublet or subcontract any portion of the work in excess of one-half of 1 percent of the prime contractor's total bid as to which his original bid did not designate a subcontractor.

(Formerly § 4104, Enacted by Stats.1943, c. 134, p. 981, § 4104. Amended by Stats.1945, c. 1380, p. 2576, § 4. Renumbered § 4107 and amended by Stats.1963, c. 2125, p. 4412, § 8; Stats.1969, c. 332, p. 705, § 1; Stats.1974, c. 889, p. 1889, § 1; Stats.1975, c. 678, p. 1482, § 25.)

Historical Note

The 1945 amendment, in the opening paragraph, referred to "general contractor" instead of to the "contractor". In subd. (b), reference was made to any "such" subcontract and reference was made to the original subcontractor "listed in the bid". In subd. (c), the percentage provision was added. A subd. (d) was added.

For partial validity provision of the 1945 act, see Historical Note under § 4102.

The 1963 amendment rewrote the section, which previously read:

"No general contractor whose bid is accepted shall, without the consent of the awarding authority, either:

"(a) Substitute any person as subcontractor in place of the subcontractor designated in the original bid.

"(b) Permit any such subcontract to be assigned or transferred or allow it to be performed by anyone other than the original subcontractor listed in the bid.

"(c) Sublet or subcontract any portion of the work in excess of one-half (½) of one per cent (1%) of the general contractor's total bid as to which his original bid did not designate a subcontractor.

"(d) The awarding authority may consent to the substitution of another person as a subcontractor, when the subcontractor named in the bid after having had a reasonable opportunity to do so, fails or refuses to execute a written contract,

when said written contract, based upon the general terms, conditions, plans and specifications for the project involved, or the terms of such subcontractor's written bid, is presented to him by the contractor."

The 1969 amendment rephrased subd. (a) by inserting numbered subparagraphs; in the introductory provision of subd. (a), added the exception as to § 4107.5; in subpar. 2, added bankruptcy as a ground for substitution; inserted the subject matter contained in subpars. (5), (6), and (7); and substantially rewrote the first and second sentences of the second paragraph of subd. (a) relating to notice of prime contractor's request to substitute.

The 1971 amendment included, throughout the section, following "awarding authority", the words "or its duly authorized officer"; added the last two sentences of the second paragraph of subd. (a); and added the third paragraph of subd. (a) relating to written objections.

The 1975 amendment amended the section without change in the text.

Former § 4107, enacted by Stats.1943, c. 134, p. 981, § 4107, was renumbered § 4112 and amended by Stats.1963, c. 2125, p. 4413, § 13.

Derivation: Stats.1941, c. 1283, p. 3230, § 1.

Cross References

Contractors License Law, see Business and Professions Code § 7000 et seq.

Library References

Municipal Corporations ⇨374(1).
States ⇨108½.

C.J.S. Municipal Corporations § 1208 et seq.
C.J.S. States §§ 174 to 183.

Notes of Decisions

Burden of proof 9
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1. Construction and application

Where prime contractor utilized mason's bid in compiling its total bid for construction project, but inadvertently failed to schedule mason on list of subcontractors per Cal, prime contractor could not be held liable to mason under Subletting and Subcontracting Fair Practices Act, absent detrimental reliance on part of mason. C. L. Smith Co., Inc. v. Roger Ducharme, Inc. (1977) 135 Cal.Rptr. 185, 65 C.A.3d 735.

Even if prime contractor's bid had reflected savings afforded by subcontract bid lower than plaintiff's bid, where plaintiff's name and make of machinery it offered to supply were shown on bid form, prime contractor which obtained permission, after award of contract, to use other machinery supplied by lower bidder violated Subletting and Subcontracting Fair Practices Act, in absence of prime contractor's complying with § 4107.5 procedures for asserting claim of clerical error, and plaintiff was entitled to recover from prime contractor the benefit of the bargain it would have realized had it not been wrongfully deprived of subcontract. Coast Pump Associates v. Stephen Tyler Corp. (1976) 133 Cal.Rptr. 88, 62 C.A.3d 121.

Once prime contractor's bid has been accepted for public project, it may not retain new subcontractors or substitute new subcontractors for existing subcontractors without approval of awarding authority. Bay Cities Paving & Grading, Inc. v. Hensel Phelps Const. Co. (1976) 128 Cal.Rptr. 632, 56 C.A.3d 361.

A general contractor on a public contract could not recover from a subcontractor for breach of such subcontract where contractor failed to comply with applicable provisions of § 4100 et seq., governing performance of subcontracts by a party other than original subcontractor listed in its bid, and where such violation was an integral and essential part of the transaction upon which its asserted cause of action was based. Kiely Corp. v. Gibson (1965) 41 Cal.Rptr. 559, 231 C.A.2d 39.

No contractual relationship is created between subcontractor and general contractor by the submission by general contractor of bid using subcontractor's bid, though bid is accepted by awarding au-

thority. Klose v. Sequoia Union High School Dist. (1953) 258 P.2d 515, 118 C.A.2d 636.

Subcontractor, whose name is submitted with bid of general contractor, secures no legal rights as result of acceptance of general contractor's bid by awarding authority. Id.

2. Purpose

This section was intended to protect original subcontractor against replacement by another subcontractor. Const Pump Associates v. Stephen Tyler Corp. (1976) 133 Cal.Rptr. 88, 62 C.A.3d 421.

Purpose of this section forbidding prime contractor, once his bid is accepted, from substituting subcontractor designated in original bid, except with consent of contracting agency is to protect original subcontractor against replacement by either another subcontractor or by the prime contractor. Bay Cities Paving & Grading, Inc. v. Hensel Phelps Const. Co. (1976) 128 Cal.Rptr. 632, 56 C.A.3d 361.

3. Existence of subcontract

Where prime contractor received unsolicited oral bid for masonry work from mason, figures submitted were used by prime contractor in compiling its total bid, after prime contractor was awarded prime contract, it sent to mason a form of subcontract agreement for purpose of determining terms and conditions of its offer of performance, there was exchange of writings which led to preparation of document which was finally sent to mason, who signed it and returned it to prime contractor, but prime contractor never signed it and informed mason that it could not proceed with masonry work because, through prime contractor's inadvertence, mason had not been scheduled as subcontractor on bid proposal submitted to owner and therefore could not be legally utilized on project, no subcontract existed between parties. C. L. Smith Co., Inc. v. Roger Pucharme, Inc. (1977) 135 Cal.Rptr. 183, 65 C.A.3d 735.

No contractual relationship is created between subcontractor and general contractor by the submission by general contractor of bid using subcontractor's bid, though bid is accepted by awarding authority. Klose v. Sequoia Union High School Dist. (1953) 258 P.2d 515, 118 C.A.2d 636.

4. Substitution of subcontractors

Unless a listed subcontractor becomes insolvent or fails or refuses to perform a written contract for work or fails or refuses to meet the bond requirements of the prime contractor, the prime contractor may not substitute another subcontractor for the listed subcontractor and the awarding authority may not consent to such a substitution until the contract is presented to the listed subcontractor and he, after having had a reasonable opportunity to do so, fails or refuses to execute the written contract. Southern California Acoustics Co. v. C. V. Holder, Inc. (1969) 79 Cal.Rptr. 319, 456 P.2d 975, 71 C.2d 719.

Where general contractor for school construction listed plaintiff acoustical tile subcontractor as required by § 4104 requiring inclusion of names of subcontractors who are to perform one-half of one percent or more of construction work, and subcontractor acting on assumption that its bid had been accepted refrained from bidding on other construction jobs to remain within his bonding limits, and general contractor requested permission from school district to substitute another subcontractor, general contractor had no right to substitute another subcontractor in place of the plaintiff, and school district had no right to consent to that substitution. Id.

Contractor could not, without consent of county sanitation district, substitute itself for "earth work" subcontractor named in bid on public work for performance of the "earth work" after contractor declined to enter into contract with subcontractor even though subcontractor was willing to do so, and therefore, district properly withheld part of contract price as penalty for contractor's violation of his contract. Fred J. Early, Jr., Co. v. County Sanitation Dist. No. 2 of Los Angeles County (1963) 29 Cal.Rptr. 633, 214 C.A.2d 505.

Where general contractor, in making bid for repair of high school, inadvertently inserted wrong name for the electrical subcontractor, and bid of the one wrongfully named was $500 higher than bid of the one who was intended to be named, board of trustees had authority to consent to substitution of proper name for the electrical subcontractor. Klose v. Sequoia Union High School Dist. (1953) 258 P.2d 515, 118 C.A.2d 636.

A prime contractor does not violate this section, prohibiting substitution of subcontractors once prime contractor's bid has been accepted, if he permits a subcontractor to use additional subcontractors to perform certain phases of the subcontract. 50 Ops.Atty.Gen. 11, 8-9-67.

A public body has neither the power nor the obligation, at the time of or after awarding the prime contract, to substitute

Note 4

a California subcontractor in place of an out-of-state subcontractor whose bid is not more than 5 per cent lower than the California subcontractor under §§ 4101, 4104 and this section. 18 Ops.Atty.Gen. 185.

5. Damages

In action by general contractor for subcontractor's failure to honor his bid to perform certain subcontracting work at an agreed price, awarding general contractor as damages the amount representing the difference between the sub-contractor's bid and the actual cost to the general contractor for the performance of the job was proper where the general contractor made reasonable efforts to negotiate a contract with other subcontractor but was unsuccessful in doing so. Norcross v. Winters (1962) 25 Cal.Rptr. 821, 206 C.A.2d 267.

6. Penalties

Where general contractor entered into construction contract with county before 1961 amendment to § 4106 (renumbered sec. now, § 4139) and after effective date of section, contractor violated this section, county had right to recover the ten percent penalty provided for in § 4106 (renumbered; see, now, § 4139) as amended since no substantial change in the rights of contractors was made by the amendment. 39 Ops.Atty.Gen. 282.

7. Pleadings

Where plaintiff alleged that it submitted to general contractor for school construction a subcontract bid, that general contractor as required by law, submitted plaintiff's name among listed subcontractors, that plaintiff read trade newspaper report and acting on assumption that its bid had been accepted, refrained from bidding on other construction jobs in order to remain within bonding limits, and that thereafter the general contractor requested permission from school district to substitute another subcontractor for the plaintiff, which consent was granted, plaintiff stated a cause of action against general contractor for breach of statutory duty. Southern California Acoustics Co. v. C. V. Holder, Inc. (1969) 79 Cal.Rptr. 319, 456 P.2d 975, 71 C.2d 719.

8. Estoppel

School district employee's advice to general contractor that it should take no action to substitute subcontractor before contract was signed and that a request for substitution would be granted after contract was awarded did not estop school district from assessing penalty against contractor for substitution of subcontractor where district was without power to permit substitution. Merco Const. Engineers, Inc. v. Los Angeles Unified School Dist. of Los Angeles County (1969) 79 Cal.Rptr. 24, 274 C.A.2d 154.

9. Burden of proof

Plaintiff who asserted violation by prime contractor of Subletting and Subcontracting Fair Practices Act did not have burden of proving defendant's non-compliance with Act. Coast Pump Associates v. Stephen Tyler Corp. (1976) 133 Cal.Rptr. 85, 62 C.A.3d 421.

§ 4107.2. Carpeting; specifying labor subcontractor in bid

No subcontractor listed by a prime contractor under Section 4101 as furnishing and installing carpeting, shall voluntarily sublet any subcontract with respect to any portion of the labor to be performed unless he specified the subcontractor in his bid for such subcontract to the prime contractor.

(Added by Stats.1975, c. 371, p. 682, § 1.)

Library References

Municipal Corporations ⇐177, States ⇐85.

C.J.S. Municipal Corporations § 1351, C.J.S. States §§ 100 to 107.

§ 4107.5. Clerical error in listing subcontractor; objections by listed subcontractor; substitution of intended subcontractor

The prime contractor as a condition to assert a claim of inadvertent clerical error in the listing of a subcontractor shall within two working days after the time of the prime bid opening by the awarding authority give written notice to the awarding authority and copies of such notice to both the subcontractor he claims to have listed in error and the intended subcontractor who had bid to the prime contractor prior to bid opening.

Any listed subcontractor who has been notified by the prime contractor in accordance with the provisions of this section as to an inadvertent clerical error shall be allowed six working days from the time of the prime bid opening within which to submit to the awarding authority and to the prime contractor written objection to the prime contractor's claim of inadvertent clerical error. Failure of such listed subcontractor to file such written notice within the six working days shall be primary evidence of his agreement that an inadvertent clerical error was made.

The awarding authority shall, after a public hearing as provided in Section 4107 and in the absence of compelling reasons to the contrary, consent to the substitution of the intended subcontractor:

(a) If (1) the prime contractor, (2) the subcontractor listed in error and (3) the intended subcontractor each submit an affidavit to the awarding authority along with such additional evidence as the parties may wish to submit that an inadvertent clerical error was in fact made, provided that the affidavits from each of the three parties are filed within eight working days from the time of the prime bid opening, or

(b) If such affidavits are filed by both the prime contractor and the intended subcontractor within such specified time but the subcontractor whom the prime contractor claims to have listed in error does not submit within six working days, to the awarding authority and to the prime contractor, written objection to the prime contractor's claim of inadvertent clerical error as provided in this section.

If such affidavits are filed by both the prime contractor and the intended subcontractor but the listed subcontractor has, within six working days from the time of the prime bid opening, submitted to the awarding authority and to the prime contractor written objection to the prime contractor's claim of inadvertent clerical error, the awarding authority shall investigate the claims of the parties and shall hold a public hearing as provided in Section 4107 to determine

the validity of such claims. Any determination made shall be based on the facts contained in the declarations submitted under penalty of perjury by all three parties and supported by testimony under oath and subject to cross-examination. The awarding authority may, on its own motion or that of any other party, admit testimony of other contractors, any bid registries or depositories, or any other party in possession of facts which may have a bearing on the decision of the awarding authority.

(Added by Stats.1969, c. 332, p. 706, § 3.)

Cross References

Perjury and subornation of perjury, see Penal Code § 118 et seq.

Notes of Decisions

1. In general

Even if prime contractor's bid had reflected savings afforded by subcontract bid lower than plaintiff's bid, where plaintiff's name and make of machinery it offered to supply were shown on bid form, prime contractor which obtained permission, after award of contract, to use other machinery supplied by lower bidder violated Subletting and Subcontracting Fair Practices Act, in absence of prime contractor's complying with this section procedures for asserting claim of clerical error, and plaintiff was entitled to recover from prime contractor the benefit of the bargain it would have realized had it not been wrongfully deprived of subcontract. Coast Pump Associates v. Stephen Tyler Corp. (1976) 133 Cal.Rptr. 88, 62 C.A.3d 421.

§ 4108. Subcontractors' performance bonds

(a) It shall be the responsibility of each subcontractor submitting bids to a prime contractor to be prepared to submit faithful performance and payment bond or bonds if so requested by the prime contractor.

(b) In the event any subcontractor submitting a bid to a prime contractor does not, upon the request of the prime contractor and at the expense of the prime contractor at the established charge or premium therefor, furnish to such prime contractor a bond or bonds issued by an admitted surety wherein the prime contractor shall be named the obligee, guaranteeing prompt and faithful performance of such subcontract and the payment of all claims for labor and materials furnished or used in and about the work to be done and performed under such subcontract, the prime contractor may reject such bid and make a substitution of another subcontractor subject to the provisions of Section 4107. Such bond or bonds may be required at the expense of the subcontractor only if the prime contractor in his written or published request for subbids (1) specifies that the expense for such bond or bonds shall be borne by the subcontractor and (2) clearly specifies the amount and requirements of such bond or bonds.

(Added by Stats.1963, c. 2125, p. 4112, § 9. Amended by Stats.1974, c. 544, p. 1248, § 6.)

Historical Note

The 1974 amendment substituted "payment bond" for "labor and materials bond".

Former § 4108, enacted by Stats.1945, c. 1380, p. 2577, § 7, as renumbered § 4113 and amended by Stats.1963, c. 2125, p. 4413, § 14.

Cross References

Payment bond for public works, see Civil Code § 3247 et seq.

Library References

Municipal Corporations ⇐311 et seq.
States ⇐101.

C.J.S. Municipal Corporations § 1171 et seq.
C.J.S. States §§ 184 to 193.

Notes of Decisions

1. In general

Even though general contractor which contracted to perform work for public college could have required delivery of performance bond by subcontractor under this section, such a bond was not general contractor's sole means of protecting itself against loss resulting from non-performance, and surety which issued $2,500 bond on behalf of subcontractor was not thereby relieved of liability on such bond. Bailey-Sperber, Inc. v. Yosemite (1976) 134 Cal.Rptr. 740, 61 C.A.3d 725.

§ 4109. Conditions under which subcontract permitted after failure to designate subcontractor in bid

Subletting or subcontracting of any portion of the work in excess of one-half of 1 percent of the prime contractor's total bid as to which no subcontractor was designated in the original bid shall only be permitted in cases of public emergency or necessity, and then only after a finding reduced to writing as a public record of the awarding authority setting forth the facts constituting the emergency or necessity.

(Formerly § 4105, enacted by Stats.1943, c. 134, p. 981, § 4105. Amended by Stats.1945, c. 1380, p. 2577, § 5. Renumbered § 4109 and amended by Stats.1963, c. 2125, p. 4413, § 10.)

Historical Note

The 1947 amendment added the percentage provisions.

For partial validity provision of the 1945 act, see Historical Note under § 4102.

The 1963 amendment referred to "prime contractor's" instead of "general contractor's".

Derivation: Stats.1941, c. 1283, p. 3250, § 1.

Library References

Municipal Corporations ⇐353.
States ⇐105.
C.J.S. Municipal Corporations § 1182.

C.J.S. Schools and School Districts § 701.
C.J.S. States § 69.

4110. Violation of chapter as contract violation; hearing; cancellation; penalty

A prime contractor violating any of the provisions of this chapter iolates his contract and the awarding authority may exercise the opon, in its own discretion, of (1) cancelling his contract or (2) assessig the prime contractor a penalty in an amount of not more than 10 ercent of the amount of the subcontract involved, and this penalty nall be deposited in the fund out of which the prime contract is warded. In any proceedings under this section the prime contractor nall be entitled to a public hearing and to five days' notice of the me and place thereof.

Formerly § 4106, enacted by Stats.1943, c. 134, p. 981, § 4106. Amended Stats.1945, c. 1380, p. 2577, § 6; Stats.1961, c. 1963, p. 4140, § 1. Renbered § 4110 and amended by Stats.1963, c. 2125, p. 4413, § 11. mended by Stats.1969, c. 332, p. 706, § 2.)

Historical Note

The 1945 amendment, in the first sence, referred to "general contractor" inad of "contractor". The second sence, which declared that after a violan the contractor could not recover for y of the materials furnished on the blic work or improvement, was deleted, d a second and third sentence were subtuted which provided that the penalty uld be 20 percent of the amount of the bcontract and that the penalties recered would be paid to the state treaer who would deposit them in the geni fund.

For partial validity provision of the 15 act, see Historical Note under § 03.

The 1961 amendment gave the awarding authority the option of canceling the contract or assessing a penalty of not more than 10 percent of the amount of the subcontract or both, and provided that the penalty would be deposited in the fund out of which the contract was awarded.

The 1963 amendment referred to "prime contractor" instead of "general contractor".

The 1969 amendment deleted subsec. (3) which contained an option of both cancelling the contract and assessing the penalty and added the second sentence.

Derivation: Stats.1941, c. 1283, p. 3230, § 1.

Cross References

cumvention of identification requirements, see § 4105.

Library References

Municipal Corporations ⇐375.
States ⇐109.

C.J.S. Municipal Corporations § 1208 et seq.
C.J.S. States §§ 151, 153, 174 to 176.

Notes of Decisions

nstruction and application 2
uidated damages 5
take 4
tus of subcontractor 3
idity 1
hholding contract price 6

1. Validity

This section authorizing awarding authority, in its discretion, to assess 10% penalty against prime contractor who violates the provisions of Chapter 2 violates due process in that it does not provide

Div. 3 S

any opportunity t present any facts o the exercise of tha predicated. Mereo v. Los Angeles Unif Angeles County (19 274 C.A.2d 151.

2. Construction and

A general contra tract could not re tractor for breach where contractor applicable provisio governing performa a party other than listed in its bid, a was an integral a transaction upon v of action was base son (1965) 41 Ca 39.

Where general construction contr 1961 amendment effective date of s ed § 4107, relatin work done by sul right to recover provided for in since no substant of contractors w ment. 39 Ops.Att

3. Status of subc

No contractual between subcont tractor by the su tractor of bid u though bid is u thority. Klose School Dist. (19 A.2d 636.

Subcontractor, with bid of gene legal rights as general contract thority. Id.

4. Mistake

A mistake th subcontracting high school au

§ 4111.

Violatio ing with Sec Code constit

any opportunity to the contractor to present any facts or arguments on which the exercise of that discretion might be predicated. Merco Const. Engineers, Inc. v. Los Angeles Unified School Dist. of Los Angeles County (1969) 79 Cal.Rptr. 23, 274 C.A.2d 154.

2. Construction and application

A general contractor on a public contract could not recover from a subcontractor for breach of such subcontract where contractor failed to comply with applicable provisions of § 4100 et seq., governing performance of subcontracts by a party other than original subcontractor listed in its bid, and where such violation was an integral and essential part of the transaction upon which its asserted cause of action was based. Kiely Corp. v. Gibson (1965) 41 Cal.Rptr. 559, 231 C.A.2d 39.

Where general contractor entered into construction contract with county before 1961 amendment to this section and after effective date of section, contractor violated § 4107, relating to public construction work done by subcontractors, county had right to recover the ten percent penalty provided for in this section, as amended, since no substantial change in the rights of contractors was made by the amendment. 39 Ops.Atty.Gen. 253.

3. Status of subcontractor

No contractual relationship is created between subcontractor and general contractor by the submission by general contractor of bid using subcontractor's bid, though bid is accepted by awarding authority. Klose v. Sequoia Union High School Dist. (1953) 258 P.2d 515, 118 C.A.2d 620.

Subcontractor, whose name is submitted with bid of general contractor, secures no legal rights as result of acceptance of general contractor's bid by awarding authority. Id.

4. Mistake

A mistake through which corporation subcontracting to do steel work on junior high school auditoriums and connecting shelter, for construction of which another corporation, aware of such mistake, had general contract with school district, seemingly agreed to perform for $37,700 for work reasonably worth at least $47,000 because of failure to exclude from subcontract steel decking specifically excluded in subcontractor's oral bids, was so essential and fundamental that parties' minds never met on subcontract as executed and subcontractor was entitled to rescission thereof. Brunzell Const. Co. v. G. J. Welsbrod Inc. (1935) 285 P.2d 989, 134 C.A.2d 278.

Where general contractor, in making bid for repair of high school, inadvertently inserted wrong name for the electrical subcontractor, and bid of the one wrongfully named was $500 higher than bid of the one who was intended to be named, board of trustees had authority to consent to substitution of proper name for the electrical subcontractor. Klose v. Sequoia Union High School Dist. (1953) 258 P.2d 515, 118 C.A.2d 636.

5. Liquidated damages

Where school district was specifically authorized by this section to provide for penalty for substitution or deletion of subcontractors, school district did not violate Civ.C. § 1670 (repealed; see, now, Civ.C. § 1671) prohibiting contracts fixing damages for breach of an obligation when district assessed penalty against contractor for making substitution. Merco Const. Engineers, Inc. v. Los Angeles Unified School Dist. of Los Angeles County (1969) 79 Cal.Rptr. 23, 274 C.A.2d 154.

6. Withholding contract price

Contractor could not, without consent of county sanitation district, substitute itself for "earth work" subcontractor named in bid on public work for performance of the "earth work" after contractor declined to enter into contract with subcontractor even though subcontractor was willing to do so, and, therefore, district properly withheld part of contract price as penalty for contractor's violation of his contract. Fred J. Early, Jr., Co. v. County Sanitation Dist. No. 2 of Los Angeles County (1963) 29 Cal.Rptr. 633, 214 C.A.2d 505.

§ 4111. Violation of chapter as grounds for discipline

Violation of this chapter by a licensee under Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code constitutes grounds for disciplinary action by the Contractors

State License Board, in addition to the penalties prescribed in Section 4110.

(Formerly § 4106.5, added by Stats.1961, c. 1963, p. 4141, § 2. Renumbered § 4111 and amended by Stats.1963, c. 2125, p. 4413, § 12.)

Historical Note

The 1963 amendment referred to "Section 4110" instead of "Section 4106".

Cross References

Circumvention of competitive bid requirements, see § 4105.
Disciplinary proceedings against contractors, see Business and Professions Code § 7090 et seq.
Subcontracting after award, see § 4106.

Library References

Licenses ⇐1, 51, 55. C.J.S. Licenses §§ 30, 43, 44.

§ 4112. Contractor's noncompliance not defense in action by subcontractor

The failure on the part of a contractor to comply with any provision of this chapter does not constitute a defense to the contractor in any action brought against him by a subcontractor.

(Formerly § 4107, enacted by Stats.1943, c. 134, p. 981, § 4107. Renumbered § 4112 and amended by Stats.1963, c. 2125, p. 4413, § 12.)

Historical Note

The 1963 act renumbered this section without changing the text. Derivation: Stats.1911, c. 1283, p. 2330, § 1.

Library References

Municipal Corporations ⇐974 1/2. C.J.S. Municipal Corporations § 1208 et seq.
States ⇐189(4). C.J.S. States §§ 174 to 182.

Notes of Decisions

1. Construction and application

In view of provision of this section that failure on the part of a public contractor to comply with certain provisions pertaining to transfer or subdivision of subcontractors' work does not constitute a defense to the contractor in any action brought against him by a subcontractor, without such privilege having been extended to the general contractor, failure of contractor to comply would be deemed to bar its right to maintain a suit against a subcontractor for breach of contract. Kirk Corp. v. Gibson (1959) 11 Cal.Rptr. 570, 354 C.A.2d 30.

§ 4113. Subcontractor; prime contractor

As used in this chapter, the word "subcontractor" shall mean a contractor, within the meaning of the provisions of Chapter 9 (com-

mencing with Section 7000) of Division 3 of the Business and Professions Code, who contracts directly with the prime contractor.

"Prime contractor" shall mean the contractor who contracts directly with the awarding authority.

(Formerly § 4108, added by Stats.1945, c. 1330, p. 2577, § 7. Renumbered § 4113 and amended by Stats.1963, c. 2125, p. 4413, § 14. Amended by Stats. 1974, c. 423, p. 1023, § 3.)

Historical Note

The 1945 amendment added the second paragraph which defines "prime contractor".

For partial validity provision of the 1945 act, see Historical Note under § 4113.

The 1974 amendment rewrote the first paragraph, which previously read: "As used in this chapter, the word 'subcontractor' shall have the meaning given to it by the provisions of Chapter 9 of Division 3 of the Business and Professions Code."

Library References

Municipal Corporations ⇐126 et seq.
States ⇐60 et seq.

C.J.S. Municipal Corporations § 1142 et seq.
C.J.S. States §§ 154, 155, 160.

Chapter 2.5

CONTRACTOR'S RESPONSIBILITY FOR WORK

Sec.

4150. Exclusion of acts of God; insurance.
4151. Definitions.
4152. Applicability.
4153. Changes in contracts to comply with environmental requirements and standards.
4154. Contracts; termination, amendment, or modification of public contracts; competitive bids.

Chapter 2.5 was added by Stats.1971, c. 1703, p. 3642, § 1.

§ 4150. Exclusion of acts of God; insurance

Construction contracts of public agencies shall not require the contractor to be responsible for the cost of repairing or restoring damage to the work which damage is determined to have been proximately caused by an act of God, in excess of 5 percent of the contracted amount, provided, that the work damaged is built in accordance with accepted and applicable building standards and the plans and specifications of the awarding authority. However, such contracts may include provisions for terminating the contract. The requirements of this section shall not be mandatory as to construction contracts fi-

DIVISION 4.5. CONFLICT OF INTEREST [REPEALED]

Division 4.5 was repealed by Stats.1981, c. 160, p. 963, § 4.

§§ 3600 to 3802. Repealed by Stats.1981, c. 160, p. 963, § 4

DIVISION 5. PUBLIC WORK AND PUBLIC PURCHASES

Chapter
3.2. Energy Conservation Contracts 4217
10.5. Target Area Contract Preference Act 4
11. Child Care Facilities for State Employees [Renumbered] 4
12. Child Care Facilities for State Employees 4
13. Withheld Contract Funds 4
14. Arbitration of Public Works Contract Claims 4

CHAPTER 2. SUBLETTING AND SUBCONTRACTING

Section
4114. Counties with population of 6,000,000 or more; delegation of awarding authority; procedur

§ 4107. Substitution of subcontractors; consent; assignment of subcontract; subcontracti after award

Notes of Decisions

3. Existence of subcontract

Mere listing of a subcontractor's name by the prime contractor in its bid to the public agency does not create a contract between subcontractor and prime contractor nor does it create any other common-law right to maintain an action against the prime contractor and "duty" created is purely a statutory one under Subletting and Subcontracting Fair Practices Act (§ 4100 et seq.). Interior Systems, Inc. v. Del E. Webb Corp. (1981) 175 Cal.Rptr. 301, 121 C.A.3d 312.

4. Substitution of subcontractors

Substituted subcontractor on government construction project failed to state claim against prime contractor for alleged breach of duty under Subletting and Subcontracting Fair Practice Act (§ 4100 et seq.) absent allegation that substitution was wrongful or unlawful or that permission of agency to substitute was wrong or unlawful or absent allegation of any fact implying that substitution was unlawful or wrongful and, in any event, complaint alleged statutory defense, i.e., that agency permitted substitution because of subcontractor's failure to sign subcontract. Interior Systems, Inc. v. Del E. Webb Corp. (1981) 175 Cal. Rptr. 301, 121 C.A.3d 312.

Prime contractor, faced with refusal by subcontractor to execute subcontract for certain underground work called for in proposed project, was not required by this section to give subcontractor notice of its request to city development agency for permission to perform underground work in question itself and did not breach a statutory duty to subcontractor by substituting itself after affording subcontractor a reasonable opportunity to perform work. W. J. Lewis Corp. v. C. Harper Const. Co., Inc. (1981) 171 Cal.Rptr. 806, 116 C.A.3d 27.

§ 4114. Counties with population of 6,000,000 or more; delegation of awarding authority; procedure

In counties with a population of 6,000,000 or more, the county board of supervisors, when it is the awarding authority, may delegate its functions under Sections 4107 and 4110 to a hearing officer designated by the board.

The hearing officer shall make a written recommendation to the board of supervisors. The board of supervisors may adopt the recommendation without further notice or hearing, or may set the matter for a de novo hearing before the board.

(Added by Stats.1982, c. 362, p. 1676, § 1.)

CHAPTER 3. RELIEF OF BIDDERS [REPEALED]

Former Chapter 3 was repealed by Stats.1982, c. 435, p. 1804, § 1.

§§ 4200 to 4208. Repealed

See main Pub.Con.C. §§ 5100 to
Amendment of § 4201 by Stats
204 was subordinated under the

CHAPTER 3.1. PRO

Section
4215.5. Regional notification
bility of section.
4216. Regional notification
and sharing in costs
notice to member; a
4217. Permit to excavate;

§ 4215.5. Repealed by Stats.19

The repealed section, added by Stat
4224, § 1, amended by Stats.1982, c.
related to local ordinances requiring pe

§ 4216. Regional notification c
pation and sharing in
tion number; notice

(a) For purposes of this section

(1) "Inquiry identification numb
notification center to every perso

(2) "Subsurface installation" m
structure, except nonpressurized s
drain lines, operated or maintained

(3) "Regional notification center"
of subsurface installations which p
existing subsurface installations, f
removal, relocation, or repair.

(4) "Emergency" means a sudden,
demanding immediate action to prev
essential public services. "Emergenc
soil or geologic movements, as well

(b) Every owner of a subsurface
become a member of, participate in, a
of subsurface installations who are m
notification center, including, but not
Underground Service Alert—Northe
California, on or after July 1, 1984, sh
section and Section 4217.

(c) Except in an emergency, every
appropriate regional notification cent
excavation, if the excavation will be co
known, to contain subsurface installati
by the excavator. The regional notifica
the person who contacts the center and
installation in the area of the proposed

(d) Every person planning to condu
appropriate regional notification center
known, to contain subsurface installation
by the excavator. The regional notificat

Asterisks * * * indicate deletions by am

Painters Local Union No. 1140

of the International Brotherhood Of Painters And Allied Trades AFL-CIO

TELEPHONE: (907) 279-3556 OFFICE: 1818 W. NORTHERN LIGHTS BLVD., ANCHORAGE, ALASKA 99503

February 7,1986

Senator Patrick Rodey
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Re:SB341; Section 36.30.140

Dear Senator Rodey;

SB341 is one of those bills that has the potential to correct a large number of problems connected with construction projects funded with public monies.

However, there are some people who claim that certain sections of SB341 would not be beneficial to them.

The bill is not designed to be beneficial to a select group but to insure fairness to all bidders of public works projects.

There is however,one glaring weakness in the bill , the failure to list all subcontractors at bid opening!

The Department of Transportation and the Associated General Contractors claim that the listing of all subcontractors at bid opening is not feasible.

What they really mean to say is that it does not allow for the general contractors to " shop " the bids they have received prior to bid opening.

I have attached a copy of a letter this office sent to Senator Faiks on January 2,1986. Part of the text of that letter covers the current policy of the Kenai Borough of listing subcontractors at bid opening. Also attached is a list of subcontractors for a Matanuska-Susitna Borough project . Please note that the Mat/Su borough requires notification of subcontractors within 24 hours of bid opening.

Of the eleven boroughs in the state,two of the largest boroughs are already requiring the listing of subcontractors either at bid opening or within 24 hours of bid opening.

We feel that it is time that all bidders on public construction projects were treated equally.

It is extremely frustrating to the subcontractors to spend

time and money bidding a project, come in low bidder and then see their bid shopped to someone else at a lower price.

I have also enclosed a copy of the California statue on subletting and subcontracting. Not only is this statue currently in effect, the contractors in California feel that this one statue alone has done more to persevere the integrity of the state procurement office than any other recent piece of legislation in the state of California.

As our economic continues to constrict the problem of bid shopping will only intensify.

Twenty years ago the problem of bid shopping in Alaska did not exist. Of course twenty years ago there was only ten major contractors in the entire state.

Today there is literately hundreds of major contractors bidding work in Alaska and unfortunately many of the contractors now bidding do not have the same scruples as the long time Alaskan contractors.

The inclusion of language similar to California's statue 4100 would be a step in the right direction of treating all construction contractors equally.

The current language in Title 36 (36.05.035) is totally ignored by not only the general contractor but also by the issuing agency and the State Department of Labor.

The Seward prison being a prime example of bid shopping.

The award was made to Samwhan Corp. on 9/5/1985,there is still not a list of subcontractors, five months after the award. (See attached)

Your committees consideration of language similar to the above suggestions in section36.30.140 would be appreciated by all Alaskan subcontractors.

Respectfully:

Harvey Linenschmidt

Harvey Linenschmidt
Field Representative

Rudy Trosclair

Rudy Trosclair
Business Manager

CC: Senators
Tim Kelly
Jan Faiks
Rick Halford
Robert Ziegler,Sr.

Painters Local Union No. 1140

of the International Brotherhood Of Painters And Allied Trades AFL-CIO

TELEPHONE: (907) 279-3556 OFFICE: 1818 W. NORTHERN LIGHTS BLVD., ANCHORAGE, ALASKA 99503

January 2, 1985

Senator Jan Faiks
1024 West Sixth Ave.
Anchorage AK 99501

Re: AGC Testimony of 12/5/1985

Dear Senator Faiks;

Painters and Allied Trades, Local 1140 finds itself in agreement with most of the AGC testimony of 12/5/1985, with the exception of the comments made about section 36.30.110.

The eighty-one subcontractors who are signatory with Local 1140 not only have a clear understanding of the bid process, they are also the most vocal about the current practice of general contractors shopping their bids.

The AGC failed to note that the current policy of the Kenai Borough is to have the subcontractors listed at bid opening. The AGC also failed to inform the committee that the Matanuska-Susitna Borough has a policy of requiring the general contractor to submit to the architect with in 245 hours of bid opening a list of all subcontractors. (Attachment "A")

The AGC is quite aware that with rare exception does the general contractor require a subcontractor to bond a project. The AGC should also be aware of the fact that in order for a subcontractor to secure a Specialty Licenses the sub must provide proof of insurance to the Dept. of Commerce and Economic Development prior to the licenses being issued.

If general contractors were indeed checking qualification we would not be having all the problems that we currently are having.

Alaska Statute 08.18, section 08.18.011 states that "it is unlawful for a person to submit a bid or work as a contractor until that person has been issued a certificate of registration by the Dept. of Commerce and Economic Development." How the AGC can say that complying with the current laws of the state "is unreasonable" is most indicative of the AGC's attitude toward treating all bidders fairly.

The California statute 4107 address the problem of substitution of subcontractors quite adequately, yet the AGC has chosen to ignore a system that has been proven to work.

In conclusion I feel that the AGC is taking a position on the subject of subcontracting that is not defendable.

Two of the states larger borough's are already using a system similar to other states and the state of California is using a system that has over the years demonstrated that construction cost is reduced and that all bidders are treated fairly.

Sincerely,

Harvey Linenschmidt

Harvey B. Linenschmidt
Field Representative

HBL/kia

"A"

PALMER HIGH SCHOOL

PROPOSED SUBCONTRACTORS AND SUPPLIERS

Note: This list to be delivered to the Architect by the end of the first work day following the Bid Opening.

ITEM	CONTRACTOR NAME AND ADDRESS
1. Earthwork	J.B. Warrack Company, P.O. Box 2080, Anchorage, AK 99510
2. Structural Steel & Misc. Iron	United Iron Works, P.O. Box 81023, Seattle, WA
3. Concrete	ALAGCO, 7800 Lake Otis Parkway, Anchorage, AK 99507
4. Masonry	Janssen Contracting, 1520 Post Road, Anchorage, AK 99501
5. IRMA Roofing	Anchorage Roofing, P.O. Box 110217, Anchorage, AK 99511
6. Windows	Alaska Curtain Wall, 1807 West 4th Avenue, Anchorage, AK 99517
7. Wood Doors	Northwest Millwork, 360 W. Nickerson, Seattle, WA 98119
8. Metal Doors	North Central Supply, P.O. Box 380, Rapid City, SD 57701
9. Aluminum Doors & Entrances	Alaska Curtain Wall, 1807 West 4th, Anchorage, AK
10. Door Frames - Hollow Metal	North Central Supply, P.O. Box 380, Rapid City, SD
11. Insulation	R.M. Eyre and Associates, 1013 E. Dimond, Anchorage, AK 99515
12. Casework	Northern School Specialties, P.O. Box 875496, Wasilla, AK 99687
13. Door Hardware	Brennan Commercial Co.
14. Painting	Coastal Painting, P.O. Box 871791, Wasilla, AK 99687 - 376-4303
15. Acoustical Ceilings	R.M. Eyre and Associates, 1013 E. Dimond, Anchorage, AK
16. Drywall	R.M. Eyre and Associates, 1013 E. Dimond, Anchorage, AK
17. Acoustical Panels	R.M. Eyre and Associates, 1013 E. Dimond, Anchorage, AK
18. Plumbing	M-K Mechanical, 1107 E. 70th, Anchorage, AK 99510
19. Fire Sprinkler System	M-K Mechanical, 1107 E. 70th, Anchorage, AK 99510
20. HVAC	M-K Mechanical 1107 E. 70th, Anchorage, AK 99510

21. Electrical Scofield Electric, Pouch 4-9013, Anchorage, AK 99509

22. Landscaping J.B. Warrack Company, Inc., P.O. Box 2080, Anchorage, AK 99510

23. Paving Rasco, Inc., P.O. Box 4-2377, Anchorage, AK 99509

24. - BADGER FLOORING

SAMWHAN AMERICA, INC.

290 Newhall Street
San Francisco, CA 94124
Tlx: 171462 SWC SFO
Tel: (415) 648-5020

900 W. 5th Ave. #615
Anchorage, Alaska 99501

Painters Local Union No.1140
1818 W. Northern Lights Blvd.,
Anchorage, Alaska 99503

Our Ref : 85-SML-001
Date : Oct.31,1985

Attn : Mr.Harvey B. Linenschmidt
Field Representative

Re : Subcontract List

Dear Sir;

We received your letter of Oct.28,1985 with much interests. As you may be aware of, severe winter is coming and no major Work will be performed with exception of small portion of site civil work. We expect next Spring would be time of commencement of Steel Structure Work and P.C. Work. In other words, trades like your line of business will commence in later part of next year, and for the moment we have no idea when a list of subcontractors be made available. If you contact us in next Spring, the list might be obtainable upon request. Should you need more information, please call us.

Very Truly Yours,

T. R. HAHM
Executive Vice-President

RECEIVED NOV - 7 1985

Chapter 2

SUBLETTING AND SUBCONTRACTING

Sec.

4100. Short title.
4100.5. Application of chapter.
4101. Legislative finding; bid shopping and bid peddling.
4102. Renumbered.
4103. Preservation of rights and remedies.
4104. Identification of subcontractors by bidders.
4105. Circumvention of identification requirements.
4106. Failure to specify subcontractor; performance of work; subcontracting after award.
4106.5. Renumbered.
4107. Substitution of subcontractors; consent; assignment of subcontract; subcontracting after award.
4107.2. Carpeting; specifying labor subcontractor in bid.
4107.5. Clerical error in listing subcontractor; objections by listed subcontractor; substitution of intended subcontractor.
4108. Subcontractors' performance bonds.
4109. Conditions under which subcontract permitted after failure to designate subcontractor in bid.
4110. Violation of chapter as contract violation; hearing; cancellation; penalty.
4111. Violation of chapter as grounds for discipline.
4112. Contractor's noncompliance not defense in action by subcontractor.
4113. Subcontractor; prime contractor.

Cross References

Contractors License Law, see Business and Professions Code § 7000 et seq.
State purchases and services, see § 14780 et seq.

Law Review Commentaries

Bid shopping and peddling in the subcontract construction industry. (1970) 18 U.C.L.A.Law Rev. 389.

§ 4100. Short title

This chapter may be cited as the "Subletting and Subcontracting Fair Practices Act."

(Stats.1943, c. 134, p. 980, § 4100. Amended by Stats.1949, c. 1453, p. 2535, § 1; Stats.1963, c. 2125, p. 4411, § 1.)

Historical Note

The 1949 amendment declared that the chapter did not apply to contracts for the construction, improvement or repair of "streets or highways, including bridges". Previously the section declared that the chapter did not apply to contracts for the

construction, improvement or repair of "State highways, including bridges, nor to city or county projects financed in whole or in part with motor vehicle fuel funds".

The 1963 amendment rewrote this section to read as it now appears.

Provisions formerly contained in this section prior to the 1963 amendment are now contained in § 4100.5.

Derivation: Stats.1941, c. 1283, p. 3230, § 1.

Forms

See West's California Code Forms, Government.

Library References

Municipal Corporations ⇐326 et seq.
States ⇐90 et seq.

C.J.S. Municipal Corporations § 1142 et seq.
C.J.S. States §§ 154, 155, 160.

Notes of Decisions

Construction and application 1
Purpose 2

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1. Construction and application

Where electrical contractor's mistaken bid was due to failure of its estimator to take into account that he was dealing with half-size plans although estimator knew plans were half-size and general contractor was not aware of mistake until ten minutes before bids were opened, general contractor was entitled to recover from electrical contractor the additional monies which general contractor was required to pay to have work performed by another electrical contractor after electrical contractor which submitted bid refused to perform in accordance with bid. Saliba-Kringlen Corp. v. Allen Engineering Co. (1971) 92 Cal.Rptr. 799, 15 C.A.3d 95.

2. Purpose

The purpose of Subletting and Subcontracting Fair Practices Act was not limited to providing the awarding authority with opportunity to approve substitute subcontractors, but also to protect the public and subcontractors from the evils attendant upon practices of bid shopping and bid peddling subsequent to the award of prime contract for a public facility. Southern California Acoustics Co. v. C. V. Holder, Inc. (1969) 79 Cal.Rptr. 319, 456 P.2d 975, 71 C.2d 719.

§ 4100.5. Application of chapter

With the exclusion of that portion of work covering street lighting and traffic signals, this chapter does not apply to the balance of contracts for the construction, improvement or repair of streets or highways, including bridges.

(Added by Stats.1963, c. 2125, p. 4411, § 2. Amended by Stats.1972, c. 834, p. 1488, § 1.)

Historical Note

The 1972 amendment inserted the exclusion of work covering street lighting and traffic signals and inserted the words "the balance of" preceding "contracts".

The provisions now contained in this section were formerly contained in § 4100 prior to the 1963 amendment.

Library References

Municipal Corporations ⇐326 et seq.
States ⇐90 et seq.

C.J.S. Municipal Corporations § 1142.
C.J.S. States §§ 154, 155, 160.

1. In general

Bid shopping is not agains
when done by general contr
contract for construction

§ 4101. Legislati

The Legislature f
peddling in connection
public improvements
workmanship to the d
full benefits of fair co
tractors, and lead to
other evils.

(Added by Stats.1963, c

Former § 4101, enacted
134, p. 981, § 4101, ame
1945, c. 1380, p. 2576, § 1,

Municipal Corporations ⇐
States ⇐90 et seq.

In general 1
Definitions 3
Purpose 2

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1. In general

Where prime contractor
bid in compiling its total
tion project, but inadver
schedule mason on list o
in bid, prime contractor
liable to mason under Sul
contracting Fair Practic
detrimental reliance on pa
L. Smith Co., Inc. v. R
Inc. (1977) 135 Cal.Rptr
735.

2. Purpose

Purpose of this Act is
tices of bid shopping an
connection with public
Bay Cities Paving &
Hensel Phelps Const.
Cal.Rptr. 632, 56 C.A.3d

Notes of Decisions

1. In general

Bid shopping is not against public policy when done by general contractor awarded contract for construction of freeway. Saliba-Kringlen Corp. v. Allen Engineering Co. (1971) 92 Cal.Rptr. 799, 15 C.A. 3d 95.

§ 4101. Legislative finding; bid shopping and bid peddling

The Legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration, and repair of public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils.

(Added by Stats.1963, c. 2125, p. 4411, § 4.)

Historical Note

Former § 4101, enacted by Stats.1943, c. 134, p. 981, § 4101, amended by Stats. 1945, c. 1380, p. 2576, § 1, was renumbered § 4103 and amended by Stats.1963, c. 2125, p. 4411, § 4.

Library References

Municipal Corporations ⇐326 et seq.
States ⇐90 et seq.

C.J.S. Municipal Corporations § 1142 et seq.
C.J.S. States §§ 154, 155, 160.

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In general 1
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Purpose 2

1. In general

Where prime contractor utilized mason's bid in compiling its total bid for construction project, but inadvertently failed to schedule mason on list of subcontractors in bid, prime contractor could not be held liable to mason under Subletting and Subcontracting Fair Practices Act, absent detrimental reliance on part of mason. C. L. Smith Co., Inc. v. Roger Ducharme, Inc. (1977) 135 Cal.Rptr. 483, 65 C.A.3d 735.

2. Purpose

Purpose of this Act is to prevent practices of bid shopping and bid peddling in connection with public works projects. Bay Cities Paving & Grading, Inc. v. Hensel Phelps Const. Co. (1976) 123 Cal.Rptr. 632, 56 C.A.3d 361.

The purpose of subletting and subcontracting fair practices act was not limited to providing the awarding authority with opportunity to approve substitute subcontractors, but also to protect the public and subcontractors from the evils attendant upon practices of bid shopping and bid peddling subsequent to the award of prime contract for a public facility. Southern California Acoustics Co. v. C. V. Holder, Inc. (1969) 79 Cal.Rptr. 319, 456 P.2d 975, 71 C.2d 719.

3. Definitions

"Bid shopping", practice sought to be prevented by this Act, is use of lowest bid already received by general or prime contractor to pressure other subcontractors into submitting even lower bids. Bay Cities Paving & Grading, Inc. v. Hensel Phelps Const. Co. (1976) 128 Cal.Rptr. 632, 56 C.A.3d 361.

§ 4102. Renumbered § 4104 and amended by Stats.1963, c. 2125, p. 4411, § 5

§ 4103. Preservation of rights and remedies

Nothing in this chapter limits or diminishes any rights or remedies, either legal or equitable, which:

(a) An original or substituted subcontractor may have against the prime contractor, his successors or assigns.

(b) The State or any county, city, body politic, or public agency may have against the prime contractor, his successors or assigns, including the right to take over and complete the contract.

(Formerly § 4101, enacted by Stats.1943, c. 134, p. 981, § 4101. Amended by Stats.1945, c. 1380, p. 2576, § 1. Renumbered § 4103 and amended by Stats.1963, c. 2125, p. 4411, § 4.)

Historical Note

The 1945 amendment, throughout the section, referred to the "general contractor" instead of to the "contractor", and in subd. (b), it deleted "public corporation" from the list of political bodies.

The 1945 amendatory act contained the following provision: "If any provision of this act, or the application thereof to any person or circumstance, is held invalid, the remainder of the act and the application of such provisions to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

The 1963 amendment substituted "prime" for "general" preceding "contractor" in both subdivisions.

Former § 4103, enacted by Stats.1943, c. 134, p. 981, § 4103, amended by Stats. 1945, c. 1380, p. 2576, § 3, was renumbered § 4106 and amended by Stats.1963, c. 2125, p. 4412, § 7.

Derivation: Stats.1941, c. 1283, p. 3230, § 1.

Library References

Municipal Corporations ⇐326 et seq.
States ⇐90 et seq.

C.J.S. Municipal Corporations § 1142 et seq.
C.J.S. States §§ 154, 155, 160.

Notes of Decisions

1. In general

Where general contractors awarded prime contracts formally solicit bid from subcontractor using another subcontractor's bid in computing prime bid, there is "bid chiseling" forbidden by Bid Listing Law. People v. Inland Bid Depository (1965) 44 Cal.Rptr. 206, 233 C.A.2d 851.

§ 4104. Identification of subcontractors by bidders

Any officer, department, board or commission taking bids for the construction of any public work or improvement shall provide in the specifications prepared for the work or improvement or in the general conditions under which bids will be received for the doing of the work incident to the public work or improvement that any person

making a bid or offer set forth:

(a) The name ar subcontractor who wi prime contractor in provement, or a sub who, under subcontra and installs a portion tailed drawings con amount in excess of total bid.

(b) The portion contractor under thi subcontractor for ea tractor in his bid.

(Formerly § 4102, ena by Stats.1945, c. 1380 Stats.1963, c. 2125, p. c. 1584, p. 3195, § 1

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making a bid or offer to perform the work, shall, in his bid or offer, set forth:

(a) The name and the location of the place of business of each subcontractor who will perform work or labor or render service to the prime contractor in or about the construction of the work or improvement, or a subcontractor licensed by the State of California who, under subcontract to the prime contractor, specially fabricates and installs a portion of the work or improvement according to detailed drawings contained in the plans and specifications, in an amount in excess of one-half of 1 percent of the prime contractor's total bid.

(b) The portion of the work which will be done by each such subcontractor under this act. The prime contractor shall list only one subcontractor for each such portion as is defined by the prime contractor in his bid.

(Formerly § 4102, enacted by Stats.1943, c. 134, p. 981, § 4102. Amended by Stats.1945, c. 1380, p. 2576, § 2. Renumbered § 4104 and amended by Stats.1963, c. 2125, p. 4411, § 5; Stats.1971, c. 376, p. 743, § 1; Stats.1971, c. 1584, p. 3195, § 1.)

Historical Note

The 1945 amendment, in subd. (a), required the name and location of the "place of business" of each subcontractor instead of the name and location of the "mill, shop, or office". Reference was made to the "general contractor" instead of to the "contractor". The percentage restriction was added. In subd. (b), reference was made to work to be done by each "such" subcontractor "under this act".

For partial validity provision of the 1945 act, see Historical Note under § 4102.

The 1963 amendment added the second sentence of subd. (b) relating to the listing of subcontractors.

The 1971 amendments inserted in subd. (a) subcontractors licensed by the state who, under subcontract to the prime contractor, specially fabricate and install a portion of the work or improvement according to detailed drawings contained in the plans and specifications.

Former § 4104, enacted by Stats.1943, c. 134, p. 981, § 4104, amended by Stats. 1945, c. 1380, p. 2576, § 4, was renumbered § 4107 and amended by Stats.1963, c. 2125, p. 4412, § 8.

Derivation: Stats.1941, c. 1253, p. 3230, § 1.

Cross References

Carpeting, sublet of subcontract, see § 4107.2.

Library References

Municipal Corporations ⇐332.
States ⇐98.

C.J.S. Municipal Corporations § 1151.
C.J.S. States §§ 160 to 167.

Notes of Decisions

Acceptance of bids 2
Bid chiseling 5
Construction and application 1
Designation of subcontractors 3
Existence of subcontract 4

1. Construction and application

A public body has neither the power nor the obligation at the time of or after awarding the prime contract, to substitute a California subcontractor in place of an

out-of-state subcontractor whose bid is not more than 5 per cent lower than the California subcontractor under §§ 4107, 4534 and this section. 18 Ops.Atty.Gen. 185.

2. Acceptance of bids

In absence of an agreement to the contrary listing of subcontractor in prime bid for public school construction was not an implied acceptance of subcontractor's bid by general contractor, since the listing by general contractor of subcontractors he intends to retain is in response to statutory command and cannot reasonably be construed as an expression of acceptance. Southern California Acoustics Co. v. C. V. Holder, Inc. (1969) 79 Cal.Rptr. 319, 456 P.2d 975, 71 C.2d 719.

3. Designation of subcontractors

Prime contractor, which was to excavate, by designating both itself and paving subcontractor on same line in designation of subcontractors for paving and excavating violated this Act. Bay Cities Paving & Grading, Inc. v. Hensel Phelps Const. Co. (1976) 128 Cal.Rptr. 632, 56 C.A.3d 361.

Where it was agreed that subcontractor was to pave and prime contractor was to excavate and prime contractor was willing to allow subcontractor to pave but subcontractor refused unless it was also awarded excavation work, there was no benefit of bargain to be recovered by subcontractor; thus it was not entitled to recover from prime contractor which had violated this section by, in designating subcontractors, listing both itself and subcontractor on same line without differentiating the work to be done by each. Id.

This section does not require a prime contractor to list in his bid hardware suppliers who deliver packaged, finished hardware to the job site to be installed by someone other than the supplier. 40 Ops.Atty.Gen. 15, 2-7-67.

4. Existence of subcontract

Where prime contractor received unsolicited oral bid for masonry work from mason, figures submitted were used by prime contractor in compiling its total bid, after prime contractor was awarded prime contract, it sent to mason a form of subcontract agreement for purpose of determining terms and conditions of its offer of performance, there was exchange of writings which led to preparation of document which was finally sent to mason, who signed it and returned it to prime contractor, but prime contractor never signed it and informed mason that it could not proceed with masonry work because, through prime contractor's inadvertence, mason had not been scheduled as subcontractor on bid proposal submitted to owner and therefore could not be legally utilized on project, no subcontract existed between parties. C. L. Smith Co., Inc. v. Roger Ducharme, Inc. (1977) 135 Cal.Rptr. 483, 65 C.A.3d 735.

Where subcontractor did not rely on any promise by school construction general contractor, but only on the listing of subcontractors required by this section and on restriction on general contractor's right to change its listed subcontractors without consent of school district under § 4107, and general contractor neither accepted subcontractor's offer, nor made any promise or offer to subcontractor intended to induce action or forbearance of a definite and substantial character, subcontractor had no cause of action for breach of contract against general contractor which obtained school district's consent to change of subcontractors. Southern California Acoustics Co. v. C. V. Holder, Inc. (1969) 79 Cal.Rptr. 319, 456 P.2d 975, 71 C.2d 719.

A mistake, through which corporation subcontracting to do steel work on junior high school auditoriums and connecting shelter, for construction of which another corporation aware of such mistake, had general contract with school district, seemingly agreed to perform for $37,700 for work reasonably worth at least $47,000 because of failure to exclude from subcontract steel decking specifically excluded in subcontractor's oral bids, was so essential and fundamental that parties' minds never met on subcontract as executed and subcontractor was entitled to rescission thereof. Brunzell Const. Co. v. G. J. Weisbrod Inc. (1955) 285 P.2d 989, 134 C.A.2d 278.

5. Bid chiseling

Where general contractors awarded prime contracts formally solicit lower bid from subcontractor using another subcontractor's bid in computing prime bid, there is "bid chiseling" forbidden by Bid Listing Law. People v. Inland Bid Depository (1965) 44 Cal.Rptr. 206, 233 C.A.2d 851.

§ 4105 Circumvention of identification requirements

Circumvention by a general contractor who bids as a prime contractor of the requirement under Section 4104 for him to list his sub-

contractors, by the device of listing another contractor who will in turn sublet portions constituting the majority of the work covered by the prime contract, shall be considered a violation of this chapter and shall subject such prime contractor to the penalties set forth in Sections 4110 and 4111.

(Added by Stats.1963, c. 2125, p. 4411, § 6.)

Historical Note

Former § 4105, enacted by Stats.1943, c. 134, p. 981, § 4105, amended by Stats.1945, c. 1380, p. 2577, § 5, was renumbered § 4109 and amended by Stats.1963, c. 2125, p. 4413, § 10.

Library References

Municipal Corporations ⇨375.
States ⇨109.

C.J.S. Municipal Corporations § 1208 et seq.
C.J.S. States §§ 151, 153, 174 to 176.

§ 4106. Failure to specify subcontractor; performance of work; subcontracting after award

If a prime contractor fails to specify a subcontractor or if a prime contractor specifies more than one subcontractor for the same portion of work to be performed under the contract in excess of one-half of 1 percent of the prime contractor's total bid, he agrees that he is fully qualified to perform that portion himself, and that he shall perform that portion himself.

If after award of contract such prime contractor shall, except as provided for in Sections 4107 or 4109, subcontract any such portion of the work, such prime contractor shall be subject to the penalties named in Section 4111.

(Formerly § 4103, enacted by Stats.1943, c. 134, p. 981, § 4103. Amended by Stats.1945, c. 1380, p. 2576, § 3. Renumbered § 4106 and amended by Stats.1963, c. 2125, p. 4412, § 7.)

Historical Note

The 1945 amendment referred to "general contractor" instead of to "contractor" and added the percentage limitation.

For partial validity provision of the 1945 act, see Historical Note under § 4103.

The 1963 amendment rewrote the section, which previously read: "If a general contractor fails to specify a subcontractor for any portion of the work to be performed under the contract in excess of one-half (½) of one per cent (1%) of the general contractor's total bid, he agrees to perform that portion himself."

Former § 4106, enacted by Stats.1943, c. 134, p. 981, § 4106, amended by Stats.1945, c. 1380, p. 2577, § 6, was renumbered § 4110 and amended by Stats.1963, c. 2125, p. 4413, § 11.

Derivation: Stats.1941, c. 1283, p. 3230.

Notes of Decisions

In general 1
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1. In general

Where prime contractor utilized mason's bid in compiling its total bid for construc-

tion project, but inadvertently failed to schedule mason on list of subcontractors in bid, prime contractor could not be held liable to mason under Subletting and Subcontracting Fair Practices Act, absent detrimental reliance on part of mason. C. L. Smith Co., Inc., v. Roger Ducharme, Inc. (1977) 135 Cal.Rptr. 483, 65 C.A.3d 735.

2. Standing

Where subcontractor was not designated or intended to perform excavation work on public contract, it had no standing to contest whether or not prime contractor improperly retained a subcontractor to perform that work. Bay Cities Paving & Grading, Inc. v. Hensel Phelps Const. Co. (1976) 128 Cal.Rptr. 632, 56 C.A.3d 361.

§ 4106.5. Renumbered § 4111 and amended by Stats.1963, c. 2125, p. 4413, § 12

§ 4107. Substitution of subcontractors; consent; assignment of subcontract; subcontracting after award

No prime contractor whose bid is accepted shall:

(a) Substitute any person as subcontractor in place of the subcontractor listed in the original bid, except that the awarding authority, or its duly authorized officer, may, except as otherwise provided in Section 4107.5, consent to the substitution of another person as a subcontractor:

(1) When the subcontractor listed in the bid after having had a reasonable opportunity to do so fails or refuses to execute a written contract, when such written contract, based upon the general terms, conditions, plans and specifications for the project involved or the terms of such subcontractor's written bid, is presented to him by the prime contractor,

(2) When the listed subcontractor becomes bankrupt or insolvent, or

(3) When the listed subcontractor fails or refuses to perform his subcontract, or

(4) When the listed subcontractor fails or refuses to meet the bond requirements of the prime contractor as set forth in Section 4108, or

(5) When the prime contractor demonstrates to the awarding authority, or its duly authorized officer, subject to the further provisions set forth in Section 4107.5, that the name of the subcontractor was listed as the result of an inadvertent clerical error, or

(6) When the listed subcontractor is not licensed pursuant to the Contractors License Law, or

(7) When the awarding authority, or its duly authorized officer, determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with

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the plans and specifications, or that the subcontractor is substantially delaying or disrupting the progress of the work.

Prior to approval of the prime contractor's request for such substitution the awarding authority, or its duly authorized officer, shall give notice in writing to the listed subcontractor of the prime contractor's request to substitute and of the reasons for such request. Such notice shall be served by certified or registered mail to the last known address of such subcontractor. The listed subcontractor who has been so notified shall have five working days within which to submit written objections to the substitution to the awarding authority. Failure to file such written objections shall constitute the listed subcontractor's consent to the substitution.

If written objections are filed, the awarding authority shall give notice in writing of at least five working days to the listed subcontractor of a hearing by the awarding authority on the prime contractor's request for substitution.

(b) Permit any such subcontract to be voluntarily assigned or transferred or allow it to be performed by anyone other than the original subcontractor listed in the original bid, without the consent of the awarding authority, or its duly authorized officer.

(c) Other than in the performance of "change orders" causing changes or deviations from the original contract, sublet or subcontract any portion of the work in excess of one-half of 1 percent of the prime contractor's total bid as to which his original bid did not designate a subcontractor.

(Formerly § 4104, Enacted by Stats.1943, c. 134, p. 981, § 4104. Amended by Stats.1945, c. 1380, p. 2576, § 4. Renumbered § 4107 and amended by Stats.1963, c. 2125, p. 4412, § 8; Stats.1969, c. 332, p. 705, § 1; Stats.1974, c. 889, p. 1889, § 1; Stats.1975, c. 678, p. 1482, § 25.)

Historical Note

The 1945 amendment, in the opening paragraph, referred to "general contractor" instead of to the "contractor". In subd. (b), reference was made to any "such" subcontract and reference was made to the original subcontractor "listed in the bid". In subd. (c), the percentage provision was added. A subd. (d) was added.

For partial validity provision of the 1945 act, see Historical Note under § 4103.

The 1963 amendment rewrote the section, which previously read:

"No general contractor whose bid is accepted shall, without the consent of the awarding authority, either:

"(a) Substitute any person as subcontractor in place of the subcontractor designated in the original bid.

"(b) Permit any such subcontract to be assigned or transferred or allow it to be performed by anyone other than the original subcontractor listed in the bid.

"(c) Sublet or subcontract any portion of the work in excess of one-half (½) of one per cent (1%) of the general contractor's total bid as to which his original bid did not designate a subcontractor.

"(d) The awarding authority may consent to the substitution of another person as a subcontractor, when the subcontractor named in the bid after having had a reasonable opportunity to do so, fails or refuses to execute a written contract,

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when said written contract, based upon the general terms, conditions, plans and specifications for the project involved, or the terms of such subcontractor's written bid, is presented to him by the contractor."

The 1969 amendment rephrased subd. (a) by inserting numbered subparagraphs; in the introductory provision of subd. (a), added the exception as to § 4107.5; in subpar. 2, added bankruptcy as a ground for substitution; inserted the subject matter contained in subpars. (5), (6), and (7); and substantially rewrote the first and second sentences of the second paragraph of subd. (a) relating to notice of prime contractor's request to substitute.

The 1974 amendment included, throughout the section, following "awarding authority", the words "or its duly authorized officer"; added the last two sentences of the second paragraph of subd. (a); and added the third paragraph of subd. (a) relating to written objections.

The 1975 amendment amended the section without change in the text.

Former § 4107, enacted by Stats.1943, c. 134, p. 981, § 4107, was renumbered § 4112 and amended by Stats.1963, c. 2125, p. 4113, § 13.

Derivation: Stats.1941, c. 1283, p. 3230, § 1.

Cross References

Contractors License Law, see Business and Professions Code § 7000 et seq.

Library References

Municipal Corporations ⇨374(1).
States ⇨108½.

C.J.S. Municipal Corporations § 1208 et seq.
C.J.S. States §§ 174 to 183.

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Purpose 2
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1. Construction and application

Where prime contractor utilized mason's bid in compiling its total bid for construction project, but inadvertently failed to schedule mason on list of subcontractors in bid, prime contractor could not be held liable to mason under Subletting and Subcontracting Fair Practices Act, absent detrimental reliance on part of mason. C. L. Smith Co., Inc. v. Roger Ducharme, Inc. (1977) 135 Cal.Rptr. 483, 65 C.A.3d 735.

Even if prime contractor's bid had reflected savings afforded by subcontract bid lower than plaintiff's bid, where plaintiff's name and make of machinery it offered to supply were shown on bid form, prime contractor which obtained permission, after award of contract, to use other machinery supplied by lower bidder violated Subletting and Subcontracting Fair Practices Act, in absence of prime contractor's complying with § 4107.5 procedures for asserting claim of clerical error, and plaintiff was entitled to recover from prime contractor the benefit of the bargain it would have realized had it not been wrongfully deprived of subcontract. Coast Pump Associates v. Stephen Tyler Corp. (1976) 133 Cal.Rptr. 88, 62 C.A.3d 421.

Once prime contractor's bid has been accepted for public project, it may not retain new subcontractors or substitute new subcontractors for existing subcontractors without approval of awarding authority. Bay Cities Paving & Grading, Inc. v. Hensel Phelps Const. Co. (1976) 128 Cal.Rptr. 632, 56 C.A.3d 361.

A general contractor on a public contract could not recover from a subcontractor for breach of such subcontract where contractor failed to comply with applicable provisions of § 4100 et seq., governing performance of subcontracts by a party other than original subcontractor listed in its bid, and where such violation was an integral and essential part of the transaction upon which its asserted cause of action was based. Kiely Corp. v. Gibson (1965) 41 Cal.Rptr. 559, 231 C.A.2d 39.

No contractual relationship is created between subcontractor and general contractor by the submission by general contractor of bid using subcontractor's bid, though bid is accepted by awarding authority. Klose v. Sequ
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thority. Klose v. Sequoia Union High School Dist. (1953) 258 P.2d 515, 118 C.A.2d 636.

Subcontractor, whose name is submitted with bid of general contractor, secures no legal rights as result of acceptance of general contractor's bid by awarding authority. Id.

2. Purpose

This section was intended to protect original subcontractor against replacement by another subcontractor. Coast Pump Associates v. Stephen Tyler Corp. (1976) 133 Cal.Rptr. 88, 62 C.A.3d 421.

Purpose of this section forbidding prime contractor, once his bid is accepted, from substituting subcontractor designated in original bid, except with consent of contracting agency is to protect original subcontractor against replacement by either another subcontractor or by the prime contractor. Bay Cities Paving & Grading, Inc. v. Hensel Phelps Const. Co. (1976) 128 Cal.Rptr. 632, 56 C.A.3d 361.

3. Existence of subcontract

Where prime contractor received unsolicited oral bid for masonry work from mason, figures submitted were used by prime contractor in compiling its total bid, after prime contractor was awarded prime contract, it sent to mason a form of subcontract agreement for purpose of determining terms and conditions of its offer of performance, there was exchange of writings which led to preparation of document which was finally sent to mason, who signed it and returned it to prime contractor, but prime contractor never signed it and informed mason that it could not proceed with masonry work because, through prime contractor's inadvertence, mason had not been scheduled as subcontractor on bid proposal submitted to owner and therefore could not be legally utilized on project, no subcontract existed between parties. C. L. Smith Co., Inc. v. Roger Ducharme, Inc. (1977) 135 Cal. Rptr. 483, 65 C.A.3d 735.

No contractual relationship is created between subcontractor and general contractor by the submission by general contractor of bid using subcontractor's bid, though bid is accepted by awarding authority. Klose v. Sequoia Union High School Dist. (1953) 258 P.2d 515, 118 C.A.2d 636.

4. Substitution of subcontractors

Unless a listed subcontractor becomes insolvent or fails or refuses to perform a written contract for work or fails or refuses to meet the bond requirements of the prime contractor, the prime contractor may not substitute another subcontractor for the listed subcontractor and the awarding authority may not consent to such a substitution until the contract is presented to the listed subcontractor and he, after having had a reasonable opportunity to do so, fails or refuses to execute the written contract. Southern California Acoustics Co. v. C. V. Holder, Inc. (1969) 79 Cal.Rptr. 319, 456 P.2d 975, 71 C.2d 719.

Where general contractor for school construction listed plaintiff acoustical tile subcontractor as required by § 4104 requiring inclusion of names of subcontractors who are to perform one-half of one percent or more of construction work, and subcontractor acting on assumption that its bid had been accepted refrained from bidding on other construction jobs to remain within his bonding limits, and general contractor requested permission from school district to substitute another subcontractor, general contractor had no right to substitute another subcontractor in place of the plaintiff, and school district had no right to consent to that substitution. Id.

Contractor could not, without consent of county sanitation district, substitute itself for "earth work" subcontractor named in bid on public work for performance of the "earth work" after contractor declined to enter into contract with subcontractor even though subcontractor was willing to do so, and therefore, district properly withheld part of contract price as penalty for contractor's violation of his contract. Fred J. Early, Jr., Co. v. County Sanitation Dist. No. 2 of Los Angeles County (1963) 29 Cal.Rptr. 633, 214 C.A.2d 505.

Where general contractor, in making bid for repair of high school, inadvertently inserted wrong name for the electrical subcontractor, and bid of the one wrongfully named was $500 higher than bid of the one who was intended to be named, board of trustees had authority to consent to substitution of proper name for the electrical subcontractor. Klose v. Sequoia Union High School Dist. (1953) 258 P.2d 515, 118 C.A.2d 636.

A prime contractor does not violate this section, prohibiting substitution of subcontractors once prime contractor's bid has been accepted, if he permits a subcontractor to use additional subcontractors to perform certain phases of the subcontract. 50 Ops.Atty.Gen. 14, 8-9-67.

A public body has neither the power nor the obligation at the time of or after awarding the prime contract, to substitute

Note 4

a California subcontractor in place of an out-of-state subcontractor whose bid is not more than 5 per cent lower than the California subcontractor under §§ 4104, 4334 and this section. 18 Ops.Atty.Gen. 185.

5. Damages

In action by general contractor for subcontractor's failure to honor his bid to perform certain subcontracting work at an agreed price, awarding general contractor as damages the amount representing the difference between the subcontractor's bid and the actual cost to the general contractor for the performance of the job was proper where the general contractor made reasonable efforts to negotiate a contract with other subcontractor but was unsuccessful in doing so. Noreross v. Winters (1962) 25 Cal.Rptr. 821, 209 C.A.2d 207.

6. Penalties

Where general contractor entered into construction contract with county before 1961 amendment to § 4106 (renumbered; see, now, § 4110) and after effective date of section, contractor violated this section, county had right to recover the ten percent penalty provided for in § 4106 (renumbered; see, now, § 4110) as amended, since no substantial change in the rights of contractors was made by the amendment. 39 Ops.Atty.Gen. 283.

7. Pleadings

Where plaintiff alleged that it submitted to general contractor for school construction a subcontract bid, that general contractor, as required by law, submitted plaintiff's name among listed subcontractors, that plaintiff read trade newspaper report and acting on assumption that its bid had been accepted, refrained from bidding on other construction jobs in order to remain within bonding limits, and that thereafter the general contractor requested permission from school district to substitute another subcontractor for the plaintiff, which consent was granted, plaintiff stated a cause of action against general contractor for breach of statutory duty. Southern California Acoustics Co. v. C. V. Holder, Inc. (1969) 79 Cal.Rptr. 319, 456 P.2d 975, 71 C.2d 719.

8. Estoppel

School district employee's advice to prime contractor that it should take no action to substitute subcontractor before contract was signed and that a request for substitution would be granted after contract was awarded did not estop school district from assessing penalty against contractor for substitution of subcontractor where district was without power to permit substitution. Merco Const. Engineers, Inc. v. Los Angeles Unified School Dist. of Los Angeles County (1969) 79 Cal.Rptr. 23, 274 C.A.2d 154.

9. Burden of proof

Plaintiff who asserted violation by prime contractor of Subletting and Subcontracting Fair Practices Act did not have burden of proving defendant's noncompliance with Act. Coast Pump Associates v. Stephen Tyler Corp. (1976) 133 Cal.Rptr. 88, 62 C.A.3d 421.

§ 4107.2. Carpeting; specifying labor subcontractor in bid

No subcontractor listed by a prime contractor under Section 4104 as furnishing and installing carpeting, shall voluntarily sublet his subcontract with respect to any portion of the labor to be performed unless he specified the subcontractor in his bid for such subcontract to the prime contractor.

(Added by Stats.1975, c. 271, p. 682, § 1.)

Library References

Municipal Corporations ⇨332.
States ⇨98.
C.J.S. Municipal Corporations § 1151.
C.J.S. States §§ 160 to 167.

§ 4107.5. Cleri

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al Corporations § 1151. § 160 to 167.

§ 4107.5. Clerical error in listing subcontractor; objections by listed subcontractor; substitution of intended subcontractor

The prime contractor as a condition to assert a claim of inadvertent clerical error in the listing of a subcontractor shall within two working days after the time of the prime bid opening by the awarding authority give written notice to the awarding authority and copies of such notice to both the subcontractor he claims to have listed in error and the intended subcontractor who had bid to the prime contractor prior to bid opening.

Any listed subcontractor who has been notified by the prime contractor in accordance with the provisions of this section as to an inadvertent clerical error shall be allowed six working days from the time of the prime bid opening within which to submit to the awarding authority and to the prime contractor written objection to the prime contractor's claim of inadvertent clerical error. Failure of such listed subcontractor to file such written notice within the six working days shall be primary evidence of his agreement that an inadvertent clerical error was made.

The awarding authority shall, after a public hearing as provided in Section 4107 and in the absence of compelling reasons to the contrary, consent to the substitution of the intended subcontractor:

(a) If (1) the prime contractor, (2) the subcontractor listed in error and (3) the intended subcontractor each submit an affidavit to the awarding authority along with such additional evidence as the parties may wish to submit that an inadvertent clerical error was in fact made, provided that the affidavits from each of the three parties are filed within eight working days from the time of the prime bid opening, or

(b) If such affidavits are filed by both the prime contractor and the intended subcontractor within such specified time but the subcontractor whom the prime contractor claims to have listed in error does not submit within six working days, to the awarding authority and to the prime contractor, written objection to the prime contractor's claim of inadvertent clerical error as provided in this section.

If such affidavits are filed by both the prime contractor and the intended subcontractor but the listed subcontractor has, within six working days from the time of the prime bid opening, submitted to the awarding authority and to the prime contractor written objection to the prime contractor's claim of inadvertent clerical error, the awarding authority shall investigate the claims of the parties and shall hold a public hearing as provided in Section 4107 to determine

the validity of such claims. Any determination made shall be based on the facts contained in the declarations submitted under penalty of perjury by all three parties and supported by testimony under oath and subject to cross-examination. The awarding authority may, on its own motion or that of any other party, admit testimony of other contractors, any bid registries or depositories, or any other party in possession of facts which may have a bearing on the decision of the awarding authority.

(Added by Stats.1969, c. 332, p. 706, § 3.)

Cross References

Perjury and subornation of perjury, see Penal Code § 118 et seq.

Notes of Decisions

1. In general

Even if prime contractor's bid had reflected savings afforded by subcontract bid lower than plaintiff's bid, where plaintiff's name and make of machinery it offered to supply were shown on bid form, prime contractor which obtained permission, after award of contract, to use other machinery supplied by lower bidder violated Subletting and Subcontracting Fair Practices Act, in absence of prime contractor's complying with this section procedures for asserting claim of clerical error, and plaintiff was entitled to recover from prime contractor the benefit of the bargain it would have realized had it not been wrongfully deprived of subcontract. Coast Pump Associates v. Stephen Tyler Corp. (1976) 133 Cal.Rptr. 88, 62 C.A.3d 421.

§ 4108. Subcontractors' performance bonds

(a) It shall be the responsibility of each subcontractor submitting bids to a prime contractor to be prepared to submit faithful performance and payment bond or bonds if so requested by the prime contractor.

(b) In the event any subcontractor submitting a bid to a prime contractor does not, upon the request of the prime contractor and at the expense of the prime contractor at the established charge or premium therefor, furnish to such prime contractor a bond or bonds issued by an admitted surety wherein the prime contractor shall be named the obligee, guaranteeing prompt and faithful performance of such subcontract and the payment of all claims for labor and materials furnished or used in and about the work to be done and performed under such subcontract, the prime contractor may reject such bid and make a substitution of another subcontractor subject to the provisions of Section 4107. Such bond or bonds may be required at the expense of the subcontractor only if the prime contractor in his written or published request for subbids (1) specifies that the expense for such bond or bonds shall be borne by the subcontractor and (2) clearly specifies the amount and requirements of such bond or bonds.

(Added by Stats.1963, c. 2125, p. 4412, § 9. Amended by Stats.1974, c. 544, p. 1248, § 6.)

The 1974 amendment ment bond" for "lab bond".

Payment bond for public

Municipal Corporation States ⇐101.

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§ 4109. Cond ur

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The 1945 amendment age provisions.

For partial validity 1945 act, see Historic 4103.

Municipal Corporation States ⇐105. C.J.S. Municipal Cor

Historical Note

The 1974 amendment substituted "payment bond" for "labor and materials bond".

Former § 4108, enacted by Stats.1943, c. 1380, p. 2577, § 7, was renumbered § 4113 and amended by Stats.1963, c. 2125, p. 4413, § 14.

Cross References

Payment bond for public works, see Civil Code § 3247 et seq.

Library References

Municipal Corporations ⇐341 et seq.
States ⇐101.

C.J.S. Municipal Corporations § 1171 et seq.
C.J.S. States §§ 184 to 193.

Notes of Decisions

1. In general

Even though general contractor which contracted to perform work for public college could have required delivery of performance bond by subcontractor under this section, such a bond was not general contractor's sole means of protecting itself against loss resulting from non-performance, and surety which issued $2,500 bond on behalf of subcontractor was not thereby relieved of liability on such bond. Bailey-Sperber, Inc. v. Yosemite (1976) 134 Cal.Rptr. 740, 64 C.A.3d 725.

§ 4109. Conditions under which subcontract permitted after failure to designate subcontractor in bid

Subletting or subcontracting of any portion of the work in excess of one-half of 1 percent of the prime contractor's total bid as to which no subcontractor was designated in the original bid shall only be permitted in cases of public emergency or necessity, and then only after a finding reduced to writing as a public record of the awarding authority setting forth the facts constituting the emergency or necessity.

(Formerly § 4105, enacted by Stats.1943, c. 134, p. 981, § 4105. Amended by Stats.1945, c. 1380, p. 2577, § 5. Renumbered § 4109 and amended by Stats.1963, c. 2125, p. 4413, § 10.)

Historical Note

The 1945 amendment added the percentage provisions.

For partial validity provision of the 1945 act, see Historical Note under § 4103.

The 1963 amendment referred to "prime contractor's" instead of "general contractor's".

Derivation: Stats.1941, c. 1283, p. 3230, § 1.

Library References

Municipal Corporations ⇐353.
States ⇐105.
C.J.S. Municipal Corporations § 1182.

C.J.S. Schools and School Districts § 301.
C.J.S. States § 169.

§ 4110. Violation of chapter as contract violation; hearing; cancellation; penalty

A prime contractor violating any of the provisions of this chapter violates his contract and the awarding authority may exercise the option, in its own discretion, of (1) cancelling his contract or (2) assessing the prime contractor a penalty in an amount of not more than 10 percent of the amount of the subcontract involved, and this penalty shall be deposited in the fund out of which the prime contract is awarded. In any proceedings under this section the prime contractor shall be entitled to a public hearing and to five days' notice of the time and place thereof.

(Formerly § 4106, enacted by Stats.1943, c. 134, p. 981, § 4106. Amended by Stats.1945, c. 1380, p. 2577, § 6; Stats.1961, c. 1963, p. 4140, § 1. Renumbered § 4110 and amended by Stats.1963, c. 2125, p. 4413, § 11. Amended by Stats.1969, c. 332, p. 706, § 2.)

Historical Note

The 1945 amendment, in the first sentence, referred to "general contractor" instead of "contractor". The second sentence, which declared that after a violation the contractor could not recover for any of the materials furnished on the public work or improvement, was deleted, and a second and third sentence were substituted which provided that the penalty would be 20 percent of the amount of the subcontract and that the penalties recovered would be paid to the state treasurer who would deposit them in the general fund.

For partial validity provision of the 1945 act, see Historical Note under § 4103.

The 1961 amendment gave the awarding authority the option of canceling the contract or assessing a penalty of not more than 10 percent of the amount of the subcontract or both, and provided that the penalty would be deposited in the fund out of which the contract was awarded.

The 1963 amendment referred to "prime contractor" instead of "general contractor".

The 1969 amendment deleted subsec. (3) which contained an option of both cancelling the contract and assessing the penalty and added the second sentence.

Derivation: Stats.1941, c. 1283, p. 3230, § 1.

Cross References

Circumvention of identification requirements, see § 4105.

Library References

Municipal Corporations ⇐375.
States ⇐109.

C.J.S. Municipal Corporations § 1208 et seq.
C.J.S. States §§ 151, 153, 174 to 176.

Notes of Decisions

Construction and application 2
Liquidated damages 5
Mistake 4
Status of subcontractor 3
Validity 1
Withholding contract price 6

1. Validity

This section authorizing awarding authority, in its discretion, to assess 10% penalty against prime contractor who violates the provisions of Chapter 2 violates due process in that it does not provide

any opportunity to the present any facts or arg the exercise of that dis predicated. Merco Const v. Los Angeles Unified Sc Angeles County (1969) 274 C.A.2d 154.

2. Construction and appl

A general contractor tract could not recover tractor for breach of where contractor failed applicable provisions of governing performance o a party other than origi listed in its bid, and wh was an integral and ess transaction upon which of action was based. K son (1965) 41 Cal.Rptr 39.

Where general contra construction contract w 1961 amendment to this effective date of section, ed § 4107, relating to work done by subcontr right to recover the te provided for in this se since no substantial ch of contractors was ma ment. 39 Ops.Atty.Gen.

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Subcontractor, whose with bid of general con legal rights as result general contractor's bi thority. Id.

4. Mistake

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§ 4111. Viol

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any opportunity to the contractor to present any facts or arguments on which the exercise of that discretion might be predicated. Merco Const. Engineers, Inc. v. Los Angeles Unified School Dist. of Los Angeles County (1969) 79 Cal.Rptr. 23, 274 C.A.2d 154.

2. Construction and application

A general contractor on a public contract could not recover from a subcontractor for breach of such subcontract where contractor failed to comply with applicable provisions of § 4100 et seq., governing performance of subcontracts by a party other than original subcontractor listed in its bid, and where such violation was an integral and essential part of the transaction upon which its asserted cause of action was based. Kiely Corp. v. Gibson (1965) 41 Cal.Rptr. 559, 231 C.A.2d 39.

Where general contractor entered into construction contract with county before 1961 amendment to this section and after effective date of section, contractor violated § 4107, relating to public construction work done by subcontractors, county had right to recover the ten percent penalty provided for in this section, as amended, since no substantial change in the rights of contractors was made by the amendment. 39 Ops.Atty.Gen. 283.

3. Status of subcontractor

No contractual relationship is created between subcontractor and general contractor by the submission by general contractor of bid using subcontractor's bid, though bid is accepted by awarding authority. Klose v. Sequoia Union High School Dist. (1953) 258 P.2d 515, 118 C.A.2d 636.

Subcontractor, whose name is submitted with bid of general contractor, secures no legal rights as result of acceptance of general contractor's bid by awarding authority. Id.

4. Mistake

A mistake through which corporation subcontracting to do steel work on junior high school auditoriums and connecting shelter, for construction of which another corporation, aware of such mistake, had general contract with school district, seemingly agreed to perform for $37,700 for work reasonably worth at least $47,000 because of failure to exclude from subcontract steel decking specifically excluded in subcontractor's oral bids, was so essential and fundamental that parties' minds never met on subcontract as executed and subcontractor was entitled to rescission thereof. Brunzell Const. Co. v. G. J. Welsbrod Inc. (1955) 285 P.2d 989, 134 C.A.2d 278.

Where general contractor, in making bid for repair of high school, inadvertently inserted wrong name for the electrical subcontractor, and bid of the one wrongfully named was $500 higher than bid of the one who was intended to be named, board of trustees had authority to consent to substitution of proper name for the electrical subcontractor. Klose v. Sequoia Union High School Dist. (1953) 258 P.2d 515, 118 C.A.2d 636.

5. Liquidated damages

Where school district was specifically authorized by this section to provide for penalty for substitution or deletion of subcontractors, school district did not violate Civ.C. § 1670 (repealed; see, now, Civ.C. § 1671) prohibiting contracts fixing damages for breach of an obligation when district assessed penalty against contractor for making substitution. Merco Const. Engineers, Inc. v. Los Angeles Unified School Dist. of Los Angeles County (1969) 79 Cal.Rptr. 23, 274 C.A.2d 154.

6. Withholding contract price

Contractor could not, without consent of county sanitation district, substitute itself for "earth work" subcontractor named in bid on public work for performance of the "earth work" after contractor declined to enter into contract with subcontractor even though subcontractor was willing to do so, and, therefore, district properly withheld part of contract price as penalty for contractor's violation of his contract. Fred J. Early, Jr., Co. v. County Sanitation Dist. No. 2 of Los Angeles County (1963) 29 Cal.Rptr. 633, 214 C.A.2d 505.

§ 4111. Violation of chapter as grounds for discipline

Violation of this chapter by a licensee under Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code constitutes grounds for disciplinary action by the Contractors

Research Present Statutes

State License Board, in addition to the penalties prescribed in Section 4110.

(Formerly § 4106.5, added by Stats.1961, c. 1963, p. 4141, § 2. Renumbered § 4111 and amended by Stats.1963, c. 2125, p. 4413, § 12.)

Historical Note

The 1963 amendment referred to "Section 4110" instead of "Section 4106".

Cross References

Circumvention of identification requirements, see § 4105.
Disciplinary proceedings against contractors, see Business and Professions Code § 7090 et seq.
Subcontracting after award, see § 4106.

Library References

Licenses ⇐11(5), 38.
C.J.S. Licenses §§ 30, 43, 44.

§ 4112. Contractor's noncompliance not defense in action by subcontractor

The failure on the part of a contractor to comply with any provision of this chapter does not constitute a defense to the contractor in any action brought against him by a subcontractor.

(Formerly § 4107, enacted by Stats.1943, c. 134, p. 981, § 4107. Renumbered § 4112 and amended by Stats.1963, c. 2125, p. 4413, § 13.)

Historical Note

The 1963 act renumbered this section without changing the text.

Derivation: Stats.1941, c. 1283, p. 3230, § 1.

Library References

Municipal Corporations ⇐374(1).
States ⇐105½.
C.J.S. Municipal Corporations § 1208 et seq.
C.J.S. States §§ 174 to 183.

Notes of Decisions

1. Construction and application

In view of provision of this section that failure on the part of a public contractor to comply with certain provisions pertaining to transfer or substitution of subcontractors other than original subcontractors listed in bid shall not constitute a defense to the contractor in any action brought against him by a subcontractor, without such privilege having been extended to the general contractor, failure of contractor to comply would be deemed to bar his right to maintain a suit against a subcontractor for breach of contract. Kiely Corp v. Gibson (1965) 41 Cal.Rptr. 539, 231 C.A.2d 39.

§ 4113. Subcontractor; prime contractor

As used in this chapter, the word "subcontractor" shall mean a contractor, within the meaning of the provisions of Chapter 9 (com-

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sions Code, who contr

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(Formerly § 4108, add
4113 and amended by
1974, c. 423, p. 1023,

The 1963 amendment
paragraph which defines
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For partial validity p
1945 act, see Historical
4103.

Municipal Corporations
States ⇐90 et seq.

CONTRACT

Sec.
4150. Exclusion of a
4151. Definitions.
4152. Applicability.
4153. Changes in c
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Chapter 2

§ 1.

§ 4150. Excl

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"Prime contractor" shall mean the contractor who contracts directly with the awarding authority.

(Formerly § 4108, added by Stats.1945, c. 1380, p. 2577, § 7. Renumbered § 4113 and amended by Stats.1963, c. 2125, p. 4413, § 14. Amended by Stats. 1974, c. 423, p. 1023, § 3.)

Historical Note

The 1963 amendment added the second paragraph which defines "prime contractor".

For partial validity provision of the 1945 act, see Historical Note under § 4103.

The 1974 amendment rewrote the first paragraph, which previously read: "As used in this chapter, the word 'subcontractor' shall have the meaning given to it by the provisions of Chapter 9 of Division 3 of the Business and Professions Code."

Library References

Municipal Corporations ⇐326 et seq.
States ⇐90 et seq.

C.J.S. Municipal Corporations § 1142 et seq.
C.J.S. States §§ 154, 155, 160.

Chapter 2.5

CONTRACTOR'S RESPONSIBILITY FOR WORK

Sec.

4150. Exclusion of acts of God; insurance.
4151. Definitions.
4152. Applicability.
4153. Changes in contracts to comply with environmental requirements and standards.
4154. Contracts; termination, amendment, or modification of public contracts; competitive bids.

Chapter 2.5 was added by Stats.1971, c. 1703, p. 3642, § 1.

§ 4150. Exclusion of acts of God; insurance

Construction contracts of public agencies shall not require the contractor to be responsible for the cost of repairing or restoring damage to the work, which damage is determined to have been proximately caused by an act of God, in excess of 5 percent of the contracted amount, provided, that the work damaged is built in accordance with accepted and applicable building standards and the plans and specifications of the awarding authority. However, such contracts may include provisions for terminating the contract. The requirements of this section shall not be mandatory as to construction contracts fi-

§§ 3600 to 3802
Repealed

DIVISION 4.5. CONFLICT OF INTEREST [REPEALED]

Division 4.5 was repealed by Stats.1981, c. 160, p. 962, § 4.

§§ 3600 to 3802. Repealed by Stats.1981, c. 160, p. 963, § 4

DIVISION 5. PUBLIC WORK AND PUBLIC PURCHASES

Chapter

3.2. Energy Conservation Contracts ..... Sec. 4217
10.5. Target Area Contract Preference Act 4
11. Child Care Facilities for State Employees [Renumbered] 4
12. Child Care Facilities for State Employees 4
13. Withheld Contract Funds 4
14. Arbitration of Public Works Contract Claims 4

CHAPTER 2. SUBLETTING AND SUBCONTRACTING

Section

4114. Counties with population of 6,000,000 or more; delegation of awarding authority; procedure

§ 4107. Substitution of subcontractors; consent; assignment of subcontract; subcontracting after award

Notes of Decisions

3. Existence of subcontract

Mere listing of a subcontractor's name by the prime contractor in its bid to the public agency does not create a contract between subcontractor and prime contractor nor does it create any other common-law right to maintain an action against the prime contractor and "duty" created is purely a statutory one under Subletting and Subcontracting Fair Practices Act (§ 4100 et seq.) Interior Systems, Inc. v. Del E. Webb Corp. (1981) 175 Cal.Rptr. 301, 121 C.A.3d 312.

4. Substitution of subcontractors

Substituted subcontractor on government construction project failed to state claim against prime contractor for alleged breach of duty under Subletting and Subcontracting Fair Practice Act (§ 4100 et seq.) absent allegation that substitution was wrongful or unlawful or that permission of agency to substitute was wrong or unlawful or absent allegation of any fact implying that substitution was unlawful or wrongful and, in any event, complaint alleged statutory defense, i.e., that agency permitted substitution because of subcontractor's failure to sign subcontract. Interior Systems, Inc. v. Del E. Webb Corp. (1981) 175 Cal.Rptr. 301, 121 C.A.3d 312.

Prime contractor, faced with refusal by subcontractor to execute subcontract for certain underground work called for in proposed project, was not required by this section to give subcontractor notice of its request to city development agency for permission to perform underground work in question itself and did not breach a statutory duty to subcontractor by substituting itself after affording subcontractor a reasonable opportunity to perform work. W. J. Lewis Corp. v. C. Harper Const. Co., Inc. (1981) 171 Cal.Rptr. 806, 116 C.A.3d 27.

§ 4114. Counties with population of 6,000,000 or more; delegation of awarding authority; procedure

In counties with a population of 6,000,000 or more, the county board of supervisors, when it is the awarding authority, may delegate its functions under Sections 4107 and 4110 to a hearing officer designated by the board.

The hearing officer shall make a written recommendation to the board of supervisors. The board of supervisors may adopt the recommendation without further notice or hearing, or may set the matter for a de novo hearing before the board.

(Added by Stats.1982, c. 362, p. 1676, § 1.)

CHAPTER 3. RELIEF OF BIDDERS [REPEALED]

Former Chapter 3 was repealed by Stats.1982, c. 435, p. 1803, § 1.

§ 4200 to 4208. Repealed

See, now, Pub.Con.C. §§ 5100 to
Amendment of § 4201 by Stats.
244 was subordinated under the

CHAPTER 3.1. PROT

Section

4215.5. Regional notification c
bility of section.
4216. Regional notification c
and sharing in costs;
notice to member; a
4217. Permit to excavate; n

§ 4215.5. Repealed by Stats.19

The repealed section, added by Stat
4225, § 1, amended by Stats.1982, c. 1
related to local ordinances requiring pu

§ 4216. Regional notification c pation and sharing i tion number; notice

(a) For purposes of this section

(1) "Inquiry identification num notification center to every pers

(2) "Subsurface installation" m structure, except nonpressurized drain lines, operated or maintaine

(3) "Regional notification center of subsurface installations which existing subsurface installations, removal, relocation, or repair.

(4) "Emergency" means a sudde demanding immediate action to pre essential public services. "Emerge soil or geologic movements, as wel

(b) Every owner of a subsurfac become a member of, participate in, of subsurface installations who are notification center, including, but n Underground Service Alert—North California, on or after July 1, 1984, section and Section 4217.

(c) Except in an emergency, ever appropriate regional notification ce excavation, if the excavation will be known, to contain subsurface install by the excavator. The regional noti the person who contacts the center installation in the area of the propos

(d) Every person planning to co appropriate regional notification cent known, to contain subsurface installa by the excavator. The regional notif

Asterisks * * * indicate deletions by

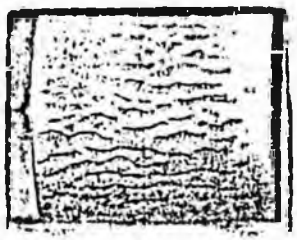
CONTRACTORS' GUIDE TO CALIFORNIA CONTRACTORS' STATE LICENSE BOARD CITATION PROCEDURE

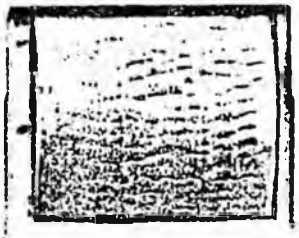
INTRODUCTION

In 1980, the Legislature enacted Section 7099 of the Business and Professions Code as part of the Contractors' License Law. That law authorized the Contractors' State License Board (CSLB) to issue Citations, Correction Orders and Civil Penalties for violations of laws pertaining to contractors. The CSLB passed Board Rules implementing the Citation procedures. These rules implement the State Law and they can be found as Board Rule Numbers 803 to 806.

Section I of this booklet will be a brief explanation of the Citation Procedures. Section II is a list of the Statutes and the recommended minimum and maximum penalty for each. Section III is a listing of each Statute, in numerical order with a brief explanation of the wording of that Statute. We have also included an Appendix of various forms that may be utilized by the Contractors' State License Board.

This booklet merely highlights the Citation procedure and the Laws that the procedure is intended to enforce. For a detailed understanding and explanation of each, we would recommend that you utilize the services of your attorney, or in the alternative, read the Business & Professions Code or the Board's Rules and Regulations themselves.





SECTION I
CITATION PROCEDURE

The Citation Procedures being implemented by the CSLB are an alternative to the more formalized procedures that the Board has used in the past. Previously, the CSLB has filed an Accusation to revoke or suspend a license when they found that a contractor had violated the law. This would mean that the contractor would hire an attorney and proceed to an Administrative Hearing in order to defend himself. That procedure was costly, and, in numerous instances, wasteful.

The Citation Procedure would allow the Contractors' State License Board to issue a Citation, requiring the Contractor to do various things. It may require him to correct a deficiency in his construction project, it may require him to pay a penalty of $50.00 to $1,500.00, or the Citation may require him to do both. In no event can a citation for a single construction project have a fine in excess of $2,000.00. The Citation system, when fully implemented and the "bugs" worked out, will allow the CSLB to act in a much quicker fashion. Issuing citations will be a much simpler process.

As any new enforcement tool, it can be both helpful and subject to abuse. The prior ultimate enforcement tool utilized by the CSLB, going to a formal hearing, was costly to the Contractor. Further, in many instances, the CSLB would utilize the fact that the Contractor had violated technical portions of the law, for example; failure to put his License Number on the Contract, or the date of completion, to coerce the Contractor into doing certain corrective work that it could not otherwise have him do. In order to defend himself the Contractor would have to hire an attorney and proceed to a formal hearing. The Citation Procedure allows the CSLB to issue a civil penalty in nominal sums thereby enforcing the law and not requiring the Contractor to expend large sums of money in defense.

However, like any other enforcement tool, the Citation Procedure is subject to abuse. It is possible that CSLB Deputies

will indiscriminately write Citations and that the amounts of the penalty would be excessive in light of the alleged violation.

The CSLB has attempted to insure against such arbitrary use of the procedure by having their Citations issued by only District Offices, rather than a Junior Deputy. Further, the rules themselves have a built-in appeal procedure.

If you are issued a Citation, you have various alternatives. You may choose to pay the Civil Penalty and correct any deficiencies that are alleged in the Citation. In the alternative, you may wish to appeal *all* or any portion of the Citation. You can do this by checking off boxes, in the form that is provided along with the Citation (See Appendix "D").

You may appeal the fact that you have not violated the Business & Professions Code Section that is cited. You may appeal the amount of the Civil Penalty, the Order of Correction, or both. This appeal must be made in writing and within fifteen (15) days. If you wish to appeal, you will still have the opportunity to be heard before an Administrative Law Judge. You may represent yourself, or have an attorney represent you.

The various forms that are used by the CSLB are enclosed as an Appendix to this booklet. You should look them over so you are familiar with what is being used.

It should be clearly understood that this is probably the most revolutionary enforcement tool that has been afforded to the CSLB in many, many years. The interpretation and implementation of these procedures, as well as the force given to these procedures by the Office of Administrative Hearings, is not determined at this time. The full impact of the new Citation System may not be felt for a number of years.

SECTION II
SHORT TITLE OF BUSINESS AND PROFESSIONS CODE SECTIONS AFFECTED BY CITATION PROCEDURE

Business & Professions Code Section	
7018.5	Lengthy notice of Mechanic's Lien Laws
7026.7	You must have the proper license to do work for which you advertise.
7028	Contracting without a license is a misdemeanor.
7028.5	Officers, Directors and RMO's cannot individually contract without their own license.
7029	Two or more individual licensees must have a joint venture license to work together.
7029.5	Identification requirements for well-digging truck or rig.
7029.6	Identification requirements for Plumbing Contractor's vehicle.
7029.7	Identification requirements for C-45 Electrical Sign Contractor's vehicle.
7030	Contract must contain notice of Contractors' License Law
7030.5	Contractor's identification requirements.
7034	Contracts may not contain any indemnity against negligence or misconduct, or waiver of lien rights.
7068.1	Requirements and responsibilities of a qualifying individual.

7068.2	Notice required regarding loss of RMO or RME.
7071.11	Claims against license bond or deposit.
7071.13	You cannot refer to your license bond in selling jobs.
7075	A license is non-transferable and you must carry it on the job.
7083	You must report changes in name, address, of managing personnel.
7107	Abandonment of a project.
7108	Diversion of funds.
7108.5	Prime contractor must pay subs within 10 days of receipt from owner.
7109	You cannot willfully disregard the plans and specifications.
7109.5	Violation of safety provisions of Labor Code.
7110	Violation of State, City or County Building and Safety, Health and Safety, Civil, or Water Codes.
7110.1	You cannot require a release of claims on wages unless full payment is made.
7111	You must keep records of all transactions on a job and maintain them for three years afterwards.
7113	Failure to complete for the contract price.
7113.5	Avoiding obligations or settling for less than the amount owed.

7114	Allowing an unlicensed individual to use your license.
7116	Willful or fraudulent acts.
7117	Contractor must act in the name of the licensee.
7117.5	Inactive licenses.
7118	Contracting with an unlicensed contractor.
7119	Failure to diligently complete a project.
7120	Failure to pay money when due.
7123	Criminal convictions.
7125	Reporting Worker's Compensation Carrier.
7154	Employing an unregistered home improvement salesman.
7157	No kickbacks or compensation to customers.
7158	False certificate of completion.
7159	Requirements of Home Improvement Contracts.
7161	False, fraudulent or deceptive advertising.
7167	Requirements of swimming pool contracts.
7168	Copy of swimming pool contract must be given to buyer at signing.

7031

SECTION III
BUSINESS AND PROFESSIONS CODE SECTIONS AND RECOMMENDED CIVIL PENALTIES

7018.5 **$50.00-$150.00**

The State Contractors' Board has prepared a lengthy form entitled "Notice to Owner" which clearly describes in common layman's language the pertinent provisions of the California mechanics' lien laws and the rights and responsibilities of a property owner and a contractor under these laws. This also includes the possibility of filing a contract with the county recorder and the recording of contractor's payment bond for private work in the county recorder's office. Each licensed contractor must give a copy of this "Notice to Owner" to the owner, his agent, or the payer, before entering into a contract with an *owner* for work for which a contractor's license is required.

7026.7 **$50.00-$150.00**

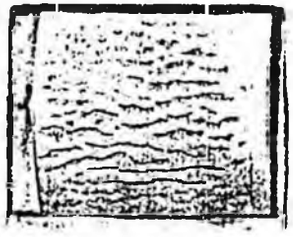
It is a misdemeanor for any person to advertise for construction or for work of improvement covered by state law unless he holds a valid license in the classification so advertised. The exception to this rule is that a licensed building or engineering contractor may advertise as a general contractor. For the purposes of this rule, "advertise" is given broad interpretation.

7028. **$50.00-$500.00**

Contracting without a license is a misdemeanor. A second conviction is punishable by a fine of not less than one hundred dollars ($100) nor more than two thousand dollars ($2,000), or imprisonment in the county jail for not less than 10 days nor more than six months, or both.

7028.5 **$50.00-$500.00**

A person who is or has been a member, officer, director or responsible managing officer of a licensed contractor cannot individually engage in the business or individually act in the capacity of a contractor without having a valid contractor's license.



7029. **$50.00-$150.00**

An additional joint venture license is required in order for two or more individually licensed contractors to jointly submit a bid or otherwise act as joint venturers.

7029.5 **$50.00-$150.00**

A well-drilling contractors' truck or drill rig must have displayed on each of its sides the contractor's name, permanent business address, and the contractor's license number in letters not less than 1½ inches high.

7029.6 **$50.00-$150.00**

A licensed plumbing contractor must display his name, permanent business address, and contractor's license number on each side of each motor vehicle used in his business in letters not less than 1½ inches high.

7029.7 **$50.00-$150.00**

A licensed C-45 electrical sign contractor who manufactures, installs or maintains electrical business signs must have displayed on each side of each commercially registered motor vehicle used in his business: his name, permanent business address and contractor's license number in letters not less than 1½ inches high.

7030. **$50.00-$100.00**

Contractors must include the following statement in at least 10-point type on all written contracts where he or she is a prime contractor: (Not Subcontractor)

"Contractors are required by law to be licensed and regulated by the Contractors' State License Board. Any questions concerning a contractor may be referred to the Registrar, Contractors' State License Board, 1020 N. Street, Sacramento, California 95814." Please note that this address has been changed to: P.O. Box 26000, Sacramento, CA 95826.

7030.5 **$50.00-$100.00**

A licensed contractor must include his license number in: (a) all construction contracts; (b) subcontracts and calls for bid;

and (c) all forms of advertising.

7034. **$50.00-$150.00**

(a) A licensed contractor cannot be a party to any contract which contains a provision, clause, covenant, or agreement which indemnifies him against liability for any personal injury or property damage caused by his negligence, willful misconduct, or defect in design furnished by him or his agent, servant or subcontractor.

(b) A licensed contractor cannot require any subcontractor, employee or supplier to waive his lien rights unless they give their written permission. Any term of a contract which attempts to waive these lien rights without express written permission is null and void if the contract is for the construction of any of the following:

(1) A single family dwelling or duplex.
(2) Improvements to a single family dwelling or duplex.
(3) Improvements to real property upon which a single family dwelling or duplex is located, or is to be located, where the improvement is related to residential use.

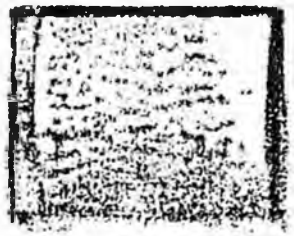
7068.1 **$50.00-$1000.00**

The person qualifying on behalf of an individual or firm shall be responsible for exercising enough direct supervision and control of his employer's or principal's construction operations as is necessary to secure full compliance with state law, and the qualifier shall not act in the capacity of the qualifying person for an additional individual or firm unless one of the following conditions exists:

(a) There is a common ownership of at least 20 percent of the equity of each individual or firm for which the person acts in a qualifying capacity.

(b) The additional firm is a subsidiary or a joint venture of the first. "Subsidiary" means any firm at least 20 percent of the equity of which is owned by the other firm.

(c) With respect to a firm under Section 7068(b) or (c), the majority of the partners or officers are the same.



"Firm" means a co-partnership, a limited partnership, a corporation, or any other combination or organization described in Section 7068.

"Person" is limited to natural persons.

7068.2 **$50.00-$150.00**

If a responsible managing officer or employee stops being employed or associated with the firm, a notice must be given to the Registrar by the licensed contractor or firm and the responsible managing officer or employee in writing within 30 days from the disassociation. If a notice is given, the license will remain in force for a reasonable length of time determined by board rules.

If the required notice is not received by the Registrar within 30 days, the license is automatically suspended. The license will be reinstated when a qualified individual takes the place of the responsible managing officer or responsible managing employee.

To replace a responsible managing officer or managing employee, the licensed contractor or firm must file an application with the Registrar. The Appliction must be executed by the licensed contractor or firm or a member of the firm, and it must designate an individual qualified under state law on the licensed contractor's or firm's behalf. The application must be accompanied by a fee. The application must state that the individual qualifying has not had his license suspended or revoked for reasons that would keep such individual from personally qualifying.

7071.11 **$50.00-$500.00**

This is a lengthy section dealing with how to file a claim against a bond or cash deposit as well as setting out the preferences, etc. However, it does require the contractor to keep the license bond or cash deposit in full force and further states that any judgment or admitted claim against the bond or deposit is grounds for discipline.

7071.13 **$50.00-$100.00**

Any reference by a contractor in his advertising, soliciting, or other representation to the public to any bond required to be filed by state law is a ground for suspension of the contractor's license. (You cannot refer to your license bond.)

7075. **$50.00-$100.00**

A contractor's license is non-transferable and must be displayed in the contractor's main office or chief place of business. A contractor must be able to prove upon demand that he has possession of his license and that it is up-to-date. This means you must carry your pocket license.

7083. **$50.00-$100.00**

Contractors must report to the Registrar all changes of personnel, name style or addresses recorded within 30 days after the changes are made.

7107. **$100.00-$1000.00**

Abandonment of a construction project without legal excuse is a cause for disciplinary action.

7108. **$100.00-$1000.00**

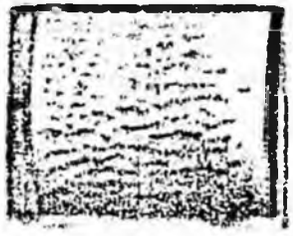
A contractor who diverts funds or property received for prosecution or completion of a specific construction project or operation, or for a specified purpose in the construction project or operation, or who fails to substantially account for the application or use of such funds or property on the construction project or operation for which such funds or property was received, is subject to disciplinary action.

7108.5 **$100.00-$1000.00**

A prime contractor must pay his subcontractor within 10 days of receipt of each progress payment, for which the subcontractor has performed, unless otherwise agreed to in writing.

7109. **$50.00-$1500.00**

Willful departure from or disregard of specific plans or specifications, or accepted trade standards for good and



workman-like construction (if there are no plans and specifications), in any material respect, that damage another and are done without the owner's consent is grounds for disciplinary action.

7109.5 **$50.00-$1500.00**

Violation of any safety provision in, or authorized by, the Labor Code resulting in death or serious injury to an employee is grounds for disciplinary action.

7110. **$50.00-$1000.00**

Willful or deliberate disregard and violation of State building laws, or of any political subdivision of them, or the State's minimum painting standards, safety laws, labor laws, compensation insurance laws, or violation by a licensee of provisions of the Health and Safety Code, Civil Code, or Water Code, relating to the digging, boring or drilling of water wells is cause for disciplinary action.

7110.1 **$50.00-$150.00**

A contractor cannot require the execution of release of any claim or right on account of wages unless payment of the wages has been made. Any such release is null and void as between the employer and the employee and is a misdemeanor. (Labor Code Section 206.5)

7111. **$50.00-$500.00**

A licensed contractor must keep records showing all contracts, documents, records, receipts and disbursements of all his transactions as a contractor, and make available for the Registrar's inspection for a period of not less than three years after completion of any construction project or operation to which the records refer.

7113. **$50.00-$1500.00**

A licensed contractor's material failure to complete any construction project or operation for the price agreed is grounds for disciplinary action.

7113.5 **$50.00-$500.00**

A licensed contractor's avoidance or settlement for less than their full amount of his lawful obligations *incurred as a contractor*, whether by (a) composition, arrangement or reorganization with creditors under state law, (b) composition, arrangement or reorganization with creditors under any agreement or understanding, (c) receivership, (d) assignment for the benefit of creditors, (e) trusteeship, or (f) dissolution, constitutes a cause for disciplinary action.

A licensed contractor will not be subject to disciplinary action for avoiding or settling his obligations in bankruptcy, or by composition, arrangement or reorganization with creditors *under federal law*.

7114. **$100.00-$1000.00**

Aiding or abetting an unlicensed person to evade the state contractor's law, or combining and conspiring with him, or allowing one's license to be used by an unlicensed person, or acting as agent, partner, associate or otherwise, of an unlicensed person with the intent to evade the state contractor's law is a cause for disciplinary action.

7116. **$50.00-$1500.00**

A licensed contractor who does any willful or fraudulent act which substantially injures another is subject to disciplinary action.

7117. **$50.00-$150.00**

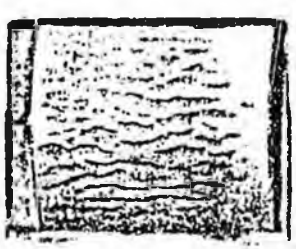
A contractor must act in the name that is on his license and in accordance with the personnel of the license. (Those persons listed on your application form.)

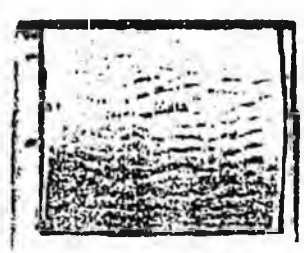
7117.5 **$50.00-$500.00**

A person who acts under an inactive license is subject to disciplinary action.

7118. **$100.00-$1000.00**

Entering into a contract with an unlicensed contractor is a cause for disciplinary action.





7119. **$100.00-$1000.00**

A contractor who injures another due to his willful failure or unjustified refusal to carry out a construction project or operation with reasonable diligence is subject to disciplinary action.

7120. **$100.00-$1000.00**

Willful or deliberate failure to pay money when due for any materials or services when a contractor is able to pay, or when the contractor was paid, is a cause for disciplinary action. Also, denying of the amount due made with the intent to secure any discount upon the debt or with the intent to hinder, delay or defraud the person to whom the debt is due is a cause for disciplinary action, if it is done falsely.

7123. **$500.00-$1500.00**

A conviction of a crime substantially related to the qualifications, functions and duties of a contractor is a cause for disciplinary action.

7125. **$50.00-$150.00**

A licensed contractor must report in writing the name and address of his Worker's Compensation Insurance Carrier after any policy of insurance is issued to him.

The carrier must then report to the Registrar any cancellation or lapse of the policy within 10 days after the cancellation or lapse.

7154 **$50.00-$500.00**

A home improvement contractor who employs an unregistered home improvement salesman to sell home improvement contracts is subject to disciplinary action.

7157. **$50.00-$500.00**

(a) A contractor cannot give compensation or reward of any kind to an owner for referral sales regarding home improvement contracts.

(b) A contractor, his agent or salesman may give tangible items to prospective customers for advertising or sales promotion purposes where the gift is not conditioned upon obtaining a contract for home improvement work, if the gift does not

exceed a value of five dollars ($5.00) and only one such gift is given in connection with any transaction.

(c) No salesman or contractor's agent can accept any compensation of any kind, for or on account of any work of improvement transaction, from any person other than the contractor whom he represents, nor shall he make any payment to any person other than his employer on account of sales.

"Owner" also means "tenant" under this rule.

(d) You cannot make a payment or give other considerations to a contractor or salesperson unless he is licensed, except where the person who you are paying is exempt from licensing or where the project is exempt.

7158. **$50.00-$1500.00**

Any person who accepts or receives a false certificate of completion on performance of a work of improvement contract with knowledge that the document is false, and who uses the document in connection with the making or accepting of any assignment or negotiation of the right to receive any payment from the owner with regard to the contract, or who does so in order to obtain or grant any credit or loan on the security of the right to receive any payment, is guilty of a misdemeanor.

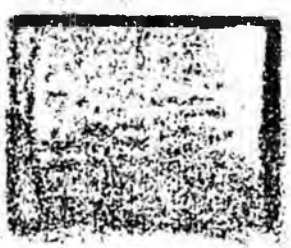
7159. **$50.00-$1000.00**

This is a long list of contractual requirements in one or more Home Improvement Contracts totalling more than $500. It says that these contracts must be in writing and signed by the parties, and shall include the following:

(a) The name, address and license number of the contractor, and the name and registration number of any salesman who solicited or negotiated the contract.

(b) The approximate dates when the work will begin and be substantially completed.

(c) A description of the work to be done and description of the materials to be used, and the equipment to be used or



installed, and the agreed consideration for the work.

(d) The down payment cannot be more than 10 percent or $1,000.00, whichever is *less*.

(e) A schedule of payments showing the amount to be paid in dollars and cents (not just percentages). The schedule of payments shall be referenced to work performed and any material or equipment supplied. You can never receive proportionately more money than the work performed (except for the down payment). If you fail to substantially commence work within 20 days of the date specified in the contract, the next payment due will be postponed for the same period.

(f) The provisions of (d) and (e) above, relating to the payment schedule, do not apply when you furnish a performance and payment bond, lien and completion bond, or a joint control approved by the Registrar. You must also place a notice in at least 10-point type, within three inches of the signature line, telling the tenant or owner that he has the right to require a performance and payment bond.

(g) Any salesman's commission can only be paid in proportion to the schedule of payments.

(h) You must give the notice required by Section 7018.5.

(i) A statement defining what constitutes substantial commencement.

(j) A notice that failure by the contractor without lawful excuse to substantially commence work within twenty (20) days from the approximate date specified in the contract when work will begin is a violation of the Contractors' License Law.

(k) If the contract provides for a contractor to furnish joint control, the contractor shall not have any financial or other interest in such joint control.

You must give a signed copy of the contract to the owner.

7161. **$50.00-$1500.00**

The following acts are misdemeanors. Any licensed contractor or applicant who commits one of these acts is subject to disciplinary actions:

(a) Using false, misleading or deceptive advertising to induce a person into any contract for a work of improvement.

(b) Making any substantial misrepresentation in obtaining a home improvement contract or other work of improvement, or making any false promise of a character likely to influence, persuade, or induce any person to enter into such a contract.

(c) Any fraud in the execution of, or in the material alteration of any contract, trust deed, mortgage, promissory note or other document incident to a home improvement transaction or other transaction involving a work of improvement.

(d) Preparing or accepting any trust deed, mortgage or promissory note of any work of improvement transaction with knowledge that it is for more money than the real value of the improvement work.

(e) Publishing any advertisement which is in any way false, deceptive or misleading. Advertising any improvement work while intending not to accept contracts for that particular work or at the price which is advertised or offered to the public.

7167. **$50.00-$1000.00**

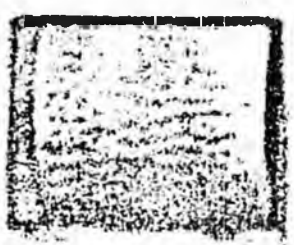
Like Section 7159, this section sets out the requirement that any contract and changes whose primary purpose is to construct a swimming pool must be in writing and signed, and must contain:

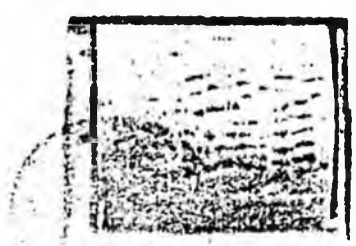
(a) The name, address and license number of the contractor, and the name and registration number of any salesman who solicited or negotiated the contract.

(b) The approximate date when the work will begin and the date certain on which all construction is to be completed.

(c) A plan and scale drawing showing the shape, size, dimensions, and construction and equipment specifications of the pool, as approved by the person contracting for construction, and a description of all work to be done, the materials and equipment to be used, and the agreed consideration for the work.

(d) If the payment schedule contained in the contract provides for a down payment to be paid to the contractor by the owner before the commencement of work, the down payment shall not exceed $200.00 or 2 percent, whichever is less.





(e) A schedule of payments showing the amount to be paid in dollars and cents (not just percentages). The schedule must be referenced to work performed or any material or equipment supplied. You can never receive proportionately more money than work performed, except for the down payment. You may receive a final payment at the completion of final plastering *provided* that any installation or construction of equipment, decking or fencing required by the contract is also complete.

(f) Upon any payment being made for any portion of the work, the contractor shall obtain unconditional, full lien releases from everyone who may have a right to claim a lien. The lien release shall be for that portion of the work that was paid for.

(g) The requirements of (d), (e) and (f) above, relating to payment schedule, do not apply when you furnish a performance and payment bond, lien and completion bond, or bond equivalent covering full performance and completion of the contract. You must also place a notice in at least 10-point type, within three inches of the signature line, telling the owner that he has a right to require a performance and payment bond.

No additional work may be done without prior written authorization. The authorization must be on a change-order form showing the reason for the change, and it shall become a part of the contract.

(i) The contract must be legible and you must give a signed copy to the owner before beginning work.

7168. **$50.00-$150.00**

A swimming pool contractor must deliver a signed, legible copy of the construction contract for the swimming pool to the person contracting for such construction at the time the contract is signed.

APPENDIX A

TEXT OF BOARD RULES AND REGULATIONS

Add Article 8, Citation, to include following Sections:

(1) Add section *803* to read:

803. Order of Correction – Practical Feasibility.

Before including an order of correction in a citation, due consideration shall be given to the practical feasibility of correction in accordance with, but not limited to, the following criteria:

A. An order of correction is appropriate where it would not result in excessive destruction of or substantial waste of existing acceptable construction.

B. An order of correction is appropriate where the owner of the construction project is willing to allow the cited licensee to correct.

C. An order of correction is appropriate where it appears to the Registrar that the cited licensee has competence or ability to correct.

(2) Add section *803.1* to read:

803.1 Order of Correction – Alternative Compliance.

A cited licensee may comply with an order of correction by having and paying for another licensee to do the corrective work. The cited licensee remains responsible, however, for any failure to fully comply with the order of correction.

An order of correction may, but need not, contain the alternative that the cited person may pay a specified sum to the owner of the construction project in lieu of correcting.

(3) Add section *804.* to read:

804. Order of Correction – Time Required to Correct.

Where an order of correction is included in a citation, due consideration shall be given to the time required to correct in accordance with, but not limited to, the following criteria:

A. Accepted industry practice in that area relating to performance of such work under certain climate or weather conditions.

B. A reasonable time in which to obtain necessary materials.

C. The number of working days the contruction project will be made accessible by the owner for corrections.

(4) Add section *804.1* to read:

804.1 Order of Correction – Extension of Time to Correct.

If the cited person, after exercising substantial efforts and reasonable diligence, is unable to complete the correction within the time allowed because of conditions beyond his control, he may request an extension of time in which to correct. Such request must be made in writing, and must be made prior to the expiration of the time allowed in the order of correction. An extension may be granted upon showing of good cause which determination is within the discretion of the Registrar. If a request for extension of time is not made prior to the expiration of time allowed in the order of correction, failure to correct within the time allowed shall constitute a violation of the order of correction whether or not good cause for an extension of time existed.

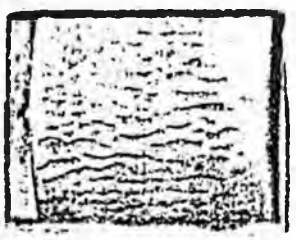
(5) Add section *805.* to read:

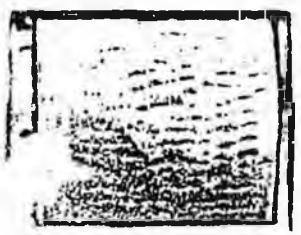
805. Recommended Assessments of Civil Penalties.

In assessing a civil penalty against a person who has not previously been cited for violation of the same or similar section of the Contractors License Law, the Registrar shall give due consideration to the following guidelines:

Section Violated	Recommended Minimum Civil Penalty	Recommended Maximum Civil Penalty
7030	$50.	$100.
7030.5	50.	100.
7071.13	50.	100.
7075	50.	100.
7083	50.	100.
7018.5	50.	150.
7026.7	50.	150.

Section Violated	Recommended Minimum Civil Penalty	Recommended Maximum Civil Penalty
7029	50.	150.
7029.5	50.	150.
7029.6	50.	150.
7029.7	50.	150.
7034	50.	150.
7068.2	50.	150.
7110.1	50.	150.
7117	50.	150.
7125	50.	150.
7168	50.	150.
7028	50.	500.
7028.5	50.	500.
7071.11	50.	500.
7111	50.	500.
7113.5	50.	500.
7117.5	50.	500.
7154	50.	500.
7157	50.	500.
7110	50.	1000.
7068.1	50.	1000.
7159	50.	1000.
7167	50.	1000.
7107	100.	1000.
7108	100.	1000.
7108.5	100.	1000.
7114	100.	1000.
7118	100.	1000.
7119	100.	1000.
7120	100.	1000.
7109	50.	1500.
7109.5	50.	1500.





Section Violated	Recommended Minimum Civil Penalty	Recommended Maximum Civil Penalty
7113	50.	1500.
7116	50.	1500.
7158	50.	1500.
7161	50.	1500.
7123	500.	1500.

The maximum and minimum penalties as set forth above are advisory only. When there is more than one violation where, in the judgment of the Registrar, a person has exhibited bad faith, or where, in the judgment of the Registrar, the violation is grave, the maximum recommended civil penalty shall be $2,000.00

Where a cited person has a history of violations of the same or similar sections of the Contractors License Law, the maximum recommended civil penalty shall be $2,000.00.

Where a citation lists more than one violation, the amount of assessed civil penalty shall be stated separately for each section violated.

Where a citation lists more than one violation, and each of the violations relates to the same construction project, the total penalty assessment in each citation shall not exceed $2,000.00.

(6) Add section *806.* to read:

806. Appeal of Citation.

Any person served with a citation pursuant to section 7099 of the Business and Professions Code may contest the citation by appealing to the Registrar within 15 working days from the receipt of such citation. The 15 day period may be extended upon showing of good cause which determination is within the discretion of the Registrar.

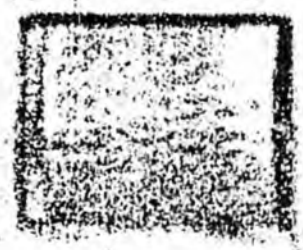
The cited person may contest any or all of the following aspects of the citation:

1. *The occurrence of a violation of the Contractors License Law;*
2. *The reasonableness of the order of correction, if an order of correction is included in the citation;*
3. *The period of time allowed for correction, if an order of correction is included in the citation;*
4. *The amount of the civil penalty, if a civil penalty is assessed in the citation.*

(7) Add section *806.1* to read:

806.1 Service of Citation.

Service of a citation shall be made in accordance with the provisions of section 11505(c) of the Government Code, and further that a copy of the citation be sent by regular mail.



APPENDIX B

Consumer Affairs

Statement to Cited Person

Attached is a copy of a Citation issued by the Office of the Registrar of Contractors, which is hereby served upon you.

Unless a written request for a hearing signed by you or on your behalf is delivered or mailed to the Registrar of Contractors within fifteen (15) days after the Citation is personally served on you or mailed to you, you will be deemed to have waived your right to a hearing and the Citation shall be deemed a final order of the Registrar and not subject to review by any court or agency.

The request for a hearing shall be made by indicating the parts of the Citation to be contested, and signing, and delivering or mailing the enclosed form entitled "Notice of Appeal" to

Registrar of Contractors, _____

The time in which to file a notice of appeal may be extended by the Registrar upon showing of good cause, which determination is within the discretion of the Registrar.

You must comply with the orders in the Citation within the times given unless you appeal.

Copies of Sections 11507.5, 11507.6, and 11507.7 of the Government Code are attached.

If you desire the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Section 11507.6 of the Government Code in possession, custody, or control of the agency, you may contact the Office of the Registrar at the above address.

You may be, but need not be, represented by counsel. If you wish to be represented by counsel, you are advised to contact your attorney immediately, so that you may be properly represented in all proceedings.

Sample Statement to Cited Person.

APPENDIX C

Consumer Affairs

Contractors' State License Board

Citation

(Business and Professions Code §7099)

To: _____

_____

_____

Citation No. _____

Location of Department

Appropriate Branch or Period of Disconnection

Date _____ Page _____ of _____

License No.: _____

An investigation of a construction project at the location identified above has been conducted by the Contractors' State License Board. This citation is being issued in accordance with the Business and Professions Code section 7099, for violations as described below that were found during the investigation.

Item No.	Code Section Violated	Description of Violation	Order of Correction	Time to Correct	Civil Penalty
					Total Amount Due

If you do not contest the order of correction, it shall become a final order of the Registrar on _____. Time to correct begins the date the order to correct becomes a final order of the Registrar.

If you do not contest the [illegible] assessing civil penalty, it shall become a final order of the Registrar on _____. Payment of civil penalty is due within _____ days of the date the order becomes a final order of the Registrar. (Payment is to be made to Registrar of Contractors by cashier's check or money order only. For your protection, please include this number on cashier's check or money order.)

_____
Date

_____
For John P. Maloney
Registrar of Contractors
Contractors' State License Board

Page 1 of Sample Citation Form.

APPENDIX D

C Fation No. CIT
Page ____ of ____

Item No.	Code & Section	Description of Violation	Order of Correction	Time to Correct	Civil Penalty

Page 2 of Sample Citation Form.

Consumer Affairs

Before the
Registrar of Contractors
of the
Contractors' State License Board
Department of Consumer Affairs
State of California

Notice of Appeal
(Contesting Citation)

In the Matter of the Citation Against: Name: _____

_____ Citation No. CIT _____

To the Registrar of Contractors:

I hereby acknowledge receipt of the Citation referenced above and notification of my rights to contest the Citation. I do hereby contest the Citation and request a hearing.

I have indicated below which parts of the Citation I am contesting. I am not contesting any parts that I have not checked.

(For each item of the Citation, indicate by marking an X in the corresponding boxes on which you are contesting the violations cited, the order of correction, the time to correct, and/or the civil penalty.)

Item No.	Violation Cited	Order of Correction	Time to Correct	Civil Penalty
	☐	☐	☐	☐
	☐	☐	☐	☐
	☐	☐	☐	☐
	☐	☐	☐	☐
	☐	☐	☐	☐
	☐	☐	☐	☐

Dated: _____ 19____

Signed _____ Address _____

_____

(If there is any change in address of the respondent other than set forth in the Citation, the new address should be indicated on this form so that the address of record can be changed and that the Notice of Hearing can be sent to the corrected address.)

Sample Notice of Appeal Form.

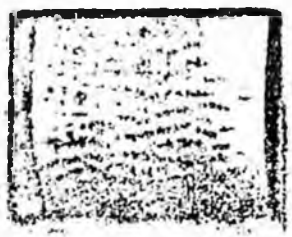
Researched & written by:
Sam K. Abdulaziz, Attorney
Ninth Floor, Valley Plaza Tower
12160 Victory Blvd.
No. Hollywood, CA 91606
(213) 760-2000

Chief Counsel
American Building Contractors Association

Distributed by:
The American Building Contractors Association
8727 West Third Street, Suite #203
Los Angeles, CA 90048
(213) 278-2533

Discount prices are available for professional and trade organizations.

License law is subject to change at any time. Use this guideline but refer to specific rules or statutes.



Bill seeks buying changes

by Dean Fosdick
Associated Press

JUNEAU — An 82-page bill designed to simplify the state's "inconsistent, inadequate, outdated and sporadically scattered" buying policies was introduced Tuesday in the Senate.

The measure grew out of hearings last year by a Senate interim committee created to investigate and review grand jury recommendations about procurement methods and executive-branch ethics.

A Juneau grand jury last summer accused Gov. Bill Sheffield of steering a $9.1 million state office lease in Fairbanks to a friend and political supporter, then lying about it while under oath.

The panel returned no indictments in the case, but it recommended that lawmakers meet to consider whether Sheffield should be impeached for his actions in the matter. The lease later was canceled on the advice of former Attorney General Norm Gorsuch.

The Senate dropped impeachment proceedings after finding no evidence that Sheffield did anything illegal. Before leaving Juneau, however, it did create the committee in efforts to help tighten state procurement and ethics policies.

"This (bill) brings us full circle since the grand jury made its recommendations," said Sen. Jan Faiks, R-Anchorage and committee chairwoman.

Among other things, the bill recommends that:

- A comprehensive procurement policy be passed to replace buying methods the committee called "inconsistent, inadequate, outdated and sporadically scattered throughout our laws."
- Buying be centralized within the executive branch.
- Non-competitive and sole-source contracts be strictly limited.
- Procurement officers be trained and protected from political pressure.
- A clear and uniform appeals procedure be passed.

SB 311

Bill could tighten bidding laws

By JOHN LINDBACK
Daily News reporter

JUNEAU — A reform bill that is an outgrowth of last summer's impeachment hearings against Gov. Bill Sheffield could dramatically reduce non-competitive bid contracting and purchasing by state government, a state official said Monday.

Competitive bidding is legally bypassed by the state Department of Administration in about 680 major contracts and purchases each year, Deputy Commissioner Marsha Hubbard said.

"We anticipate that only 20 percent of those would remain sole-source under passage of this law," Hubbard said.

The bill, scheduled for public hearings this week before the Senate Judiciary Committee, was first proposed by a special committee of legislators and other state officials. The committee was asked to propose a bill because the grand jury that criticized Sheffield for awarding a non-competitive, $9 million state lease for office space in Fairbanks said a new procurement code was needed to protect the public interest.

The biggest policy change in the 82-page bill — which is based on an American Bar Association model for state procurement codes — is the restriction of non-competitive bid contracts and purchases, according to Hubbard and legislators.

Under current law, state officials can award a non-competitive bid contract for more than $25,000 if they can prove that the favored contractor had previously done a good job for the state on similar work or if they prove that only one contractor can perform the task.

The new bill would allow state officials to skip competitive bidding only if they determine in writing that just one source exists for the product or service.

State officials are not required to call for competitive bidding on contracts under $25,000 or purchases of $5,000 or less. The proposed bill does not change those dollar limits, so it would primarily effect the major contracts and purchases.

But the bill does make other changes in state contracting and purchasing. It requires:

- Other branches and subdivisions of state government to adopt contracting and purchasing regulations that are "substantially equivalent" to the code. The court system, legislature and Alaska Railroad are cited in the bill.
- The hiring of an experienced chief procurement officer to supervise contracting and purchasing by the executive branch.
- That state officials who award a contract or purchase a product in violation of the code be held personally liable for the recovery of all state money plus 20 percent of the total amount and "all costs and damages arising out of the violation."
- Extensive public notice in newspapers and the Alaska Administrative Journal of contracts available for bid and contracting and purchasing regulations under consideration by the state.

Senate Judiciary Chairman Pat Rodey said the bill is needed to standardize procurement practices in state government and to improve legislative oversight of contracting and purchasing.

"The present system has fallen together by accident. It has received no legislative oversight since oil revenues ballooned," Rodey said.

Rodey's Judiciary Committee is scheduled to hear public testimony on the bill today and discuss it Saturday at an Anchorage meeting. The hearing today starts at 1:30 p.m. and residents throughout the state can testify by teleconference.

Saturday's hearing is scheduled at 10 a.m. at the Legislative Information Office in Anchorage, 1024 W. Sixth Ave.

SB

341

(FILE 4)

BILL CONTACT/ACTION

DATE	CONTACT/ACTION
2/5	Office Checklist - AFL/CIO - included sub-contractor wage info: expanded UA, IBEW, Hod Carr.

OVERVIEW OF SENATE JUDICIARY COMMITTEE
MAJOR CHANGES TO SB 341

1. Section 36.30.005(c) The University of Alaska is subject to the requirements of SB 341, but it has the authority to issue its own regulations implementing the chapter in conformance with state APA requirements.

2. Section 36.30.010 The term of the Chief procurement officer is four years as opposed to automatically expiring with the governor's term.

3. Section 36.30.015 The department of administration may not delegate the authority to dispose of surplus supplies to any agency.

4. Section 36.30.030 This provision has been modified to provide that the administrative director of courts shall adopt procedures governing the procurement of supplies, services, professional services and construction by the judicial branch. The procedures shall be based upon the competitive principles established under SB 341, but must be adapted to the special needs of the judicial branch as determined by the administrator of courts.

5. Section 36.30.040(b) This section addresses the areas in which the commissioner shall adopt regulations. It has been expanded to include the authority to adopt regulations concerning (1) conditions under which an agency may use the services of an employment program as defined under section 36.30.100(c) and (2) a bidder's or offeror's duties under 36.30.115 and 36.30.210 with respect to subcontractors.

6. Section 36.30.050(d) A provision is added which requires that lists maintained by the commissioner shall be used in providing notice of intent to make a small procurement to Alaska bidders as defined under 36.30.170(c).

7. Section 36.30.100(b)(3)&(c) The provision has been amended to provide that competitive sealed bidding procedures need not be utilized for the purchase of products or services manufactured or provided by an "employment program" which is defined to include a non-profit program designed to increase employment opportunities for individuals with physical or mental disabilities that constitute substantial handicaps to employment.

8. Section 36.30.115 This is a new section dealing with the responsibilities and duties of a contractor with respect to the subcontractors he proposes

to use in performance of a contract. It provides that within 48 hours after the opening of bids, each bidder will submit a list of the subcontractors proposed to be used in the performance of a contract and further provides those conditions under which a bidder may replace a listed subcontractor. Paragraph (e) of this section provides that a bidder who violates the section may either have his contract cancelled or, after notice and a hearing, be assessed a penalty in an amount not exceeding 10% of the value of the subcontract at issue.

9. Section 36.30.120(b) The paragraph provides that bid security must be a bond provided by a surety company in an amount equal to at least 10% of the amount of the bid if the bid does not exceed $100,000 or 10% of the first $100,000 and 5% of the amount of the bid over $100,000 if the bid exceeds $100,000, up to a maximum of $200,000 in security.

10. Section 36.30.130 The section is amended to provide that notice of an invitation to bid shall be published in the Alaska Administrative Journal. Paragraph (b) of the section further provides that if the state fails to substantially comply with the notice requirements of the section, the state is liable for the damages caused by that failure.

11. Section 36.30.150(b) This new paragraph provides that a contract based on total or life cycle costs may be awarded only when the chief procurement officer or the commissioner of transportation and public facilities, if appropriate, determines in writing at the time of contract solicitation that the contract promotes overall economy for the purposes intended, encourages competition, is not unduly restrictive, and is in the best interests of the state.

12. Section 36.30.170 Paragraph (b) of this section provides that a contract based on solicited bids shall be awarded to the lowest responsive and responsible "Alaska bidder" if the bid is not more than 5% higher than the lowest non-resident bidder's. The paragraph further delineates the qualifications a person must possess in order to be an "Alaska bidder." Paragraph (c) of the section provides that an Alaska bidder who also qualifies as an "employment program," as defined under 36.30.100(c), shall be awarded a contract based on solicited bids if it is the lowest responsible and responsive bidder with a bid that is not more than 10% higher than the lowest bid of a non-resident. Original paragraph (d) of this section, excluding construction contracts in excess of $5,000 from the Alaska bidder preference, has been deleted.

13. Section 36.30.200 Paragraph (a) is modified to provide that construction may only be procured by competitive sealed proposals under conditions specified in new paragraph (c) of this section. Paragraph (c) provides that when the chief procurement officer determines that it is advantageous to the state, a procurement officer may issue a request for proposals requesting the submission of offers to provide construction in accordance with a design provided by the offeror. The paragraph further provides that the request for proposals shall require that each proposal submitted contain a single price that includes the design and construction.

14. Section 36.30.210 This section is modified to provide that an offeror must list the subcontractors he proposes to use in the performance of the contract within 48 hours after the date by which the proposals must be received. In addition, paragraph (d) of the section provides that the duties of bidders under section 36.30.115(b) - (e) with respect to subcontractors apply to competitive sealed proposals.

15. Section 36.30.230 This section provides that the register of proposals, and the proposals themselves, are open for public inspection after the notice of intent to award a contract is issued under section 36.30.365.

16. Section 36.30.240 This section is amended to provide that discussions with responsible offerors submitting proposals determined to be reasonably susceptable of being selected for award are excluded from application of the Alaska Open Meetings Law as specified in AS 44.62.310.

17. Section 36.30.250 In new paragraph (b), the procurement officer is directed to take into account, in accordance with regulations of the commissioner, whether the offeror qualifies as an Alaska bidder under section 36.30.170(b) or is offering the services of an employment program as defined in section 36.30.100(c), in determining whether a proposal is advantageous to the state.

18. Section 36.30.270 This is a new section which incorporates the substance of the provisions of SB 204 relating to architectural, engineering and land surveying contracts. The major difference between this section and SB 204 is that section 270 applies only to procurement practices of executive agencies, specifically excluding those practices as undertaken by the court system or the legislature.

19. Section 36.30.320 Paragraph (b) provides that a contract for professional services not exceeding $25,000 may be made under regulations adopted by the commissioner

for small procurements. Under paragraph (e) of this section, notice of small procurements shall be provided to Alaska bidders designated by the commissioner under section 36.30.050(d).

20. Section 36.30.340 This section now applies to all contracts governed by the procurement code rather than solely to those negotiated under the competitive sealed bid method.

21. Section 36.30.362 This is a new section requiring the procurement officer to issue a written statement explaining his actions should he award a contract to a person who does not reside or maintain a place of business in Alaska, if the supplies, services, professional services or construction which is the subject of the contract could have been obtained from in-state sources.

22. Section 36.30.510 This section requires that a contract file open for inspection by the public shall be kept by the commissioner and the contracting agency for each contract awarded under the competitive sealed proposal procedure. A file kept by the commissioner shall contain a summary of the information in the file of the contracting agency.

23. Section 36.30.540 Paragraphs (4) and (5) of this section provide that the commissioner's biennial report to the legislature concerning agency procurements shall include a list of all procurements made from both out-of-state and in-state sources, with the exception of small procurements as specified in section 36.30.320.

24. Section 36.30.850(b) This section now includes an exemption for contracts of the department of fish and game for non-point-to-point flights requiring specialized flying and piloting skills.

25. Section 36.30.930 The civil penalty for violation of the chapter now applies to a person who contracts for a purchase of supplies, equipment for the state fleet, services, professional services or construction in a manner the person knows to be contrary to the requirements of this chapter or the regulations adopted under this chapter. The person is liable for all costs and damages to the state arising out of the violation.

26. Section 36.30.990 This section deals with definitions of terms as used in the bill. Under paragraph (1), "agency" is now defined to exclude the University of Alaska, a regional native housing authority created under AS 18.55.996 and a regional electrical authority created under AS 18.57.020. Under paragraph (10), the term "grant" is defined to include the furnishing by the state of

assistance to a person to support a program authorized by law, but it does not include an award whose primary purpose is to procure an end-product for a state agency, whether in the form of supplies, services, professional services or construction.

27. Section 10. Under this section, AS 18.55.100 is amended by providing a new subsection which, among other things, specifies that to the extent AS 36.30 conflicts with the responsibilities of ASHA under AS 18.55.110, the provisions of AS 18.55.110 shall prevail.

28 Section 40. Under this section, AS 37.05.316 is amended to delete reference to the term "contract" in favor of the word "grant."

POLICY ISSUES - SB 341

1.) 36.30.010 Chief Procurement Officer's term
- Expiration coincides the Governor's term.

2.) 36.30.015 Executive Branch Agencies
- Should University of Alaska be included?
- Should ASHA be excluded?

3.) 36.30.050 (d) Lists of Contractors
- Small Procurements
- Names furnished on a rotating basis

4.) 36.30.130 (b) Notice of Bids
- Liability of State for failure to give notice expressly disavowed

5.) 36.30.170 Alaska Preference
- Should construction contracts in excess of $5,000 be included?
- Definition of "Alaska Bidder"

6.) 36.30.110 & 210 Subcontractors listed at time of opening bid or submitting proposals
- Inclusion of provisions protecting sub-contractors derived from California Law.

7.) 36.30.320 (b) Small procurements
- Professional services - how should they be handled?

8.) 36.30.850 Application of this Chapter
- Grants are excluded under (b)(1)

9.) 36.30.930 Civil penalty
- Employee liable for all amounts paid plus 20%

10)

3/6/86

POLICY ISSUES - SB 341

1. 36.30.010 - Chief Procurement Officer's term expires with Governor's term.

2. 36.30.130(b) - Degree of state's liability for failure to give notice of bid - no liability under current draft. See proposed amendment #1.

3. 36.30.170 - Alaska bidder preference - additional or different requirements.

4. New sections: a.) Move to roll SB 204 (contracts for architectural and engineering services) into SB 341 with directions to legal services to make all changes necessary for it to comport with SB 341.

   b.) Section requiring written justification for choice of a non-Alaskan contract recipient if goods or services could have been procured from an Alaskan source. See proposed amendment #2.

PROPOSED SENATE JUDICIARY COMMITTEE SUBSTITUTE
SENATE BILL 341
SECTIONAL ANALYSIS

(Unless otherwise indicated, "commissioner" means commissioner of administration)

SECTION 1. The purposes of the act are outlined to include: simplification, clarification, modernization of the laws; consistency among the branches of government; increased public confidence; fair and equitable treatment of all vendors; increased economy in state procurement; broad-based competition; safeguards for the maintenance of a procurement system of quality and integrity; and elimination and prevention of discrimination in state contracting.

SECTION 2. A new chapter is added to AS 36 entitled "State Procurement Code."

Article 1. Organization of State Procurement.

Sec. 36.30.005. Centralization of procurement of supplies and services for state agencies is under the authority of the commissioner of administration and the chief procurement officer. Procurement of construction and procurements to or disposals from the state equipment fleet and the control over construction and the state equipment fleet is under the commissioner of transportation and public facilities.

Sec. 36.30.010. The chief procurement officer is selected by the commissioner; is responsible for procurement of supplies and services for agencies in the executive branch; is a partially exempt employee; must have a minimum of 5 years in public procurement; and may be removed by the commissioner only for cause. The term of office of the Chief Procurement Officer expires when the term of the governor expires. Duties of the Chief Procurement Officer are enumerated.

Sec. 36.30.015. The commissioner of transportation and public facilities may contract for construction, procurements for the state equipment fleet, and may delegate to another agency the authority to contract for construction, after written determination has been made that the agency is capable of implementing the delegated authority. The commissioner of administration may delegate to an agency the authority to contract for its own supplies and services after a written determination has been made that the agency is capable of implementing the delegated authority.

The Alaska Railroad Corporation must adopt procedures substantially equivalent to the procurement code and regulations adopted by the commissioner.

Sec. 36.30.020. The Legislature must adopt procedures substantially equivalent to the procurement code.

Sec. 36.30.030. The Court System must adopt procedures substantially equivalent to the procurement code.

Sec. 36.30.040. Procurement regulations must be adopted by the commissioner.

Sec. 36.30.050. A list of persons who desire to provide supplies, services or construction items to the state will be established and maintain by the commissioner. Evidence of a valid Alaska business license and a statement of the contractor's qualifications must be submitted to be included on the list. Construction contractors must also submit a valid certificate of registration. The list must be used by the state agencies for small purchases

Sec. 36.30.060. Specification regulations must be adopted by the commissioner. Specifications must promote overall economy for the purposes intended and encourage competition in satisfying the state's needs, and may not be unduly restrictive.

Sec. 36.30.070. Supply management is under the authority of the commissioner and regulations must be adopted which govern management of supplies, surplus supplies and transfer of excess supplies.

Sec. 36.30.080. The department shall lease necessary space, and contract for the lease of space for the use of the state or an agency. A lease or contract for a lease may not be for a period of occupancy greater than 40 years. The department may enter into lease-financing agreements, which are subject to annual appropriation. If the department intends to enter into a lease or lease financing agreement with an annual rent anticipated to exceed $1,000,000, notice must be provided the legislature for approval.

Article 2. Competitive Sealed Bidding.

Sec. 36.30.100. Competitive sealed bidding is the preferred method of contracting. Competitive sealed bidding is not required for certain purchases, including professional services, which are itemized.

Sec. 36.30.110. When competitive sealed bidding is used, an invitation to bid is issued which must include the date

by which the bid must be received, purchase description, and all contractual terms and conditions. Subcontractors must be listed. Evidence of a valid Alaska business license for all bidders and subcontractors must be submitted when responding to the ITB. A bidder for construction contracts must also submit evidence of the bidder's registration under AS 08.18 and evidence of registration for each listed subcontractor.

Sec. 36.30.120. Bid security shall be required for all competitive sealed bidding for construction contracts which exceed an amount established by regulation. Bid security may be required for other types of supplies and services.

Sec. 36.30.130. Public notice o the ITB must be provided 21 days before the date for the opening of the bid, unless otherwise determined in writing by the chief procurement officer, or the commissioner of transportation and public facilities for construction or state equipment bids. Notice of solicitations must be published in the Alaska Administrative Journal.

Sec. 36.30.140. Bid opening must be public, in the presence of witnesses, and relevant information must be recorded, which is open to public inspection. The bids are not open for public inspection until after a notice of intent to award a contract has been issued.

Sec. 36.30.150. The procurement officer must evaluate bids based on the requirements set out in the ITB. The criteria used for the evaluation of an award must be objectively measurable. Criteria may not be used in bid evaluation if they are not set out in the ITB.

Sec. 36.30.160. Bids received after the bid due date indicated on the ITB may not be accepted unless the delay was due to an error of the contracting agency.

Correction or withdrawal of inadvertently erroneous bids before or after bid opening, or cancellation of awards or contracts based on bid mistakes shall be permitted in accordance with regulations and supported by written justification.

Sec. 36.30.170. Awards to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set out in the ITB shall be promptly made. The Alaska bidder preference is retained.

Sec. 36.30.190. Multi-step sealed bidding is allowed when it is considered impractical to initially prepare a definitive purchase description to support an award based on price. Unpriced technical offers are submitted, followed by an ITB limited to the bidders whose offers are determined to be technically qualified under the criteria established.

Article 3. Competitive Sealed Proposals.

Sec. 36.30.200. Contracts may be awarded by competitive sealed proposals when the chief procurement officer, or the commissioner of transportation and public facilities for construction and state equipment fleet contracts, determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the state.

Sec. 36.30.210. Request for proposals must contain the same information required for ITBs. The same notice provisions for ITBs apply for RFPs.

Sec. 36.30.220. Standard overhead rate established by agencies and applicable to contra ts for supplies and services, must be included in a RFP.

Sec. 36.30.230. Proposals are to be opened in a manner which avoids disclosure of contents to competing offerors during the process of negotiation. A register of proposals containing the name and address of each offeror shall be prepared and open for public inspection after the award.

Sec. 36.30.240. Discussions with responsible offerors, who submit proposals determined to be reasonably susceptible of being selected for award, may be conducted for the purpose of clarification to assure full understanding of and responsiveness to the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals. Revisions may be permitted after submissions and before the award for the purpose of obtaining best and final offers.

Sec. 36.30.250. A contract under competitive sealed proposals shall be awared to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the state taking into consideration price and the evaluation factors set out in the RFP.

Sec. 36.30.260. A contract awarded under competitive sealed proposals must contain: the amount of the contract; the date for supplies to be delivered or the term for services to be performed; a description of the

services or supplies contracted for; and a certification that sufficient funds are available for the amount of the contract.

Sec. 36.30.270. Contracts are subject to review by the Department of Law.

Article 4. Other Procurement Methods.

Sec. 36.30.300. Sole source procurements may only be awarded if it is determined in writing that there is only one source for the required supply, service or construction. A sole source procurement may not be approved if a reasonable alternative source exists.

Sec. 36.30.310. Emergency procurements may be authorized under emergency conditions when there exists a threat to public health, welfare, or safety, and procurement through competitive sealed bids or competitive sealed proposals is impracticable, or contrary to the public interest, or to protect public or private property. A written determination of the basis for the emergency and for the selection of the particular contractor must be provided.

Sec. 36.30.320. Small procurements which do not exceed an aggregate amount of $5,000 shall be made with competition that is practicable under the circumstances. A contract for professional services that does not exceed $25,000 may be made in accordance with regulations adopted by the commissioner.

Article 5. Contract Formation and Modification.

Sec. 36.30.350. Solicitations may be cancelled or any bids or proposals may be rejected, in whole or in part, or the date for opening bids or proposals may be delayed as may be specified in the solicitation, when it is in the best interest of the state.

Sec. 36.30.360. A written determination of responsibility of a bidder or offeror shall be made by the procurement officer.

Sec. 36.30.365. At least 10 days before the formal award of a contract the procurement officer shall provide to each bidder or offeror notice of intent to award a contract.

Sec. 36.30.370. Any type of contract that will promote the best interests of the state may be used, except that

the use of a cost-plus-a-percentage-of cost contract is prohibited.

Sec. 36.30.380. Except with respect to contracts awarded through competitive sealed bidding or firm fixed-price contracts, a contract type may not be used unless it has been approved in writing by the procurement officer.

Sec. 36.30.390. Unless otherwise provided by law, multi-term contracts are permitted, but subject to availability and appropriation of funds. Written determination must support multi-term contracts.

When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal periods, the contract shall be cancelled. The contractor may only be reimbursed for the reasonable value of any nonrecurring costs incurred, but not amortized in the price of the supplies or services delivered under the contract that are not otherwise recoverable.

Sec. 36.30.400. Cost or pricing data must be submitted and certified by contractors. This does not apply when: the contract price is based on adequate price competition; the contract price is based on established catalogue or market prices; the contract price is set by law or regulation; or it is determined in writing that the requirements of this section are waived and the reasons for waiver are stated in writing.

Sec. 36.30 10. The state has the right to inspect the plant or place of business of a contractor or subcontractor that is related to the performance of a contract awarded or to be awarded by the state.

Sec. 36.30.420. The state may audit books and records of a person who has submitted cost or pricing data or receives a contract.

Sec. 36.30.430. The commissioner shall adopt regulations permitting the inclusion of clauses providing for adjustments in prices, time of performance, or other contract provisions, and appropriate remedies.

Sec. 36.30.460. Standard clauses in state contract may be modified if supported by a written determination that states the circumstances justifying the variation.

Sec. 36.30.470. If the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget or the total contract budget, the procurement officer may not execute the contract modification, change order, or

adjustment in contract price unless sufficient funds are available, or the scope of the project or contract is adjusted to permit the degree of completion that is feasible within the total project budget or total contract budget as it existed before the contract modification, change order, or adjustment in contract price.

Sec. 36.30.480. Cost principle regulations shall be adopted.

Article 6. Procurement Records and Reports.

Sec. 36.30.500. Procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the state archivist.

Sec. 36.30.510. A contract file open for public inspection must be kept by the commissioner and the contracting agency for each contract awarded under competitive sealed proposals.

Sec. 36.30.520. The commissioner shall maintain for at least 5 years a record listing all sole source and emergency procurement contracts. An agency which has delegated procurement authority shall by October 1, of each year, submit records of all sole source and emergency procurement contracts to the commissioner.

Sec. 35.30.530. Procurement information is public except as otherwise provided by law.

Sec. 36.30.540. The commissioner shall biennially report to the legislature concerning procurements by agencies.

Article 7. Legal and Contractual Remedies.

Sec. 36.30.560. An interested party may protest the award of a contract, the proposed award of a contract, or a solicitation for goods, services or construction. The protest shall be filed with the procurement officer of the contracting agency in writing and must contain specified items.

Sec. 36.30.565. Time deadlines for filing protests are specified.

Sec. 36.30.570. Notice of a protest shall immediately be given to the contractor if a contract has been awarded or, if no award has been made, to all interested parties.

Sec. 36.30.575. If a protest is filed before a contract is awarded, the award may be made unless the procurement

officer of the contracting agency determines in writing that: a reasonable probability exists that the protest will be sustained; or stay of the award is not contrary to the best interests of the state.

Sec. 36.30.580. A written decision by the procurement officer of the contracting agency shall be issued within 14 days after a protest has been filed, unless the time is extended up to 26 days for good cause. Notice shall be sent to the protester. If a decision is not made by the due date, the protester may proceed as if the procurement officer had issued a decision adverse to the protester.

Sec. 36.30.585. If the procurement officer sustains a protest the procurement officer shall implement an appropriate remedy.

Sec. 36.30.590. An appeal from a decision of a procurement officer on a protest must be filed with the commissioner within 5 days after the decision is received by the protester.

Sec. 36.30.595. The procurement officer shall immediately give notice of an appeal to the contractor if a contract has been awarded, or, if no award has been made, to all interested parties.

Sec. 36.30.600. If a protest appeal is filed before a contract is awarded and the award was stayed, the filing of the appeal automatically continues the stay until the commissioner of administration or transportation and public facilities makes a written determination that the award of the contract is necessary to protect substantial interests of the state.

Sec. 36.30.605. The procurement officer of the contracting agency shall file a complete report on the protest and decision with the commissioner of administration or transportation and public facilities within 7 days after a protest appeal is filed. The protester and all interested parties that have requested a copy of the appeal shall be furnished one. The protester may file comments on the protest report within 7 days after the report is received. Extensions may be granted.

Sec. 36.30.610. The commissioner of administration or transportation and public facilities shall dismiss a protest appeal before a hearing is held if it is determined in writing that the appeal is untimely. The appropriate commissioner may issue a decision on an appeal without a hearing if the appeal involves questions of law without genuine issues of fact.

Sec. 36.30.615. A hearing on a protest appeal shall be conducted according to AS 36.30.670 and regulations adopted.

Sec. 36.30.620. If a controversy, asserted by a contractor, concerning a contract awarded under this chapter cannot be resolved by agreement, the procurement officer shall, after receiving a written request by the contractor, issue a written decision no more than 90 days after receipt of all necessary information from the contractor, unless the due date is extended for good cause.

The decision shall be sent to the contractor. If a decision is not made by the due date, the contractor may proceed as if the procurement officer had issued a decision adverse to the contractor. If a controversy asserted by the state concerning a contract awarded cannot be resolved by agreement, the matter shall be immediately referred to the commissioner of administration or transportation and public facilities.

Sec. 36.30.625. An appeal from a decision of the procurement officer on a contract controversy may be filed by the contractor with the commissioner of administration or transportation and public facilities. The appeal shall be filed within 14 days after the decision is received by the contractor.

Sec. 36.30.630. A hearing on a contract controversy appealed to the commissioner or referred to the commissioner shall be conducted according to AS 36.30.670 and regulations adopted .

Sec. 36.30.632. The commissioners of administration and transportation and public facilities may delegate responsibilities under Sec. 36.30.590 and Sec. 36.30.630 to the head of the contracting agency.

Sec. 36.30.635. The commissioners of administration and transportation and public facilities may debar or suspend a person from consideration for award of contracts. Notice and opportunity for a hearing are specified.

Sec. 36.30.640. Causes for debarment or suspension are enumerated.

Sec. 36.30.645. The commissioners of administration and transportation and public facilities shall issue a written decision to debar or suspend.

Sec. 36.30.650. A person suspended is entitled to a hearing if the person files a written request for a

hearing within 7 days after receipt of the notice of suspension.

Sec. 36.30.655. The commissioner shall maintain a list of all persons debarred or suspended from consideration for award of contracts.

Sec. 36.30.660. The commissioner of administration or the commissioner of transportation and public facilities may, at any time after a final decision to debar a person, reinstate the person after determining that the cause for which the person was debarred no longer exists or has been substantially mitigated.

A debarred person may request reinstatement. A hearing may be held on a reinstatement petition. A decision on reinstatement shall be made in writing within 7 days after a reinstatement petition is submitted. A decision under this section is not subject to judicial appeal.

Sec. 36.30.665. The commissioner of administration or transportation and public facilities may permit a debarred person to participate in a contract on a limited basis during the debarment period.

Sec. 36.30.670. The commissioner of administration or transportation and public facilities shall act as a hearing officer or appoint a hearing officer for a hearing conducted under this chapter. The provisions of the Administrative Procedure Act do not apply to a hearing conducted under this chapter. The authority of a hearing officer is outlined.

Sec. 36.30.675. If the commissioner of administration or transportation and public facilities is not acting as hearing officer, the hearing officer shall recommend a decision to the appropriate commissioner based on the evidence presented. The recommendation shall include findings of fact and conclusions of law. The appropriate commissioner may affirm, modify or reject the hearing officer's recommendation or take any other appropriate action.

Sec. 36.30.680. A decision by the commissioner of administration is final, and shall be sent within 20 days after a hearing to all parties. A decision by the commissioner of transportation and public facilities involving procurement of construction shall be sent within 90 days after the hearing.

Sec. 36.30.685. A final decision of the commissioner of administration or transportation and public facilities may be appealed to the superior court in accordance with the Alaska Rules of Appellate Procedure.

Sec. 36.30.687. Civil and criminal sanctions are outlined for misrepresentations and fraudulent claims.

Sec. 36.30.690. This chapter and the regulations adopted under it are the exclusive procedures for asserting a claim against the state or an agency arising in relation to a procurement conducted under this chapter.

Sec. 36.30.695. The commissioner of administration may adopt by regulation additional rules of procedure.

Sec. 36.30.699. The definition of interested party is given.

Article 8. Intergovernmental Relations.

Sec. 36.30.700. Cooperative purchasing is authorized between public procurement units or external procurement activities in accordance with an agreement entered into between the participants.

Sec. 36.30.710. Sale, acquisition, or use of supplies among public procurement units or with external procurement activity may be done independent of certain requirements of this chapter.

Sec. 36.30.720. Joint use of facilities is allowable.

Sec. 36.30.730. A public procurement unit may provide personnel, information and technical services to a requesting public procurement unit or external procurement activity.

Sec. 36.30.735. Current Alaska law on restrictions of contracting with or employing experts on radiation hazards is retained.

Sec. 36.30.740. The commissioner may collect information concerning supplies, services or construction being procured or used by state public procurement units.

Sec. 36.30.750. Under a cooperative purchasing agreement, controversies arising between an administering public procurement unit and its bidders, offerors, or contractors shall be resolved in accordance with this chapter.

Sec. 36.30.790. Definitions for this article are provided.

Article 9. General Provisions.

Sec. 36.30.850. This chapter applies to contracts solicited or entered into after January 1, 1987, unless the parties agree to its application to a contract

solicited or entered into before that date. This chapter applies to the disposal of state supplies and every expenditure of public funds irrespective of their sources, except as specified in AS 36.30.915.

This chapter does not apply to: grants; contracts for professional witnesses; contracts of the University of Alaska where the work is to be performed substantially by enrolled students; contracts for medical doctors and dentists; contracts for the purchase of residential child care services under AS 47.40; disposals of land or interest in land; disposals under AS 38.05; contracts for the preparation of ballots under AS 15.15.030; acquisitions or disposals of property and other contracts relating to airports; acquisitions of real property or disposals of obsolete property under AS 19.05.060, 19.05.100, 19.05.110 or 19.05.120; disposals of obsolete material or equipment under AS 35.20.060; or leases of ferry terminal facilities under AS 19.60.010.

Except for AS 36.30.700-36.30.895, this chapter does not apply to contracts between two or more agencies, the state and its political subdivisions, or the state and other governments.

Sec. 36.30.860. Unless displaced by the particular provision of this chapter, all other principles of law and equity shall supplement the provisions of this chapter.

Sec. 36.30.870. Regulations under this chapter shall be adopted in accordance with the Administrative Procedure Act. Regulations applicable to procurements of construction or procurements for or disposal of property of the state equipment fleet shall be adopted by the commissioner of administration only after consultation with the commissioner of transportation and public facilities.

Sec. 36.30.880. This chapter requires all parties involved in the negotiation, performance, or administration of state contracts to act in good faith.

Sec. 36.30.890. If a procurement involves the expenditure of federal funds or federal assistance and there is a conflict between a provision of this chapter or a regulation adopted under a provision, the federal statute or regulation shall prevail.

Sec. 36.30.900. This chapter does not modify, amend, or alter laws regarding preference for Alaska forest products or preference to producers or dealers in Alaska, except as provided in AS 36.30.170(c).

Sec. 36.30.910. This chapter does not prevent purchasing through the general services administration as proviced by law.

Sec. 36.30.920. Suspected anticompetitive practices are to be reported to the attorney general.

Sec. 36.30.930. In addition to penalties prescribed for unethical conduct, civil and criminal penalties are provided for violations of this chapter.

Sec. 36.30.940. The attorney general on behalf of the state shall enforce the provisions of this chapter.

Sec. 36.30.990. Definitions.

Sec. 36.30.995. This chapter may be cited as the State Procurement Code.

SECTION 3 through SECTION 61 amend other Alaska statutes to reflect the provisions of this chapter.

SECTION 62. The commissioner must report to the legislature by December 1, 1987, concerning procurements by state agencies during the first 6 months of 1987.

SECTION 63. The commissioner of administration shall adopt the regulations required under this chapter by January 1, 1987.

SECTION 64. This is the repealer section.

SECTION 65. Section 63 of this Act takes effect immediately.

SECTION 66. Except as provided in sec. 65, this Act takes effect January 1, 1987.

MAJOR CHANGES TO CS SB 341 SINCE 3/5/86 DRAFT

1.	Sec 1. Purpose.	Amendment suggested by the court system re: consistent procurement practices for all branches of state government.
2.	Sec 36.30.030	Court system amendment re: nature of its procurement practices.
3.	Sec 36.30.200	Amendment restricting the use of competitive sealed proposals in construction context.
4.	Sec 36.30.270	Incorporates SB 204 concerning architectural, engineering and land surveying services into SB 341.
5.	Sec 36.30.362	Requires written justification for contracts awarded to non-residents.
6.	Sec 36.30.850(b)(12)	Excludes Fish and Game non-point-to-point flights from the bill.
7.	Sec 40.	Amends AS 37.05.316 concerning grants to remove "contract" language.

MAJOR CHANGES TO CS SB 341 SINCE 2/9/86 DRAFT

1.	Sec 36.30.005(c)	University of Alaska. Must comply with the law, but has authority to issue its own regulations which will conform to APA requirements.
2.	Sec 36.30.015	DOA may not delegate the authority to dispose of supplies. Currently has this authority under AS 44.71.010.
3.	Sec 36.30.040(b)	Expands areas in which DOA will adopt regulations to implement the chapter, e.g., for contracting with employment program and duties of bidders re: subcontractors.
4.	Sec 36.30.050(d)	Adds a preference for Alaskan bidders in small procurements.
5.	Sec 36.30.100(b)&(c)	Deletes "sheltered workshop" in favor of "employment program" to include additional organizations.
6.	Sec 36.30.115	New section addressing bidder's duties with respect to subcontractors; establishes penalties for violations.
7.	Sec 36.30.140 (b)	Clarifies when bidding information is available to the public.
8.	Sec 36.30.170(b),(c) & (d)	Clarifies requirements for qualifying as an Alaska bidder. Adds a new paragraph covering employment programs. Deletes provisions denying Alaska bidder preference for construction contracts in excess of $5,000.
9.	Sec 36.30.210(a)&(d)	Amends offeror's duties with respect to subcontractors to comport with bidder's duties.
10.	Sec 36.30.240	Adds section providing that Alaska Open Meetings Law does not apply to meetings with offerors.
11.	Sec 36.30.250	Requires procurement officer to consider whether offeror is Alaska

bidder or employment program in determining whether a proposal is "advantagous" to the state.

12. Sec 36.30.340 Moves section dealing with Department of Law review of contracts to Article 5.

13. Sec 36.30.540 Deletes small procurements from biennial lists of in/out of state contracts provided to legislature.

14. Sec 36.30.930 Scienter requirement of "knowledge" added to civil penalty provision.

15. Sec 10. AS 18.55.100. Amended to provide that ASHA is not required to comply with SB 341 in situations where it would jeopardize its federal funding as provided in AS 18.55.110.

SB

341

(FILE 5)

Introduced: 1/14/86
Referred: Judiciary and Finance

BY THE RULES COMMITTEE BY REQUEST OF THE SENATE SELECT INTERIM COMMITTEE ON PROCUREMENT PRACTICES AND PROCEDURES

IN THE SENATE

SENATE BILL NO. 341

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to state procurement practices and procedures; and providing for an effective date."

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

* Section 1. PURPOSE. This Act shall be construed and applied to promote its underlying purposes and policies. The underlying purposes and policies of this Act are to

(1) simplify, clarify, and modernize the law governing procurement by the state;

(2) make as consistent as possible the procurement practices among the executive branch, the legislative branch, and the judicial branch of state government;

(3) provide for increased public confidence in the procedures followed in state procurement;

(4) ensure the fair and equitable treatment of all persons who deal with the procurement system of the state;

(5) provide increased economy in state procurement activities and maximize to the fullest extent practicable the purchasing value of state funds;

(6) foster effective broad-based competition within the free enterprise system;

(7) provide safeguards for the maintenance of a procurement system of quality and integrity;

(8) permit the continued development of state procurement practices and policies; and

(9) eliminate and prevent discrimination in state contracting because of race, religion, color, national origin, sex, age, marital status, pregnancy, or parenthood.

* Sec. 2. AS 36 is amended by adding a new chapter to read:

CHAPTER 30. STATE PROCUREMENT CODE.

ARTICLE 1. ORGANIZATION OF STATE PROCUREMENT.

Sec. 36.30.005. CENTRALIZATION OF PROCUREMENT AUTHORITY. (a) Except as otherwise provided, all rights, powers, duties, and authority relating to the procurement of supplies, services, and professional services, and the control over supplies, services, and professional services vested in or exercised by an agency on January 1, 1987, are transferred to the commissioner of administration and to the chief procurement officer.

(b) Except as otherwise provided, all rights, powers, duties, and authority relating to the procurement of construction and procurements to or disposals from the state equipment fleet and the control over construction and the state equipment fleet vested in or exercised by an agency on January 1, 1987, are transferred to the commissioner of transportation and public facilities, subject to regulations adopted by the commissioner of administration.

Sec. 36.30.010. CHIEF PROCUREMENT OFFICER. (a) The commissioner shall appoint to the partially exempt service the chief procurement officer of the state who is responsible for procurement and management of supplies, services, and professional services for agencies in the executive branch. The chief procurement officer shall have at least five years of prior experience in public procurement, and may be removed by the commissioner only for cause. The term of office of the chief procurement officer expires when the term of the governor expires.

(b) Except as otherwise specifically provided in this chapter, the chief procurement officer shall

(1) procure or supervise the procurement of all supplies, services, and professional services needed by an agency;

(2) exercise general supervision and control over all inventories of supplies belonging to an agency and prescribe the manner in which supplies shall be purchased, delivered, stored, and distributed;

(3) prescribe the time, manner, authentication, and form of making requisitions for supplies and services;

(4) sell, trade, transfer between agencies, or otherwise dispose of surplus, obsolete, or unused supplies and make proper adjustments in the accounts of agencies concerned;

(5) establish and maintain programs for the inspection, testing, and acceptance of supplies and services and the testing of samples submitted with bids;

(6) prescribe standard forms for bids and contracts; and

(7) provide for other matters that may be necessary to carry out the provisions of this chapter and the regulations adopted under this chapter.

Sec. 36.30.015. EXECUTIVE BRANCH AGENCIES. (a) ~~The Department of Transportation and Public Facilities may contract for construction and procurements for the state equipment fleet. The Department of Transportation and Public Facilities may dispose of property of the state equipment fleet.~~ The commissioner of transportation and public facilities may delegate to another agency the authority to contract for construction. Before delegating authority to an agency under this subsection, the commissioner of transportation and public facilities shall make a written determination that the agency is capable of

implementing the delegated authority. Contracts for construction and procurements to and disposals from the state equipment fleet are governed by this chapter and regulations adopted by the commissioner of administration under this chapter.

(b) The commissioner may delegate to an agency the authority to contract for and manage ~~supp~~ suppl except property of the state equipment fleet, services, and professional services. Notwithstanding delegation of authority under this subsection, an agency's authority to contract for supplies, services, and professional services, is governed by this chapter and regulations adopted by the commissioner under this chapter. Before delegating authority to an agency under this subsection, the commissioner shall make a written determination that the agency is capable of implementing the delegated authority.

(c) The commissioner may not delegate the authority to adopt regulations under this chapter.

(d) An agency may not contract for the services of legal counsel without the approval of the attorney general.

(e) The board of directors of the Alaska Railroad Corporation shall adopt procedures to govern the procurement of supplies, services, professional services, and construction by the corporation. The procedures must be substantially equivalent to the procedures prescribed in this chapter and in regulations adopted under this chapter.

Sec. 36.30.020. LEGISLATURE. The Legislative Council shall adopt procedures to govern the procurement of supplies, services, professional services, and construction by the legislature, legislators, and legislative agencies and committees. The procedures must be substantially equivalent to the procedures prescribed in this chapter.

Sec. 36.30.030. COURT SYSTEM. The supreme court shall adopt procedures to govern the procurement of supplies, services,

professional services, and construction by the judicial branch. The procedures must be substantially equivalent to the procedures prescribed in this chapter.

Sec. 36.30.040. PROCUREMENT REGULATIONS. (a) The commissioner shall adopt regulations governing the procurement, management, control, and disposal of supplies by agencies and the procurement, management, and control of services, professional services and construction by agencies. The commissioner may audit and monitor the implementation of the regulations and the requirements of this chapter with respect to using agencies.

(b) The commissioner shall adopt regulations pertaining to the following:

(1) suspension, debarment, and reinstatement of prospective bidders and contractors;

(2) bid protests;

(3) conditions and procedures for the procurement of perishables and items for resale;

(4) conditions and procedures for the use of source selection methods authorized by this chapter, including sole source procurements, emergency procurements, and small procurements;

(5) the opening or rejection of bids and offers, and waiver of informalities in bids and offers;

(6) confidentiality of technical data and trade secrets submitted by actual or prospective bidders or offerors;

(7) partial, progressive, and multiple awards;

(8) storerooms and inventories, including determination of appropriate stock levels and the management, transfer, sale, or other disposal of agency supplies;

(9) definitions and classes of contractual services and

procedures for acquiring them;

(10) providing for conducting price analysis;

(11) use of payment and performance bonds in connection with contracts for supplies and services;

(12) guidelines for use of cost principles in negotiations, adjustments, and settlements; and

(13) the elimination and prevention of discrimination in state contracting because of race, religion, color, national origin, sex, age, marital status, pregnancy, or parenthood.

Sec. 36.30.050. LISTS OF CONTRACTORS. (a) The commissioner shall establish and maintain lists of persons who desire to provide supplies, services, professional services, or construction services to the state.

(b) A person who desires to be on a list shall submit to the commissioner evidence of a valid Alaska business license together with a biennial fee in an amount established by regulation. A construction contractor shall also submit a valid certificate of registration issued under AS 08.18. The commissioner, by regulation, may require submission of additional information.

(c) The lists shall be used by the chief procurement officer or an agency when issuing invitations to bid or requests for proposals under this chapter.

(d) The lists shall be used by the Legislative Council, the court system, and the Alaska Railroad Corporation.

Sec. 36.30.060. SPECIFICATIONS. (a) The commissioner shall adopt regulations governing the preparation, revision, and content of specifications for supplies, services, professional services, and construction required by an agency. The commissioner shall monitor the use of these specifications.

(b) Specifications for construction of highways must conform as closely as practicable to those adopted by the American Association of State Highway and Transportation Officials.

(c) The commissioner may obtain expert advice and assistance from personnel of using agencies in the development of specifications. Specifications must promote overall economy for the purposes intended and encourage competition in satisfying the state's needs, and may not be unduly restrictive. The requirements of this subsection regarding the purposes and nonrestrictiveness of specifications apply to all specifications, including those prepared by architects, engineers, designers, and other professionals.

(d) In this section. "specification" means a description of the physical or functional characteristics, or of the nature of a supply, service, professional service, or construction project; it may include requirements for inspecting, testing, and delivery.

Sec. 36.30.070. SUPPLY MANAGEMENT. The commissioner shall adopt regulations governing the

(1) management of supplies during their entire life cycle;

(2) sale, lease, or disposal of surplus supplies by public auction, competitive sealed bidding, or other appropriate method designated by regulation;

(3) purchase of surplus supplies by an employee of the using or disposing agency; and

(4) transfer of excess supplies.

Sec. 36.30.080. LEASES. (a) The department shall lease space for the use of the state or an agency wherever it is necessary and feasible, subject to compliance with the requirements of this chapter. A lease may not provide for a period of occupancy greater than 40 years. An agency requiring office, warehouse, or other space shall

lease the space through the department.

(b) The department may enter into lease-financing agreements, including lease-purchase agreements and agreements related to the issuance of certificates of participation. A lease-financing agreement must provide that lease payments are subject to annual appropriation.

(c) If the department intends to enter into a lease or lease-financing agreement with an annual rent to the state anticipated to exceed $1,000,000, the department shall provide notice to the legislature. The notice must include the anticipated annual lease obligation amount and the anticipated total construction, acquisition, or other costs of the project. The department may not enter into an agreement under this subsection unless the project has been approved by the legislature by law. An appropriation for the project does not constitute approval of the project for purposes of this subsection.

ARTICLE 2. COMPETITIVE SEALED BIDDING.

Sec. 36.30.100. GENERAL POLICY. (a) Except as otherwise provided in this chapter, or unless specifically exempted by law, an agency contract shall be awarded by competitive sealed bidding.

(b) Competitive sealed bidding is not required

(1) when the commissioner determines in writing that food, clothing, or medical supplies, or materials for use in laboratory or medical studies may be purchased otherwise to the best advantage of the state;

(2) when rates are fixed by law or ordinance;

(3) for contracts for the operation of transportation systems for students to and from the schools within the state, as are authorized under AS 14.09.010; these contracts may be awarded by bid or negotiation and, at the discretion of the Board of Education, may

be awarded for periods of three years or less;

(4) for the purchase of products or services manufactured or provided by a sheltered workshop;

(5) for the purchase of products or services provided by the correctional industries program established under AS 33.32;

(6) for professional services; or

(7) for concessions operated on state property.

(c) In this section "sheltered workshop" means a place where manufacture or handiwork is carried on, and that is operated for the primary purpose of providing remunerative employment to individuals with physical or mental disabilities that constitute substantial handicaps to employment.

Sec. 36.30.110. INVITATION TO BID. (a) When competitive sealed bidding is used, the procurement officer shall issue an invitation to bid. It must include a date by which the bid must be received, purchase description, and all contractual terms and conditions applicable to the procurement.

(b) The invitation to bid shall require the bidder to list subcontractors the bidder proposes to use in the performance of the contract. When responding to the invitation, the bidder shall also supply evidence of the bidder's valid Alaska business license and evidence of a valid Alaska business license for each listed subcontractor. A bidder for a construction contract shall also submit evidence of the bidder's registration under AS 08.18 and evidence of registration for each listed subcontractor.

Sec. 36.30.120. BID SECURITY. (a) Bid security shall be required for all competitive sealed bidding for construction contracts when the price is estimated by the procurement officer to exceed an amount established by regulation of the commissioner. Bid security on

construction contracts under the amount set by the commissioner may be required when the circumstances warrant. Bid security may be required for competitive sealed bidding for contracts for supplies, services, or professional services in accordance with regulations of the commissioner when needed for the protection of the state.

(b) Bid security must be a bond provided by a surety company authorized to do business in the state, ~~or the equivalent in cash~~ or otherwise supplied in a form satisfactory to the commissioner. Bid security must be in an amount equal to at least

(1) 10 percent of the amount of the bid if the bid does not exceed $100,000; or

(2) five percent of the amount of the bid if the bid exceeds $100,000.

(c) When the invitation to bid requires security, the procurement officer shall reject a bid that does not comply with the bid security requirement unless, in accordance with regulations, the officer determines that the bid fails to comply in a nonsubstantial manner with the security requirements.

Sec. 36.30.130. PUBLIC NOTICE OF INVITATION TO BID. (a) The procurement officer shall give adequate public notice of the invitation to bid at least 21 days before the date for the opening of bids. If a determination is made in writing that a shorter notice period is necessary for a particular bid, the 21-day period may be shortened. The determination shall be made by the chief procurement officer for bids for supplies, services, or professional services. The determination shall be made by the commissioner of transportation and public facilities for bids for construction or acquisition of property for the state equipment fleet. Notice shall be mailed to all active prospective contractors on the appropriate list maintained under

AS 36.30.050. The time and manner of notice must be in accordance with regulations adopted by the commissioner of administration. When practicable, notice may include

(1) publication in a newspaper calculated to reach prospective bidders;

(2) notices posted in public places within the area where the work is to be performed or the material furnished; and

~~(3) publication in the Alaska Administrative Journal.~~

mandatory notice 44.62.175 44 adm reg

(b) Failure to comply with the notice requirements of this section does not invalidate a bid or the award of a contract. The state is not liable for damages caused by failure to comply with this section.

Sec. 36.30.140. BID OPENING. (a) The procurement officer shall open bids publicly in the presence of one or more witnesses at the time and place designated in the invitation to bid. The amount of each bid and other relevant information that is specified by regulation of the commissioner, together with the name of each bidder, shall be recorded.

(b) The information recorded under (a) of this section is open to public inspection as soon as practicable before the contract is awarded. The bids are not open for public inspection until after a contract is awarded. To the extent the bidder designates and the procurement officer concurs, trade secrets and other proprietary data contained in a bid document are confidential.

Sec. 36.30.150. BID ACCEPTANCE AND BID EVALUATION. Bids shall be unconditionally accepted without alteration or correction, except as authorized in AS 36.30.160. The procurement officer shall evaluate bids based on the requirements set out in the invitation to bid, which may include criteria to determine acceptability such as inspection,

testing, quality, delivery, and suitability for a particular purpose. The criteria that will affect the bid price and be considered in evaluation for award must be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation to bid must set out the evaluation criteria to be used. Criteria may not be used in bid evaluation if they are not set out in the invitation to bid.

Sec. 36.30.160. LATE BIDS; CORRECTION OR WITHDRAWAL OF BIDS; CANCELLATION OF AWARDS. (a) Bids received after the bid due date indicated on the invitation to bid may not be accepted unless the delay was due to an error of a ~~state employee directly responsible for opening the bids~~.

(b) Correction or withdrawal of inadvertently erroneous bids before or after bid opening, or cancellation of awards or contracts based on bid mistakes may be permitted in accordance with regulations adopted by the commissioner. After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the state or fair competition may not be permitted. Except as otherwise provided by regulation, a decision to permit the correction or withdrawal of a bid, or to cancel an award or contract based on a bid mistake, shall be supported by a written determination made by the procurement officer. If a bidder is permitted to withdraw a bid before award, an action may not be maintained against the bidder or the bid security.

Sec. 36.30.170. CONTRACT AWARD AFTER BIDS. (a) Except as provided in (b) of this section, the procurement officer shall award a contract based on the solicited bids with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria

set out in the invitation to bid.

(b) The procurement officer shall award a contract based on solicited bids to the lowest responsible and responsive Alaska bidder if the bid is not more than five percent higher than the lowest nonresident bidder's. In this subsection, "Alaska bidder" means a person who

(1) holds a current Alaska business license;

(2) submits a bid for goods, services, or construction under the name as appearing on the person's current Alaska business license;

(3) has maintained a place of business within the state for a period of six months immediately preceding the date of the bid; and

(4) if a joint venture, is composed entirely of ventures that qualify under (1) - (3) of this subsection.

(c) The provisions of (b) of this section do not apply to construction contracts for highways and public works if the construction contract exceeds $5,000.

Sec. 36.30.190. MULTI-STEP SEALED BIDDING. When it is considered impractical to initially prepare a definitive purchase description to support an award based on price, the procurement officer may issue an invitation to bid requesting the submission of unpriced technical offers to be followed by an invitation to bid limited to the bidders whose offers are determined to be technically qualified under the criteria set out in the first solicitation.

ARTICLE 3. COMPETITIVE SEALED PROPOSALS.

Sec. 36.30.200. CONDITIONS FOR USE. (a) Except as otherwise provided in this chapter, or unless specifically exempted by law, an agency contract shall be awarded by competitive sealed proposals if it is not awarded by competitive sealed bidding.

(b) The commissioner may provide by regulation that it is either not practicable or not advantageous to the state to procure specified types of supplies, services, or construction by competitive sealed bidding that would otherwise be procured by that method. When the chief procurement officer, or for construction contracts or procurements for the state equipment fleet, the commissioner of transportation and public facilities, determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the state, a contract may be entered into by competitive sealed proposals in accordance with the regulations. When it is determined that it is practicable but not advantageous to use competitive sealed bidding, the chief procurement officer or commissioner of transportation and public facilities shall specify with particularity the basis for the determination.

Sec. 36.30.210. REQUEST FOR PROPOSALS. (a) A request for competitive sealed proposals must contain the date by which the proposal must be received, a description of the supplies, construction, services, or professional services to be provided under the contract, and the terms under which the supplies, construction, services, or professional services are to be provided. The request shall require the offeror to list subcontractors the offeror proposes to use in the performance of the contract. The offeror must also supply evidence of the offeror's valid Alaska business license together with evidence of a valid Alaska business license for each listed subcontractor. An offeror for a construction contract shall also submit evidence of the offeror's registration under AS 08.18 and evidence of registration for each listed subcontractor.

(b) A request for proposals must contain that information necessary for an offeror to submit a proposal or contain references to

any information that cannot reasonably be included with the request. The request must provide a description of the factors that will be considered by the procurement officer when evaluating the proposals received, including the relative importance of price and other evaluation factors.

(c) Notice of a request for proposals shall be given in accordance with procedures under AS 36.30.130. The procurement officer may use additional means considered appropriate to notify prospective offerors of the intent to enter into a contract through competitive sealed proposals.

Each agency to another agency shall establish a standard overhead rate covered by this chap

Sec. 36.30.220. STANDARD OVERHEAD RATE. (a) If an agency submits a proposal in response to a request for competitive sealed proposals, the agency must include its standard overhead rate within its proposal.

(b) In this section, "standard overhead rate" means a charge established for services and professional services from an agency that is designed to compensate the agency for administration and support services incidentally provided with the services contracted for.

Sec. 36.30.230. TREATMENT OF PROPOSALS. The procurement officer shall open proposals so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals containing the name and address of each offeror shall be prepared in accordance with regulations adopted by the commissioner. The register and the proposals are open for public inspection after the contract is awarded. To the extent that the offeror designates and the procurement officer concurs, trade secrets and other proprietary data contained in the proposal documents are confidential.

Sec. 36.30.240. DISCUSSION WITH RESPONSIBLE OFFERORS AND REVISIONS TO PROPOSALS. As provided in the request for proposals, and

under regulations adopted by the commissioner, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before the award of the contract for the purpose of obtaining best and final offers. In conducting discussions, the procurement officer may not disclose information derived from proposals submitted by competing offerors.

Sec. 36.30.250. AWARD OF CONTRACT. The procurement officer shall award a contract under competitive sealed proposals to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the state taking into consideration price and the evaluation factors set out in the request for proposals. Other factors and criteria may not be used in the evaluation. The contract file must contain the basis on which the award is made.

Sec. 36.30.260. CONTRACT EXECUTION. A contract awarded under competitive sealed proposals must contain

(1) the amount of the contract stated on its first page;

(2) the date for the supplies to be delivered or the dates for construction, services, or professional services to begin and be completed;

(3) a description of the supplies, construction, services, or professional services to be provided; and

(4) certification by the project director for the contracting agency, the head of the contracting agency, or a designee that

sufficient funds are available in an appropriation to be encumbered for the amount of the contract.

Sec. 36.30.270. REVIEW AND APPROVAL BY DEPARTMENT OF LAW. If a contract contains a term that is in conflict with a state standard form contract term or if a standard term is deleted or modified by a term that is not standard, the contract must be reviewed by the Department of Law and approved as to form.

ARTICLE 4. OTHER PROCUREMENT METHODS.

Sec. 36.30.300. SOLE SOURCE PROCUREMENTS. (a) A contract may be awarded for supplies, services, professional services, or construction without competitive sealed bidding, competitive sealed proposals, or other competition in accordance with regulations adopted by the commissioner of administration. A contract may be awarded under this section only when the ~~commissioner of administration~~ chief procurement officer or, for construction contracts or procurements for the state equipment fleet, the commissioner of transportation and public facilities determines in writing that there is only one source for the ~~required~~ acquisition ~~of supplies, services, professional services, or~~ construction. A sole source procurement may not be awarded if a reasonable alternative source exists. The written determination must include findings of fact that support by clear and convincing evidence the determination that only one source exists. The authority to make the determination required by this subsection may not be delegated.

(b) The using agency shall submit written evidence to support a sole source determination. The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, may also require the submission of cost or pricing data in connection with an award under this section.

(c) The procurement officer shall negotiate with the single

supplier, to the extent practicable, to obtain a contract advantageous to the state.

Sec. 36.30.310. EMERGENCY PROCUREMENTS. Procurements may be made under emergency conditions as defined in regulations adopted by the commissioner when there exists a threat to public health, welfare, or safety, when a situation exists that makes a procurement through competitive sealed bidding or competitive sealed proposals impracticable or contrary to the public interest, or to protect public or private property. An emergency procurement need not be made through competitive sealed bidding or competitive sealed proposals but shall be made with competition that is practicable under the circumstances. A written determination by the procurement officer of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The written determination must include findings of fact that support the determination.

Sec. 36.30.320. SMALL PROCUREMENTS. (a) A procurement for supplies, services, or construction that does not exceed an aggregate dollar amount of $5,000 may be made in accordance with regulations adopted by the commissioner for small procurements.

(b) A contract for professional services that does not exceed $25,000 may be made under regulations adopted by the commissioner for small procurements, except that an agency may not contract

(1) for the services of legal counsel without the approval of the attorney general; or

(2) with a person under this subsection if the total amount of professional services contracts awarded to that person from the agency exceeds $25,000 in a 12-month period.

(c) Small procurements need not be made through competitive sealed bidding or competitive sealed proposals but shall be made with

competition that is practicable under the circumstances.

(d) Procurement requirements may not be artificially divided or fragmented so as to constitute a purchase under this section or to circumvent the source selection procedures required by AS 36.30.100 - 36.30.270.

ARTICLE 5. CONTRACT FORMATION AND MODIFICATION.

Sec. 36.30.350. BID CANCELLATION, REJECTION. An invitation to bid, a request for proposals, or other solicitation may be cancelled or any or all bids or proposals may be rejected in whole or in part or the date for opening bids or proposals may be delayed when it is in the best interests of the state in accordance with regulations adopted by the commissioner. The reasons for cancellation, rejection, or delay in opening bids or proposals shall be made part of the contract file.

Sec. 36.30.360. DETERMINATION OF RESPONSIBILITY. (a) A written determination of responsibility of a bidder or offeror shall be made by the procurement officer in accordance with regulations adopted by the commissioner. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility is grounds for a determination of nonresponsibility with respect to the bidder or offeror.

(b) Information furnished by a bidder or offeror under (a) of this section is confidential and may not be disclosed without prior written consent by the bidder or offeror.

Sec. 36.30.365. NOTICE OF INTENT TO AWARD A CONTRACT. At least 10 days before the formal award of a contract under this chapter the procurement officer shall provide to each bidder or offeror notice of intent to award a contract. The notice shall conform to regulations adopted by the commissioner.

Sec. 36.30.370. TYPES OF CONTRACTS. Subject to limitations of this section, any type of contract that will promote the best interests of the state may be used, except that the use of a cost-plus-a-percentage-of-cost contract is prohibited. A cost-reimbursement contract may be used only when a determination is made in writing by the procurement officer that a cost-reimbursement contract is likely to be less costly to the state than any other type or that it is impracticable to obtain the supplies, services, professional services, or construction required except under a cost-reimbursement contract.

Sec. 36.30.380. APPROVAL OF ACCOUNTING SYSTEM. Except for a contract awarded through competitive sealed bidding ~~and~~ or a firm fixed-price contract, a contract type may not be used unless it has been determined in writing by the procurement officer that the proposed contractor's accounting system

(1) will permit timely development of all necessary cost data in the form required by the specific contract type contemplated; and

(2) is adequate to allocate costs in accordance with generally accepted accounting principles.

Sec. 36.30.390. MULTI-TERM CONTRACTS. (a) Unless otherwise provided by law, a contract for supplies, services, or professional services may be entered into for any period of time considered to be in the best interests of the state provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds for them.

(b) Before using a multi-term contract, the procurement officer

shall determine in writing that

(1) estimated requirements cover the period of the contract and are reasonably firm and continuing; and

(2) the contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economies in state procurement.

(c) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled. The contractor may only be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies, services, or professional services delivered under the contract that are not otherwise recoverable. The cost of cancellation may be paid from any appropriations available for these purposes.

Sec. 36.30.400. COST OR PRICING DATA. (a) Before an award of a contract or a change order or contract modification, the contractor or prospective contractor shall submit cost and pricing data. The contractor or prospective contractor shall certify that, to the best of the contractor's or prospective contractor's knowledge and belief, the data submitted is accurate, complete, and current as of a mutually determined specified date and will continue to be accurate and complete during the performance of the contract.

(b) When a contractor becomes aware of a situation that may form the basis of a claim for compensation in addition to that provided for under the contract and before performing work or supplying materials not required under the contract, the contractor shall submit cost and pricing data on the additional work or materials. The contractor shall certify that, to the best of the contractor's knowledge and belief, the data submitted is accurate, complete, and current and is

the actual cost to the contractor of performing the additional work or supplying the additional materials.

(c) A contract, change order, or contract modification under which a certificate is required under (a) or (b) of this section must contain a provision that the price to the state, including the contractor's profit or fee, will be adjusted to exclude any significant sums by which the state finds that the price is increased because the cost or pricing data furnished by the contractor or prospective contractor is inaccurate, incomplete, or not current as of the date agreed upon by the parties.

(d) The requirements of this section do not apply when

(1) the contract price is based on adequate price competition;

(2) the contract price is set by law or regulation; or

(3) it is determined by the procurement officer in writing and in accordance with regulations adopted by the commissioner that the requirements of this section may be waived, and the reasons for waiver are stated.

Sec. 36.30.410. RIGHT TO INSPECT PLANT. The state may, at reasonable times, inspect the part of the plant or place of business of a contractor or subcontractor that is related to the performance of a contract awarded or to be awarded by an agency.

Sec. 36.30.420. RIGHT TO AUDIT RECORDS. (a) The state may, at reasonable times and places, audit the books and records of a person who has submitted cost or pricing data under AS 36.30.400 to the extent that the books and records relate to the cost or pricing data. A person who receives a contract, change order, or contract modification for which cost or pricing data is required, shall maintain books and records that relate to the cost or pricing data for three years

after the date of final payment under the contract, unless a shorter period is authorized in writing by the commissioner.

(b) The state may audit the books and records of a contractor or a subcontractor to the extent that the books and records relate to the performance of the contract or subcontract. Books and records shall be maintained by the contractor for a period of three years after the date of final payment under the prime contract and by the subcontractor for a period of three years after the date of final payment under the subcontract, unless a shorter period is authorized in writing by the commissioner.

Sec. 36.30.430. STANDARD MODIFICATION CLAUSES FOR CONTRACTS. (a) The commissioner shall adopt regulations permitting the inclusion of clauses providing for adjustments in prices, time of performance, or other contract provisions as appropriate.

(b) The commissioner shall adopt regulations permitting or requiring the inclusion in state contracts of clauses providing for appropriate remedies and covering the following subjects:

(1) liquidated damages;

(2) specified excuses for delay or nonperformance;

(3) termination of the contract for default; and

(4) termination of the contract in whole or in part for the convenience of the state.

Sec. 36.30.460. MODIFICATION OF STANDARD CLAUSES. The procurement officer or the head of a contracting agency may vary the clauses adopted under AS 36.30.430 for inclusion in a particular state contract if the

(1) variations are supported by a written determination that states the circumstances justifying the variation; and

(2) approval required by AS 36.30.270 is obtained.

Sec. 36.30.470. FISCAL RESPONSIBILITY. A contract modification, change order, or contract price adjustment under a construction contract in excess of an amount established by regulation of the commissioner is subject to prior written certification by the fiscal officer of the agency responsible for funding the project or the contract, or other official responsible for monitoring and reporting upon the status of the costs of the total project budget or contract budget, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. If the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget or the total contract budget, the procurement officer may not approve the contract modification, change order, or adjustment in contract price unless sufficient funds are available, or the scope of the project or contract is adjusted to permit the degree of completion that is feasible within the total project budget or total contract budget as it existed before the contract modification, change order, or adjustment in contract price under consideration. A contract modification change order, or adjustment in contract that is signed by both parties and has been reasonably relied on by a contractor, is presumed to be valid even if the provisions of this section have not been met.

Sec. 36.30.480. COST PRINCIPLE REGULATIONS. The commissioner shall adopt regulations setting out cost principles that shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions that provide for the reimbursement of costs. If a written determination is approved at a level above the procurement officer, the cost principles may be modified by contract.

ARTICLE 6. PROCUREMENT RECORDS AND REPORTS.

Sec. 36.30.500. RETENTION OF PROCUREMENT RECORDS. Procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the state archivist. Retained documents shall be made available to the attorney general or a designee upon request and proper receipt.

Sec. 36.30.510. RECORDS OF CONTRACTS AWARDED UNDER COMPETITIVE SEALED PROPOSALS. A contract file open for public inspection must be kept by the commissioner and the contracting agency for each contract awarded under competitive sealed proposals. The file must contain

(1) a copy of the contract;

(2) the register of proposals prepared under AS 36.30.230 and a copy of each proposal submitted;

(3) the written determination to award the contract prepared under AS 36.30.250; and

(4) a summary of the information required under (1) - (3) of this section.

Sec. 36.30.520. RECORDS OF SOLE SOURCE AND EMERGENCY PROCUREMENTS. (a) The commissioner shall maintain for a minimum of five years a record listing all sole source procurement contracts made under AS 36.30.300 and emergency procurements made under AS 36.30.310. The record must contain

(1) each contractor's name;

(2) the amount and type of each contract; and

(3) a listing of the supplies, services, professional services, or construction procured under each contract.

(b) The Department of Transportation and Public Facilities and any agency to whom the commissioner of administration or the commissioner of transportation and public facilities has delegated

procurement authority under AS 36.30.015 shall, by October 1 of each year, submit to the commissioner of administration records of the type specified in (a) of this section. The commissioner of administration shall maintain these records as required by (a) of this section.

Sec. 36.30.530. PUBLIC ACCESS TO PROCUREMENT INFORMATION. Procurement information is public except as otherwise provided by law.

Sec. 36.30.540. REPORT TO LEGISLATURE. Beginning with December 1, 1989, the commissioner shall biennially report to the legislature concerning procurements by agencies. The report must include

(1) the records prepared under AS 36.30.510(4) and 36.30.-520(a) for the previous two fiscal years;

(2) recommendations for changes in this chapter or other laws based on implementation of this chapter in the previous two fiscal years; and

(3) a description of any matters that involved litigation concerning this chapter in the previous two fiscal years.

ARTICLE 7. LEGAL AND CONTRACTUAL REMEDIES.

Sec. 36.30.560. FILING OF A PROTEST. An interested party may protest the award of a contract, the proposed award of a contract, or a solicitation for supplies, services, professional services, or construction by an agency. The protest shall be filed with the procurement officer of the contracting agency in writing and include the following information:

(1) the name, address, and telephone number of the protester;

(2) the signature of the protester or the protester's representative;

(3) identification of the contracting agency and the solicitation or contract at issue;

(4) a detailed statement of the legal and factual grounds of the protest, including copies of relevant documents; and

(5) the form of relief requested.

Sec. 36.30.565. TIME FOR FILING A PROTEST. (a) A protest based upon alleged improprieties in a solicitation involving competitive sealed bidding that are apparent before the bid opening shall be filed before the bid opening. A protest based on alleged improprieties in a solicitation involving competitive sealed proposals that are apparent

(1) before the due date for receipt of initial proposals shall be filed before that due date;

(2) after the due date for receipt of initial proposals shall be filed before the next due date for receipt of adjusted proposals that occurs after the improprieties are apparent.

(b) In situations not covered under (a) of this section, protests shall be filed within 10 days after a notice of intent to award the contract is issued by the procurement officer.

(c) If the protester shows good cause, the procurement officer of the contracting agency may consider a filed protest that is not timely.

Sec. 36.30.570. NOTICE OF A PROTEST. The procurement officer shall immediately give notice of a protest filed under AS 36.30.565 to the contractor if a contract has been awarded or, if no award has been made, to all interested parties.

Sec. 36.30.575. STAY OF AWARD. If a protest is filed the award may be made unless the procurement officer of the contracting agency determines in writing that a

(1) reasonable probability exists that the protest will be sustained; or

(2) stay of the award is not contrary to the best interests

of the state.

Sec. 36.30.580. DECISION BY THE PROCUREMENT OFFICER. (a) The procurement officer of the contracting agency shall issue a written decision containing the basis of the decision within 14 days after a protest has been filed. A copy of the decision shall be furnished to the protester by certified mail or other method that provides evidence of receipt.

(b) The time for a decision may be extended up to 26 days for good cause by the commissioner of administration, or for protests involving construction or procurements for the state equipment fleet, the commissioner of transportation and public facilities. If an extension is granted, the procurement officer shall notify the protester in writing of the date the decision is due.

(c) If a decision is not made by the date it is due, the protester may proceed as if the procurement officer had issued a decision adverse to the protester.

Sec. 36.30.585. PROTEST REMEDIES. (a) If the procurement officer sustains a protest in whole or in part, the procurement officer shall implement an appropriate remedy.

(b) In determining an appropriate remedy, the procurement officer shall consider the circumstances surrounding the solicitation or procurement including the seriousness of the procurement deficiencies, the degree of prejudice to other interested parties or to the integrity of the procurement system, the good faith of the parties, the extent the procurement has been accomplished, costs to the agency and other impacts on the agency of a proposed remedy, and the urgency of the procurement to the welfare of the state.

Sec. 36.30.590. APPEAL ON A PROTEST. (a) An appeal from a decision of a procurement officer on a protest may be filed by the

protester with the commissioner of administration, or for protests involving construction or procurements for the state equipment fleet, the commissioner of transportation and public facilities. An appeal shall be filed within five days after the decision is received by the protester. The protester shall file a copy of the appeal with the procurement officer.

(b) An appeal must contain the information required under AS 36.30.560. In addition, the appeal must include

(1) a copy of the decision being appealed; and

(2) identification of the factual or legal errors in the decision that form the basis for the appeal.

Sec. 36.30.595. NOTICE OF A PROTEST APPEAL. (a) The procurement officer shall immediately give notice of an appeal filed under AS 36.30.590 to the contractor if a contract has been awarded or, if no award has been made, to all interested parties.

(b) The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall, on request, furnish a copy of the appeal to a person notified under (a) of this section, except that confidential material shall be deleted from the copy.

Sec. 36.30.600. STAY OF AWARD DURING PROTEST APPEAL. If a protest appeal is filed before a contract is awarded and the award was stayed under AS 36.30.575, the filing of the appeal automatically continues the stay until the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, makes a written determination that the award of the contract without further delay is necessary to protect substantial interests of the state.

Sec. 36.30.605. PROTEST REPORT. (a) The procurement officer of

the contracting agency shall file a complete report on the protest and decision with the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, within seven days after a protest appeal is filed. The procurement officer shall furnish a copy of the report to the protester and to interested parties that have requested a copy of the appeal under AS 36.30.595(b).

(b) The procurement officer may request an extension of time to prepare the protest report. The request must be in writing listing the reasons for the request. The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall respond to the request in writing. If an extension is granted, the commissioner shall list the reasons for granting the extension and indicate the date the protest report is due. The commissioner shall notify the protester in writing that the time for submission of the report has been extended and the date the report is due.

(c) The protester may file comments on the protest report with the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, within seven days after the report is received. The protester shall provide copies of the comments to the procurement officer and to interested parties that have requested a copy of the appeal under AS 36.30.595(b).

(d) The protester may request an extension of time to prepare the comments on the protest report. The request must be in writing listing the reasons for the request. The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall respond to the request in writing. If an extension is granted, the commissioner shall list the reasons for granting the extension and indicate the date the comments are due.

The commissioner shall notify the procurement officer in writing that the time for submission of the comments has been extended and the date the comments are due.

Sec. 36.30.610. DECISION WITHOUT HEARING. (a) The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall dismiss a protest appeal before a hearing is held if it is determined in writing that the appeal is untimely under AS 36.30.590(a).

(b) The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, may issue a decision on an appeal without a hearing if the appeal involves questions of law without genuine issues of fact.

Sec. 36.30.615. HEARING ON PROTEST APPEAL. A hearing on a protest appeal shall be conducted in accordance with AS 36.30.670 and regulations adopted by the commissioner.

Sec. 36.30.620. CONTRACT CONTROVERSIES. (a) A contractor shall file a claim concerning a contract awarded under this chapter with the procurement officer. The contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of the contractor's knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the state is liable.

(b) If a controversy asserted by a contractor concerning a contract awarded under this chapter cannot be resolved by agreement, the procurement officer shall, after receiving a written request by the contractor for a decision, issue a written decision. The decision shall be made no more than 90 days after receipt by the procurement officer of all necessary information from the contractor. Failure of the contractor to furnish necessary information to the procurement

officer constitutes a waiver of the claim. Before issuing the decision the procurement officer shall review the facts relating to the controversy and obtain necessary assistance from legal, fiscal, and other advisors.

(c) The time for issuing a decision under (b) of this section may be extended for good cause by the commissioner of administration, or for a controversy involving a construction contract or procurement for the state equipment fleet, the commissioner of transportation and public facilities, if the controversy concerns an amount in excess of $50,000. The procurement officer shall notify the contractor in writing that the time for the issuance of a decision has been extended and of the date by which a decision shall be issued.

(d) The procurement officer shall furnish a copy of the decision to the contractor by certified mail or other method that provides evidence of receipt. The decision shall include a

(1) description of the controversy;

(2) reference to the pertinent contract provisions;

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

(4) statement of reasons supporting the decision; and

(5) statement substantially as follows:

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

(e) If a decision is not made by the date it is due, the contractor may proceed as if the procurement officer had issued a decision adverse to the contractor.

(f) If a controversy asserted by the state concerning a contract awarded under this chapter cannot be resolved by agreement the matter shall be immediately referred to the commissioner of administration or the commissioner of transportation and public facilities, as appropriate.

Sec. 36.30.625. APPEAL ON A CONTRACT CONTROVERSY. (a) An appeal from a decision of the procurement officer on a contract controversy may be filed by the contractor with the commissioner of administration, or for a controvery involving a construction contract or procurement for the state equipment fleet, the commissioner of transportation and public facilities. The appeal shall be filed within 14 days after the decision is received by the contractor. The contractor shall file a copy of the appeal with the procurement officer.

(b) An appeal shall contain a copy of the decision being appealed and identification of the factual or legal errors in the decision that form the basis for the appeal.

Sec. 36.30.630. HEARING ON A CONTRACT CONTROVERSY. (a) Except as provided in (b) of this section, a hearing shall be conducted according to AS 36.30.670 and regulations adopted by the commissioner of administration on a contract controversy appealed to the commissioner of administration or the commissioner of transportation and public facilities or referred to either commissioner under AS 36.30.620(f).

(b) Within 15 days after receipt of an appeal on a contract controversy the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, may adopt the decision of the procurement officer as the final decision without a hearing.

Sec. 36.30.632. DELEGATION. The commissioner of administration and the commissioner of transportation and public facilities may delegate responsibilities under AS 36.30.590 and 36.30.630 to the head of the contracting agency.

Sec. 36.30.635. AUTHORITY TO DEBAR OR SUSPEND. (a) After consultation with the using agency and the attorney general and after a hearing conducted according to AS 36.30.670 and regulations adopted by the commissioner of administration, the commissioner of administration or the commissioner of transportation and public facilities may debar a person for cause from consideration for award of contracts. Notice of a debarment hearing shall be provided in writing at least seven days before the hearing. The debarment may not be for a period of more than three years.

(b) The commissioner of administration or the commissioner of transportation and public facilities, after consultation with the using agency and the attorney general, may suspend a person from consideration for award of contracts if there is probable cause for debarment and compelling reasons require suspension to protect state interests. The suspension may not be for a period exceeding three months.

(c) The authority to debar or suspend shall be exercised in accordance with regulations adopted by the commissioner of administration.

Sec. 36.30.640. CAUSES FOR DEBARMENT OR SUSPENSION. The causes for debarment or suspension include the following:

(1) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of the contract or subcontract;

(2) conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or other offense indicating a lack of business integrity or business honesty that currently and seriously affects responsibility as a state contractor;

(3) conviction or civil judgment finding a violation under state or federal antitrust statutes;

(4) violation of contract provisions of a character that is regarded by the commissioner to be so serious as to justify debarment action, such as

(A) knowing failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

(B) failure to perform or unsatisfactory performance in accordance with the terms of one or more contracts, except that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor may not be considered to be a basis for debarment;

(5) for violation of the ethical standards set out in law or regulation;

(6) for a violation of this chapter punishable under AS 36.30.930(2); and

(7) any other cause listed in regulations of the commissioner determined to be so serious and compelling as to affect responsibility as a state contractor, including debarment by another governmental entity for a cause listed in the regulations.

Sec. 36.30.645. WRITTEN DETERMINATIONS. (a) The commissioner of administration or the commissioner of transportation and public facilities shall issue a written decision to debar or suspend. The

decision must

(1) state the reasons for the action taken; and

(2) inform the debarred person of rights to judicial appeal or inform the suspended person of rights to administrative and judicial appeal.

(b) A copy of the decision under (a) of this section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other intervening party.

Sec. 36.30.650. HEARING ON A SUSPENSION. (a) A person suspended under AS 36.30.635 is entitled to a hearing conducted according to AS 36.30.670 and regulations adopted by the commissioner of administration if the person files a written request for a hearing with the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, within seven days after receipt of the notice of suspension under AS 36.30.645.

(b) If a suspended person requests a hearing the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall schedule a prompt hearing unless the attorney general determines that a hearing at the proposed time is likely to jeopardize an investigation. A hearing may not be delayed longer than six months after notice of the suspension is provided under AS 36.30.645.

Sec. 36.30.655. LIST OF PERSONS DEBARRED OR SUSPENDED. The commissioner shall maintain a list of all persons debarred or suspended from consideration for award of contracts.

Sec. 36.30.660. REINSTATEMENT. (a) The commissioner of administration or the commissioner of transportation and public facilities may at any time after a final decision to debar a person from consideration for award of contracts reinstate the person after

determining that the cause for which the person was debarred no longer exists or has been substantially mitigated.

(b) A debarred person may request reinstatement by submitting a petition to the commissioner of administration or the commissioner of transportation and public facilities supported by evidence showing that the cause for debarment no longer exists or has been substantially mitigated.

(c) The commissioner of administration or the commissioner of transportation and public facilities may require a hearing on a reinstatement petition. A decision on reinstatement shall be made in writing within seven days after a reinstatement petition is submitted. The decision shall specify the factors on which it is based. A decision under this section is not subject to judicial appeal.

Sec. 36.30.665. LIMITED PARTICIPATION. The commissioner of administration or the commissioner of transportation and public facilities may permit a debarred person to participate in a contract on a limited basis during the debarment period if the commissioner determines in writing that the participation is advantageous to the state. The determination shall specify the factors on which it is based and the limits imposed on the debarred person.

Sec. 36.30.670. HEARING PROCEDURES. (a) The commissioner of administration or the commissioner of transportation and public facilities shall act as a hearing officer or appoint a hearing officer for a hearing conducted under this chapter. The hearing officer shall arrange for a prompt hearing and notify the parties in writing of the time and place of the hearing. The hearing shall be conducted in an informal manner. The provisions of AS 44.62 (Administrative Procedure Act) do not apply to a hearing conducted under this chapter.

(b) The hearing officer may

(1) hold prehearing conferences to settle, simplify, or identify the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(2) require parties to state their positions concerning the various issues in the proceeding;

(3) require parties to produce for examination those relevant witnesses and documents under their control;

(4) rule on motions and other procedural matters;

(5) regulate the course of the hearing and conduct of the participants;

(6) establish time limits for submission of motions or memoranda;

(7) impose appropriate sanctions against a person who fails to obey an order of the hearing officer, including

(A) prohibiting the person from asserting or opposing designated claims or defenses or introducing designated matters into evidence;

(B) excluding all testimony of an unresponsive or evasive witness; and

(C) excluding a person from further participation in the hearing;

(8) take official notice of a material fact not appearing in evidence, if the fact is among the traditional matters subject to judicial notice;

(9) administer oaths or affirmations.

(c) A transcribed record of the hearing shall be made available at cost to a party that requests it.

Sec. 36.30.675. RECOMMENDATION BY THE HEARING OFFICER. (a) If the commissioner of administration or the commissioner of

transportation and public facilities is not acting as hearing officer, the hearing officer shall recommend a decision to the commissioner based on the evidence presented. The recommendation shall include findings of fact and conclusions of law.

(b) The commissioner of administration or the commissioner of transportation and public facilities may affirm, modify, or reject the hearing officer's recommendation in whole or in part, may remand the matter to the hearing officer with instructions, or take other appropriate action.

Sec. 36.30.680. FINAL DECISION BY THE COMMISSIONER. A decision by the commissioner of administration or the commissioner of transportation and public facilities after a hearing under this chapter is final. A decision shall be sent within 20 days after the hearing to all parties by personal service or certified mail, except that a decision by the commissioner of transportation and public facilities involving procurement of construction shall be sent within 90 days after the hearing to all parties by personal service or certified mail.

Sec. 36.30.685. JUDICIAL APPEAL. (a) A final decision of the commissioner of administration or the commissioner of transportation and public facilities under AS 36.30.610, 36.30.635(a), 36.30.650, or 36.30.680 may be appealed to the superior court in accordance with the Alaska Rules of Appellate Procedure.

(b) A final decision of the commissioner of administration or the commissioner of transportation and public facilities under AS 36.30.630(b) may be appealed to the superior court for a trial de novo.

Sec. 36.30.690. EXCLUSIVE REMEDY. Notwithstanding AS 44.77 or other law to the contrary, AS 36.30.560 - 36.30.699 and regulations

adopted under those sections provide the exclusive procedure for asserting a claim against an agency arising in relation to a procurement under this chapter.

Sec. 36.30.695. OTHER RULES OF PROCEDURE. The commissioner may adopt by regulation additional rules of procedure providing for the expeditious administrative review of all contract claims or controversies, both before the contracting agency and through an appeal heard de novo.

Sec. 36.30.699. DEFINITION. In AS 36.30.560 - 36.30.695, "interested party" means an actual or prospective bidder or offeror whose economic interest may be affected substantially and directly by the issuance of a contract solicitation, the award of a contract, or the failure to award a contract; whether an actual or prospective bidder or offeror has an economic interest depends on the circumstances.

ARTICLE 8. INTERGOVERNMENTAL RELATIONS.

Sec. 36.30.700. COOPERATIVE PURCHASING AUTHORIZED. A public procurement unit may either participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of supplies, services, professional services, or construction with one or more public procurement units or external procurement activities in accordance with an agreement entered into between the part cipants. Cooperative purchasing may include joint or multi-party contracts between public procurement units and open-ended state public procurement unit contracts that are made available to local public procurement units.

Sec. 36.30.710. SALE, ACQUISITION, OR USE OF SUPPLIES BY A PUBLIC PROCUREMENT UNIT. (a) A public procurement unit may sell to, acquire from, or use any supplies belonging to another public

procurement unit or external procurement activity independent of the requirements of AS 36.30.070 and 36.30.100 - 36.30.280.

(b) A public procurement unit may enter into an agreement, independent of the requirements of AS 36.30.060 and 36.30.100 - 36.30.280, with another public procurement unit or external procurement activity for the cooperative use of supplies or services under the terms agreed upon between the parties.

Sec. 36.30.720. JOINT USE OF FACILITIES. A public procurement unit may enter into agreements for the common use or lease of warehousing facilities, capital equipment, and other facilities with another public procurement unit or an external procurement activity under the terms agreed upon between the parties.

Sec. 36.30.730. SUPPLY OF PERSONNEL, INFORMATION, AND TECHNICAL SERVICES. (a) A public procurement unit may, upon written request from another public procurement unit or external procurement activity, provide personnel to the requesting public procurement unit or external procurement activity. The public procurement unit or external procurement activity making the request shall pay the public procurement unit providing the personnel the direct and indirect cost of furnishing the personnel, in accordance with an agreement between the parties.

(b) The informational, technical, and other services of a public procurement unit may be made available to another public procurement unit or external procurement activity except that the requirements of the public procurement unit tendering the services has precedence over the requesting public procurement unit or external procurement activity. The requesting public procurement unit or external procurement activity shall pay for the expenses of the services so provided, in accordance with an agreement between the parties.

(c) Upon request, the commissioner may make available to public procurement units or external procurement activities the following services, among others:

(1) standard forms;

(2) printed manuals;

(3) product specifications and standards;

(4) quality assurance testing services and methods;

(5) qualified products lists;

(6) source information;

(7) common use commodities listings;

(8) supplier performance ratings;

(9) lists of persons debarred or suspended from consideration for award of state contracts;

(10) forms for invitations for bids, requests for proposals, instructions to bidders, general contract provisions, and other contract forms; and

(11) contracts or published summaries of them, including price and time of delivery information.

(d) The commissioner may provide the following technical services, among others:

(1) development of product specifications;

(2) development of quality assurance test methods, including receiving, inspection, and acceptance procedures;

(3) use of product testing and inspection facilities; and

(4) use of personnel training programs.

(e) The commissioner may enter into contractual arrangements and publish a schedule of fees for the services provided under (c) and (d) of this section.

Sec. 36.30.735. RESTRICTION ON CONTRACTING WITH OR EMPLOYING

EXPERTS ON RADIATION HAZARDS. (a) Except for the Department of Health and Social Services, the Department of Labor, the Department of Environmental Conservation, and the Department of Military and Veterans' Affairs, a state agency may not

(1) contract, other than with the Department of Health and Social Services, to have services performed that require expertise in determining or reducing the hazards of radiation; or

(2) employ a person whose duties require expertise in determining or reducing the hazards of radiation.

(b) In this section, "state agency" means a state department or agency, whether in the legislative, judicial, or executive branch, including such entities as the Alaska State Housing Authority, but not including the University of Alaska, a municipality, or an agency of a municipality.

(c) In this section, "radiation" does not include radiation emitted from a Federal Communications Commission licensed facility emitting radiation of a wave length longer than one centimeter and an average power output not exceeding two kilowatts.

Sec. 36.30.740. REVIEW OF PROCUREMENT REQUIREMENTS. To the extent possible, the commissioner may collect information concerning the type, cost, quality, and quantity of commonly used supplies, equipment for the state fleet, services, or construction being procured or used by state public procurement units. The commissioner may also collect this information from local public procurement units. The commissioner may make this information available to a public procurement unit upon request.

Sec. 36.30.750. CONTRACT CONTROVERSIES. (a) Under a cooperative purchasing agreement, controversies arising between an administering public procurement unit and its bidders, offerors, or

contractors shall be resolved in accordance with AS 36.30.560 - 36.30.699.

(b) A local public procurement unit that is not subject to AS 36.30.560 - 36.30.699 may enter into an agreement with another local public procurement unit or external procurement activity to establish procedures or use that unit's or activity's existing procedures to resolve controversies with contractors, whether or not the controversy arose under a cooperative purchasing agreement.

Sec. 36.30.790. DEFINITIONS. In AS 36.30.700 - 36.30.790

(1) "cooperative purchasing" means procurement conducted by, or on behalf of, more than one public procurement unit, or by a public procurement unit with an external procurement activity;

(2) "external procurement activity" means a buying organization not located in this state that. if located in this state, would qualify as a public procurement unit; an agency of the United States is an external procurement activity;

(3) "local public procurement unit" means a municipality or other subdivision of the state or other entity that expends public funds for the procurement of supplies, services, professional services, and construction, and any nonprofit corporation operating a charitable hospital;

(4) "public procurement unit" means either a local public procurement unit or a state public procurement unit;

(5) "state public procurement unit" means the Department of Administration and any other contracting agency of the state.

ARTICLE 9. GENERAL PROVISIONS.

Sec. 36.30.850. APPLICATION OF THIS CHAPTER. (a) This chapter applies only to contracts solicited or entered into after January 1, 1987, unless the parties agree to its application to a contract

solicited or entered into before that date.

(b) This chapter applies to the disposal of state supplies and every expenditure of state funds irrespective of their sources, including federal assistance except as otherwise specified in AS 36.30.890, by the state, acting through an agency, under a contract, except that this chapter does not apply to

(1) grants;

(2) contracts for professional witnesses to provide for professional services or testimony relating to existing or probable lawsuits in which the state is or may become a party;

(3) contracts of the University of Alaska where the work is to be performed substantially by students enrolled in the university;

(4) contracts for medical doctors and dentists;

(5) contracts for the purchase of residential child care services under AS 47.40;

(6) disposals of land or interests in land;

(7) disposals under AS 38.05;

(8) contracts for the preparation of ballots under AS 15.15.030;

(9) acquisitions or disposals of property and other contracts relating to airports under AS 02.15.070, 02.15.090, and 02.15.091;

(10) acquisitions of real property or disposals of obsolete property under AS 19.05.060, 19.05.100, 19.05.110, or 19.05.120;

(11) disposals of obsolete material or equipment under AS 35.20.060; or

(12) leases of ferry terminal facilities under AS 19.60.010.

(c) Except for AS 36.30.700 - 36.30.790, this chapter does not apply to contracts between two or more agencies, the state and its

political subdivisions, or the state and other governments.

(d) Nothing in this chapter or in regulations adopted under this chapter prevents an agency or political subdivision from complying with the terms and conditions of a grant, gift, bequest, or cooperative agreement.

Sec. 36.30.860. SUPPLEMENTARY GENERAL PRINCIPLES OF LAW APPLICABLE. Unless displaced by the particular provisions of this chapter, the principles of law and equity, including the Uniform Commercial Code (AS 45.01 - AS 45.09), the law merchant, and law relative to capacity to contract, agency, fraud, misrepresentation, duress, coercion, mistake, or bankruptcy shall supplement the provisions of this chapter.

Sec. 36.30.870. ADOPTION OF REGULATIONS. (a) Regulations under this chapter shall be adopted in accordance the Administrative Procedure Act (AS 44.62).

(b) Regulations under this chapter applicable to procurements of construction or procurements for or disposal of property of the state equipment fleet shall be adopted by the commissioner of administration only after consultation with the commissioner of transportation and public facilities.

Sec. 36.30.880. REQUIREMENT OF GOOD FAITH. All parties involved in the negotiation, performance, or administration of state contracts shall act in good faith.

Sec. 36.30.890. FEDERAL ASSISTANCE. If a procurement involves the expenditure of federal funds or federal assistance and there is a conflict between a provision of this chapter or a regulation adopted under a provision of this chapter and a federal statute or regulation the federal statute or regulation shall prevail.

Sec. 36.30.900. PREFERENCE FOR ALASKA PRODUCTS. This chapter

does not modify, amend, or alter AS 36.15.010 and 36.15.020 regarding preference for Alaska forest products, or AS 36.20.010 regarding preference to producers or dealers in Alaska except as provided in AS 36.30.170(b).

Sec. 36.30.910. PURCHASES THROUGH GENERAL SERVICES ADMINISTRATION. This chapter does not prevent purchasing through the general services administration as provided by law.

Sec. 36.30.920. REPORTING OF ANTICOMPETITIVE PRACTICES. When for any reason collusion or other anticompetitive practices are suspected among bidders or offerors, a notice of the relevant facts shall be transmitted to the attorney general by the person who suspects the collusion or other anticompetitive practices.

Sec. 36.30.930. CIVIL AND CRIMINAL PENALTIES. The following penalties apply to violations of this chapter:

(1) a person who contracts for or purchases supplies, equipment for the state fleet, services, professional services, or construction in a manner contrary to the requirements of this chapter or the regulations adopted under this chapter is personally liable for the recovery of all state money paid plus 20 percent of that amount, legal interest from the date of payment, and all costs and damages arising out of the violation;

(2) a person who intentionally or knowingly contracts for or purchases supplies, equipment for the state fleet, services, professional services, or construction under a scheme or artifice to avoid the requirements of this chapter is guilty of a class C felony.

Sec. 36.30.940. ENFORCEMENT. The attorney general on behalf of the state shall enforce the provisions of this chapter.

Sec. 36.30.990. DEFINITIONS. In this chapter, unless the context in which a term is used clearly requires a different meaning or a

different definition is prescribed for a particular provision,

(1) "agency" means a department, institution, board, commission, division, authority, public corporation, the Alaska Pioneers' Home, or other administrative unit of the executive branch of state government, including the University of Alaska; it does not include the Alaska Railroad Corporation;

(2) "change order" means a written order signed by the procurement officer, directing the contractor to make changes that the changes clause of the contract authorizes the procurement officer to order without the consent of the contractor;

(3) "commissioner" means the commissioner of the Department of Administration;

(4) "competitive sealed bidding" means the procedure under AS 36.30.100 - 36.30.190;

(5) "competitive sealed proposals" means the procedure under AS 36.30.200 - 36.30.270;

(6) "construction" means the process of building, altering, repairing, maintaining, improving, or demolishing a public highway, structure, building, or other public improvement of any kind to real property; it includes planning and design required for the construction; it does not include the routine operation of a public improvement to real property;

(7) "contract" means all types of state agreements, regardless of what they may be called, for the procurement or disposal of supplies, equipment for the state fleet, services, professional services, or construction;

(8) "contract modification" means a written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of a contract accomplished

by mutual action of the parties to the contract;

(9) "department" means the Department of Administration;

(10) "grant" means the furnishing by the state of assistance, whether financial or otherwise, to a person to support a program authorized by law; it does not include an award whose primary purpose is to procure an end product (for a state agency), whether in the form of supplies, services, professional services, or construction; a contract resulting from such an award is not a grant but a procurement contract;

(11) "person" means a business, individual, union, committee, club, other organization, or group of individuals;

(12) "procurement" means buying, purchasing, renting, leasing, or otherwise acquiring supplies, equipment for the state fleet, services, or construction; it also includes functions that pertain to the obtaining of a supply, equipment for the state fleet, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration;

(13) "procurement officer" means a person authorized to enter into and administer contracts for an agency and make written determinations with respect to them; it also includes an authorized representative of a procurement officer acting within the limits of authority;

(14) "professional services" means professional, technical, or consultant's services that are predominantly intellectual in character, result in the production of a report or the completion of a task, and include analysis, evaluation, prediction, planning, or recommendation; "professional services" does not include services performed under an employment contract for services to be performed under direct supervision, regardless of whether there is an employer-

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employee relationship, if the person responsible for awarding the contract files with the commissioner of administration a written justification for the contract;

(15) "services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports that are merely incidental to the required performance; it does not include employment agreements or collective bargaining agreements;

(16) "supplies" means all property procured for the use of an agency, including equipment, materials, and insurance; it includes leases of privately owned real property for the use of agencies, such as office space, but does not include the procurement or disposition of other interests in land; and

(17) "using agency" means an agency that uses supplies, equipment from the state fleet, services, professional services, or construction procured under this chapter.

Sec. 36.30.995. SHORT TITLE. This chapter may be cited as the State Procurement Code.

* Sec. 3. AS 03.22.030 is amended to read:

Sec. 03.22.030. CENTER SITE, BUILDINGS AND EQUIPMENT. The department shall obtain a site, either by donation, lease, or purchase, and erect suitable buildings on the site, if they are needed for the use of the plant materials center. The department shall also acquire the agricultural land, scientific instruments and equipment necessary to carry on the work of the center. Acquisition of scientific instruments and equipment under this section is governed by AS 36.30 (State Procurement Code).

* Sec. 4. AS 05.20.040 is amended to read:

Sec. 05.20.040. PERSONNEL TO INSPECT DEVICES. The department

shall designate a person qualified in experience and training as the inspector of devices. The department may employ additional employees as are necessary to administer this chapter. The inspector and the employees may be hired on a temporary basis or borrowed from other state departments or political subdivisions of the state, or the department may contract with individuals or firms for the inspecting service on an independent basis. The department shall prescribe the salary or other remuneration for this service. Contracting under this section is governed by AS 36.30 (State Procurement Code).

* Sec. 5. AS 09.50.250 is amended to read:

Sec. 09.50.250. ACTIONABLE CLAIMS AGAINST THE STATE. A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in the superior court. A person who may present the claim under AS 44.77 may not bring an action under this section except as set out in AS 44.77.-040(c). A person who may bring an action under AS 36.30.560 - 36.30.-695 may not bring an action under this section except as set out in AS 36 However, no action may be brought under this section if the claim

(1) is an action for tort, and is based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused;

(2) is for damages caused by the imposition or establishment of a quarantine by the state;

(3) arises out of assault, battery, false imprisonment,

false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

* Sec. 6. AS 14.08.101 is amended to read:

Sec. 14.08.101. POWERS. A regional school board may

(1) sue and be sued;

(2) contract with the department, the Bureau of Indian Affairs, or any other school district, agency, or regional board for the provision of services, facilities, supplies or utilities;

(3) determine its own fiscal procedures including but not limited to policies and procedures for the purchase of supplies and equipment; the regional school boards are exempt from the Fiscal Procedures Act (AS 37.05) and the State Procurement Code (AS 36.30);

(4) appoint, compensate and otherwise control all school employees in accordance with this title; these employees are not subject to the State Personnel Act (AS 39.25);

(5) adopt regulations governing organization, policies and procedures for the operation of the schools;

(6) establish, maintain, operate, discontinue and combine schools subject to the approval of the commissioner;

(7) recommend to the department projects for construction, rehabilitation, and improvement of schools and education-related facilities as specified in AS 14.11.010(a), and plan, design, and construct the project when the responsibility for it is assumed under AS 14.11.020;

(8) exercise those other functions that may be necessary for the proper performance of its responsibilities;

(9) by resolution adopted by a majority of all the members of the board and provided to the commissioner of the department, assume ownership of all land and buildings used in relation to the

schools in the regional educational attendance area;

(10) provide housing for rental to teachers, by leasing existing housing from a local agency or individual, or by entering into contractual arrangements with a local agency or individual to lease housing that will be constructed by the local agency or individual for that purpose.

* Sec. 7. AS 16.05.050 is amended to read:

Sec. 16.05.050. POWERS AND DUTIES OF COMMISSIONER. The commissioner has, but not by way of limitation, the following powers and duties:

(1) assist the United States Fish and Wildlife Service in the enforcement of federal laws and regulations pertaining to fish and game;

(2) through the appropriate state agency and under the provisions of AS 36.30 (State Procurement Code). acquire by gift, purchase, or lease, or other lawful means, land, buildings, water, rights-of-way, or other necessary or proper real or personal property when the acquisition is in the interest of furthering an objective or purpose of the department and the state;

(3) under the provisions of AS 36.30, design and construct hatcheries, pipelines, rearing ponds, fishways, and other projects beneficial for the fish and game resources of the state;

(4) accept money from any person under conditions requiring the use of the money for specific purposes in the furtherance of the protection, rehabilitation, propagation, preservation, or investigation of the fish and game resources of the state or in settlement of claims for damages to fish or game resources;

(5) collect, classify, and disseminate statistics, data and information that, in the commissioner's discretion, will tend to

promote the purposes of this title except AS 16.51 and AS 16.52;

(6) capture, propagate, transport, buy, sell, or exchange fish or game or eggs for propagating, scientific or stocking purposes;

(7) under the provisions of AS 36.30, provide public facilities where necessary or proper to facilitate the taking of fish or game, and enter into cooperative agreements with any person to effect them;

(8) exercise administrative, budgeting, and fiscal powers;

(9) under the provisions of AS 36.30, construct, operate, supervise, and maintain vessels used by the Department of Fish and Game;

(10) authorize the holder of an interim-use permit under AS 16.43 to engage on an experimental basis in commercial taking of a fishery resource with vessel, gear, and techniques not presently qualifying for licensing under this chapter in conformity with standards established by the Alaska Commercial Fisheries Entry Commission;

(11) not later than January 31 of each year, provide to the commissioner of revenue the names of those fish and shellfish species which the commissioner of fish and game designates as developing commercial fish species for that calendar year; a fish or shellfish species is a developing commercial fish species if, within a specified geographical region,

(A) the optimum yield from the harvest of the species has not been reached;

(B) a substantial portion of the allowable harvest of the species has been allocated to fishing vessels of a foreign nation; or

(C) a commercial harvest of the fish species has recently developed;

(12) initiate or conduct research necessary or advisable to carry out the purposes of this title except AS 16.51 and AS 16.52;

(13) enter into cooperative agreements with agencies of the federal government, educational institutions, or other agencies or organizations, when in the public interest, to carry out the purposes of this title except AS 16.51 and AS 16.52.

* Sec. 8. AS 16.05.826(c) is amended to read:

(c) The department may contract to others the performance of the department's responsibilities under this section. Contracting under this subsection is governed by AS 36.30 (State Procurement Code), except that a [A] contract may include provisions for advance payment or reimbursement for services performed under the contract. All costs incurred under this section may be paid from the fish and game fund.

* Sec. 9. AS 18.15.120 is amended to read:

Sec. 18.15.120. TUBERCULOSIS CONTROL PROGRAM AUTHORIZED. The department may establish a comprehensive program for the control of tuberculosis in the state, and may

(1) arrange means by which persons in the state may be X-rayed to determine the presence of tuberculosis;

(2) establish necessary out-patient clinics for the care of tuberculosis;

(3) encourage and promote the establishment of adequate sanatorium facilities within the state to care for persons suffering from tuberculosis and allied conditions;

(4) under the provisions of AS 36.30 (State Procurement Code), obtain, by purchase or donation from surplus federal property or otherwise, medical supplies and equipment useful in carrying out this program and to allot or resell these supplies and equipment to private institutions engaged by the department to carry out this

program;

(5) under the provisions of AS 36.30, contract with hospitals, associations, or sanatoria qualified and equipped to give adequate care inside or outside the state;

(6) employ necessary and trained personnel to carry out the purposes of AS 18.15.120 - 18.15.140;

(7) pay the costs of care and incidental expenses for residents of the state, in whole or in part, depending on the ability of each patient to pay, and the temporary costs of care and transportation for nonresidents on the same basis until they can be transferred to their residence;

(8) enlist the cooperation of state and federal agencies operating in the state for the furtherance of this program;

(9) establish standards in accordance with department procedure for the care of tuberculars receiving treatment under AS 18.15.120 - 18.15.140.

* Sec. 10. AS 18.55.100 is amended by adding a new subsection to read:

(d) The authority's power to contract, lease, rent, construct, acquire, procure, and provide for services under this section is governed by AS 36.30.

* Sec. 11. AS 19.05.020 is amended to read:

Sec. 19.05.020. REGULATIONS. The department shall adopt regulations necessary to carry out the purpose of AS 19.05 - AS 19.25. The regulations may not conflict with AS 36.30 (State Procurement Code) or regulations adopted by the Department of Administration to implement that chapter.

* Sec. 12. AS 19.05.080 is amended to read:

Sec. 19.05.080. ACQUISITION OF LAND, RIGHTS-OF-WAY, AND MATERIALS BY PURCHASE OR EMINENT DOMAIN. The department on behalf of the

state and as part of the cost of constructing or maintaining a highway may purchase in the open market, acquire, take over, or condemn under the right and power of eminent domain land in fee simple or easements which it considers necessary for present public use, either temporary or permanent, or which it considers necessary and reasonable for the public use. By the same means, the department may obtain material, including clay, gravel, sand, or rock, or the land necessary to obtain material, including access to it. The department may acquire the land or materials notwithstanding the fact that title to it is vested in the state or a department, agency, commission or institution of the state. Acquisition of materials by purchase in the open market under this section is governed by AS 36.30 (State Procurement Code).

* Sec. 13. AS 19.10.160 is amended to read:

Sec. 19.10.160. STANDARD PLANS AND SPECIFICATIONS. The department shall prepare and adopt uniform standard plans and specifications for the establishment, construction and maintenance of highways in the state. The department may amend the plans and specifications as it considers advisable. The standards shall conform as closely as practicable to those adopted by the American Association of State Highway and Transportation Officials.

* Sec. 14. AS 19.10.170(a) is amended to read:

(a) Except as provided in [AS 36.98 AND] AS 44.33.300, it is [SHALL BE] the general policy of the state [DEPARTMENT] to require the construction of all highways under bid contract in accordance with AS 36.30 (State Procurement Code). However, subject to the provisions of (b) of this section, when the estimated cost of a construction project is less than $100,000 or when it appears to be in the best interests of the state, the department may perform the work notwithstanding any other provisions of law.

* Sec. 15. AS 19.10.180 is repealed and reenacted to read:

Sec. 19.10.180. REQUEST FOR PUBLIC BIDS. Requests for public bids are governed by AS 36.30 (State Procurement Code). The request for public bids may require the contractor to furnish equipment, labor, materials, and supplies for the project, or it may state that the department will furnish the materials and supplies. If the department elects to provide materials and supplies for a project, it shall do so at the time it adopts the construction program. The department shall acquire these materials and supplies under AS 36.30 by requesting bids for them according to the class, type, and nature of the materials and supplies. The contract for materials and supplies may be awarded either upon the basis of delivery to the construction project directly or to a central storehouse or storehouses maintained by the department. Those materials and supplies so purchased by the department may be delivered to the project site without expense to the contractor, or it may sell them to the contractor at cost and make the materials and supplies a part of the construction cost.

* Sec. 16. AS 19.10.200 is repealed and reenacted to read:

Sec. 19.10.200. PROCEDURES FOR THE AWARD OF CONTRACTS. The award of a contract for highway construction work is governed by AS 36.30 (State Procurement Code), AS 19.05 - AS 19.25, and regulations adopted under those laws.

* Sec. 17. AS 19.30.070 is amended to read:

Sec. 19.30.070. CONTRACTS FOR CONSTRUCTION OF ROADS. The director of the division of lands may contract with private persons for the construction of roads to and on state lands programmed for surface disposal which are not more than six miles from existing roads or highways. Contracts under this section are governed by AS 36.30

(State Procurement Code).

* Sec. 18. AS 19.30.080 is amended to read:

Sec. 19.30.080. CONSTRUCTION STANDARDS AND MAINTENANCE. An access road constructed under AS 19.30.060 - 19.30.100 shall be of low standard, not necessarily suitable for all weather use. The state is not under obligation to maintain an access road constructed under AS 19.30.060 - 19.30.100. If an access road is constructed outside a municipality that has zoning ordinances, the right-of-way width for the road shall be determined by the division of lands and the Department of Transportation and Public Facilities. If an access road is constructed within the boundaries of a municipality that has zoning ordinances, the right-of-way width shall conform to the subdivision control ordinances of the municipality. Contracts for the work on an access road are governed by AS 36.30 (State Procurement Code) [SHALL BE AWARDED TO THE LOWEST RESPONSIBLE BIDDER QUALIFIED TO CONTRACT WITH THE STATE]

* Sec. 19. AS 19.60.010 is amended to read:

Sec. 19.60.010. ACQUISITION AND MAINTENANCE OF FERRY TERMINAL FACILITIES. The department shall construct, purchase or lease ferry terminal facilities at locations it selects for the loading and unloading of passengers and vehicles under their own power, on and off ferries. The department shall repair and maintain these facilities. Construction and purchasing under this section are governed by AS 36.30 (State Procurement Code).

* Sec. 20. AS 23.15.611(a) is amended to read:

(a) The department may [IS AUTHORIZED TO] participate in programs of manpower training if it finds they are necessary to meet the occupational needs of the state. This authorization includes authority to execute on behalf of the state agreements or contracts which may

be necessary or desirable to enable the state to participate in a program, to receive and expend all appropriate funds made available for programs by the state or from other sources, to supervise the expenditure of the funds and conduct of the programs by other public and private agencies of the state, and to make the reports and certificates which are called for, and in cooperative arrangements with the Department of Education. Contracts with private entities under this subsection are governed by AS 36.30 (State Procurement Code).

* Sec. 21. AS 23.20.075(a) is amended to read:

(a) The department may acquire in the name of the state by term purchase agreements based on competitive bids in accordance with AS 36.30 (State Procurement Code) land and buildings upon terms and conditions that [WHICH] are approved by the Bureau of Employment Security of the United States, or its successor, for the purpose of providing office space for the department at a place which the department finds necessary and suitable.

* Sec. 22. AS 23.35.110 is amended to read:

Sec. 23.35.110. CONTRACTS FOR CARE. In carrying out this chapter, the department may enter into contracts or other arrangements with hospitals and doctors in the state for furnishing care on an annual basis to persons entitled to benefits. Contracting under this section is governed by AS 36.30 (State Procurement Code).

* Sec. 23. AS 24.55.275 is amended to read:

Sec. 24.55.275. CONTRACT PROCEDURES. The ombudsman shall adopt by regulation procedures consistent with AS 36.30 [AS 24.23] to be followed by the office of the ombudsman in contracting for services. However, the procedure for requests for proposals does not apply to contracts for investigations under AS 24.55.100.

* Sec. 24. AS 24.60.040(a) is amended to read:

(a) A person to whom this chapter applies may not be a party to or have an interest in a state contract or lease unless the contract or lease is let under the competitive bid procedure in AS 36.30 (State Procurement Code) [AS 37.05.230] or the total annual amount of the state contract or lease is $1,000 or less, or is a standardized contract or lease which was developed under publicly established guidelines and is generally available to the public at large, members of a profession, occupation or group. A person has an interest in a state contract or lease under this section if the person receives direct or indirect financial benefits.

* Sec. 25. AS 26.05.230(a) is amended to read:

(a) Buildings and sites for armory purposes may be leased or constructed, based upon location and size of units to be organized, and shall be financed through state and federal appropriations or both. These facilities may be made available by local communities or by the cooperative arrangement between the state and the federal government and any local community. Leasing and construction under this subsection are governed by AS 36.30 (State Procurement Code).

* Sec. 26. AS 26.05.280 is amended to read:

Sec. 26.05.280. TRANSPORTATION, SUBSISTENCE, AND SUPPLIES. There shall be provided by the state, transportation and subsistence for all officers and enlisted persons who are ordered into active service by the state for encampment, field duty, or other duty. Necessary transportation, stores and subsistence for troops when ordered on duty shall be contracted by the proper officers and paid for as other military bills. Contracting under this section is governed by AS 36.30 (State Procurement Code).

* Sec. 27. AS 27.21.030 is amended to read:

Sec. 27.21.030. GENERAL POWERS. To accomplish the purposes of

this chapter, the commissioner may

(1) in accordance with the Administrative Procedure Act (AS 44.62) adopt, amend, and enforce regulations pertaining to surface coal mining and reclamation operations;

(2) issue permits;

(3) conduct hearings and conferences;

(4) issue orders requiring an operator to take the actions necessary to comply with this chapter and the regulations adopted under this chapter;

(5) issue orders modifying previous orders;

(6) after opportunity for a due process hearing, issue a final order revoking the permit of an operator who has failed to comply with an order of the commissioner to take action required by this chapter or regulations adopted under this chapter;

(7) order the immediate cessation of all or part of a surface coal mining and reclamation operation if the commissioner finds that the operation or part of the operation creates an imminent danger to the health or safety of the public or is causing or can reasonably be expected to cause significant imminent harm to land, air, or water resources, and, to the extent reasonably necessary to eliminate or alleviate those conditions, take other action or make changes in a permit, as provided in this chapter;

(8) hire and authorize the hiring of employees and private contractors, subject to the conflict of interest provisions of this chapter and subject to AS 36.30 (State Procurement Code), to assist in carrying out the requirements of this chapter;

(9) enter and inspect a surface coal mining operation that is subject to the provisions of this chapter to assure that the operation is in compliance with this chapter;

(10) conduct, encourage, request, and participate in studies, surveys, investigations, research, experiments, training, and demonstrations;

(11) prepare reports and require permittees to prepare reports;

(12) accept, receive, and administer grants, gifts, or other money made available for the purposes of this chapter regardless of the source of the grants, gifts, or money;

(13) take the steps necessary to allow the state to participate to the fullest extent practicable in the abandoned mine land program provided in Title IV of the Surface Mining Control and Reclamation Act of 1977, including engaged in any work and adopting, amending and enforcing regulations;

(14) take the actions necessary to establish and maintain exclusive jurisdiction over surface coal mining and reclamation operations in the state under the provisions of the Surface Mining Control and Reclamation Act of 1977, including making recommendations for legislation to clarify or amend this chapter to conform with the terms of the Surface Mining Control and Reclamation Act of 1977;

(15) contract with state agencies to obtain the professional and technical services necessary to carry out the provisions of this chapter;

(16) coordinate the review of applications and issuance of permits for surface coal mining and reclamation operations with other federal or state permit processes applicable to those operations;

(17) enter into cooperative agreements with the Secretary of the United States Department of the Interior for the regulation of surface coal mining operations on federal land in accordance with the Surface Mining Control and Reclamation Act of 1977; and

(18) perform other duties required by this chapter.

* Sec. 28. AS 33.30.050 is amended to read:

Sec. 33.30.050. COMMISSIONER TO PROVIDE MEDICAL SERVICES. The commissioner shall detail physicians, nurses, and psychiatrists, or their aides, and laboratory technicians, employed by the department to any prison facility where state prisoners are detained or confined, for the purpose of furnishing necessary medical services, including examinations for communicable and infectious diseases. However, if medical services cannot be furnished by physicians, nurses, psychiatrists, or their aides, and laboratory technicians, regularly employed by the department, the commissioner may contract with private practitioners located in the area of a prison facility to furnish these services. The cost of contracted services shall be paid out of appropriations made to the department. Contracting for services under this section is governed by AS 36.30 (State Procurement Code).

* Sec. 29. AS 33.30.062(a) is amended to read:

(a) The commissioner may enter into an agreement with a privately operated correctional facility, but only if the facility is located in the state and if the purpose of the agreement is to involve prisoners in a work or rehabilitation furlough program established under this chapter, to provide necessary facilities under AS 33.30.282 - 33.30.288, or to confine prisoners convicted of a misdemeanor. An [NOTWITHSTANDING AS 37.05.230(1)(B), AN] agreement awarded under this subsection is governed by AS 36.30 (State Procurement Code) [SHALL BE BASED ON COMPETITIVE BIDS].

* Sec. 30. AS 33.32.015(b) is amended to read:

(b) The commissioner of corrections may

(1) subject to AS 36.30 (State Procurement Code) [THE FISCAL PROCEDURES ACT (AS 37.05)], use, purchase, lease, equip, and

maintain buildings, machinery, and other equipment, and may purchase materials and enter into contracts, which may be necessary for the correctional industries program;

(2) provide for prisoners to be employed in rendering services and producing articles, materials, and supplies needed by a state agency, a political subdivision of the state, an agency of the federal government, other states or their political subdivisions, or for use by nonprofit organizations;

(3) if the Correctional Industries Commission established in AS 33.32.070 approves, employ prisoners to provide services or products as needed by private industry if the services or products have potential for contributing to the economy of the state and will have minimal negative impact on an existing private industry or labor force in the state.

* Sec. 31. AS 35.05.010 is amended to read:

Sec. 35.05.010. PLANNING AND CONSTRUCTION. The department is responsible for the planning and construction of public works except as provided for court facilities in AS 22.05.025. Contracts for planning and construction of public works are governed by AS 36.30 (State Procurement Code).

* Sec. 32. AS 35.05.020 is amended to read:

Sec. 35.05.020. RULES AND REGULATIONS. The department shall adopt [RULES AND] regulations that [WHICH] it considers necessary to carry out the purpose of this title. The regulations may not conflict with AS 36.30 (State Procurement Code) or the regulations adopted by the Department of Administration under that chapter.

* Sec. 33. AS 35 is amended by adding a new section to read:

Sec. 35.10.195. CONFORMANCE WITH AS 36.30. The contractual techniques for the procurement of labor, materials, and contractual

services under the policies developed under this chapter must conform to the requirements of AS 36.30 (State Procurement Code).

* Sec. 34. AS 35.15.010(a) is amended to read:

(a) Except as provided in [AS 36.98 AND] AS 44.33.300, it is [SHALL BE] the general policy of the state [DEPARTMENT] to require the construction of all public works under bid contract in accordance with AS 36.30 (State Procurement Code). However, when the estimated cost of a construction project is less than $100,000, or when it appears to be in the best interests of the state, the department may perform the work, notwithstanding any other provisions of law. A complete record shall be kept by the commissioner or the commissioner's designee of all transactions entered into under this section including names of employees involved in the transactions.

* Sec. 35. AS 35.15.020 is repealed and reenacted to read:

Sec. 35.15.020. REQUEST FOR PUBLIC BIDS. The solicitation of bids for construction of public works is governed by AS 36.30 (State Procurement Code). The request for bids may require the contractor to furnish equipment, labor, materials, and supplies for the project, or it may state that the department will furnish the materials and supplies. If the department elects to provide materials and supplies for a project, it shall make the election at the time it adopts the construction program. The department shall acquire these materials and supplies under AS 36.30 by requesting bids for them according to the class, type, and nature of the materials and supplies. The contract may be awarded either upon the basis of delivery to the construction project directly or to a central storehouse or storehouses maintained by the department. Those materials and supplies so purchased by the department may be delivered to the project site without expense to the contractor, or it may sell them to the contractor at cost and make the

materials and supplies a part of the construction cost.

* Sec. 36. AS 35.15.040 is repealed and reenacted to read:

Sec. 35.15.040. PROCEDURES FOR THE AWARD OF CONTRACTS. Award of a contract for the construction of a public work shall comply with this title, AS 36.30 (State Procurement Code), and the regulations adopted under those laws.

* Sec. 37. AS 35.20.010 is amended to read:

Sec. 35.20.010. ACQUISITION OF LAND, RIGHTS-OF-WAY, AND MATERIALS BY PURCHASE OR EMINENT DOMAIN. The department, on behalf of the state and as part of the cost of constructing or maintaining a public work, may purchase <u>in the open market</u>, acquire, take over, or condemn under the right and power of eminent domain land in fee simple or easements which it considers necessary for present public use, either temporary or permanent, or which it considers necessary and reasonable for the public use. By the same means, the department may obtain material including clay, gravel, sand, or rock, or the land necessary to obtain the material, and the necessary land or easements to provide access to it. The department may acquire the land or material notwithstanding the fact that the title to it is in the state or a department, agency, commission or institution of the state. <u>Acquisition of material in the open market under this section is governed by AS 36.30 (State Procurement Code).</u>

* Sec. 38. AS 37.05 is amended by adding a new section to read:

Sec. 37.05.232. PETTY CASH ACCOUNTS. The department shall determine the amount of the petty cash accounts needed by each state agency and inspect the petty cash accounts at least once each year to determine that the total plus amounts of receipts for unreplenished disbursements is equal to the fixed sum of cash set aside. Shortages in petty cash accounts are a personal liability of the responsible

head of the agency to whom the account is set aside. The department shall adopt necessary regulations governing use and replenishment of petty cash funds.

* Sec. 39. AS 41.21.020(a) is amended to read:

(a) The Department of Natural Resources shall

(1) develop a continuing plan for the conservation and maximum use in the public interest of the scenic, historic, archaeologic, scientific, biological, and recreational resources of the state;

(2) plan for and develop a system of state parks and recreational facilities, to be established as the legislature authorizes and directs;

(3) acquire by gift, purchase, or transfer from state or federal agencies, or from individuals, corporations, partnerships or associations, land necessary, suitable and proper for roadside, picnic, recreational or park purposes;

(4) control, develop and maintain state parks and recreational areas;

(5) provide for the acquisition, care, control, supervision, improvement, development, extension and maintenance of public recreational land, and make necessary arrangements, contracts or commitments for the improvement and development of land acquired under AS 41.21.010 - 41.21.040; <u>contracting for improvement and development under this paragraph is governed by AS 36.30 (State Procurement Code);</u>

(6) adopt, in accordance with this section and the Administrative Procedure Act (AS 44.62), regulations governing the use and designating incompatible uses within the boundaries of state park and recreational areas to protect the property and to preserve the peace;

(7) cooperate with the United States and its agencies and

local subdivisions of the state to secure the effective supervision, improvement, development, extension, and maintenance of state parks, state monuments, state historical areas, and state recreational areas, and secure agreements or contracts for the purpose of AS 41.21.010 - 41.21.040;

(8) encourage the organization of state public park and recreational activities in the local political subdivisions of the state;

(9) provide for consulting service designed to develop local park and recreation facilities and programs;

(10) provide clearing-house services for other state agencies concerned with park and recreation matters; and

(11) perform other duties as are prescribed by executive order or by law;

(12) maintain memorials to Alaska veterans located in state parks;

(13) adopt, in accordance with the Administrative Procedure Act (AS 44.62), regulations governing the use of the Chena River State Recreation Area and designating incompatible uses within the boundaries of the Chena River State Recreation Area in accordance with AS 41.21.490.

* Sec. 40. AS 42.40.920(b) is amended to read:

(b) Unless specifically provided otherwise in this chapter, the following laws do not apply to the operations of the corporation:

(1) AS 19;

(2) AS 30.15;

(3) AS 35;

(4) <u>AS 36.30, except as specifically provided in AS 36.30 (State Procurement Code);</u>

(5) AS 37.05;

(6) [(5)] AS 37.07;

(7) [(6)] AS 37.10.010 - 37.10.060;

(8) [(7)] AS 37.10.085;

(9) [(8)] AS 37.20;

(10) [(9)] AS 37.25;

(11) [(10)] AS 38;

(12) [(11)] AS 44.62.040 - 44.62.320.

* Sec. 41. AS 44.21.310(a) is amended to read:

(a) The telecommunications divisions, as directed by the deputy commissioner, shall

(1) advise the governor on matters of policy and comprehensive state planning for telecommunications services;

(2) make an annual report to the governor and to the legislature on the activities of the telecommunications divisions;

(3) coordinate, manage, and supervise state programs in telecommunications, including the management of those telecommunication services for the state obtained from common carriers and from the communications industry;

(4) when requested, provide technical and consulting assistance to the executive, judicial, and legislative branches of state government, to the University of Alaska, and to private noncommercial entities which request that assistance in facility procurement and leasing and in identifying long-range goals and objectives for the state and its political subdivisions in all aspects of telecommunications, including public, educational, and instructional telecommunications;

(5) prepare and maintain a state comprehensive telecommunications development plan to further state telecommunications devel-

opment and to meet state telecommunications needs and prepare and maintain a comprehensive inventory of all state communications facilities;

(6) whenever feasible, procure services from private enterprise or certified and franchised utilities and contract for the construction, management, operation and maintenance of telecommunications systems, and develop a procurement policy consistent with AS 36.30 (State Procurement Code) [UNDER AS 37.05.010 - 37.05.410]; the procurement policy must seek to achieve the maximum benefit to the public, and methods of procurement, including lease, purchase, rental, or combinations of lease, purchase, and rental, must be selected on the basis of factors such as the ratio of long-range costs versus benefits, life cycle costing, and the costs to the communications industry to the extent that these costs may affect local and long distance basic telephone rates; procurement, contracting, construction, and maintenance under this paragraph is governed by AS 36.30;

(7) provide information and assistance to state agencies to promot governmental coordination and unity in the preparation of agency plans and programs involving the use of telecommunications;

(8) apply for and accept federal and private money, property, or assistance, that may be appropriated, granted, or otherwise made available to the telecommunications divisions and use and disburse money and property for purposes consistent with AS 44.21.300 - 44.21.330 and AS 44.21.256 - 44.21.290, subject to reasonable limitations imposed by the grantor;

(9) participate with other governmental units in planning, and assist local governments and governmental conferences and councils in the state in planning and coordinating their activities relating to telecommunications;

(10) provide for the orderly transition to new telecommunications services and systems by state agencies;

(11) serve as a clearinghouse for information, data, and other materials which may be necessary or helpful to federal, state, or local governmental agencies in the development of telecommunication systems;

(12) coordinate their services and activities with those of other state departments and agencies to the fullest extent possible to avoid unnecessary duplication; and

(13) provide that all activities of the telecommunications divisions are responsive to state statutes and regulations, and to the regulations and rulings of the Federal Communications Commission.

* Sec. 42. AS 44.19.144(b) is amended to read:

(b) The director may

(1) with the written concurrence of the governor, enter into contr ts and subcontracts on behalf of the state to carry out the provisions of AS 44.19.141 - 44.19.152; contracting under this paragraph is governed by AS 36.30 (State Procurement Code);

(2) act for the state in the initiation, investigation, evaluation of or participation in any program relative to the stated purpose of AS 44.19.141 - 44.19.152 which may involve more than one government or governmental unit;

(3) on behalf of the state, accept and expend any gifts or grants made to the state with the approval of the governor where such gifts or grants were made for the purposes of furthering the objectives of the office.

* Sec. 43. AS 44.33.300 is amended to read:

Sec. 44.33.300. WAIVER OF CERTAIN PROVISIONS. When the governor has by proclamation declared an area impacted by an economic

disaster, the following provisions regarding public contracts may be waived to the extent specified in the proclamation:

(1) the requirement of a contractor's bond as prescribed in AS 36.25.010 may be waived if the contract amount does not exceed $100,000;

(2) the public bid requirements as contained in AS 19.10.-170, AS [19.10.190,] 19.30.191(b), AS 35.15.010 - 35.15.020, and AS 36.30 (State Procurement Code) [AND AS 35.15.010 - 35.15.030] may be waived if the contract is to be performed by a contractor whose principal office is in the designated area and the contract amount does not exceed $50,000;

(3) the general policy to require all construction to be under bid contract as contained in AS 19.10.170, AS 35.15.010, and AS 36.30 (State Procurement Code) may be waived if the contract is to be performed by the state, another governmental entity, or a nonprofit entity.

* Sec. 44. AS 44.47.250 is amended by adding a new subsection to read:

(c) Contracts with persons or nongovernmental entities under this section are governed by AS 36.30.

* Sec. 45. AS 44.47.490(a) is amended to read:

(a) The director may establish field offices under this chapter, may hire one or more lending officers, and, under AS 36.30 (State Procurement Code), may contract for the services of

(1) real property appraisers who are familiar with rural construction; and

(2) engineers who are familiar with engineering problems in arctic and subarctic regions.

* Sec. 46. AS 44.71.010 is amended to read:

Sec. 44.71.010. DISPOSITION OF OBSOLETE OR SURPLUS STATE PROP-

ERTY. The Department of Administration shall take possession of obsolete or surplus property of the state for which there is no immediate or prospective use, except abandoned or obsolete school buildings and other school property. It shall also take possession of property remaining in the control of a commission or board of the state government after the commission or board stops functioning. The Department of Administration shall sell, lease, license, or dispose of the property on the terms it considers for the best interests of the state in conformance with regulations adopted under AS 36.30 (State Procurement Code).

* Sec. 47. AS 44.77.010(a) is amended to read:

(a) Except as provided in (d) of this section, every [EVERY] claim for reimbursement for money expended, or for compensation for labor, materials, or supplies furnished, or services given to or for the state, whether based on a contract or on a ratification, shall be promptly presented to the appropriate administrative or executive officer for approval and payment.

* Sec. 48. AS 44.77.010 is amended by adding a new subsection to read:

(d) A claim that is governed by AS 36.30.560 - 36.30.699 is not governed by this chapter.

* Sec. 49. AS 44.85.120 is amended to read:

Sec. 44.85.120. CARE AND CUSTODY OF BONDS. The bond bank authority, in accordance with AS 36.30 (State Procurement Code), may enter into agreements or contracts with a bank, trust company, banking or financial institution inside or outside the state as may be necessary, desirable or convenient, in the opinion of the bond bank authority, for rendering services in connection with the care, custody or safekeeping of municipal bonds or other investments held or owned by the bond bank authority, for rendering services in connection with the

payment or collection of amounts payable as to principal or interest, and for rendering services in connection with the delivery to the bond bank authority of municipal bonds or other investments purchased by it or sold by it, and to pay the cost of those services. The bond bank authority may also, in connection with any of the services to be rendered by a bank, trust company or banking or financial institution as to the custody and safekeeping of its municipal bonds or investments, require security in the form of collateral bonds, surety agreements or security agreements in such form and amount as, in the opinion of the bond bank authority, is necessary or desirable.

* Sec. 50. AS 44.99.001 is amended to read:

Sec. 44.99.001. ADMINISTRATION OF HIGHWAY SAFETY PROGRAM. The governor may contract and do all other things necessary on behalf of this state under 23 U.S.C. 401-404 (Highway Safety Act of 1966), and may cooperate with interested persons and agencies to effectuate the purposes of that Act. Contracting under this section is governed by AS 36.30 (State Procurement Code). The governor may designate a person to serve as the governor's highway safety representative; however, the governor is the official in this state having the ultimate responsibility for dealing with the federal government with respect to programs and activities under the Federal Highway Safety Act of 1966. The governor shall coordinate the activities relating to highway safety of state departments, agencies and subdivisions and of the Governor's Commission on Transportation Safety established in AS 44.19.190.

* Sec. 51. AS 46.04.090(a) is amended to read:

(a) The department, when feasible, shall enter into contracts with persons or private organizations to provide the personnel, equipment, or other services or supplies which may be required to

carry out this chapter. Contracts under this section are governed by AS 36.30 (State Procurement Code). When private contracting is not feasible, the department may establish and maintain at ports, harbors, or other locations in the state, the cleanup personnel, equipment, and supplies which, in its judgment, are necessary to carry out this chapter.

* Sec. 52. AS 46.07.040(a) is amended to read:

(a) The commissioner shall provide for the construction of facilities under this chapter, and is authorized to provide for the construction by contract or through grants to public agencies or private nonprofit organizations, or otherwise. A [NO] contribution toward the cost of the construction of a facility may not be required from its users. Construction under this section by contract is governed by AS 36.30 (State Procurement Code).

* Sec. 53. AS 46.15.020(a) is amended to read:

(a) The commissioner shall exercise all those powers and do all those acts necessary to carry out the provisions and objectives of this chapter. The commissioner may

(1) subject to AS 36.30 (State Procurement Code), enter into contractual agreements necessary to carry out the provisions of this chapter including agreements with federal, state and local agencies;

(2) apply for, accept, administer and expend grants, gifts, and loans from the federal government and any other public or private sources for the purposes of this chapter, and adopt procedures and do acts not otherwise restricted by law which are necessary to qualify the state to receive grants, gifts and loans;

(3) establish a division of water in the Department of Natural Resources and assign to that division the responsibility for

carrying out the provisions of this chapter.

* Sec. 54. AS 47.05.015(c) is amended to read:

(c) A contract authorized under this section is exempt from the competitive bid requirements of AS 36.30 (State Procurement Code) [AS 37.05.230]. In awarding a contract under this section the department shall [PUBLISH A] request [FOR] proposals in accordance with regulations of the Department of Administration under AS 36.30 (State Procurement Code) [DEPARTMENT].

* Sec. 55. AS 47.30.350(a) is amended to read:

(a) The department shall

(1) develop and submit to the Surgeon General of the United States Public Health Service a comprehensive program for the constructing and equipping of hospitals and other facilities for the examination, observation, care, and treatment of the mentally ill;

(2) develop and submit to the Surgeon General plans and specifications for the constructing and equipping of the hospitals and other facilities;

(3) construct and equip the hospitals and other facilities in accordance with the program, plans, and specifications approved by the Surgeon General; construction and equipping under this paragraph is governed by AS 36.30 (State Procurement Code);

(4) cooperate, coordinate, and contract, wherever indicated and desirable, with other state boards, departments and agencies, and agencies of the United States in the construction program, and hire necessary personnel and enter into contracts with private individuals and companies, to the end that the hospitals and other facilities are constructed in the most economical and expeditious manner; ontracting and construction under this section are governed by AS 36.30 (State Procurement Code).

* Sec. 56. AS 47.30.660 is amended to read:

Sec. 47.30.660. POWERS AND DUTIES OF DEPARTMENT. The department is the mental health authority of the state and shall

(1) administer a comprehensive program for the prevention of mental illness and the care and treatment of the mentally ill, including inpatient and outpatient care and treatment and the procurement of services of specialists or other persons on a contractual or other basis;

(2) take the actions and undertake the obligations which are necessary to participate in federal grants-in-aid programs and accept federal or other financial aid from whatever sources for the study, examination, care, and treatment of the mentally ill;

(3) administer AS 47.30.660 - 47.30.915;

(4) designate, operate, and maintain treatment facilities equipped and qualified to provide inpatient and outpatient care and treatment for the mentally ill;

(5) provide for the placement of mentally ill patients in designated treatment facilities;

(6) enter into arrangements with governmental agencies for the care or treatment of the mentally ill in facilities of the governmental agencies in the state or in another state;

(7) enter into contracts with treatment facilities for the custody and care or treatment of the mentally ill; <u>contracts under this paragraph are governed by AS 36.30 (State Procurement Code);</u>

(8) enter into contracts which incorporate safeguards consistent with AS 47.30.660 - 47.30.915 and the preservation of the civil rights of the patients with another state for the custody and care or treatment of patients previously committed from this state under 48 U.S.C., sec. 46 et seq., and P.L. 830, 84th Congress, 2nd

Session, 70 Stat. 709;

(9) prescribe the form of applications, records, reports, requests for release, and consents to medical or psychological treatment required by AS 47.30.660 - 47.30.915;

(10) require reports from the head of a treatment facility concerning the care of patients;

(11) visit each treatment facility at least annually to review methods of care or treatment for patients;

(12) investigate complaints made by a patient or an interested party on behalf of a patient;

(13) delegate upon mutual agreement to another officer or agency of it, or a political subdivision of the state, or a treatment facility designated, any of the duties and powers imposed upon it by AS 47.30.660 - 47.30.915; and

(14) adopt regulations to implement the provisions of AS 47.30.660 - 47.30.915.

* Sec. 57. AS 47.35.010(a) is amended to read:

(a) The department may

(1) license and supervise boarding homes, foster homes, group homes, nurseries, institutions caring for children and foster homes, group homes and institutions caring for dependent adults;

(2) investigate and supervise licensees;

(3) enforce the standards established by it;

(4) contract with private or municipal agencies to investigate and make recommendations to the department for the licensing and supervision of boarding homes, foster homes, group homes, nurseries, institutions caring for children and foster homes, group homes and institutions caring for dependent adults under procedures and standards of operation established by the department; contracts with

private agencies under this paragraph are governed by AS 36.30 (State Procurement Code).

* Sec. 58. AS 47.37.030 is amended to read:

Sec. 47.37.030. POWERS OF OFFICE. The office may

(1) plan, establish, and maintain treatment programs as appropriate;

(2) make contracts and award grants necessary or incidental to the performance of its duties and the execution of its powers, including contracts with and grants to public and private agencies, organizations, and individuals, to pay them for services rendered or furnished to alcoholics or intoxicated persons; to the maximum extent possible, contracts and grants shall be for a period of two years; contracts under this paragraph are governed by AS 36.30 (State Procurement Code);

(3) solicit and accept for use a gift of money or property or a grant of money, services, or property from the federal government, the state, or a political subdivision of it or a private source, and do all things necessary to cooperate with the federal government or any of its agencies in making an application for a grant;

(4) administer or supervise the administration of the provisions relating to alcoholics and intoxicated persons of any state plan submitted for federal funding under federal health, welfare, or treatment legislation;

(5) coordinate its activities and cooperate with alcoholism programs in this and other states, and make contracts and other joint or cooperative arrangements with state, local, or private agencies for the treatment of alcoholics and intoxicated persons and for the common advancement of alcoholism programs in this and other states;

(6) keep records and engage in research and the gathering

of relevant statistics;

(7) do other acts necessary to implement the authority expressly granted to it;

(8) acquire, hold, or dispose of real property or any interest in it, and construct, lease, or otherwise provide treatment facilities for alcoholics and intoxicated persons; however, the office shall encourage local initiative, involvement and financial participation under grants-in-aid whenever possible in preference to the construction or operation of facilities directly by the office; contracting and construction under this paragraph are governed by AS 36.30.

* Sec. 59. AS 47.37.130(g) is amended to read:

(g) The office may contract for the use of any facility as an approved public treatment facility if the coordinator, subject to the regulations of the department, considers this an effective and economical course to follow. Contracting under this subsection is governed by AS 36.30 (State Procurement Code).

* Sec. 60. AS 47.90.010(a) is amended to read:

(a) The commissioner, in consultation with state and local government agencies, community groups, and groups concerned with displaced homemakers, may

(1) contract with eligible private profit and nonprofit corporations for multipurpose service centers for displaced homemakers; contracting under this paragraph is governed by AS 36.30 (State Procurement Code); and

(2) coordinate existing state programs for displaced homemakers.

* Sec. 61. AS 47.40.041(b) is amended to read:

(b) Notices published by the department concerning the opening of the application process for a grant award shall specify the geo-

graphical area in which services are needed, the type of services, the number of beds anticipated to be needed, the maximum number of days of care, and any other requirements established by the department. Grants authorized under this section are exempt from AS 36.30 (State Procurement Code) [THE COMPETITIVE BID REQUIREMENTS OF AS 37.05.230].

* Sec. 62. REPORT. By December 1, 1987, the commissioner of administration and the commissioner of transportation and public facilities shall report to the legislature concerning procurements by state agencies during the first six months of 1987. The report must include

(1) the records prepared under AS 36.30.510(4);

(2) recommendations for changes in AS 36.30 or other laws based on implementation of AS 36.30 in those six months; and

(3) a description of any matters that involved litigation concerning AS 36.30 during those six months.

* Sec. 63. REGULATIONS DEADLINE. The regulations required under AS 36.30 as added by sec. 2 of this Act, shall be adopted by January 1, 1987 and shall be effective on that date. Regulations adopted under laws repealed in sec. 64 of this Act become ineffective January 1, 1987.

* Sec. 64. REPEALER. The following laws are repealed: AS 14.40.340; AS 19.10.190, 19.10.210; AS 24.23; AS 35.15.030, 35.15.050; AS 36.98; AS 37.05.220, 37.05.230, 37.05.231, 37.05.240, 37.05.250, 37.05.260, 37.05.270, 37.05.280, 37.05.290, 37.05.400(2) and (3); AS 44.65; AS 44.77.010(c); and AS 47.90.010(c).

* Sec. 65. Section 63 of this Act takes effect immediately in accordance with AS 01.10.070(c).

* Sec. 66. Except as provided in sec. 65, this Act takes effect January 1, 1987.

PROPOSED PROCUREMENT LEGISLATION
SECTIONAL ANALYSIS
DRAFT #3

(Unless otherwise indicated, "commissioner" means commissioner of administration)

SECTION 1. The purposes of the act are outlined to include: simplification, clarification, modernization of the laws; consistency among the branches of government; increased public confidence; fair and equitable treatment of all vendors; increased economy in state procurement; broad-based competition; safeguards for the maintenance of a procurement system of quality and integrity; and elimination and prevention of discrimination in state contracting.

SECTION 2. A new chapter is added to AS 36 entitled "State Procurement Code."

Article 1. Organization of State Procurement.

Sec. 36.30.005. Centralization of procurement of supplies and services for state agencies is under the authority of the commissioner of administration and the chief procurement officer. Procurement of construction and procurements to or disposals from the state equipment fleet and the control over construction and the state equipment fleet is under the commissioner of transportation and public facilities.

Sec. 36.30.010. The chief procurement officer is selected by the commissioner; is responsible for procurement of supplies and services for agencies in the executive branch; is a partially exempt employee; must have a minimum of 5 years in public procurement; and may be removed by the commissioner only for cause. The term of office of the Chief Procurement Officer expires when the term of the governor expires. Duties of the Chief Procurement Officer are enumerated.

Sec. 36.30.015. The commissioner of transportation and public facilities may contract for construction, procurements for the state equipment fleet, and may delegate to another agency the authority to contract for construction, after written determination has been made that the agency is capable of implementing the delegated authority. The commissioner of administration may delegate to an agency the authority to contract for its own supplies and services after a written determination has been made that the agency is capable of implementing the delegated authority.

The Alaska Railroad Corporation must adopt procedures substantially equivalent to the procurement code and regulations adopted by the commissioner.

Sec. 36.30.020. The Legislature must adopt procedures substantially equivalent to the procurement code.

Sec. 36.30.030. The Court System must adopt procedures substantially equivalent to the procurement code.

Sec. 36.30.040. Procurement regulations must be adopted by the commissioner.

Sec. 36.30.050. A list of persons who desire to provide supplies, services or construction items to the state will be established and maintain by the commissioner. Evidence of a valid Alaska business license and a statement of the contractor's qualifications must be submitted to be included on the list. Construction contractors must also submit a valid certificate of registration. The list must be used by the state agencies, Legislative Council, the Court System, and the Alaska Railroad Corporation.

Sec. 36.30.060. Specification regulations must be adopted by the commissioner. Specifications must promote overall economy for the purposes intended and encourage competition in satisfying the state's needs, and may not be unduly restrictive.

Sec. 36.30.070. Supply management is under the authority of the commissioner and regulations must be adopted which govern management of supplies, surplus supplies and transfer of excess supplies.

Sec. 36.30.080. The department shall lease necessary space, and contract for the lease of space for the use of the state or an agency. A lease or contract for a lease may not be for a period of occupancy greater than 40 years. The department may enter into lease-financing agreements, which are subject to annual appropriation. If the department intends to enter into a lease or lease financing agreement with an annual rent anticipated to exceed $1,000,000, notice must be provided the legislature for approval.

Article 2. Competitive Sealed Bidding.

Sec. 36.30.100. Competitive sealed bidding is the preferred method of contracting. Competitive sealed bidding is not required for certain purchases, including professional services, which are itemized.

Sec. 36.30.110. When competitive sealed bidding is used, an invitation to bid is issued which must include the date

by which the bid must be received, purchase description, and all contractual terms and conditions. Subcontractors must be listed. Evidence of a valid Alaska business license for all bidders and subcontractors must be submitted when responding to the ITB. A bidder for construction contracts must also submit evidence of the bidder's registration under AS 08.18 and evidence of registration for each listed subcontractor.

Sec. 36.30.120. Bid security shall be required for all competitive sealed bidding for construction contracts which exceed an amount established by regulation. Bid security may be required for other types of supplies and services.

Sec. 36.30.130. Public notice of the ITB must be provided 21 days before the date for the opening of the bid, unless otherwise determined in writing by the chief procurement officer, or the commissioner of transportation and public facilities for construction or state equipment bids. Notice must be mailed to all active prospective contractors on the bid list, and other forms of notice are allowable when practicable.

Sec. 36.30.140. Bid opening must be public, in the presence of witnesses, and relevant information must be recorded, which is open to public inspection. The bids are not open for public inspection until after a contract is awarded.

Sec. 36.30.150. The procurement officer must evaluate bids based on the requirements set out in the ITB. The criteria used for the evaluation of an award must be objectively measurable. Criteria may not be used in bid evaluation if they are not set out in the ITB.

Sec. 36.30.160. Bids received after the bid due date indicated on the ITB may not be accepted unless the delay was due to an error of a state employee directly responsible for opening the bids.

Correction or withdrawal of inadvertently erroneous bids before or after bid opening, or cancellation of awards or contracts based on bid mistakes shall be permitted in accordance with regulations and supported by written justification.

Sec. 36.30.170. Awards to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set out in the ITB shall be promptly made. The Alaska bidder preference is retained.

Sec. 36.30.190. Multi-step sealed bidding is allowed when it is considered impractical to initially prepare a definitive purchase description to support an award based on price. Unpriced technical offers are submitted, followed by an ITB limited to the bidders whose offers are determined to be technically qualified under the criteria established.

Article 3. Competitive Sealed Proposals.

Sec. 36.30.200. Contracts may be awarded by competitive sealed proposals when the chief procurement officer, or the commissioner of transportation and public facilities for construction and state equipment fleet contracts, determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the state.

Sec. 36.30.210. Request for proposals must contain the same information required for ITBs. The same notice provisions for ITBs apply for RFPs.

Sec. 36.30.220. Standard overhead rate established by agencies and applicable to contracts for supplies and services, must be included in a RFP.

Sec. 36.30.230. Proposals are to be opened in a manner which avoids disclosure of contents to competing offerors during the process of negotiation. A register of proposals containing the name and address of each offeror shall be prepared and open for public inspection after the award.

Sec. 36.30.240. Discussions with responsible offerors may be conducted for the purpose of clarification to assure full understanding of and responsiveness to the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals. Revisions may be permitted after submissions and before the award for the purpose of obtaining best and final offers.

Sec. 36.30.250. A contract under competitive sealed proposals shall be awared to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the state taking into consideration price and the evaluation factors set out in the RFP.

Sec. 36.30.260. A contract awarded under competitive sealed proposals must contain: the amount of the contract; the date for supplies to be delivered or the term for services to be performed; a description of the

services or supplies contracted for; and a certification that sufficient funds are available for the amount of the contract.

Sec. 36.30.270. Contracts are subject to review by the Department of Law.

Article 4. Other Procurement Methods.

Sec. 36.30.300. Sole source procurements may only be awarded if it is determined in writing that there is only one source for the required supply, service or construction. A sole source procurement may not be approved if a reasonable alternative source exists.

Sec. 36.30.310. Emergency procurements may be authorized under emergency conditions when there exists a threat to public health, welfare, or safety, and procurement through competitive sealed bids or competitive sealed proposals is impracticable, or contrary to the public interest, or to protect public or private property. A written determination of the basis for the emergency and for the selection of the particular contractor must be provided.

Sec. 36.30.320. Small procurements which do not exceed an aggregate amount of $5,000 shall be made with competition that is practicable under the circumstances. A contract for professional services that does not exceed $25,000 may be made in accordance with regulations adopted by the commissioner.

Article 5. Contract Formation and Modification.

Sec. 36.30.350. Solicitations may be cancelled or any bids or proposals may be rejected, in whole or in part, or the date for opening bids or proposals may be delayed as may be specified in the solicitation, when it is in the best interest of the state.

Sec. 36.30.360. A written determination of responsibility of a bidder or offeror shall be made by the procurement officer.

Sec. 36.30.365. At least 10 days before the formal award of a contract the procurement officer shall provide to each bidder or offeror notice of intent to award a contract.

Sec. 36.30.370. Any type of contract that will promote the best interests of the state may be used, except that

the use of a cost-plus-a-percentage-of cost contract is prohibited.

Sec. 36.30.380. Except with respect to contracts awarded through competitive sealed bidding or firm fixed-price contracts, a contract type may not be used unless it has been approved in writing by the procurement officer.

Sec. 36.30.390. Unless otherwise provided by law, multi-term contracts are permitted, but subject to availability and appropriation of funds. Written determination must support multi-term contracts.

When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal periods, the contract shall be cancelled. The contractor may only be reimbursed for the reasonable value of any nonrecurring costs incurred, but not amortized in the price of the supplies or services delivered under the contract that are not otherwise recoverable.

Sec. 36.30.400. Cost or pricing data must be submitted and certified by contractors. This does not apply when: the contract price is based on adequate price competition; the contract price is based on established catalogue or market prices; the contract price is set by law or regulation; or it is determined in writing that the requirements of this section are waived and the reason for waiver are stated in writing.

Sec. 36.30.410. The state has the right to inspect the plant or place of business of a contractor or subcontractor that is related to the performance of a contract awarded or to be awarded by the state.

Sec. 36.30.420. The state may audit books and records of a person who has submitted cost or pricing data or receives a contract.

Sec. 36.30.430. The commissioner shall adopt regulations permitting the inclusion of clauses providing for adjustments in prices, time of performance, or other contract provisions, and appropriate remedies.

Sec. 36.30.460. Standard clauses in state contract may be modified if supported by a written determination that states the circumstances justifying the variation.

Sec. 36.30.470. If the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget or the total contract budget, the procurement officer may not execute the contract modification, change order, or

adjustment in contract price unless sufficient funds are available, or the scope of the project or contract is adjusted to permit the degree of completion that is feasible within the total project budget or total contract budget as it existed before the contract modification, change order, or adjustment in contract price.

Sec. 36.30.480. Cost principle regulations shall be adopted.

Article 6. Procurement Records and Reports.

Sec. 36.30.500. Procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the state archivist.

Sec. 36.30.510. A contract file open for public inspection must be kept by the commissioner and the contracting agency for each contract awarded under competitive sealed proposals.

Sec. 36.30.520. The commissioner shall maintain for at least 5 years a record listing all sole source and emergency procurement contracts. An agency which has delegated procurement authority shall by October 1, of each year, submit records of all sole source and emergency procurement contracts to the commissioner.

Sec. 35.30.530. Procurement information is public except as otherwise provided by law.

Sec. 36.30.540. The commissioner shall biennially report to the legislature concerning procurements by agencies.

Article 7. Legal and Contractual Remedies.

Sec. 36.30.560. An interested party may protest the award of a contract, the proposed award of a contract, or a solicitation for goods, services or construction. The protest shall be filed with the procurement officer of the contracting agency in writing and must contain specified items.

Sec. 36.30.565. Time deadlines for filing protests are specified.

Sec. 36.30.570. Notice of a protest shall immediately be given to the contractor if a contract has been awarded or, if no award has been made, to all interested parties.

Sec. 36.30.575. If a protest is filed before a contract is awarded, the award may be made unless the procurement

officer of the contracting agency determines in writing that: a reasonable probability exists that the protest will be sustained; or stay of the award is not contrary to the best interests of the state.

Sec. 36.30.580. A written decision by the procurement officer of the contracting agency shall be issued within 14 days after a protest has been filed, unless the time is extended up to 26 days for good cause. Notice shall be sent to the protester. If a decision is not made by the due date, the protester may proceed as if the procurement officer had issued a decision adverse to the protester.

Sec. 36.30.585. If the procurement officer sustains a protest the procurement officer shall implement an appropriate remedy.

Sec. 36.30.590. An appeal from a decision of a procurement officer on a protest must be filed with the commissioner within 5 days after the decision is received by the protester.

Sec. 36.30.595. The procurement officer shall immediately give notice of an appeal to the contractor if a contract has been awarded, or, if no award has been made, to all interested parties.

Sec. 36.30.600. If a protest appeal is filed before a contract is awarded and the award was stayed, the filing of the appeal automatically continues the stay until the commissioner of administration or transportation and public facilities makes a written determination that the award of the contract is necessary to protect substantial interests of the state.

Sec. 36.30.605. The procurement officer of the contracting agency shall file a complete report on the protest and decision with the commissioner of administration or transportation and public facilities within 7 days after a protest appeal is filed. The protester and all interested parties that have requested a copy of the appeal shall be furnished one. The protester may file comments on the protest report within 7 days after the report is received. Extensions may be granted.

Sec. 36.30.610. The commissioner of administration or transportation and public facilities shall dismiss a protest appeal before a hearing is held if it is determined in writing that the appeal is untimely. The appropriate commissioner may issue a decision on an appeal without a hearing if the appeal involves questions of law without genuine issues of fact.

Sec. 36.30.615. A hearing on a protest appeal shall be conducted according to AS 36.30.670 and regulations adopted.

Sec. 36.30.620. If a controversy, asserted by a contractor, concerning a contract awarded under this chapter cannot be resolved by agreement, the procurement officer shall, after receiving a written request by the contractor, issue a written decision no more than 90 days after receipt of all necessary information from the contractor, unless the due date is extended for good cause.

The decision shall be sent to the contractor. If a decision is not made by the due date, the contractor may proceed as if the procurement officer had issued a decision adverse to the contractor. If a controversy asserted by the state concerning a contract awarded cannot be resolved by agreement, the matter shall be immediately referred to the commissioner of administration or transportation and public facilities.

Sec. 36.30.625. An appeal from a decision of the procurement officer on a contract controversy may be filed by the contractor with the commissioner of administration or transportation and public facilities. The appeal shall be filed within 5 days after the decision is received by the contractor.

Sec. 36.30.630. A hearing on a contract controversy appealed to the commissioner or referred to the commissioner shall be conducted according to AS 36.30.670 and regulations adopted .

Sec. 36.30.632. The commissioners of administration and transportation and public facilities may delegate responsibilities under Sec. 36.30.590 and Sec. 36.30.630 to the head of the contracting agency.

Sec. 36.30.635. The commissioners of administration and transportation and public facilities may debar or suspend a person from consideration for award of contracts. Notice and opportunity for a hearing are specified.

Sec. 36.30.640. Causes for debarment or suspension are enumerated.

Sec. 36.30.645. The commissioners of administration and transportation and public facilities shall issue a written decision to debar or suspend.

Sec. 36.30.650. A person suspended is entitled to a hearing if the person files a written request for a

hearing within 7 days after receipt of the notice of suspension.

Sec. 36.30.655. The commissioner shall maintain a list of all persons debarred or suspended from consideration for award of contracts.

Sec. 36.30.660. The commissioner of administration or the commissioner of transportation and public facilities may, at any time after a final decision to debar a person, reinstate the person after determining that the cause for which the person was debarred no longer exists or has been substantially mitigated.

A debarred person may request reinstatement. A hearing may be held on a reinstatement petition. A decision on reinstatement shall be made in writing within 7 days after a reinstatement petition is submitted. A decision under this section is not subject to judicial appeal.

Sec. 36.30.665. The commissioner of administration or transportation and public facilities may permit a debarred person to participate in a contract on a limited basis during the debarment period.

Sec. 36.30.670. The commissioner of administration or transportation and public facilities shall act as a hearing officer or appoint a hearing officer for a hearing conducted under this chapter. The provisions of the Administrative Procedure Act do not apply to a hearing conducted under this chapter. The authority of a hearing officer is outlined.

Sec. 36.30.675. If the commissioner of administration or transportation and public facilities is not acting as hearing officer, the hearing officer shall recommend a decision to the appropriate commissioner based on the evidence presented. The recommendation shall include findings of fact and conclusions of law. The appropriate commissioner may affirm, modify or reject the hearing officer's recommendation or take any other appropriate action.

Sec. 36.30.680. A decision by the commissioner of administration is final, and shall be sent within 20 days after a hearing to all parties. A decision by the commissioner of transportation and public facilities involving procurement of construction shall be sent within 90 days after the hearing.

Sec. 36.30.685. A final decision of the commissioner of administration or transportation and public facilities may be appealed to the superior court in accordance with the Alaska Rules of Appellate Procedure.

Sec. 36.30.690. This chapter and the regulations adopted under it are the exclusive procedures for asserting a claim against the state or an agency arising in relation to a procurement conducted under this chapter.

Sec. 36.30.695. The commissioner of administration may adopt by regulation additional rules of procedure.

Sec. 36.30.699. The definition of interested party is given.

Article 8. Intergovernmental Relations.

Sec. 36.30.700. Cooperative purchasing is authorized between public procurement units or external procurement activities in accordance with an agreement entered into between the participants.

Sec. 36.30.710. Sale, acquisition, or use of supplies among public procurement units or with external procurement activity may be done independent of certain requirements of this chapter.

Sec. 36.30.720. Joint use of facilities is allowable.

Sec. 36.30.730. A public procurement unit may provide personnel, information and technical services to a requesting public procurement unit or external procurement activity.

Sec. 36.30.735. Current Alaska law on restrictions of contracting with or employing experts on radiation hazards is retained.

Sec. 36.30.740. The commissioner may collect information concerning supplies, services or construction being procured or used by state public procurement units.

Sec. 36.30.750. Under a cooperative purchasing agreement, controversies arising between an administering public procurement unit and its bidders, offerors, or contractors shall be resolved in accordance with this chapter.

Sec. 36.30.790. Definitions for this article are provided.

Article 9. General Provisions.

Sec. 36.30.850. This chapter applies to contracts solicited or entered into after January 1, 1987, unless the parties agree to its application to a contract

solicited or entered into before that date. This chapter applies to the disposal of state supplies and every expenditure of public funds irrespective of their sources, except as specified in AS 36.30.915.

This chapter does not apply to: grants; contracts for professional witnesses; contracts of the University of Alaska where the work is to be performed substantially by enrolled students; contracts for medical doctors and dentists; contracts for the purchase of residential child care services under AS 47.40; disposals of land or interest in land; disposals under AS 38.05; contracts for the preparation of ballots under AS 15.15.030; acquisitions or disposals of property and other contracts relating to airports; acquisitions of real property or disposals of obsolete property under AS 19.05.060, 19.05.100, 19.05.110 or 19.05.120; disposals of obsolete material or equipment under AS 35.20.060; or leases of ferry terminal facilities under AS 19.60.010.

Except for AS 36.30.700-36.30.895, this chapter does not apply to contracts between two or more agencies, the state and its political subdivisions, or the state and other governments.

Sec. 36.30.860. Unless displaced by the particular provision of this chapter, all other principles of law and equity shall supplement the provisions of this chapter.

Sec. 36.30.870. Regulations under this chapter shall be adopted in accordance with the Administrative Procedure Act. Regulations applicable to procurements of construction or procurements for or disposal of property of the state equipment fleet shall be adopted by the commissioner of administration only after consultation with the commissioner of transportation and public facilities.

Sec. 36.30.880. This chapter requires all parties involved in the negotiation, performance, or administration of state contracts to act in good faith.

Sec. 36.30.890. If a procurement involves the expenditure of federal funds or federal assistance and there is a conflict between a provision of this chapter or a regulation adopted under a provision, the federal statute or regulation shall prevail.

Sec. 36.30.900. This chapter does not modify, amend, or alter laws regarding preference for Alaska forest products or preference to producers or dealers in Alaska, except as provided in AS 36.30.170(c).

Sec. 36.30.910. This chapter does not prevent purchasing through the general services administration as proviced by law.

Sec. 36.30.920. Suspected anticompetitive practices are to be reported to the attorney general.

Sec. 36.30.930. In addition to penalties prescribed for unethical conduct, civil and criminal penalties are provided for violations of this chapter.

Sec. 36.30.940. The attorney general on behalf of the state shall enforce the provisions of this chapter.

Sec. 36.30.990. Definitions.

Sec. 36.30.995. This chapter may be cited as the State Procurement Code.

SECTION 3 through SECTION 61 amend other Alaska statutes to reflect the provisions of this chapter.

SECTION 62. The commissioner must report to the legislature by December 1, 1987, concerning procurements by state agencies during the first 6 months of 1987.

SECTION 63. The commissioner of administration shall adopt the regulations required under this chapter by January 1, 1987.

SECTION 64. This is the repealer section.

SECTION 65. Section 63 of this Act takes effect immediately.

SECTION 66. Except as provided in sec. 65, this Act takes effect January 1, 1987.

ANALYSIS OF SENATE PROCUREMENT BILL NO. 341
January 14, 1986

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

CONTACT PERSON: Dan Malick PHONE: 465-3911

This department is providing working draft comments to be used by executive branch and legislative staff. These comments are not to be construed as the department's position on the final bill.

SECTION: 36.30.015(a) PAGE NUMBER: 3 LINES: 22

REPLACEMENT LANGUAGE DESIRED: (stated below or attached)

After "may contract for" add "professional services,".

REASONING/JUSTIFICATION: (stated below or attached)

In the performance of its design and construction function DOT&PF elects to have a portion of this work performed by engineers from the private sector.

ANALYSIS OF SENATE PROCUREMENT BILL NO. 341
January 14, 1986

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

CONTACT PERSON: Dan Malick PHONE: 465-3911

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SECTION: 36.30.015 PAGE NUMBER: 3 LINES: 23

REPLACEMENT LANGUAGE DESIRED: (stated below or attached)

Line 23. Remove the words "procurements for the state equipment fleet" and replace with the words "for the procurement of the state equipment fleet including its maintenance and operation".

REASONING/JUSTIFICATION: (stated below or attached)

To clarify the intent of the bill, that is, to permit the DOT&PF not only to procure the cars, trucks, graders, etc., for the state equipment fleet, but grant them the authority to operate and maintain them with the purchase of fuel and parts, etc.

ANALYSIS OF SENATE PROCUREMENT BILL NO. 341
January 14, 1986

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

CONTACT PERSON: Dan Malick PHONE: 465-3911

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SECTION: 36.30.015 PAGE NUMBER: 3 LINES: 27

REPLACEMENT LANGUAGE DESIRED: (stated below or attached)

Line 27. Insert after "for construction" the words "and for the procurement of equipment to be added to the state equipment fleet".

REASONING/JUSTIFICATION: (stated below or attached)

To clarify the intent of the bill. Without the proposed amendment, the bill says that the Commissioner of DOT&PF may only delegate the authority to contract for construction and implies that none of the other authority vested in that position may be delegated.

ANALYSIS OF SENATE PROCUREMENT BILL NO. 341
January 14, 1986

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

CONTACT PERSON: Dan Malick PHONE: 465-3911

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SECTION: 36.30.040 PAGE NUMBER: 6 LINES: 22

REPLACEMENT LANGUAGE DESIRED: (stated below or attached)

After this chapter insert "The provisions of (a) (b) and (c) of this section do not apply to construction contracts for Transportation and Public Facilities."

REASONING/JUSTIFICATION: (stated below or attached)

The DOT&PF, in the past, has found this practice to be costly and ineffective in attracting bidders interested in our projects.

ANALYSIS OF SENATE PROCUREMENT BILL NO. 341
January 14, 1986

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

CONTACT PERSON: Dan Malick PHONE: 465-3911

This department is providing working draft comments to be used by executive branch and legislative staff. These comments are not to be construed as the department's position on the final bill.

SECTION: 36.30.110 PAGE NUMBER: 9 LINES: 15

REPLACEMENT LANGUAGE DESIRED: (stated below or attached)

Line 15: After "include" delete "a" and insert "the time, place, and".

REASONING/JUSTIFICATION: (stated below or attached)

To clarify the intent of the bill, that is, to give bidders clear instructions and equal opportunity to participate in all state procurement.

ANALYSIS OF SENATE PROCUREMENT BILL NO. 341
January 14, 1986

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

CONTACT PERSON: Dan Malick PHONE: 465-3911

This department is providing working draft comments to be used by executive branch and legislative staff. These comments are not to be construed as the department's position on the final bill.

SECTION: 36.30.110 PAGE NUMBER: 9 LINES: 18

REPLACEMENT LANGUAGE DESIRED: (stated below or attached)

Following (b) insert the words "Within 7 days following the bid opening the". Delete "The".

REASONING/JUSTIFICATION: (stated below or attached)

Listing of subcontractor's is an item of responsibility and not one of responsiveness. Listing of subcontractors should be done, within a reasonable length of time, after the bid opening. Only items essential to determine a contractor's responsiveness should be required at the bid opening. Items which address responsibility can be determined after the actual bid opening and before the actual award of a contract. This should make bid openings less complicated and encourage more bidders with less bid protests. Requiring bidders to list subcontractors, with in a reasonable time frame, should discourage bid shopping.

ANALYSIS OF SENATE PROCUREMENT BILL NO. 341
January 14, 1986

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

CONTACT PERSON: Dan Malick PHONE: 465-3911

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SECTION: 36.30.120 PAGE NUMBER: 10 LINES: 7

REPLACEMENT LANGUAGE DESIRED: (stated below or attached)

Line 7. Delete "or the equivalent in cash".

REASONING/JUSTIFICATION: (stated below or attached)

The actual form and type of bid security is better addressed in the regulations. The requirements for returning and safe keeping must also be included in the regulations.

ANALYSIS OF SENATE PROCUREMENT BILL NO. 341
January 14, 1986

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

CONTACT PERSON: Dan Malick PHONE: 465-3911

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SECTION: 36.30.120(b)(2) PAGE NUMBER: 10 LINES: 11

REPLACEMENT LANGUAGE DESIRED: (stated below or attached)

After "$100,000;" delete "or"

After "(2)" insert "and an additional"

After "amount of" delete "the" and insert "a"

After "bid" delete "if the bid exceeds $100,000." and insert "exceeding $100,000, up to a maximum bid security of $200,000."

REASONING/JUSTIFICATION: (stated below or attached)

The bid security for a project of $101,000 should be greater than one for $99,000. It is unreasonable not to set an upper limit on a bid security. This section may be an example where the actual amounts may be better addressed in regulations.

ANALYSIS OF SENATE PROCUREMENT BILL NO. 341
January 14, 1986

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

CONTACT PERSON: Dan Malick PHONE: 465-3911

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SECTION: 36.30.140(a) PAGE NUMBER: 11 LINES: 18

REPLACEMENT LANGUAGE DESIRED: (stated below or attached)

After "shall be" add the following "read aloud and"

REASONING/JUSTIFICATION: (stated below or attached)

Makes the statute conform with accepted practice.

ANALYSIS OF SENATE PROCUREMENT BILL NO. 341
January 14, 1986

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

CONTACT PERSON: Dan Malick PHONE: 465-3911

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SECTION: 36.30.160 PAGE NUMBER: 12 LINES: 9

REPLACEMENT LANGUAGE DESIRED: (stated below or attached)

Line 9. After the word "date" insert "and time".

REASONING/JUSTIFICATION: (stated below or attached)

To better define the circumstance under which a bid would not be accepted.

ANALYSIS OF SENATE PROCUREMENT BILL NO. 341
January 14, 1986

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

CONTACT PERSON: Dan Malick PHONE: 465-3911

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SECTION: 36.30.170 PAGE NUMBER: 13 LINES: 15, 16, and 17

REPLACEMENT LANGUAGE DESIRED: (stated below or attached)

Delete "(c) The provisions of (b) of this section do not apply to construction contracts for highways and public works if the construction exceeds $5,000.00.".

REASONING/JUSTIFICATION: (stated below or attached)

The deletion would conform to the Governor's comment to Alaska Hire. Note: section 36.30.890 states if there is a conflict between these provisions and federal statutes or regulations then the federal shall prevail. So the section could not apply to federally assisted projects.

ANALYSIS OF SENATE PROCUREMENT BILL NO. 341
January 14, 1986

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

CONTACT PERSON: Dan Malick PHONE: 465-3911

This department is providing working draft comments to be used by executive branch and legislative staff. These comments are not to be construed as the department's position on the final bill.

SECTION: 36.30.620(d) PAGE NUMBER: 32 LINES: 26

REPLACEMENT LANGUAGE DESIRED: (stated below or attached)

Delete "five" and insert "21".

REASONING/JUSTIFICATION: (stated below or attached)

The procurement officer is given 90 days to make his decision yet we wish to allow the contractor only 5 days to appeal it. The time is so short as to be unreasonable and unenforceable.

ANALYSIS OF SENATE PROCUREMENT BILL NO. 341
January 14, 1986

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

CONTACT PERSON: Dan Malick PHONE: 465-3911

This department is providing working draft comments to be used by executive branch and legislative staff. These comments are not to be construed as the department's position on the final bill.

SECTION: 36.30.625 PAGE NUMBER: 33 LINES: 12

REPLACEMENT LANGUAGE DESIRED: (stated below or attached)

Delete "five days" and insert "twenty-one days".

REASONING/JUSTIFICATION: (stated below or attached)

Dept. of Transportation & Public Facilities

Position Paper

BILL NO: Senate Bill 341

APPROVED: R. J. Knapp for Commissioner

TITLE: Procurement Practices

DATE: January 30, 1986

The Department of Transportation and Public Facilities has worked closely with the Legislative interim committees in the drafting of Senate Bill 341. Many of the department's concerns of both a technical and policy nature have been addressed in the initial drafting of the bill.

However, while the department supports the Legislature and the administration's effort to revise and update procurement codes, there are a few areas within Senate Bill 341 that the department feels needs further consideration:

1. SB 341 requires the maintenance and use of bidders lists for the request for proposal and bid notification process. This is time consuming, expensive and has proven from department experience to be of limited value. We feel this requirement for DOT&PF construction should be removed from the bill.

2. SB 341 requires the listing of all sub-contractors at time of bid opening. This further complicates the bid opening process and might jeopardize bidder responsiveness ~~the~~ WITH potentially large cost consequences to the state. The department feels that a subcontractor list would be appropriate to require seven days after the bid opening to limit the extent of bid shopping.

3. SB 341 lacks definitive statements on Alaska preference. An Alaska preference clause for all construction even those over $5,000 should be considered.

4. SB 341 has no provisions for expanding sole-source and small procurement eligibility. There are numerous purchasing needs of the department which fall outside of the strict definitions provided in the bill. Some sort of extension process is highly advisable.

5. SB 341 requires "teeth" for handling of false claims. False claims without penalty would jeopardize the efficiency and credibility of the claims process.

For further information call Susan Fleischhauer at 465-3900.

6. SB 341's small procurement procedures limit consultants to a total of $25,000 in small contracts within a twelve (12) month period. The department feels this is an unreasonable restriction and would seriously jeopardize the ability of many firms to continue providing critical services to the department.

7. There are numerous areas within the SB 341, particularly in Articles 5 and 6, where the statute is overly specific and those items might be best addressed in regulations.

The Department of Transportation and Public Facilities supports the current effort underway to update procurement procedure along the lines of the model procurement code with modifications to minimize the adverse impact on the state and private sector contracting community. The department is presently assisting in the development of Regulation to implement the bill.

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : Senate Bill No. 341
Title : Procurement Practices and Procedures

Sponsor : Rules Committee
Requestor : _____
Date of Request : _____

FISCAL DETAIL

Agency Affected : DOT&PF
BRU : _____

Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		50.0	55.0	60.0	65.0	70.0
TRAVEL		10.0				
CONTRACTUAL		100.0	55.0	60.0	65.0	70.0
SUPPLIES		40.0	20.0	25.0	27.0	30.0
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		200.0	130.0	145.0	157.0	170.0
CAPITAL		0	0	0	0	0
REVENUE		0	0	0	0	0

FUNDING : (Thousands of Dollars)

GENERAL FUND		200.0	130.0	145.0	157.0	170.0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME		1	1	1	1	1
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Based on the following figures: 1) delegations to other agencies - $30.0 for the start up year; 2) procedures updates - $30.0 for start up year; 3) development of standards and forms - $10.0 for start up year; 4) one officer plus expenses to administer hearings and claims - $100.0; 5) list maintenance and mailing - $10.0; and 6) subcontractor list checking and bid opening administration - $10.0; 7) travel

Prepared by: Daniel F. Malick, Director Phone : 465-3911
Division : Management and Finance Date : 1-30-86

Approved by Commissioner : R. J. Knapp by Wann S. Spurlock Date : 1-30-86
Agency : DOT&PF

Distribution (by Agency preparing fiscal note) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

10/25/85

to the hearings for the Regulations.

DEC 9 1985

Painters Local Union No. 1140

of the International Brotherhood Of Painters And Allied Trades AFL-CIO

TELEPHONE: (907) 279-3556 OFFICE: 1818 W. NORTHERN LIGHTS BLVD., ANCHORAGE, ALASKA 99503

December 5, 1985

Senator Jan Faiks
1024 West Sixth Avenue
Anchorage, AK 99501

Re: Subletting and Subcontracting, Chapter 30, Title 36

Dear Senator Faiks:

This organization supports the inclusion of subcontracting language similar to Calif. Statute 4100, because of the complete and total chaos that has enveloped the construction industry and publicly funded projects.

In the not to distant past a subcontractor who submitted a responsive low bid on a project knew that they would in fact be performing the work on that project, however, a low bid today means that the general contractor has a starting point for shopping a bid. Issuing agencies and general contractors do not comply with existing statutes because they are aware that the penalty sections of Title 36 are never enforced and that the odds rest in their favor of never being exposed for non-compliance. The Seward Prison being a case in point. The general contractor who is awarded a construction project has a margin of profit built into the bid, but by bid shopping the general contractor knows that the margin of profit can be increased by a substantial amount; with total disregard for the subcontractor and their employees.

There are many examples of the devastating effect that bid shopping has on subcontractors and their employees but in order to keep this letter short I shall only point out three which are quite representative of the current problem.

1) University of Alaska, Juneau; Student Housing

Morrison-Knudsen Company, Inc. is the general contractor for this project. The subcontractor for the hanging of sheetrock, taping and pAINTING was not selected until shortly prior to the start of that phase of the project. M/K shopped the bids for over six (6) months. The subcontractor subsequently went bankrupt, no taxes have been paid on any of the approximately

40 employees, and the issuing agency has had to withhold $160,000 in payments from the general contractor. The former employees have had their unemployment affected, and they will have problems when they file their income tax in 1985. Because of the bid shopping, the issuing agency, the State Department of Labor and the Internal Revenue Service has become involved with this project. All of this involvement means more money and time will be expended on a problem that should have never have been, except for the greed of a general contractor who will not incur any of this added cost, and will most likely do the same thing on the next project.

2) Fire Lake Elementary School; Eagle River

The taping and painting subcontract was shopped for almost two months after the award of the contract. The recipient of the contract was a subcontractor with no experience in commercial work, had only been in Alaska for seven months and had no financial means by which to man the project or secure material. The end results being the general contractor having to take over the taping and painting, after some of the workers had worked 8 weeks without being paid. The general contractor had to issue back pay checks to the workers in excess of $77,000.00, but he did not have to pay the broke sub any of the money.

3) Homer High School

The subcontractor bids for electrical, taping and painting were shopped for almost 9 weeks. The taping and painting subcontractor defaulted on the contract and another contractor is completing the project on a time and material basis. (This is one of the few times that a sub had a performance bond). The project is currently 5 months behind schedule for completion; one of the main reasons being that the subcontractors were unable to perform the work required at the price they signed the contract for.

This is only three examples of the current problems being caused by bid shopping, but there are many, many more examples that could be pointed out.

The sad part of this problem is that all parties involved are losers. The state is incurring added cost that can be easily eliminated, the sub-contractors are either in default or bankruptcy which in turn is driving up the cost of surety bonds and performance bonds (for those that have performance bonds).

The issuing agencies are experiencing long delays in the completion of projects, which in turn means that schools are having to double shift students; airlines who make schedule adjustments based on projected completion dates are having to move into facilities that are not completed; housing for students are not ready on time forcing them to seek shelter somewhere else at a higher cost, etc. Yet there are some people who will claim that this is only a temporary condition in the construction industry and that time will correct the problem. This is simply not the case, in the twenty years that I have been in Alaska I have watched this problem grow a little more each year.

It is time that the problem of bid shopping was faced and corrective action taken. The State can no longer financially afford the added cost of bid shopping.

Thank you for your time and if we can be of any assistances on this or related matters please feel free to contact this office.

Sincerely,

Harvey B Linenschmidt

Harvey B. Linenschmidt
Field Representative

Rudy J. Trosclair

Rudy J. Trosclair
Business Manager
Financial Secretary

HBL/ka
Faiks Letter

Ombudsman

John B. Chenoweth

State of Alaska

Reply to:

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October 21, 1985

Senator Jan Faiks, Chair
Senate Select Committee on Procurement Practices
1024 West Sixth Avenue
Anchorage, Alaska 99501

Dear Senator Faiks:

This letter is by way of response to Senator Josephson's August 30 invitation to comment from experience to the Select Committee on the ombudsman's office's experience with procurement-related matters.

As my September 10 letter indicated, I undertook review of pertinent complaints. That review considered more than 400 complaints filed with the ombudsman's office and closed since 1980. The review grouped the procurement-related complaints received among six general categories:

-- competitive bidding generally;

-- leasing;

-- sole source procurement;

-- bid waivers;

-- bid award and professional service contract award appeals; and

-- professional services contracting.

Our impressions about the public's principal concerns for the state's procurement process and our general recommendations to the committee about public contracting concerns are set out below. An accompanying appendix provides supplementary information as to the statistical basis of the complaints received and examined and a summary of significant complaints which have been received.

Alaska's statutes make a basic distinction between "procurement" (AS 37.05.220 - 37.05.280) and "professional services contracting" (AS 36.98). The information based on examination of complaints received by this office is reported following that distinction. A third section collects and reports material common to both broad categories. I trust that this is a form useful to the committee's deliberations.

D. The appeal mechanism relating to award of competitive bids does not permit a review of the merits;

E. The legislature should determine by law the contracting authority and procedures which may be exercised by the Legislative Affairs Agency (and associated agencies, including this office), the administration of the Alaska Court System, and the University of Alaska system. It should provide by law an outline of contracting systems intended to safeguard the interests of the agencies and the rights of bidders and aggrieved bidders, thereafter allowing the agencies opportunity to implement and make certain their respective contracting authorities.

II

Professional Services Contracting:

Though the number of complaints filed with respect to professional services contracts (AS 36.98) has fallen substantially since the legislature's comprehensive revision of state law covering professional services contracts in 1982, elements of professional services contracting still raises significant questions. In the intervening years, the public has raised objections or presented complaints generally as follows:

A. Exceptions which the agencies have been able to implement in their use of "professional services" contracting;

B. In framing and offering requests for proposals in contemplation of a professional services contract, agencies handle RFP's improperly;

C. In evaluating requests for proposals, agencies have erred;

D. The appeal process applicable to professional services contracting discourages or does not permit fair evaluation of grievances of unsuccessful responders on their merits; and

E. Exception of the Department of Transportation and Public Facilities from oversight by the Department of Administration essentially precludes uniformity of contracting within the executive branch; no professional services contracting process is specifically identified in law for the University of Alaska. Additionally, the committee may wish to consider whether to extend the provisions of

In the main, my concerns go to the contract issuance process and the clarity of that process to the public. The experience of this office suggests that, while the procurement-related statutes should be closely examined and the contracting process clarified, within some fairly well defined limits the revision should allow agencies to enjoy a measure of discretion in contract award and management. The public interest requires, however, that agencies which are provided that discretion shall explain their decisions.

This document does not treat contract-related subject matter in detail. No legislation you may consider will answer all questions or objections which the public will raise. I have tried to identify the key points which legislation which you have or will have under consideration should address. The points set out below are those which I believe the public has indicated to be as particularly deficient (based on an examination of the number of complaints filed and a review of investigations completed) or those which I believe should be addressed in order to provide a procedurally-complete contracting system.

I

Procurement (Competitive bidding and related techniques):

In this letter, I reserve the use of the term "procurement" to cover contract award process authorized by the state's Fiscal Procedures Act (and similar authority applicable to the legislative and judicial branches, and the University of Alaska) as distinguished from professional services contracting.

The common thread running through the overwhelming number of the procurement-related complaints filed with the ombudsman's offices is that key elements of the process are unfair. Broadly speaking, those allegations of unfairness seem to be most often directed to the following:

A. Procurement procedures are unclear or uncertain, resulting in an award of a contract which is allegedly improper;

B. Agencies improperly use, and the Department of Administration erroneously allows use of, "bid waiver," "brand name," "sole source," and "negotiated contract" procurement techniques in situations which, the public suggests, are properly subject to competitive bid;

C. The process by which the issuing agency evaluates and accepts or rejects bids and by which the issuing agency determines whether the low bid has been submitted by the lowest responsible bidder is uncertain;

AS 36.98 to regional educational attendance areas or, alternatively, to require the commissioner of education to assure that all school districts have in place a professional services contracting process.

III

Considerations applicable to both categories:

The public's complaints and our own work on them suggest other facets of public contracting--both procurement and professional services related--which is deserving of the committee's attention:

A. Contracts are awarded to firms who are not qualified to do business in Alaska at the time of contract award;

B. The use of contract extensions or continuations is not well regulated;

C. Nonprofit firms operated with public support and government agencies compete for public contract work at an advantage to firms in the private sector;

D. State law covering public release of information contained in the documents submitted in response to invitations to bid or requests for proposals is unclear;

E. State law is too uncertain as to certain ethical concerns involving state officials or employees responsible for contracts who are related by blood or marriage to, who have a financial or associational interest in, or who are former employees of a firm submitting a bid or responding to an RFP.

Each of these is deserving of brief explanation or example.

I

A. Competitive Bidding. Without doubt, a major factor contributing to public objection to the state's contracting practices is the public's (and prospective contractors') lack of familiarity with specifics of applicable contracting practices. A significant part of the work of the office in the area of public contracting has been to work with aggrieved bidders to explain--so far as we are able to obtain information about particulars--specific questions or concerns.

The public's difficulties arise, I suggest to you, from

(1) the incomplete and rather haphazard form of the state's general procurement statute;

(2) the dearth of meaningful regulations to implement, interpret and make specific the procurement system;

(3) the maintenance of contracting systems by the other departments tied back to the Department of Administration by only the loosest of bonds; and

(4) the separate procurement processes used by the legislature and judiciary, and the University.

For someone with no more than occasional exposure to it, Alaska's procurement system is not an easy process to understand. To the owner of a small business, the process is characterized by confusion. Contracting within the executive branch typically involves two departments--the issuing agency and the Department of Administration.

Despite a good effort by the Division of General Services and Supply to prepare a comprehensive volume explaining purchasing and procurement in an effort to develop some uniformity in the system, at the start of the term of the current administration, Commissioner Rudd reemphasized that the process of advertising and awarding contracts would be decentralized through a system of "delegations of purchasing authority" and individual "internal departmental policy and procedures manuals." While this approach to management of the state's procurement process in the executive branch is generally consistent with current AS 37.05.220, the absence of a generally uniform system of procedures to which the public may have easy access is, to my mind, the source of a significant portion of the misunderstanding, frustration, and complaint about the process.

So that, as a general matter, the public may better understand, use, and have confidence in the state's procurement system, and so that the legislature and its committee staffs may more readily evaluate individual procurement decisions, the committee can and should:

(1) revise the applicable provisions of the "Purchasing" article of the state's Fiscal Procedures Act--Administration refers to this as the "Uniform Purchasing Act"--to establish a uniform system, applicable to <u>all</u> agencies, with few (if any) exceptions;

(2) strictly and specifically limit exceptions to the competitive bid process;

-- where exceptions are authorized based on a proposed dollar amount for a contract, the exception should have a reasonable basis documented in the legislative history of the bill;

-- where exception is made for any other reason, they should be authorized and approved only if consistent with identified standards of evaluation;

(3) require one agency--probably the Department of Administration--to implement, interpret, or make specific the re-enacted provisions in a way that is uniformly applicable;

(4) recast the procurement system in a way that does not rely procedurally on "delegations of authority" and internal "procedure manuals;" because procurement affects the public, it should be made a public process: a description of the procurement process applicable to all agencies should be adopted into the Alaska Administrative Code in accordance with the Administrative Procedure Act.

Secondly, in any revision of the "Purchasing" article of the Fiscal Procedures Act, specific attention should be given to a number of key facets that have been the basis of significant complaints to this office that are not now carefully prescribed by law:

(1) the issuing agency should be required to identify and describe evaluation procedures and performance criteria before bids are solicited;

(2) bid specifications or criteria should be certain, not vague, and direct vendor involvement in the development of specifications should be prevented;

(3) sufficient time should be allowed for bid submissions; and

(4) agency decisions concerning the disposition of bids should be promptly communicated to all bidders;

B. Alternative procurement procedures. The committee should undertake a careful review of the statutes authorizing alternative procurement techniques. In this category I place the use of "negotiated contracts" (AS 37.05.230(2)), "bid waiver" (AS 37.05.220(2) and AS 37.05.230(1); AS 35.05.040(9)), "brand name", and "sole source" (AS 37.05.230(2); AS 35.05.040(9)) techniques.

Use of these techniques has given rise to one of the largest categories of complaints involving procurement practices. Typically, the complaints are submitted by prospective competitors who learn of the contract award only after the fact. Our experience has been that the agencies often fail to document, or incompletely explain, the reasons for using one or another of these techniques. Our experience has also

been that the Department of Administration's Contract Review Committee, which passes on these submissions with a recommendation to the commissioner or her designee, is little more than a rubber stamp--indeed, the committee typically operates with a rubber stamp--that does little to effectively check on the appropriateness of these exceptional situations.

Surely there is a legitimate place for exceptions within a government procurement system. But the legislature should act to assure that the use of these techniques is confined to uncommon situations.

I suggest to the committee that no method of internal review and recommendation can be as effective as public scrutiny; simply stated, the legislature should provide a system by which the public may have the opportunity to better understand and be able to evaluate these authorized exceptions and their use.

To that end, my recommendations to the committee are these:

(1) The committee should reconsider the "best interest of the state" standard. Agencies relying on that standard, or on any standard which the committee may substitute for it, should not be allowed to proceed merely by concluding that a use of the proposed exception is in the "best interest of the state." Rather, the agency should demonstrate and document, in advance of contract award, exactly how the state's interests are to be best served by the proposed decision.

(2) Unless an exception is clearly required by an emergency condition--and here I have in mind the qualifying definition of AS 44.62.270--the intention of an agency to enter into a contract based on a "sole source," "brand name," or "bid waiver" exception should be publicly advertised for not less than, say, 10 to 14 days preceding contract award; advertisement or publication of notice to award in the Alaska Administrative Journal (AS 44.62.175) may well be sufficient for purposes of public review without incurring to the state substantial additional costs of publication.

C. Low bidder versus lowest responsible bidder. A third common category of complaint to this office arises when an agency fails to award a contract to the low bidder. Under current law, the award of contract is made to the "lowest responsible bidder," and the determination of the identity of the "lowest responsible bidder" rests with the issuing agency. The applicable statute is AS 37.05.240(a). Typically, in the instances we have examined, the agency has reason to withhold the bid award, citing factors which it believes renders the low bidder "nonresponsible."

Investigation of several complaints suggests, however, that there are shortcomings in the process by which the issuing agency evaluates bids and determines that the "low bidder" and "lowest responsible bidder" are not synonymous. Where, for example, failure to award to the low bidder turns on a question of unit price, failure to meet qualifications specified in the bid invitation documents, failure to provide a bond, or other bid-related factor, these can be objectively reviewed, and we usually find no merit in the complainant's grievance. If, however, the agency's decision not to award to the low bidder is based on more subjective factors--the agency's evaluation of the bidder's past performance and reputation, estimated capabilities, or financial capacity--our review necessarily involves an examination of the veracity of these factors and whether the agency has appropriately applied them.

The committee's revision of the "Procurement" article should assure that, in circumstances in which the agency decides to find a low bidder or bidders "nonresponsive" and to award to another party, the issuing agency provides to the low bidder, to the lowest responsible bidder, and to anyone who may have an interest in the outcome, a complete statement of the basis for the agency's decision to find a bidder or bidders "nonresponsive." That notice should be given in advance of, or simultaneously with, bid award. The legislation should require strict adherence to the provision: if the agency fails to provide a complete statement at the time required, award of the bid should be disallowed.

D. Appeal procedures. It has been my experience that complainants approach the office of the ombudsman to protest bid awards because they do not know that 2 AAC 15.100 provides opportunity for administrative appeal or because they were unable to use 2 AAC 15.100 because of its requirement of prompt (i.e. five day) protest. Save only for the five day requirement (imposed by AS 37.05.240(a)), the appellate process available to disgruntled bidders is wholly a product of regulation, without specific statutory direction.

While I have no specific criticism of the agency's handling of complaints on appeal--and, indeed, the process, when it works, seems to provide sound and timely decisions--in this review, the committee should consider the sufficiency and effectiveness of the current appeal procedure. It should, to my mind, determine either to spell out, in statute, specific procedures for appeal or, alternatively, direct and require one agency (probably the Department of Administration) to fashion a comprehensive appeal mechanism containing such safeguards as the committee may find necessary.

In any event, the committee should reconsider the time limit in which the aggrieved bidder must submit the appeal and the content of what is to be submitted: five days is simply not sufficient time to aggrieved bidders to gather and submit information sufficient to allow the department to review these matters on their merits.

E. Procurement processes applicable to state government agencies outside the executive branch. Significant numbers of procurement-related complaints have been filed against the University of Alaska system. Investigation of them is almost always a significant exercise, largely because of the few references available to guide the investigator. The authority of the university system to contract substantially independently of the Department of Administration rests, in statute, on the thin thread of AS 14.40.340, a statute which directs only that the "competitive bid practices set forth in AS 37.05.230 apply to the University." University officials themselves are without direction as to whether any other procurement elements of the Purchasing article of the State Fiscal Procedures Act apply. Hence, the University's approach to contracting is independent of other executive branch units. Surely in a system that mandates adherence to competitive bidding, the legislature should act to assure that state statutes establishing the university system either impose or otherwise assure that the University of Alaska has developed a comprehensive, uniform, and procedurally sound purchasing procedure.

So far as I have been able to determine, the legislative branch acts without the benefit or constraints of any body of legislatively-enacted procurement law. There is a fine irony, then, that for the period under consideration few complaints have been lodged against contracting practices of the line agencies of the legislative branch, and even fewer against the Court System. The same suggestion applicable to the university system should be understood, however, to apply to these.

II

Professional services contracting:

Fewer significant problems seem to attend the issuance and performance of professional services contracts. The enactment of AS 36.98 and the department's subsequent adoption of pertinent regulations in 2 AAC 17 (17 AAC 7 for professional services contracts issued by the Department of Transportation and Public Facilities) has provided a sound general procedural basis. In the main, the complaints we have received have been directed at the substantive decisions made in conjunction with the process rather than against the process itself. The legislature's enactment of AS 36.98 and the departments' efforts directed at improving professional services contracting have been useful in reducing the number of complaints.

A. Exceptions which the agencies have developed to the proper use of "professional services" contracting. In the 1982 enactment covering contracts let for professional services, the term "professional services" is defined as

> . . . professional, technical, or consultant's services that are predominantly intellectual in character and that

(A) include analysis, evaluation, prediction, planning, or recommendation; and

(B) result in the production of a report or the completion of a task.

Complaints reaching this office call into question the strict applicability of the professional service contract requirements to certain professions which cannot be readily evaluated through an RFP. The specific complaints relate to attorneys' services--principally contracts issued by the Department of Law and the University of Alaska--and raise a question as to whether there should be created an exception to the professional services contracting statute for services of professionals using a limited solicitation process where the interests of the state demonstrably so require.

B. The framing and offering of requests for proposals. A fair number of complaints received since mid-1982 have called into question agency compliance with the offering requirements of AS 36.98 and related regulations (2 AAC 17 and 17 AAC 7). Typical challenges have had to do with failure to circulate an RFP to a complainant, provision of insufficient time to respond to an RFP ("quick deadlines"), and the sufficiency of the information provided about the RFP on which an interested party could depend. Applicable statute (AS 36.98.030) and regulation (2 AAC 17) require that the manner of solicitation by an agency must be consistent with law but, beyond that, the issuing agency has latitude to solicit. Our evaluation has usually been on the basis of the reasonableness of the agency's actions, and we have generally upheld agency decisions.

C. The agencies' evaluation of requests for proposals. Since 1982, the process by which the agencies conduct the evaluation of RFPs has stimulated complaints to the ombudsman. Elements of these complaints have included requests that this office

-- determine and report the identity of the evaluators;

-- pass upon the qualifications of the evaluators;

-- determine whether selection criteria were properly applied;

-- consider and evaluate the quality of the successful proposal; and

-- criticize agencies for their use of "outside" evaluators (i.e. contractors to or third parties not employed by the agency).

We have generally looked to the record of evaluation--to the extent we are able to find one--to determine whether there has been substantial compliance by the agency.

While I cannot ask the legislature to consider additional provisions that would rigidly bind the way in which agencies complete their evaluations, it would surely be useful--and I would encourage the committee to consider--amending AS 36.98 specifically to require that the records of the evaluators be put in useful form and be retained. Since review of proposals is typically conducted and discussed by an ad hoc committee, I believe the legislature should be clear in indicating whether the state's Open Meeting Law should apply to these deliberations.

One rather apparent shortcoming, though not yet the subject of an investigation, is the tendency of agencies to minimize or eliminate "cost" as a significant evaluation variable. The committee may want to consider amending the evaluation provisions of AS 36.98.040 in some way to specify that contract "cost" may not be ignored or omitted as a substantial variable in the preparation and evaluation of RFPs.

D. The appeal process requirements discourage fair evaluation of grievances on their merits. A recent series of complaints calls into question 2 AAC 17.050's provision that an appeal must be filed within five days. The regulation parallels a statutory provision in the procurement statute.

Consistent with my philosophy of operation of the ombudsman's office, an agency should act on appeal to evaluate the merits of its own performance. For the reasons indicated in the preceding provision covering procurement, the committee should extend the appeal provision and should set the limitation by statute.

E. Exceptions and exclusions. I want to say again that the legislature's enactment of AS 36.98 has gone a long way to improve professional services contracting. Guided by the Department of Administration, the bulk of state agencies seem to have improved performance in this area.

The exception made in law for separate treatment by the Department of Transportation and Public Facilities should, in my judgment, based on that agency's handling of a vast number of professional services contracts, be reconsidered, and the department brought under the umbrella of the Department of Administration.

There has come to this office's attention one or two instances of alleged deficiencies in the award of professional services contracts by regional educational areas. The committee may want to act to have the commissioner of education assure that school districts generally have in place some rational means of assuring proper preparation, solicitation, evaluation, award, and appeal of these contracts.

III

In this last category I discuss five general contract-related complaint subjects tangential to the principal categories. All appear to me tc warrant legislative attention.

A. Prospective contractors not qualified to conduct business. An oft-repeated grievance by unsuccessful competitors is that the successful party was not qualified to do business in Alaska at the time the bid or proposal was submitted. Investigation can readily determine whether the successful party was qualified by virtue of having a business license and, as applicable, being incorporated or authorized to do business as a corporation.

State law does not require qualification until the time the contract is executed. As qualification is somewhat nominal, the committee may wish to require, by law, the determination that a bidder (or respondent to an RFP) is non-responsive if the individual or firm is not qualified to do business in the state at the time of submission of the bid or proposal. Thereafter, implementation would require all bidders or respondents to list their credential in their submissions.

B. Contract extensions or continuations. A growing number of complaints calls into question the constraints (or, more properly, the lack of constraints) on agencies which propose to extend or continue an existing contract. Renewal options are in derogation of competitive bidding or reissuance of an RFP. While their use is accepted as a matter of sound public contract administration, they are regulated not by statute or regulation, but usually arise out of option clauses in existing contracts (or require securing a "bid waiver" if no option exists). I am particularly struck by the number of contracts to which our attention is called in which the period for which an option may be renewed greatly exceeds the duration of the contract for the period for which originally executed.

The committee should consider whether specific provision by which an agency other than the contracting agency (or some other independent review process) examines and approves (or comments on) a proposed extension or continuation. Again, since the extension process is itself an exception to the norm, as with the recommendation I have made for all exceptions to competitive bids, extensions or continuations should be justified by the requesting agency and should be publicized in the Alaska Administrative Journal.

C. Nonprofit firms and government agencies competing with private sector business. This topic covers a mix of concerns which have been brought to our attention at one time or another. The complaints have a common source--private sector firms who believe, correctly or otherwise, that firms and individuals supported by the public sector--non-profit corporations or government entities themselves--enjoy a competitive advantage in the award of public contracts. The subject has arisen with

reference to both competitive bid and professional service contract awards.

Broadly speaking, there is some basis to suggest that these objections are credible, though little evidence to conclusively determine whether the state's interests are well served by the applicable statutory provisions on which they are based. I call it to your attention as a kind of complaint which probably deserves legislative attention though it may not now warrant any attempt at correction.

D. Disclosure of bid documents and bid submissions. A fair number of complaints to the office addresses the largely uncertain question of whether draft invitations to bid are public documents and whether bid submissions should, in whole or in part, be made public at the time of bid award.

The legislature should decide the matter, clearly indicating whether or not these are public documents and, if they are, at what point they should be made public. This may be no more than revising the penultimate sentence of AS 37.05.240(a) to apply generally to all competitive bid situations and making clear that, whatever is decided, the determination is generally applicable to all agency procurement efforts.

E. Ethics considerations. Because the award of professional services contracts depends on the agency's evaluation of solicitations, this office has received an unusual number of complaints alleging or suggesting existence of a conflict of interest (or apparent conflict of interest) between, on the one hand, persons preparing the requests or evaluating the materials submitted and, on the other, competitors of the complainant. Typical situations cited include instances of alleged collusion involving persons with relationship by blood or marriage, persons having common financial or associational interests, and individuals formerly employed by the agency now part of a firm responding to an RFP (or vice versa) in which intangible factors may weigh heavily. We can and do investigate to determine if the factual situation giving rise to the conflict or apparent conflict is as alleged and have critically examined evaluations and the evaluation process to determine whether there was an effect.

At this point, where the committee's attention is focussed on its two major subjects--public contracting and ethics--I respectfully urge addition of some body of law that essentially describes permitted or prohibited relationships that may have an effect on contract evaluation and award.

*

Thank you for the opportunity to respond. If I may assist further in your deliberations, please contact me.

Sincerely,

John B. Chenoweth
Ombudsman

JBC:pjc
Enclosures

APPENDIX:

1. Methodology: Our review examined and considered 434 complaints filed with the ombudsman's office and closed between January, 1980, and September 30, 1985. The review grouped the procurement-related complaints received among the general categories outlined in the letter. The largest single category of these complaints--an estimated 60 - 65%--involved complaints generally relating to competitive bidding practices. In lesser numbers, the complaints filed with my office involved concerns relating to professional services contracting, exceptions to competitive bidding, appeals, and a variety of other grievances and concerns loosely identified under leasing and purchasing.

2. Trends and indicators: As you might expect, the bulk of the competitive bid-related complaints were filed against the executive branch agencies principally responsible for contract award--the Departments of Administration (78 complaints), Transportation & Public Facilities (68 complaints), and, surprisingly, Commerce & Economic Development (38 complaints). Apart from the executive branch agencies directly covered by AS 37.05.220 - 37.05.280, the University of Alaska accounted for an additional 28 complaints.

The professional services-related complaints were less numerous and more widely scattered (though the same four agencies listed immediately above topped the list). Most noteworthy, in my judgment, is the significant reduction of professional services related complaints since enactment of the 1982 provision (Ch. 144, SLA 1982, now AS 36.98). The tallies are:

1980	19 complaints closed
1981	13 complaints closed
1982	12 complaints closed
1983	15 complaints closed
1984	6 complaints closed
1985 to-date	2 complaints closed
	67 complaints closed

This downward trend in professional services contracting complaints filed with this office at least suggests that the adoption of comprehensive legislation on that subject has answered many of the original objections of the complainants and provided an effective means of internal review of these problems.

For both categories, Court System (6 complaints), legislative branch (4 complaints) and REAA-related (7 complaints) procurement grievances account for an insignificant portion of the total.

3. Some examples of specific complaints received:

I

Procurement (Competitive bidding and related techniques):

A. Competitive Bidding.

The so-called Uniform Purchasing Act was enacted in 1955. Apart from the 1982 effort to better describe authorized professional services contracting requirements (which, themselves, constituted an exception to the Uniform Purchasing Act), recent legislative amendments to the Act have not been significant. Through 30 years of use, the lead agency, the Department of Administration, has had ample opportunity to identify and develop procedures and definitions by which the Purchasing Act's provisions may be consistently applied. But the department's efforts to lay down a body of law that would apply to other agencies and which might provide explain to the public interested in contracting with the state has not been particularly helpful. Except for provisions covering bid rejection and appeals, the regulations relating to competitive bidding, 2 AAC 15, add little to the public's understanding of how the issuing agency and the Department of Administration may be expected to perform, and what standards may be applied to measure that performance.

Agency purchasing significantly depends upon a system of "delegations of purchasing authority" and agency "administrative manuals." See, in this regard, memo of January 10, 1983, of former Director of General Services and Supply George Elgee. This is consistent with AS 37.05.220 giving to the Department of Administration authority to prescribe purchasing and leasing arrangements and standards for use by themselves and by other agencies.

However, this system in essence requires that those who conduct the state's procurement business, those who have an interest in doing business with the state--and those who may have to check on how that business is entered into--try to gain an understanding of how more than a dozen agencies shall conduct their affairs. Moreover, it is far from certain to many how the University of Alaska system "fits" into Purchasing Act requirements, and there is, so far as we have been able to determine, nothing to cover contracting by the legislative and judicial branches.

The nadir of this system of interagency "authority delegations" is perhaps best illustrated by Ombudsman Complaint A81-0468, a complaint against the Division of Parks of the Department of Natural Resources.

The complainant called to seek an explanation as to how the division had avoided seeking a competitive bid in conjunction with gravelling operations. Investigation suggested that a delegation of authority (Administration to Transportation and Public Facilities) supporting a master contract for vehicle and equipment rental had been inappropriately applied to support the Natural Resource division's subsequent acquisition and use of a vehicle. One was left with the impression that Administration's delegations of authority to its sister agencies were fairly flexibly interpreted by those agencies to help themselves (and third agencies), and would be stretched so far as necessary or convenient to defeat the competitive elements of the procurement statute if that suited the purpose of the agency securing the delegation. Among the line agencies dependent upon the grace and favor of the Department of Administration to secure their procurement authorities, the Uniform Purchasing Act had become, if you please, state government's in-house version of the shell game.

Under such a loosely-organized and -operated system, I am truly surprised that we have not received more complaints.

The relatively small number of complaints is probably due, in the main, to the good efforts of the Division of General Services and Supply in trying to provide a measure of order to competitive procurement. The most useful commentary to current Alaska practices is that division's own Administrative Manual covering purchasing. I commend that volume to the committee's attention.

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Complaints to my office generally relating to competitive bidding have spanned the range of procurement practices, running from purchase requisition, through conduct of the process, making of exceptions, and handling of appeals, to claims of unethical practices and improper influence in the planning and evaluation process. My letter highlights topics in which I think the competitive process is particularly weak or to which the committee may wish to give attention for other reasons indicated.

1. The first involves the sufficiency of the issuing agency's planning and evaluation procedures. Some complainants have come to the office--typically, after their bids have been rejected as "non-responsive"--claiming that the process followed was significantly flawed, to their detriment. Investigation by this office suggests that, in virtually all such cases, the "Invitation to Bid" was the critical document, and that the problem of concern to the complainant lay in the issuing agency's failure to provide sound specifications as to what was required. While the statutes and regulations are silent, the Division of General Services and Supply's own guidelines on the point are useful:

> Specifications [of goods to be bid] are one of the most important elements of the purchasing process. Specifications communicate what is required or desired, and are the primary basis on which bids are

> awarded. Specifications should be clearly understandable, open, and unrestrictive.
>
> . . .
>
> [The division] must insure the specification that finally accompanies the bid is not restrictive and does not call for features or for a level of quality not needed for the item's intended use.

A fair reading and application of these principles might have avoided such complaints as F81-0811 and three others, a 1981 challenge to the now-defunct energy audit program, in which, among other assertions, the complainants presented valid allegations in which information pertinent to the bid process and criteria on which the bids were to be evaluated were not fully disclosed.

2. A second objection goes to a lack of time. Complainants have raised the question of the amount of time which a prospective bidder should have to evaluate a bid invitation, clarify questions, and prepare and submit a complete bid. In F80-0004, for example, the complainant alleged that, following a major alteration to a bid, the issuing agency did not extend the deadline for receipt of bids to provide sufficient time to revise the submission, and in F80-0904 and others, the complainants asserted they had been given insufficient time to prepare responses to requests for land clearing contracts. On the opposite side, in F79-0945, the complainant objected to an extension of time after competitors advised the issuing agency that they could not meet an existing submission deadline.

In the absence of any standard covering time allowed for bid preparation and submission extensions, with rare exceptions, complaints claiming lack of sufficient time are typically found "unsupported." The committee should consider language covering minimal offering periods or otherwise establish a "reasonable" time period for bidder's consideration of invitations to bid, and should consider the matter of extensions and notification of those extensions to interested parties.

3. The last topic covers, generally, communication of decisions made with respect to bids to the bidders.

Some number of complaints cover situations in which bidders are not advised as to the successful bid, thereby precluding possible appeal.

There is also the situation in which all competitive bids are rejected. Competitive bids may be rejected and the invitation to bid set aside. The statute (AS 37.05.240) is silent on notification of this decision--one that is typically made, or should be made, in the event that issuing agency contemplates negotiation of contract for which an invitation to bid was previously let. So, for example, complaints A81-0782, J81-0346, A82-0753, A83-1021, and J83-0340 all raised questions relating to improper cancellation of invitations to bid and, in some, questions of sufficiency of notice were raised.

Our complaints notwithstanding, those who have prepared and submitted bids only to have the issuing agency decline to award on the basis of competitive bid may have a claim against the state. AS 44.77.010(c). King v. ASHA, 633 P. 2d 256 (1981). Accordingly, the committee should give careful consideration of the state's obligation to inform competing contractors of the decision in these situations.

B. Exceptional procedures.

A number of complaints raised questions about an agency's use of "bid waiver," "brand name product," or "sole source contract." Complaints covering this topic are consistent, and the situations which have been directed to our attention suggest that this topic is one of significance.

1. Our experience strongly suggests, first, the need to build better checks against the writing of unnecessarily "tight" bid specs to cut off or reduce opportunity for competition. Some examples should serve to illustrate.

Companion complaints J80-0312 and J82-0289 examined the decision of the Department of Fish and Game to use specific brands of incubators purchased outside the competitive bidding process. Investigation of the first confirmed use of the sole source purchasing technique--requiring a specific brand (for which the agency had no data on which to base a justification and no evidence of evaluation) of hatchery incubator be installed by the contractor; the agency sought to avoid evaluation of the exception by running the request through as part of construction of the facility, that is, as an adjunct of a capital improvement. Just when we thought the agency understood its obligations under the purchasing provisions of the Fiscal Procedures Act, it tried again. At that point, our only "weapon"--one hardly adequate, in my view, to assure that the matter would not be encountered a third time--was to review and refine the purchasing authority delegations to the Department of Fish and Game of the two lead departments.

The issue in a pair of unrelated complaints, A80-0189 and F84-0490, involved the use of bid specifications that, in the case of the former, designated by brand name and, in the latter, unreasonably restricted competition (essentially allowing only one product to qualify) without being based on a valid technical reason. As to both, the agencies accepted and agreed to implement, at the level of their individual policies and procedures, standards to address specifications that would not wrongly limit or eliminate competition by relying on designated brand names or by imposing unreasonable restriction or specifications in a competitive bid.

In A83-01059, I challenged the University of Alaska's reliance on brand names (rather than performance criteria) for acquisition of a library security system. University officials defended, contending that use of or reliance on brand names is a well-established means of procurement.

2. Our experience suggests, too, the significance of a well documented bid file during an independent review of a purchasing decision. Unrelated investigations A84-0605, A80-0528 and A80-0189 well illustrate the contrast.

In the first, filed against the Division of Mental Health and Developmental Disabilities, investigation was able to show that, for guard services at API, the division had demonstrated that a sole source exception would well serve the interests of the state, had secured necessary approvals in advance, and had otherwise proceeded in a procedurally correct manner. We found the complaint "unsupported."

I also found "unsupported" the objections made to the Department of Transportation and Public Facilities' award of a street light service contract in A80-0528. The lights in question were situated in downtown Anchorage and interspersed with street lights on roads for which the Municipality had responsibility. The matter had been thoroughly researched and reviewed by attorneys, who had found a reasonable basis for the state's decision.

A80-0189, by contrast, involving purchases by the Department of Transportation and Public Facilities restricted to a particular brand of heavy-duty tractor, was based on an outdated preference for that particular brand that had not been independently reviewed or verified; past preference, in other words, governed the direction of then-current purchasing practice, until the purchase of one kind of vehicle became an ingrained habit. We criticized the agency and secured from them a commitment to draft a written policy covering limitations on bid specifications.

3. By law (AS 37.05.230(2)) an agency may negotiate a contract if it finds that it is in the best interests of the state. An "authority to negotiate" is a prerequisite.

ATNs and negotiated contracts have contributed their share of problems, notably those which are authorized after a public competitive bid advertisements in which all bids are rejected. We can usually examine and explain that.

What we can't explain, and what the committee should give attention to, is the absence of any statutory or regulatory framework suggesting when an ATN is proper and when it has been properly issued, and the scope and duration of the authority granted under the ATN. So, for example, there is the complaint occasionally presented raising a question as to whether an approved ATN retains a long-term validity and whether an agency was improperly depending on an approved ATN to meet one set of circumstances when those circumstances have demonstrably changed.

There is, I suggest, no more critical examination which the committee can give--no more essential steps that it can direct to improvement of state contracting procedures--than this matter of administratively-authorized exceptions to competitive bidding. This week, for example, I expect to conclude an investigation (A85-0941)

contesting the decision of a department to award a sole source contract, in which the Division Director Bob Link and Professional Services Contract Specialist Vincent Isturis are reported to have advised the investigator that the department cannot check requests for alternative procurement methods submitted by state agencies and must take each department's word that it has "demonstrated" that a sole source is appropriate.

In the absence of any effort to make an independent determination that "alternative procurement" is in order, how can the public be expected to have any confidence in the current procurement system? The committee should develop both clear standards and a public review process in this area.

C. Low bidder versus lowest responsible bidder.

This is not a complaint that we often receive. One example may well be the land clearing contract example (F80-0904 and others) mentioned above also raised questions concerning the eventual award of contracts to parties not submitting the low bids. In another, A83-0881, the Department of Administration's own Division of Telecommunication Services awarded a contract to other than the low bidder and neglected to advise bidders of their right to appeal, thereby cutting off challenges to the contract award. Our recommendations urged, among others, adoption of an appeal process and the development of related policies which would contribute to improved handling of bids.

Despite a relatively low volume of complaints, this is an area with potential abuse. Statute (AS 37.05.240(a)) and regulation (2 AAC 15.040 and 2 AAC 15.060) authorize award of a bid to a responsible bidder and withholding of a bid from one who is deemed non-responsible. One regulation, 2 AAC 15.040, authorizes the division to exercise discretion in the matter, but our experience, in the limited number of complaints that have raised a claim of unreasonable rejection, suggests that the reasons justifying the exercise of discretion are not documented.

In my judgment, the committee should

-- set down the standards against which a bidder may be found non-responsible; if determination of standards is delegated to an agency, the standards should be set out in regulation; and

-- require determinations of non-responsibility to be fully documented; documentation should include a brief, albeit comprehensive, explanation of how the bidder or the bidder's submission does not comply with one or more of the identified standards.

D. Appeals.

An appeal process for competitive bids and for alternative procurement is authorized by statute (AS 37.05.240(a)) and implemented by regulation (2 AAC 15.100). Unlike professional services contracting, described in II below, the five day limit for taking appeals in procurement-related matters is a creature of the statute.

The system in place effectively precludes, in my judgment, a review of an appeal on its merits. See discussion in II(D) below.

E. Procurement processes applicable to state government agencies outside the executive branch.

This topic is intended to speak briefly to University, legislative and judicial branch procurement. As to the latter two, I have no suggestions but, by analogy to the professional services contract enactment (Ch. 144, SLA 1982), the legislature should consider--or may want the Legislative Council to consider and recommend--some range of procurement enactments covering the legislature's own acquisitions.

No single investigation prompts inclusion of this recommendation. The recommendation is empirically based: through the 5+ year period considered, the University of Alaska was the source of a significant number (28) of complaints.

Despite the University's preparation and recent presentation to the committee of tidy summary books (implying that the procurement and decision review processes of the University are well established and well recognized), a review of the complaints received by this office suggests that there is a fair degree of confusion among administrators as to what rules do apply.

All of the objections noted hereinabove to contracts awarded under the Uniform Purchasing Act have probably, at one time or another, been filed against the University. So, for example:

> -- In A80-0850, a complainant charged that University officials had failed to award a bid to the lowest bidder and had altered applicable bid specs on which the award was eventually made.
>
> -- In F81-0630, the University awarded a telephone system contract to one vendor when use of a multi-step competitive bidding procedure, sometimes used by other executive branch agencies, would have accommodated a competitive procurement.
>
> -- In F81-1049, the complainant charged the University with, among other things, unfair denial of a subcontract award in which contract specifications were narrowly drawn without opportunity for complainant's company to provide

evidence of "equal or better" equipment that might be substituted. Finding the complaint "unsupported," the office nevertheless asked University officials to commit themselves to an examination and development of a substitute system of procurement, emphasizing development and use of broader specifications uniformly applicable to all contracts which it proposed to let. University officials rejected the recommendation, indicating that Facilities and Planning staff were simply too busy to make major changes in a system which they believed was adequate.

-- In A82-0938, investigation supported complainant's assertion that University employees had circumvented competitive bid practices through use of subjectively evaluated bid specs.

-- The complainant in A84-0292 withdrew a complaint that the University was improperly relying on a "prehearing" to determine whether a formal hearing would be granted on complainant's appeal of denial of bid award, notwithstanding that absence of such a procedure in University procedures.

-- In the complaint identified as F84-0686, the complainant, who apparently did not understand the distinction between competitive bidding and professional services contracting, asked the office to review University contracting processes applicable to materials testing.

-- In F85-0545, a complaint which the complainant was advised to file as an appeal, the complainant challenged the University's award of a supply contract to an out-of-state firm notwithstanding the statutory bidder preference provision.

The confusion in University contractual processes is compounded for all of us--except, perhaps, the handful of University officials who work with the system on a daily basis--by the absence of any reference to procurement through competitive contracting except by the inclusion of the Uniform Purchasing Act by reference appearing in AS 14.40.340.

There is a need, in my judgment, for the legislature to give its attention to University contracting so that University officials and those who deal or want to deal with the University system as vendors may better understand both the legal basis for and the procedures applicable to the University's procurement system.

II

Professional services contracting:

A. Applicability of "professional services" contracting.

On the whole, the distinction between professional services contracts and the procurement provisions applicable to goods and supplies is distinct. There have been very few complaints since 1982 in which the complaint suggests that the issuing agency has confused its choice of method.

Several open complaints raise the question as to whether agencies have improperly made or used exceptions to the professional services contracting process to secure certain professionals' services. In testimony at your recent Fairbanks hearing, University officials suggested the need for an exception for attorneys, physicians and dentists. The Department of Law has adopted and follows its own procedures for acquiring the services of "outside counsel" to secure special legal services. (See memo of January 2, 1985, from Administrative Services Division Director Richard Pegues to the Contract Review Committee). These exceptions appear to depend upon the agencies' interpretation of the "sole source" exception of AS 36.98.030(d)(1) and, as exceptions, are themselves subject to criticism for abuse. The committee would be well advised to consider the problems presented by University officials and the Department of Law--there may be others--but any exception drawn to meet their expressions of concern following the "sole source" exception of AS 36.98.030(d)(1) should require that the issuing agency document the basis of its decision.

As I have suggested with respect to issuance of contracts under the "alternative procedures" provisions in the procurement section (I B above), the legislature may want to require that contracts issued under any exception created for special classes of professionals be publicly reported by the issuing agency. Public reporting would serve the useful purpose of determining whether the agency is following a pattern of awarding contracts to a limited number of professionals.

A comparable situation exists as to use of architects, engineers, and construction managers' services for which the Department of Transportation and Public Facilities regularly issues contracts. Before proceeding in this area, the committee would be well advised to ascertain how that department has proceeded to engage the services of these professionals, the past record of securing these services under contract, and the amounts of these contracts. The record of activity by that department should be instructive on this issue.

B. The framing and offering of requests for proposals.

The discussion in the letter reflects our experience based on various complaints filed with the office. The following are typical:

A81-0839 and J82-0471: Unrelated complaints filed against different agencies in which the

complainants asserted that submission of responses to request for proposals within 10 days of their publication was unreasonable.

J82-0511: The complainant contended that an agency's decision to require a response to an RFP within one week was unreasonable.

F83-1105: In a complaint against the Department of Corrections, the complainant--a competitor for a halfway house contract--contended that the financial report of and other information about a contract facility's halfway house operations essential for his preparation for a response to an RFP was not available for review.

F83-1500: The complainants asserted an improper professional services contract award predicated in part on his assertion that the needs of the agency were not specifically described in the RFP.

J83-0683: In this complaint, filed against the Department of Transportation and Public Facilities arising out of award of a professional services contract in conjunction with the Governor's Mansion renovation, the complainant charged, among other things, that the department misused its authority to award a contract of $25,000 or less directly.

A84-0920: The complainant asserted that the agency was inefficient in providing information relating to award of a contract based on an RFP.

C. The agencies' evaluations of requests for proposals.

The discussion in the letter under this section also reflects our experience with complainants' concerns. Some examples include:

A82-0158 and A82-0165: In this pair of related complaints, the complainants charged that the successful bid was not responsive to the published request for proposals and that the contract award was influenced by a person not employed by state government who had a conflict of interest with one of the persons submitting the proposal.

A82-1223: The complainant charged, among other things, that the selection review process was improper because the evaluators were not qualified to review the proposals received and because information critical to a proper appeal (release of information about the evaluators and their rating sheets) was not timely provided.

F82-1293: This complaint was predicated upon complainant's learning that one evaluator of a five member team misjudged all submissions because he had used an evaluation form different than the one used by the four others.

F83-0928: The complainants charged, among other things, that an RFP was inadequate and that the selection committee lacked the technical expertise adequate to the task of conducting an evaluation of proposals received. (The issuing agency subsequently declined to accept a response or award a contract.)

F85-0994: Among other concerns, the complainants charged error in the ranking and selection of proposals. (The complaint was discontinued when an appeal was filed.)

D. The appeal process requirements discourage fair evaluation of grievances on their merits.

A "review process" for professional services contracts is required by law. AS 36.98.070.

The handling of three recent complaints, Ombudsman Complaints A85-0910, A85-0951, and A85-0957 illustrate one element of the problem which typically arises with respect to professional services contracting but which may have applicability to procurement as well.

Briefly summarized, the three complaints giving rise to this petition are these:

A85-0951:

The contract award was made July 1. The complainant claims the notice of award was received by the aggrieved respondent on July 8. The notice of award made available to the investigator is dated July 1, and contains the subject of the request, date, ATN number, contracting officer, a short notice, the successful bidder, and the names and addresses of all other respondents.

There was no information about the basis for the award. The notice states:

> . . . This abstract of responses is final notice of award of contract(s) if no amendment is subsequently issued by the State and if no appeal of the award(s) stated hereon is received from an aggrieved respondent during the five days following the date of this abstract,

Saturdays, Sundays, and other legal holidays excluded.

The complainant called the contracting office, learned some of the basis for the decision informally over the phone, and mailed his appeal, dated July 8. According to Commissioner Eleanor Andrews's letter of rejection, it was received by Administration on July 15. That letter stated:

> 2 AAC 17.050 provides that for an appeal to be considered, it must be received within five (5) working days following the notice of award. In this instance, your appeal had to be received by close of business on July 9, 1985.
>
> For the reason that your appeal was not received in a timely fashion, I must reject your appeal as provided in 2 AAC 17.050(d).

A85-0957:

The notice of award, dated July 1, arrived by regular mail on Saturday, July 6. The complainant states that on Monday, July 8, the aggrieved respondent requested pertinent information from the Department of Corrections, the agency letting the contracting. This information was received from the department on July 10, and an appeal was hand-delivered to the Department of Administration on July 12.

The response from the commissioner's office reported that the appeal was dated July 11 and received July 12, and therefore rejected as untimely.

A85-0910:

The aggrieved respondent appealed the award of RFP 86-0031 on June 25; the department received the appeal within the prescribed five days of the award of the contract. Commissioner Andrews advised that you were rejecting the appeal for "lack of specificity," stating to the aggrieved party:

> . . . You have not taken issue with the specific scores assigned to either proposal in any area of evaluation nor have you provided any specifics concerning where or why you feel yours was the better proposal.

The strict application of 2 AAC 17.050 does not afford an aggrieved respondent a fair opportunity to be heard. It is apparent from looking at the three examples cited that five days is not sufficient time for an aggrieved respondent to:

(1) receive pertinent information about the basis for the contract award (this information is usually sent to the respondent by mail);

(2) prepare the required detailed reasons for appeal; and

(3) submit the appeal in writing to the department.

Aggrieved bidders are placed in the position of having to either submit a late or an incomplete appeal.

Investigation culminated in my submitting a petition for the Amendment of 2 AAC 17.050 to Commissioner Andrews. My petition asked the department to delete the five day requirement for appeals of 2 AAC 17.050(a) and to insert new language as deemed appropriate by the department. The substituted language should either prescribe a more reasonable (longer) period of time by which the aggrieved respondent may appeal or, alternatively, provide for a two stage process whereby notice of the appeal must be given to the department prior to one deadline and additional time provided by which the aggrieved respondent may submit the required detailed reasons for the appeal.

In petitioning, I cited the three complaints, each of which alleged that the five day requirement of 2 AAC 17.050 was unfair. I believed that these three appeals may very well raise substantive issues about the selection processes used by the awarding department. In fact, the commissioner had so indicated in at least one of the rejections of the complainant's appeals. The effect of the strict application of the provisions of the regulation cited has precluded the department from addressing potentially important questions about the award of professional services contracts.

An appeal system should not be allowed to produce extensive delays in every contract award. However, the Alaska Legislature clearly contemplated appeal pursuant to AS 36.98.070. At least as to these three complainants, the effect of the five day rule has undercut the intended result that there be an opportunity for appeal, by rejecting appeals that are filed in good faith within a reasonable amount of time without opportunity to further consider their merits.

Because I perceived the current regulation as unfair to aggrieved respondents, and because it was apparent that substantive issues are not being considered by the department due to the overly restrictive language of 2 AAC 17.050, it would clearly be in the interest of both the State and future aggrieved respondents to amend the regulation.

I urged the department to act to initiate essential changes in the appeal process in order to improve the opportunity that process provides

to permit a reasonable review of contract awards for professional services. I saw no other check within the executive branch to assure that awards are not made on improper grounds and urged prompt action on the request.

Commissioner Andrews rejected the petition:

> This will acknowledge receipt of your letter of August 15, 1985, petitioning under AS 44.62.220 for a modification to 2 AAC 17.050.
>
> I would agree that the appeal process for professional services contracts, and more specifically the five-day rule, should be reviewed for possible modification. I feel, however, that to go to public hearing now is premature. This department is currently advertising through an RFP for a study of State procurement practices. The final report of that study will not be available until December 15, 1985. A Senate committee is currently examining the State's procurement practices and Executive Branch ethics. We have been advised that the legislature intends to completely rewrite the procurement laws (which includes the appeal process). Although, as stated earlier, the procedure needs to be reviewed, to spend the two to three months necessary to change the regulations now and then have to do it again in a few months to be consistent with legislative changes and study recommendations, appears to be not in the State's best interest at this time. The current regulations have been in effect since 1982, and a few months delay to assure coordination with other interests considering changes to the law and regulation appears to me to be the preferred method of progress.

*

As it considers matters of appeals, the committee may want to give attention to the scope of review.

In material prepared for an April, 1984, seminar, former Ombudsman Frank Flavin directed attention to the lack of a viable appeals process. "The grievance procedures for [the Department of Transportation and Public Facilities] and [the Department of Administration]," Flavin noted,

> are limited to a determination '. . . whether the award of the contested contract was made in accordance with applicable statutes and prescribed procedures. . . .' 17 AAC 07.050 and 2 AAC 17.050. Consequently, the review is procedural rather than substantive and precludes a total review of all facts which may establish an abuse of discretion.

> [The departments] have limited themselves to a review as narrow as a judicial review instead of a full administrative hearing on all factors within 'administrative expertise.'

Flavin also noted that judicial relief in these situations was rather unlikely:

> Review of professional services contracting will undoubtedly follow that for regular bidding and is consequently limited to questions of law. The court will not substitute its judgment for that of the administrative agency. Since professional services contracting by nature is more subjective than regular bidding, available judicial relief is extremely limited. [Citations omitted.]

Complaints to the office raise questions about appeals.

E. Exceptions and exclusions.

The separate status for administration and management of professional services contracting by the Department of Transportation and Public Facilities arises out of the definition of "commissioner" in AS 36.98.080(1). The committee should consider the award of contracts by the department's experience in awarding and managing contracts under the exception established in the 1982 statute.

The professional services contracting statutes incorporate the University of Alaska under AS 36.98 by virtue of the definition of "state agency" in AS 36.98.080(5). University officials have indicated they seek an exception from the filing requirement. If an exception is provided, the committee and legislature should assure that the University has in place a professional services contracting process fully sufficient to maintain the credibility of the professional services contracting process and of public confidence in that process.

REAA professional services contracting practices were highlighted in F83-0392. Investigation disclosed that, notwithstanding a clear requirement in the procedures adopted by the school board, district administrators awarded a contract for a needs assessment study without prior approval of the board. At the conclusion of the investigation, the omission was reported to the board.

III

A. Prospective contractors not qualified to conduct business.

Current state law (AS 37.05.230(5)) pertinent to competitive bidding requires only that a person or firm hold a current Alaska business license to take advantage of the "Alaska bidder" preference. Otherwise, the determination of whether a bidder is a responsible bidder

as regards the bidder's "compliance with state laws" (AS 37.05.-240(a)(3)) may be made by the issuing agency at the time of bid evaluation.

Although complaints in this category are not numerous, they recur with some regularity. Typically submitted by aggrieved or disgruntled bidders or respondents, the complaints appear to be prompted by a rather common expectation that persons and firms who respond to invitations to bid or requests for proposals should be qualified to engage in business in Alaska (i.e. licensed under AS 43.70 to do business in the state) at the time of submission of the bid or response.

This office's typical response to these complaints is to advise the complainant of the requirements of AS 37.05.230(a) and the interpretation and application of AS 43.70 and decline the complaint. See, in this regard, Ombudsman Complaints A81-0250 (complaint filed against the Business License Section of the Department of Revenue for failure to enforce requirements against prospective contractors), F81-1243 (University awarded renovation contract to firm which could not show evidence of a business license or a contractor's license), A82-0239 (challenging the award of a contract by the Division of Vocational Education, Department of Education, to a person who had no business license), and A83-0616 (questioning the Department of Transportation and Public Facilities' award of a contract to a bidder who did not hold a business license at the time of bid submission). The consistency with which the complaint is filed, however, suggests that the legislature may want to conform state law to what are apparently widely held, albeit mistaken, expectations regarding a person's or firm's qualification to respond to a bid invitation or RFP.

B. Contract extensions or continuations.

In the recent receipt of several open complaints, we have observed public displeasure in the tendency of some agencies to avoid or circumvent the contract award process for purchases under the Fiscal Procedures Act (including office space leases) and, to a lesser extent, professional services through the use of contract continuations and extensions. The subject deserves the committee's attention.

Speaking to extensions, the Department of Administration's own purchasing regulations advised:

> Where contract terms include a renewal option, that option may be exercised without re-bidding or a bid waiver. (A bid waiver is necessary to negotiate a renewal if no options exist.) The existence of a renewal option does not imply we must renew, it is simply an option which can be exercised if it is in the best interests of the State. The conditions of exercising the option are limited to the option clause. [Emphasis added.]
>
> . . .

In its review of procurement practices, the committee should consider the trend or tendency of agencies to

> (1) add a provision, often no more than as a matter of boilerplate (in a range of agency-initiated documents--including, but not limited to, grants awarded and managed under other provisions of the Fiscal Procedures Act) to authorize contract extension or continuation options;
>
> (2) include contract extension or continuation option provisions that authorize contract extension for periods as long or longer than the period of performance for the original contract on which the extension is based; and
>
> (3) extend or continue existing contracts under a contract renewal without evaluating whether extension or continuation is "in the best interests of the State."

Since extension or continuation under an existing contract is an alternative to contract award through competitive bid or examination and award on the basis of RFPs, the committee should, in my judgment, establish some general rules as to when and how an agency may opt to extend or continue a contract.

*

On a related matter: AS 36.98.010(1) establishes that the provisions of AS 36.98 apply only to contracts of more than $25,000, and AS 37.05.230 sets its own exceptions for small contracts. In complaints filed with this office examining the renovation of the Governor's Mansion and in Ombudsman Complaint J85-0202, complainants' allegations included the observation that the limitations were routinely, and improperly, being circumvented through the device of contract amendment or contract extension. Indeed, the evidence supported this. In the instance of the Mansion contract, the Department of Transportation and Public Facilities--following what, as I understand, has become routine practice, issued a $25,000 contract, then proceeded to continue and extend it. In J85-0202, an emergency contract for septic collection disposals let by the Department of Corrections under authority of AS 37.05.230(3), the "emergency" was continued and the contract reoffered at least three additional times, each without benefit of competitive bid.

It is up to the committee and the legislature, of course, to determine whether the dollar limitations now in law for these small contract exceptions should be revised or amended. More significantly, the committee should be exceedingly careful about any exceptions to the general rules it identifies simply because, unless some safeguard against abuse is included, the issuing agencies will, I can assure you, devise ways to apply the exceptions to avoid the use of the norm. The easiest safeguard may be to specify that an agency may not extend a

contract beyond the specified ceiling--$25,000 for professional services contracts--or that the agency may use the exception to contract with a party in excess of the specified ceiling during any fiscal year. However handled, the committee should understand the potential difficulties posed by any such statutory exception which it may enact.

C. Nonprofit firms and government agencies unfairly compete with private sector business.

This is another category in which the public's expectations are at variance with the law.

As it considers this point, the committee should understand that:

(1) agencies are specifically authorized to contract for professional services with other state agencies, a federal agency, or a political subdivision of the state--this term is not defined--free of the requirement that RFP's be solicited (AS 36.98.040(d)(3)); and

(2) agencies are also authorized to purchase, in derogation of competitive bid provisions of the Fiscal Procedures Act, through the General Services Administration (AS 37.05.270).

We have regularly received complaints of "unfair competition" on the part of state agencies, the bulk of the complaints being filed against the University of Alaska. Among examples:

> -- F82-1442 (the University of Alaska enjoys competitive advantage in competing against private businesses for available public sector contracts);
>
> -- F83-1392 (Community college system inappropriately and unfairly compete with private contractors for available professional services contractors);
>
> -- A83-0734 (a unit of the University system, the Arctic Environmental Information and Data Center, unfairly competes with the private sector for media production contracts); and
>
> -- A85-0449 (the university's Institute of Social and Economic Research enjoys a preference and, in the particular circumstances described by the complainant, did not submit the proposal with the lowest cost).

Not all complaints in this category have involved challenges to involvement of the University. Concluding investigation of J84-0771, for example, I found "unsupported" complainant's assertion of error against the Department of Community and Regional Affairs for approving a competitive bid waiver for a municipality's provision of day care services. There was sufficient evidence that, under the unusual facts

of the situation, the issuance of a waiver in response to an "emergency" was appropriate. I also found "unsupported" the complainant's assertion in J84-0649 that the Department of Transportation and Public Facilities erroneously substituted work under an interagency agreement for issuance of a professional services agreement, thus favoring use of and reliance on in-house expertise over private sector talent: state law indicates a preference for reimbursable services agreements.

Complaints have filed, too, relating to decisions not to make use of this preference. So, in F83-0513, the challenge was raised against the decision of the Energy and Power Development Office of the Department of Commerce and Economic Development to use a nonprofit corporation to manage programs which, in the complainant's judgment, should have been passed through to the local government.

Perhaps the oddest in this group of odd-lot complaints was a 1984 grievance, J84-0865, in which the Division of General Services and Supply refused to go to competitive bid for acquisition of outboard motors. It relied instead on a "bid waiver" process which itself depended on a long-extended "contract award" of General Services Administration, the procurer of goods and services for the federal government. In other words, the division had omitted competitive bidding for motors citing a contract award by the federal purchasing agency, though the contacts between the state and federal procurement agencies over acquisition of outboard motors appeared extremely nebulous. The old statute (AS 37.05.270, enacted in 1955) appears to countenance this exception and we, regrettably, found the complaint "unsupported." The division, in turn, indicated that it would probably no longer cite an outdated federal agency contract award, but would go to competitive bid.

The problems arising as to one part of this section appear to have been partially alleviated by the inclusion, in the 1982 addition of the professional services contracting provisions, of a requirement that standard overhead rates be incorporated into proposals from an offering state agency. AS 36.98.035. It is far from clear that the provision is always honored, and the committee may wish to inform itself on the impact of the provision.

D. Release of information.

Some examples of the confusion that attends the matter of disclosure of competitive bid and proposal submission documentation:

> A81-0884: At the behest of a bidder who had not been able to obtain information about disposition of a competitive bid, the office interceded to obtain from the agency information as to the winner of that bid.
>
> A81-1196: A complainant, who had submitted a proposal in response to an RFP and who was not awarded the contract, encountered difficulty in

obtaining access to the rating sheets and a copy of the successful proposal in order to review the contract award preparatory to an appeal.

F81-0649: The complainant had been unsuccessful in securing a copy of the winning proposal, the agency erroneously citing the proposers' proprietary information.

A83-0826: Citing the need to consult with its attorney, the agency delayed disclosure of information to the complainant that the complainant believed was need to file an appeal from an adverse professional services contract award.

A83-0881: In this, information indicating the reasons for contract award were withheld from the complainant, a competitor, until after contract award, thereby cutting of complainant's opportunity to appeal the decision.

A84-0526: The complainant was unable to secure information as to the basis for award of a contract to a competing firm in preference to his own.

E. Ethics considerations in public contracting.

Conflicts of interest can occur when a present or prospective contractor has interests, current or planned, that directly or indirectly relate to work to be performed under contract. These interests may affect the contractor's ability to perform effectively and impartially under the contract or result in the contractor's enjoying an unfair advantage when competing for the contract or other contracts.

The public--and particularly that segment of the public that competes for the state's contract business--is alert and sensitive to real or perceived conflicts of interest in the evaluation of bids and proposals, in the award of contracts, and in the management of awarded contracts, and in the evaluation of services performed under contract. Among matters which have been directed to our attention:

J79-0213: Investigation of this complaint confirmed the complainant's assertion of a conflict of interest between the Department of Administration and its contractor in a matter relating to data processing: the spouse of the an agency employee was employed by the firm to which the contract was awarded.

A81-1152: This complaint considered, among other elements, and found no support for complainant's assertion that there may have been a financial tie between a state employee who

negotiated the contract in question and the successful contractor.

F81-1314 and others: Investigation of this complaint indicated that, while two members of a department's proposal evaluation committee were former employees of the firm to which the contract was awarded, there was no overt evidence of favoritism in the award. Among other recommendations, the agency was alerted to the appearance of impropriety involved with such an arrangement.

A83-0592: On referral from a complainant, the office evaluated the assertion that the award of a contract was made to a firm employing a former department official at the expense of award to a firm which employed and used the services of another department official.

J83-0043: The complainant reported a situation in which the law firm that employed or included a recently-resigned former state official received a contract for legal services work.

J83-0855: In the award of a professional services contract for inspection services on a sole source basis, the complainant suggested that the agency may have selected an individual who was employed by or retained by the prime contractor on the public works project which he was directed to inspect. Investigation found no evidence of conflict, but noted that the department needed to include a conflict provision in its negotiated contracts.

JBC:pjc

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Letter from Commissioner Knapp

Letter from George Janssen on Spring Creek Correctional Center (10-30-85)

Letter from the University of Alaska (11-11-85)

ADDITIONAL INFORMATION

Letter from Painters Local Union No. 1140 (12-5-85)

Testimony of Alaska Chapter, Associated General Contractors of America (12-5-85)

Letter from Alaska State Housing Authority (12-13-85)

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

MEMORANDUM December 26, 1986

SUBJECT: Revision of Procurement Practices (W.O. 14-1361)

TO: Senator Jan Faiks, Chair Senate Select Interim Committee on Procurement Practices and Procedures

FROM: Tamara Brandt Cook TBC
Legislative Counsel
Division of Legal Services

After draft number three of the bill revising state procurement practices was made available to the public I received several suggestions for improvements. It is my understanding that the Senate Select Interim Committee on Procurement Practices and Procedures may consider this draft again before the legislative session begins, so I wanted to pass along these recommendations. I would be pleased to incorporate any changes the committee approves into the final version of the bill.

The following suggestions come from Mr. Bob Link of the Department of Administration:

1. Page 2, line 23: after "procurement" add "and management".

2. Page 10, line 12: paragraph (2) should read "10 percent of the first $100,000 bid and five percent of the amount of the bid over $100,000 if the bid exceeds $100,000". As written, less security is required for slightly larger contracts than for small contracts.

3. Page 11, line 20: bidding information should be made public before the "notice of intent to award a contract" rather than before the award itself. This provision was included in the draft before Sec. 36.30.365 requiring a notice of intent to award a contract was added.

4. Page 16, line 5: add after "Offerors" "reasonably susceptible of being selected for award". This matches the provision regarding discussions with offerors.

5. Page 25, line 9: delete "the commissioner and". This would avoid the necessity of keeping two complete sets of contract files.

6. Page 48, line 20: after "property" insert "other than privately owned real property leased for the use of agencies". Since DOT is in charge of all construction, without this exception the Department of Administration would lack authority to make needed improvements on buildings they lease for office space.

Linda Walton, Assistant Attorney General has requested the following changes:

1. Page 21, lines 24-26: Delete "in addition to that provided for under the contract and before performing work or supplying materials not required under the contract" and insert "that exceeds the amount designated as the base amount in the contract and before performing additional work or supplying additional materials".

2. Page 22, line 11: Delete "this section" and insert "(a) of this section".

3. Add a new section on misrepresentations and fraudulent claims. Her draft of the proposed section is attached to this memo.

TBC:ml
me1/033

MISREPRESENTATIONS AND FRAUDULENT CLAIMS

(a) A person who makes or uses in support of a claim, a misrepresentation, or who practices or attempts to practice a fraud, at any stage of proceedings relating to a procurement or contract controversy under this chapter:

(1) forfeits all claims relating to that procurement or contract; and

(2) is liable to the (state)? (contracting agency?) for reimbursement of all sums paid on the claim, for all costs attributable to review of the claim, and for a civil penalty equal to the amount by which the claim is misrepresented.

(b) The procurement officer, commissioner or court shall make specific findings of misrepresentation, attempted fraud or fraud before declaring a forfeiture under section a(1).

(c) Suits to recover costs and penalties provided under a(2) must be commenced within six years after the discovery of the misrepresentation, fraud or attempted fraud.

(d) For purposes of this section, "misrepresentation" means a false or misleading statement of material fact, or conduct intended to deceive or mislead concerning material fact, whether or not it succeeds in deceiving or misleading.

(e) If a person in a matter relating to a procurement or a contract controversy or claim under this chapter makes a misrepresentation to the state through a trick, scheme, or device, that person is guilty of a class C felony.

DEC

December 13, 1985

The Honorable Jan Faiks
Senator
Senate Select Interim Committee on
Procurement Practices and Procedures
1024 West Sixth Avenue
Anchorage, Alaska 99501

Dear Senator Faiks:

The staff of the Alaska State Housing Authority (ASHA) has read three drafts of the procurement bill on which your committee has been working. From the most recent teleconference on the bill, it appears that certain sections remain "in process" and are to be given final definition at a later date. We expect that the formal committee process of legislative review will allow further opportunities to comment on this important document and that it will be possible to have these comments incorporated into later drafts. Based on what we have reviewed thus far, the following information regarding this legislation's impact on ASHA is offered:

(1) Sec.36.30.015(e) should be amended to state: "The boards of directors of the Alaska Railroad Corporation and the Alaska State Housing Authority shall adopt, etc."

As you may know, ASHA currently has in place procurement regulations particularly tailored to its business of constructing, managing and maintaining various types of housing units throughout Alaska. Given the fact that residential wage scales will differ from those applied to other types of public construction and that local building codes, zoning ordinances and construction permit procedures also vary from those used on other public projects, the need to delegate specific residential construction contract authority to ASHA becomes more apparent. Although this issue could be addressed administratively after the fact, it would be more straightforward for such delegation to receive direct legislative review and approval prior to passage of a new procurement law.

TELEPHONE (907) 562-2813 BOX 100080 ANCHORAGE, ALASKA 99510

With regard to the procurement of supplies and services (non-professional) with which we maintain some 3500 housing units across the State, it is again important to understand our current practices. Developed in accordance with U.S. Department of Housing and Urban Development policies, 3 AAC 95.010, et. seq. is a sophisticated set of regulations with application particular only to housing management uses. ASHA cannot predict and plan for broken pipes, windows or doorways, to name a few of the purchases we make on an as needed and regular basis. Tenants cannot be expected to wait for ASHA to go through individual procurement processes when stoves or refrigerators go out or when a damaged unit is vacated and in need of repairs. With over 1,000 people on waiting lists for low income housing across the State, and with vacancy/unit turnaround goals monitored by the federal government, the additional imposition of a State level review would not change the way we currently operate, nor serve any productive public purpose. Such review will only delay a system that has worked effectively for over forty years, was rewritten in 1981, and is in no current need of modification.

ASHA's procedures on professional services contracting have been performed in recent years under AS 36.98.010, et. seq., except in those cases where to follow such procedures is demonstrated to jeopardize our receipt of federal funds (AS 18.55.110). The lack of delegable professional services authority under this section is particularly troublesome to ASHA. State boilerplate articles, under Appendix A of Professional Services Contract Form 02-093 (Rev 10/82) are frequently not specific nor detailed enough to protect the interests of the U.S. Department of Housing and Urban Development and the Authority on large scale professional service contracts. By far the majority of our contractual agreements contain explicitly detailed articles created by and for ASHA projects. These contracts cannot be reduced to the generalities of the standard State professional services statement without significant loss to ASHA of contractual protections developed by the Authority through experience, research and course of dealing. ASHA is not automatically cc red by the Division of Risk Management, the Division of Labor Relations, nor the Office of the Attorney General for

contractual problems arising after the fact. The protection of our assets from various liabilities or contingencies remains foremost in our minds when entering into a contractual agreement. It is inappropriate, at best, for the State to weaken our abilities to specifically protect federal funds for no demonstrated public purpose. If the Commissioner of Administration is not able to delegate this authority, then ASHA should be added to the Railroad, University and Court System with clear exemptions from this section.

(2) Sec.36.30.040(b)(8-13) regarding storerooms and inventories; classes of contractual services; price analysis; payments and performance bonds; cost principles in negotiations; and discrimination in contracting are areas where the U.S. Department of Housing and Urban Development directly monitors this housing authority. Any regulations adopted under this section which would apply to this agency will need to be reviewed and coordinated with the U.S. Department of Housing and Urban Development, Regional Counsel, for compliance with federal regulations.

(3) Sec.36.30.070(1-4) Governed by federal regulations applicable to ASHA.

(4) Sec.36.30.080(b) This language should be reviewed by bond counsel to any parties entering into lease-financing or lease-purchase agreements.

(5) Sec.36.30.110 These items should be required after bid award but before notice to proceed. Gathering this information is an unnecessarily cumbersome task for unsuccessful bidders to perform and would inundate agency personnel with useless reviews of extraneous information.

(6) Sec.36.30.120(b)(1-2) The 10% requirement of this section is higher than necessary and these unnecessary costs are eventually borne by the contracting agency within the cost of total project development. 5% is standard for construction purposes.

(8) Sec.36.30.200 This article almost precludes the state from using design/built options given the restrictions on competitive sealed proposals. Competitive sealed proposals become relegated to a second class type of solicitation and limit creativity of thought for development of new concepts in construction within budgeted fund limits.

(9) Sec.36.30.310 This section is more broadly written than that in current ASHA regulations. This agency would have a lower level of comfort operating under a statute prescribing an open-ended or subjective interpretation of instances affecting "public health, welfare or safety." Also, there is no consideration given to an analysis of time or urgency in determining an "emergency" exists.

(10) Sec.36.30.370 May conflict with U.S. Department of Housing and Urban Development regulations.

(11) Sec.36.30.380 May conflict with U.S. Department of Housing and Urban Development regulations.

(12) Sec.36.30.890 ASHA is not covered sufficiently by this section to avoid conflict with federal government practices and procedures. Federal due process allows public notice on regulations to come after the fact and, in the interim, to administer programs through interpretations of handbooks or other non-regulatory documents. Although not statute or regulation, this method of program delivery marks a federal preference to model programs after field trial experience is known. The State share of discretionary HUD funds oftentimes depends on ASHA's compliance with federal practices and procedures which aren't necessarily in statutory or regulation form. We would not be sufficiently exempted by this Section to avoid conflict with federal policies and procedures.

These initial comments are generated strictly from an in-house review by our staff. Neither our Board of Directors nor any officials from the U.S. Department of Housing and Urban Development have reviewed the most recent version of this legislation. It is likely they will have additional comments to offer.

The concept of centralized procurement is valuable and efficient for those agencies that may be inexperienced in the complexities of obtaining goods and services and/or have minimal written regulations or policies to structure their procurement activities. The Alaska State Housing Authority falls into neither category. With strict federal oversight and monitoring, federal funds are expended for a valuable public purpose. Financial information on expenditures is well documented and regularly reviewed. Complex volumes of federal procurement instructions are interpreted for ASHA by local HUD officials. Bidding and contracting activities are defined in detail by ASHA regulations.

The procedures of the State Procurement Code are exemplary in nature and should be modeled by all public organizations (including ASHA) operating on state and local levels. However, the delays and generic treatment this agency would experience in having this law superimposed on its existing systems would create confusion and inefficiencies for both the public and the agencies involved. Aside from generating new "paper pushing" positions and having to revamp many existing procedures after implementation, there is virtually no new effect to ASHA's present practices that would be realized from including ASHA in this legislation. Business will continue, only more slowly and at a greater cost to the programs involved.

Thank you for your consideration of these remarks. We shall be following with interest this legislation and look to an enhancement of ASHA's regulations to make them substantially equivalent to this bill in its final version. Should you or any members of the committee wish further information on this matter and its effect on our agency, please let me know.

Sincerely,

ALASKA STATE HOUSING AUTHORITY

Barbara Morse-Quinn

Barbara Morse-Quinn
Executive Director

BMQ/jlr
enclosure

cc: Susan Olsen, HUD, Chief Counsel
ASHA Board of Directors
ASHA Department Heads
Marsha Hubbard, DOA
Steve Hildebrand, DCED

A M E N D M E N T

Offered in the SENATE

TO: Proposed CS for SB 341

Page 9, line 19:

After (b), delete the first sentence and insert the following:

Immediately following the opening of bids, the bidders shall list subcontractors to be used in the performance of the contract.

Page 9, between lines 26 and 27, insert the following:

(c) A bidder may replace a subcontractor set out in the list required by (b) of the section only if the subcontractor:

(1) fails to satisfy the provisions of AS 08.18;

(2) files for bankruptcy;

(3) fails to execute a subcontract;

(4) fails to obtain bonding;

(5) fails to obtain insurance;

(6) fails to perform the subcontract; or

(7) is determined by the department to not be a responsible bidder.

(d) The commissioner may implement this section by regulation.

for Sue Urig

Loren Rasmussen - (h) 789-9956
(w) 465-2960

DRAFT

Proposed Technical Amendments to Senate Bill No. 341
Sec. 36.30.010.
Page 2
Lines 21,22,23,24,25.

PROPOSED AMENDMENT
(a) The commissioner shall appoint to the partially exempt service the chief procurement officer of the state who is responsible for the procurement and management of supplies, services, and professional services for agencies in the executive branch.

REASON: To clarify the intent of the bill because elsewhere it makes the chief procurement officer for the management of supplies during their life cycle, including the responsibility for property management, inventory and disposal.

Sec. 36.30.015
Page 3
Lines 21,22,23.

PROPOSED AMENDMENT
(a) The Department of Transportation and Public Facilities may contract for construction and [PROCUREMENTS FOR] for the procurement of equipment to be added to the state equipment fleet.

REASON: To clarify the intent of the bill, that is, to permit the Department of Transportation to procure cars, trucks, graders, etc., for the state equipment fleet, not to grant them the authority to make all procurements for the state equipment fleet.

Sec. 36.30.015
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Lines 25,26,27.

PROPOSED AMENDMENT
The commissioner of transportation and public facilities may delegate to another agency the authority to contract for construction [.] and for the procurement of equipment to be added to the state equipment fleet.

REASON: To clarify the intent of the bill. Without the proposed amendment, the bill says that the commissioner of transportation and public facilities may only delegate the authority to contract for construction and implies that none of the other authority vested in that position may be delegated.

DRAFT

Sec. 36.30.015
Page 4
Lines 5,6,7.

PROPOSED AMENDMENT
(b) The commissioner may delegate to an agency the authority contract for and manage [SUPPLIES] services, professional services and supplies, except property of the state equipment fleet. [SERVICES, AND PROFESSIONAL SERVICES.]

REASON: To clarify the intent of the bill.

Sec. 36.30.120
Page 10
Lines 8,9,10,11,12,13.

PROPOSED AMENDMENT
Bid security must be in an amount equal to at least

(1) 10 percent of the amount of the bid if the bid does not exceed $100,000; [OR] and

(2) five percent of the amount of [THE] a bid exceeding $100,000 , if the bid exceeds $100,000.

REASON: To clarify the intent of the bill, that is, that the bid security required for a contract greater than $100,000 is more than the bid security required for a contract of less than $100,000.

Sec. 36.30.140
Page 11
Lines 21,22.

PROPOSED AMENDMENT
The bids are not open for public inspection until after a [CONTRACT IS AWARDED.] notice of intent to award a contract has been issued.

REASON: This proposed amendment will permit bidders to inspect all of the bid responses at the time a notice of intent to award a contract is issued and to file a protest then, rather than after the contract has been awarded.

DRAFT

Sec. 36.30.240
Page 16
Lines 5,6,7,8,9.

PROPOSED AMENDMENT
Offerors reasonably susceptible of being selected for award shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before the award of the contract for the purpose of obtaining best and final offers.

REASON: To clarify the intent of the bill, that is, that the contracting agency may accord specific offerors an opportunity to discuss and revise their competitive sealed proposals and submit their best and final offer but that this may be done only with offerors whose proposals initially met the intent of the competitive sealed proposal and were reasonably susceptible of being selected for award.

Sec. 36.30.380
Page 20
Lines 10,11,12,13,14.

PROPOSED AMENDMENT
Except for a contract awarded through competitive sealed bidding [AND] or a firm fixed-price contract, a contract may not be used unless it has been determined in writing by the procurement officer that the proposed contractor's accounting system...

REASON: To clarify the intent of the bill. That contracts established by competitive bid or other contracts with a fixed-price need not have the approval of the contractors accounting system. These are contracts established by bid which do not have a firm fixed price.

DRAFT

Sec. 36.30.510
Page 25
Lines 8,9,10.

PROPOSED AMENDMENT
A contract file open for public inspection must be kept by [THE COMMISSIONER AND] the contracting agency for each contract awarded under competitive sealed proposals.

REASON: The proposed amendment would eliminate the need for duplicate sets of contract files to be kept.

Sec. 36.30.990
Page 48
Lines 17,18,19,20.

PROPOSED AMENDMENT
(6) "construction" means the process of building, altering, repairing, maintaining, improving, or demolishing a public highway, structure, building, or other public improvement of any kind to <u>public</u> real property:

REASON: To clarify the intent of the bill. To avoid confusion between public property and private property open to the public.

THE END

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REASON: To clarify the intent of the bill. To avoid confusion between public property and private property open to the public.

THE END

TO: KEVIN BRUCE
FROM: ELIZABETH
SUBJECT: PROCUREMENT BILL
DATE: JANUARY 21, 1986

Kevin, attached is an index of all letters received on the procurement bill to date. I have also enclosed the Ombudsman's report, testimony of the Associated General Contractors of America, and a letter from the Painters Local Union No. 1140. I contacted the Purchasing Management Association of Alaska for a final statement, however, they decided to send individual comments.

If you would like me to send you any of the letters, memos, etc., please let me know. Most reflect individual concerns, not position papers by groups.

Let me know what you need. Thanks.

Telcon w/ Cook, Hickerson, Baldwin, Lauren (DOT/PF)

→ Univ of Alaska - leave as it is

Admin comments

-.010 - add "management"

-.015 - delete last 2 lines

-.015 (b) - move exception d.

10 90 of last 100, 5% of anything else - p. 10

24.23.010 - policy decision - take out 12-month period; dept of law memo showing problems

- law/admin will defend

44.62.175

subs - let com. decide

Rodey - local hire p. 13 @ 15-17

if delete 3d pg upon d.h issue

Alaska State Legislature

SENATOR
ARLISS STURGULEWSKI
Chairman, Senate Resources Committee
Vice-Chairman, Senate Health, Education and Social Services Committee
Member, Senate Community and Regional Affairs Committee

2957 SHELDON JACKSON STREET
ANCHORAGE, ALASKA 99508

While in Juneau
POUCH V
JUNEAU, ALASKA 99811
(907) 465-3818

Senate

MEMORANDUM January 21, 1986

TO: Senator Pat Rodey

FROM: Senator Arliss Sturgulewski

RE: SB 341 "An Act relating to state procurement practices and procedures; and providing for an effective date."

Pat, this memo will confirm our earlier discussion regarding SB 204 "An Act relating to contracts for architectural, engineering, and land surveying services; and providing for an effective date" which was introduced by myself and co-sponsored by you. I feel it is entirely appropriate to fold SB 204 into SB 341 as it obviously is an important part of overall state procurement practices. I will be happy to work with you personally on this issue.

Although Senator Faiks plans to schedule SB 204 for a hearing next week, I still feel it is important to include SB 204 in SB 341. I would welcome your testimony on SB 204. The exact date of the hearing is uncertain at this time but I will advise you as soon as I know the date and time of the meeting.

ALASKA CHAPTER
THE AMERICAN INSTITUTE OF ARCHITECTS
P.O. BOX 10-3563 • ANCHORAGE, ALASKA 99510

December 16, 1985

Ray Gillespie
Governors Office
Pouch A
Juneau, Alaska 99811

Dear Mr. Gillespie:

As requested by Sharon Macklin, our Legislative Affairs Consultants, we are enclosing draft legislation that the A/E profession requests be included in the State of Alaska Model Procurement Code presently being considered.

This draft is an excerpt from Senate Bill 204 as submitted during the Fourteenth Legislature and consists of language that results from compromises between our profession and the State of Alaska, Department of Administration and the Department of Transportation and Public Facilities.

Thank you for the opportunity to provide input on this issue.

Sincerely Yours,

Harley H. Hightower

Harley H. Hightower, AIA
President, Alaska Chapter/AIA

HHH/th

cc: Richard Ritter

COMPLIANCE OF CONTRACTS WITH PROFESSIONAL REGISTRATION REQUIREMENTS. The state or a political subdivision of the state may not award for architectural, engineering, or land surveying services to:

- an individual who is not registered, in accordance with State Statue, to perform the architectural, engineering, or land surveying services required by the contract;
- a partnership that is not qualified, in accordance with State Statue, to provide the architectural, engineering, or land surveying services required by the contract; or
- a corporation that is not authorized, in accordance with State Statue, to offer the architectural, engineering, or land surveying services required by the contract.

ARCHITECTURAL, ENGINEERING, AND LAND SURVEYING CONTRACTS

(a.) State Agencies shall negotiate a contract with the most qualified and suitable firm or person of demonstrated competence for architectural, engineering, or land surveying services. The state agency shall award a contract for those services at fair and reasonable compensation as determined by the state agency, after consideration of the estimated value of the services to be rendered, and the scope, complexity, and professional nature of the services.

(b.) If negotiations with the most qualified and suitable firm or person under (a.) of this section are not successful, the state agency shall negotiate a contract with other qualified persons or firms of demonstrated competence, in order of public ranking. The state agency may reject all or part of a proposal.

(c.) The requirements of this section does not apply to contracts awarded in a situation of public necessity if the person responsible for execution of the contract on behalf of the state agency certifies in writing that a situation of public necessity exists.

(d.) Notwithstanding the other provisions of this section, a state agency may include price as a factor in selecting architectural, engineering, and land surveying services when, in the judgment of the state agency, the scope, nature, and amount of services required are sufficiently defined to reasonably enable firms and individuals making proposals to compete with a substantially equal understanding and interpretation of the services required. In order to include price as a factor in selection, the state agency shall involve in the evaluation of the proposals at least one person who is registered in the state to perform the architectural, engineering, or land surveying services that are the primary services to be provided by the contract.

(e) The consideration of price under (d) of this section as a factor in the selection of architectural, engineering, and land surveying services may not exceed 20 percent of the scoring formula used in evaluating proposals. The state agency shall base the evaluation of price on a previously established schedule that objectively correlates price with points scored.

(f) This section does not apply to a contract that incorporates both design and construction services.

AGENDA 2/11/86

SB 341 - State Procurement Code

1. Overview of findings of the interim committee on procurement and summary of major provisions of the resultant procurement bill - Senator Faiks.

2. Section by section analysis of bill provisions.
   Jim Baldwin, Dept. of Law
   Bob Link, Dept. of Administration
   Lauren Rassmussen, Dept. of Transportation
   Tam Cook, Legal Services
   Liz Hickerson, Staff Attorney for Senators Faiks & Halford
   Suzanne LaPierre, Senate Judiciary Counsel

3. Review of outstanding policy issues:
   Liz Hickerson
   Suzanne LaPierre

4. Public Testimony

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM January 20, 1986

SUBJECT: State Procurement Practices (SB 341)

TO: Senator Pat Rodey, Chair
Judiciary Committee

FROM: Tamara Brandt Cook TBC
Acting Director
Division of Legal Services

SB 341 dealing with state procurement practices has been referred to your committee. Mr. Art Peterson with the Department of Law has pointed out a potential problem in the bill. Under Section 63 regulations to implement the bill are required to be adopted by January 1, 1987 and to become effective on the same day. Sec. 36.30.870 of the bill requires that regulations be adopted in accordance with the Administrative Procedure Act. That Act contains various time periods for submission and review of regulations. (AS 44.62.060; AS 44.62.180) If regulations are not adopted until the day they are to become effective, the time requirements under the APA cannot be complied with.

The problem can be resolved by deleting the language, that could be construed as authorizing adoption of regulations to be delayed until January 1, 1987 and providing only that they take effect on that date. This achieves the original purpose behind Section 63, that of insuring that regulations are in effect to implement the bill on the date the bill becomes effective, yet avoids the administrative and legal difficulties that will face the Department of Law if agencies delay the adoption of regulations under the impression that the delay has been sanctioned by law.

Please let me know if you would like this change incorporated into a committee substitute.

TBC:mkr
M2:051

cc: Art Peterson
Department of Law

Cook

A M E N D M E N T

Offered in the HOUSE By Pignalberi

TO: SB 341

Page 26, line 14:

Delete "and"

Page 26, line 16:

Delete "." and insert ";"

Page 26, after line 16 insert the following new paragraphs:

"(4) a list of procurements made under this chapter from out-of-state sources during the previous two fiscal years together with the total number of procurement contracts entered into during that period with out-of-state contractors and the total value of these contracts; and

(5) a list of procurements made under this chapter from state sources during the previous two fiscal years together with the total number of procurement contracts entered into during that period with state contractors and the total value of these contracts."

SB

341

(FILE 6)

14-1361
Cook
12/4/85

BY THE RULES COMMITTEE BY REQUEST OF THE SENATE SELECT INTERIM COMMITTEE ON PROCUREMENT PRACTICES AND PROCEDURES

IN THE SENATE

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to state procurement practices and procedures; and providing for an effective date."

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

* Section 1. PURPOSE. This Act shall be construed and applied to promote its underlying purposes and policies. The underlying purposes and policies of this Act are to

(1) simplify, clarify, and modernize the law governing procurement by the state;

(2) make as consistent as possible the procurement practices among the executive branch, the legislative branch, and the judicial branch of state government;

(3) provide for increased public confidence in the procedures followed in state procurement;

(4) ensure the fair and equitable treatment of all persons who deal with the procurement system of the state;

(5) provide increased economy in state procurement activities and maximize to the fullest extent practicable the purchasing value of state funds;

(6) foster effective broad-based competition within the free enterprise system;

(7) provide safeguards for the maintenance of a procurement system of quality and integrity;

(8) permit the continued development of state procurement practices and policies; and

(9) eliminate and prevent discrimination in state contracting because of race, religion, color, national origin, sex, age, marital status, pregnancy, or parenthood.

* Sec. 2. AS 36 is amended by adding a new chapter to read:

CHAPTER 30. STATE PROCUREMENT CODE.

ARTICLE 1. ORGANIZATION OF STATE PROCUREMENT.

Sec. 36.30.005. CENTRALIZATION OF PROCUREMENT AUTHORITY. (a) Except as otherwise provided, all rights, powers, duties, and authority relating to the procurement of supplies, services, and professional services, and the control over supplies, services, and professional services vested in or exercised by an agency on January 1, 1987, are transferred to the commissioner of administration and to the chief procurement officer.

(b) Except as otherwise provided, all rights, powers, duties, and authority relating to the procurement of construction and procurements to or disposals from the state equipment fleet and the control over construction and the state equipment fleet vested in or exercised by an agency on January 1, 1987, are transferred to the commissioner of transportation and public facilities, subject to regulations adopted by the commissioner of administration.

Sec. 36.30.010. CHIEF PROCUREMENT OFFICER. (a) The commissioner shall appoint to the partially exempt service the chief procurement officer of the state who is responsible for procurement of supplies, services, and professional services for agencies in the executive branch. The chief procurement officer shall have at least five years of prior experience in public procurement and may be removed by the commissioner only for cause. The term of office of the chief procurement officer expires when the term of the governor expires.

(b) Except as otherwise specifically provided in this chapter, the chief procurement officer shall

(1) procure or supervise the procurement of all supplies, services, and professional services needed by an agency;

(2) exercise general supervision and control over all inventories of supplies belonging to an agency and prescribe the manner in which supplies shall be purchased, delivered, stored, and distributed;

(3) prescribe the time, manner, authentication, and form of making requisitions for supplies and services;

(4) sell, trade, transfer between agencies, or otherwise dispose of surplus, obsolete, or unused supplies and make proper adjustments in the accounts of agencies concerned;

(5) establish and maintain programs for the inspection, testing, and acceptance of supplies and services and the testing of samples submitted with bids;

(6) prescribe standard forms for bids and contracts; and

(7) provide for other matters that may be necessary to carry out the provisions of this chapter and the regulations adopted under this chapter.

Sec. 36.30.015. EXECUTIVE BRANCH AGENCIES. (a) The Department of Transportation and Public Facilities may contract for construction and procurements for the state equipment fleet. The Department of Transportation and Public Facilities may dispose of property of the state equipment fleet. The commissioner of transportation and public facilities may delegate to another agency the authority to contract for construction. Before delegating authority to an agency under this subsection, the commissioner of transportation and public facilities shall make a written determination that the agency is capable of

implementing the delegated authority. Contracts for construction and procurements to and disposals from the state equipment fleet are governed by this chapter and regulations adopted by the commissioner of administration under this chapter.

(b) The commissioner may delegate to an agency the authority to contract for and manage supplies, except property of the state equipment fleet, services, and professional services. Notwithstanding delegation of authority under this subsection, an agency's authority to contract for supplies, services, and professional services, is governed by this chapter and regulations adopted by the commissioner under this chapter. Before delegating authority to an agency under this subsection, the commissioner shall make a written determination that the agency is capable of implementing the delegated authority.

(c) The commissioner may not delegate the authority to adopt regulations under this chapter.

(d) An agency may not contract for the services of legal counsel without the approval of the attorney general.

(e) The board of directors of the Alaska Railroad Corporation shall adopt procedures to govern the procurement of supplies, services, professional services, and construction by the corporation. The procedures must be substantially equivalent to the procedures prescribed in this chapter and in regulations adopted under this chapter.

Sec. 36.30.020. LEGISLATURE. The Legislative Council shall adopt procedures to govern the procurement of supplies, services, professional services, and construction by the legislature, legislators, and legislative agencies and committees. The procedures must be substantially equivalent to the procedures prescribed in this chapter.

Sec. 36.30.030. COURT SYSTEM. The supreme court shall adopt procedures to govern the procurement of supplies, services,

professional services, and construction by the judicial branch. The procedures must be substantially equivalent to the procedures prescribed in this chapter.

Sec. 36.30.040. PROCUREMENT REGULATIONS. (a) The commissioner shall adopt regulations governing the procurement, management, control, and disposal of supplies by agencies and the procurement, management, and control of services, professional services and construction by agencies. The commissioner may audit and monitor the implementation of the regulations and the requirements of this chapter with respect to using agencies.

(b) The commissioner shall adopt regulations pertaining to the following:

(1) suspension, debarment, and reinstatement of prospective bidders and contractors;

(2) bid protests;

(3) conditions and procedures for the procurement of perishables and items for resale;

(4) conditions and procedures for the use of source selection methods authorized by this chapter, including sole source procurements, emergency procurements, and small procurements;

(5) the opening or rejection of bids and offers, and waiver of informalities in bids and offers;

(6) confidentiality of technical data and trade secrets submitted by actual or prospective bidders or offerors;

(7) partial, progressive, and multiple awards;

(8) storerooms and inventories, including determination of appropriate stock levels and the management, transfer, sale, or other disposal of agency supplies;

(9) definitions and classes of contractual services and

procedures for acquiring them;

(10) providing for conducting price analysis;

(11) use of payment and performance bonds in connection with contracts for supplies and services;

(12) guidelines for use of cost principles in negotiations, adjustments, and settlements; and

(13) the elimination and prevention of discrimination in state contracting because of race, religion, color, national origin, sex, age, marital status, pregnancy, or parenthood.

Sec. 36.30.050. LISTS OF CONTRACTORS. (a) The commissioner shall establish and maintain lists of persons who desire to provide supplies, services, professional services, or construction services to the state.

(b) A person who desires to be on a list shall submit to the commissioner evidence of a valid Alaska business license together with a biennial fee in an amount established by regulation. A construction contractor shall also submit a valid certificate of registration issued under AS 08.18. The commissioner, by regulation, may require submission of additional information.

(c) The lists shall be used by the chief procurement officer or an agency when issuing invitations to bid or requests for proposals under this chapter.

(d) The lists shall be used by the Legislative Council, the court system, and the Alaska Railroad Corporation.

Sec. 36.30.060. SPECIFICATIONS. (a) The commissioner shall adopt regulations governing the preparation, revision, and content of specifications for supplies, services, professional services, and construction required by an agency. The commissioner shall monitor the use of these specifications.

(b) Specifications for construction of highways must conform as closely as practicable to those adopted by the American Association of State Highway and Transportation Officials.

(c) The commissioner may obtain expert advice and assistance from personnel of using agencies in the development of specifications. Specifications must promote overall economy for the purposes intended and encourage competition in satisfying the state's needs, and may not be unduly restrictive. The requirements of this subsection regarding the purposes and nonrestrictiveness of specifications apply to all specifications, including those prepared by architects, engineers, designers, and other professionals.

(d) In this section, "specification" means a description of the physical or functional characteristics, or of the nature of a supply, service, professional service, or construction project; it may include requirements for inspecting, testing, and delivery.

Sec. 36.30.070. SUPPLY MANAGEMENT. The commissioner shall adopt regulations governing the

(1) management of supplies during their entire life cycle;

(2) sale, lease, or disposal of surplus supplies by public auction, competitive sealed bidding, or other appropriate method designated by regulation;

(3) purchase of surplus supplies by an employee of the using or disposing agency; and

(4) transfer of excess supplies.

Sec. 36.30.080. LEASES. (a) The department shall lease space for the use of the state or an agency wherever it is necessary and feasible, subject to compliance with the requirements of this chapter. A lease may not provide for a period of occupancy greater than 40 years. An agency requiring office, warehouse, or other space shall

lease the space through the department.

(b) The department may enter into lease-financing agreements, including lease-purchase agreements and agreements related to the issuance of certificates of participation. A lease-financing agreement must provide that lease payments are subject to annual appropriation.

(c) If the department intends to enter into a lease or lease-financing agreement with an annual rent to the state anticipated to exceed $1,000,000, the department shall provide notice to the legislature. The notice must include the anticipated annual lease obligation amount and the anticipated total construction, acquisition, or other costs of the project. The department may not enter into an agreement under this subsection unless the project has been approved by the legislature by law. An appropriation for the project does not constitute approval of the project for purposes of this subsection.

ARTICLE 2. COMPETITIVE SEALED BIDDING.

Sec. 36.30.100. GENERAL POLICY. (a) Except as otherwise provided in this chapter, or unless specifically exempted by law, an agency contract shall be awarded by competitive sealed bidding.

(b) Competitive sealed bidding is not required

(1) when the commissioner determines in writing that food, clothing, or medical supplies, or materials for use in laboratory or medical studies may be purchased otherwise to the best advantage of the state;

(2) when rates are fixed by law or ordinance;

(3) for contracts for the operation of transportation systems for students to and from the schools within the state, as are authorized under AS 14.09.010; these contracts may be awarded by bid or negotiation and, at the discretion of the Board of Education, may

be awarded for periods of three years or less;

(4) for the purchase of products or services manufactured or provided by a sheltered workshop;

(5) for the purchase of products or services provided by the correctional industries program established under AS 33.32;

(6) for professional services; or

(7) for concessions operated on state property.

(c) In this section "sheltered workshop" means a place where manufacture or handiwork is carried on, and that is operated for the primary purpose of providing remunerative employment to individuals with physical or mental disabilities that constitute substantial handicaps to employment.

Sec. 36.30.110. INVITATION TO BID. (a) When competitive sealed bidding is used, the procurement officer shall issue an invitation to bid. It must include a date by which the bid must be received, purchase description, and all contractual terms and conditions applicable to the procurement.

(b) The invitation to bid shall require the bidder to list subcontractors the bidder proposes to use in the performance of the contract. When responding to the invitation, the bidder shall also supply evidence of the bidder's valid Alaska business license and evidence of a valid Alaska business license for each listed subcontractor. A bidder for a construction contract shall also submit evidence of the bidder's registration under AS 08.18 and evidence of registration for each listed subcontractor.

Sec. 36.30.120. BID SECURITY. (a) Bid security shall be required for all competitive sealed bidding for construction contracts when the price is estimated by the procurement officer to exceed an amount established by regulation of the commissioner. Bid security on

construction contracts under the amount set by the commissioner may be required when the circumstances warrant. Bid security may be required for competitive sealed bidding for contracts for supplies, services, or professional services in accordance with regulations of the commissioner when needed for the protection of the state.

(b) Bid security must be a bond provided by a surety company authorized to do business in the state, or the equivalent in cash, or otherwise supplied in a form satisfactory to the commissioner. Bid security must be in an amount equal to at least

(1) 10 percent of the amount of the bid if the bid does not exceed $100,000; or

(2) five percent of the amount of the bid if the bid exceeds $100,000.

(c) When the invitation to bid requires security, the procurement officer shall reject a bid that does not comply with the bid security requirement unless, in accordance with regulations, the officer determines that the bid fails to comply in a nonsubstantial manner with the security requirements.

Sec. 36.30.130. PUBLIC NOTICE OF INVITATION TO BID. (a) The procurement officer shall give adequate public notice of the invitation to bid at least 21 days before the date for the opening of bids. If a determination is made in writing that a shorter notice period is necessary for a particular bid, the 21-day period may be shortened. The determination shall be made by the chief procurement officer for bids for supplies, services, or professional services. The determination shall be made by the commissioner of transportation and public facilities for bids for construction or acquisition of property for the state equipment fleet. Notice shall be mailed to all active prospective contractors on the appropriate list maintained under

AS 36.30.050. The time and manner of notice must be in accordance with regulations adopted by the commissioner of administration. When practicable, notice may include

(1) publication in a newspaper calculated to reach prospective bidders;

(2) notices posted in public places within the area where the work is to be performed or the material furnished; and

(3) publication in the Alaska Administrative Journal.

(b) Failure to comply with the notice requirements of this section does not invalidate a bid or the award of a contract. The state is not liable for damages caused by failure to comply with this section.

Sec. 36.30.140. BID OPENING. (a) The procurement officer shall open bids publicly in the presence of one or more witnesses at the time and place designated in the invitation to bid. The amount of each bid and other relevant information that is specified by regulation of the commissioner, together with the name of each bidder, shall be recorded.

(b) The information recorded under (a) of this section is open to public inspection as soon as practicable before the contract is awarded. The bids are not open for public inspection until after a contract is awarded. To the extent the bidder designates and the procurement officer concurs, trade secrets and other proprietary data contained in a bid document are confidential.

Sec. 36.30.150. BID ACCEPTANCE AND BID EVALUATION. Bids shall be unconditionally accepted without alteration or correction, except as authorized in AS 36.30.160. The procurement officer shall evaluate bids based on the requirements set out in the invitation to bid, which may include criteria to determine acceptability such as inspection,

testing, quality, delivery, and suitability for a particular purpose. The criteria that will affect the bid price and be considered in evaluation for award must be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation to bid must set out the evaluation criteria to be used. Criteria may not be used in bid evaluation if they are not set out in the invitation to bid.

Sec. 36.30.160. LATE BIDS; CORRECTION OR WITHDRAWAL OF BIDS; CANCELLATION OF AWARDS. (a) Bids received after the bid due date indicated on the invitation to bid may not be accepted unless the delay was due to an error of a state employee directly responsible for opening the bids.

(b) Correction or withdrawal of inadvertently erroneous bids before or after bid opening, or cancellation of awards or contracts based on bid mistakes may be permitted in accordance with regulations adopted by the commissioner. After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the state or fair competition may not be permitted. Except as otherwise provided by regulation, a decision to permit the correction or withdrawal of a bid, or to cancel an award or contract based on a bid mistake, shall be supported by a written determination made by the procurement officer. If a bidder is permitted to withdraw a bid before award, an action may not be maintained against the bidder or the bid security.

Sec. 36.30.170. CONTRACT AWARD AFTER BIDS. (a) Except as provided in (b) of this section, the procurement officer shall award a contract based on the solicited bids with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria

set out in the invitation to bid.

(b) The procurement officer shall award a contract based on solicited bids to the lowest responsible and responsive Alaska bidder if the bid is not more than five percent higher than the lowest non-resident bidder's. In this subsection, "Alaska bidder" means a person who

(1) holds a current Alaska business license;

(2) submits a bid for goods, services, or construction under the name as appearing on the person's current Alaska business license;

(3) has maintained a place of business within the state for a period of six months immediately preceding the date of the bid; and

(4) if a joint venture, is composed entirely of ventures that qualify under (1) - (3) of this subsection.

(c) The provisions of (b) of this section do not apply to construction contracts for highways and public works if the construction contract exceeds $5,000.

Sec. 36.30.190. MULTI-STEP SEALED BIDDING. When it is considered impractical to initially prepare a definitive purchase description to support an award based on price, the procurement officer may issue an invitation to bid requesting the submission of unpriced technical offers to be followed by an invitation to bid limited to the bidders whose offers are determined to be technically qualified under the criteria set out in the first solicitation.

ARTICLE 3. COMPETITIVE SEALED PROPOSALS.

Sec. 36.30.200. CONDITIONS FOR USE. (a) Except as otherwise provided in this chapter, or unless specifically exempted by law, an agency contract shall be awarded by competitive sealed proposals if it is not awarded by competitive sealed bidding.

(b) The commissioner may provide by regulation that it is either not practicable or not advantageous to the state to procure specified types of supplies, services, or construction by competitive sealed bidding that would otherwise be procured by that method. When the chief procurement officer, or for construction contracts or procurements for the state equipment fleet, the commissioner of transportation and public facilities, determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the state, a contract may be entered into by competitive sealed proposals in accordance with the regulations. When it is determined that it is practicable but not advantageous to use competitive sealed bidding, the chief procurement officer or commissioner of transportation and public facilities shall specify with particularity the basis for the determination.

Sec. 36.30.210. REQUEST FOR PROPOSALS. (a) A request for competitive sealed proposals must contain the date by which the proposal must be received, a description of the supplies, construction, services, or professional services to be provided under the contract, and the terms under which the supplies, construction, services, or professional services are to be provided. The request shall require the offeror to list subcontractors the offeror proposes to use in the performance of the contract. The offeror must also supply evidence of the offeror's valid Alaska business license together with evidence of a valid Alaska business license for each listed subcontractor. An offeror for a construction contract shall also submit evidence of the offeror's registration under AS 08.18 and evidence of registration for each listed subcontractor.

(b) A request for proposals must contain that information necessary for an offeror to submit a proposal or contain references to

any information that cannot reasonably be included with the request. The request must provide a description of the factors that will be considered by the procurement officer when evaluating the proposals received, including the relative importance of price and other evaluation factors.

(c) Notice of a request for proposals shall be given in accordance with procedures under AS 36.30.130. The procurement officer may use additional means considered appropriate to notify prospective offerors of the intent to enter into a contract through competitive sealed proposals.

Sec. 36.30.220. STANDARD OVERHEAD RATE. (a) If an agency submits a proposal in response to a request for competitive sealed proposals, the agency must include its standard overhead rate within its proposal.

(b) In this section, "standard overhead rate" means a charge established for services and professional services from an agency that is designed to compensate the agency for administration and support services incidentally provided with the services contracted for.

Sec. 36.30.230. TREATMENT OF PROPOSALS. The procurement officer shall open proposals so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals containing the name and address of each offeror shall be prepared in accordance with regulations adopted by the commissioner. The register and the proposals are open for public inspection after the contract is awarded. To the extent that the offeror designates and the procurement officer concurs, trade secrets and other proprietary data contained in the proposal documents are confidential.

Sec. 36.30.240. DISCUSSION WITH RESPONSIBLE OFFERORS AND REVISIONS TO PROPOSALS. As provided in the request for proposals, and

under regulations adopted by the commissioner, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before the award of the contract for the purpose of obtaining best and final offers. In conducting discussions, the procurement officer may not disclose information derived from proposals submitted by competing offerors.

Sec. 36.30.250. AWARD OF CONTRACT. The procurement officer shall award a contract under competitive sealed proposals to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the state taking into consideration price and the evaluation factors set out in the request for proposals. Other factors and criteria may not be used in the evaluation. The contract file must contain the basis on which the award is made.

Sec. 36.30.260. CONTRACT EXECUTION. A contract awarded under competitive sealed proposals must contain

(1) the amount of the contract stated on its first page;

(2) the date for the supplies to be delivered or the dates for construction, services, or professional services to begin and be completed;

(3) a description of the supplies, construction, services, or professional services to be provided; and

(4) certification by the project director for the contracting agency, the head of the contracting agency, or a designee that

sufficient funds are available in an appropriation to be encumbered for the amount of the contract.

Sec. 36.30.270. REVIEW AND APPROVAL BY DEPARTMENT OF LAW. If a contract contains a term that is in conflict with a state standard form contract term or if a standard term is deleted or modified by a term that is not standard, the contract must be reviewed by the Department of Law and approved as to form.

ARTICLE 4. OTHER PROCUREMENT METHODS.

Sec. 36.30.300. SOLE SOURCE PROCUREMENTS. (a) A contract may be awarded for supplies, services, professional services, or construction without competitive sealed bidding, competitive sealed proposals, or other competition in accordance with regulations adopted by the commissioner of administration. A contract may be awarded under this section only when the commissioner of administration or, for construction contracts or procurements for the state equipment fleet, the commissioner of transportation and public facilities determines in writing that there is only one source for the required supplies, services, professional services, or construction. A sole source procurement may not be awarded if a reasonable alternative source exists. The written determination must include findings of fact that support by clear and convincing evidence the determination that only one source exists. The authority to make the determination required by this subsection may not be delegated.

(b) The using agency shall submit written evidence to support a sole source determination. The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, may also require the submission of cost or pricing data in connection with an award under this section.

(c) The procurement officer shall negotiate with the single

supplier, to the extent practicable, to obtain a contract advantageous to the state.

Sec. 36.30.310. EMERGENCY PROCUREMENTS. Procurements may be made under emergency conditions as defined in regulations adopted by the commissioner when there exists a threat to public health, welfare, or safety, when a situation exists that makes a procurement through competitive sealed bidding or competitive sealed proposals impracticable or contrary to the public interest, or to protect public or private property. An emergency procurement need not be made through competitive sealed bidding or competitive sealed proposals but shall be made with competition that is practicable under the circumstances. A written determination by the procurement officer of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The written determination must include findings of fact that support the determination.

Sec. 36.30.320. SMALL PROCUREMENTS. (a) A procurement for supplies, services, or construction that does not exceed an aggregate dollar amount of $5,000 may be made in accordance with regulations adopted by the commissioner for small procurements.

(b) A contract for professional services that does not exceed $25,000 may be made under regulations adopted by the commissioner for small procurements, except that an agency may not contract

(1) for the services of legal counsel without the approval of the attorney general; or

(2) with a person under this subsection if the total amount of professional services contracts awarded to that person from the agency exceeds $25,000 in a 12-month period.

(c) Small procurements need not be made through competitive sealed bidding or competitive sealed proposals but shall be made with

competition that is practicable under the circumstances.

(d) Procurement requirements may not be artificially divided or fragmented so as to constitute a purchase under this section or to circumvent the source selection procedures required by AS 36.30.100 - 36.30.270.

ARTICLE 5. CONTRACT FORMATION AND MODIFICATION.

Sec. 36.30.350. BID CANCELLATION, REJECTION. An invitation to bid, a request for proposals, or other solicitation may be cancelled or any or all bids or proposals may be rejected in whole or in part or the date for opening bids or proposals may be delayed when it is in the best interests of the state in accordance with regulations adopted by the commissioner. The reasons for cancellation, rejection, or delay in opening bids or proposals shall be made part of the contract file.

Sec. 36.30.360. DETERMINATION OF RESPONSIBILITY. (a) A written determination of responsibility of a bidder or offeror shall be made by the procurement officer in accordance with regulations adopted by the commissioner. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility is grounds for a determination of nonresponsibility with respect to the bidder or offeror.

(b) Information furnished by a bidder or offeror under (a) of this section is confidential and may not be disclosed without prior written consent by the bidder or offeror.

Sec. 36.30.365. NOTICE OF INTENT TO AWARD A CONTRACT. At least 10 days before the formal award of a contract under this chapter the procurement officer shall provide to each bidder or offeror notice of intent to award a contract. The notice shall conform to regulations adopted by the commissioner.

Sec. 36.30.370. TYPES OF CONTRACTS. Subject to limitations of this section any type of contract that will promote the best interests of the state may be used, except that the use of a cost-plus-a-percentage-of-cost contract is prohibited. A cost-reimbursement contract may be used only when a determination is made in writing by the procurement officer that a cost-reimbursement contract is likely to be less costly to the state than any other type or that it is impracticable to obtain the supplies, services, professional services, or construction required except under a cost-reimbursement contract.

Sec. 36.30.380. APPROVAL OF ACCOUNTING SYSTEM. Except for a contract awarded through competitive sealed bidding and a firm fixed-price contract, a contract type may not be used unless it has been determined in writing by the procurement officer that the proposed contractor's accounting system

(1) will permit timely development of all necessary cost data in the form required by the specific contract type contemplated; and

(2) is adequate to allocate costs in accordance with generally accepted accounting principles.

Sec. 36.30.390. MULTI-TERM CONTRACTS. (a) Unless otherwise provided by law, a contract for supplies, services, or professional services may be entered into for any period of time considered to be in the best interests of the state provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds for them.

(b) Before using a multi-term contract, the procurement officer

shall determine in writing that

(1) estimated requirements cover the period of the contract and are reasonably firm and continuing; and

(2) the contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economies in state procurement.

(c) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled. The contractor may only be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies, services, or professional services delivered under the contract that are not otherwise recoverable. The cost of cancellation may be paid from any appropriations available for these purposes.

Sec. 36.30.400. COST OR PRICING DATA. (a) Before an award of a contract or a change order or contract modification, the contractor or prospective contractor shall submit cost and pricing data. The contractor or prospective contractor shall certify that, to the best of the contractor's or prospective contractor's knowledge and belief, the data submitted is accurate, complete, and current as of a mutually determined specified date and will continue to be accurate and complete during the performance of the contract.

(b) When a contractor becomes aware of a situation that may form the basis of a claim for compensation in addition to that provided for under the contract and before performing work or supplying materials not required under the contract, the contractor shall submit cost and pricing data on the additional work or materials. The contractor shall certify that, to the best of the contractor's knowledge and belief, the data submitted is accurate, complete, and current and is

the actual cost to the contractor of performing the additional work or supplying the additional materials.

(c) A contract, change order, or contract modification under which a certificate is required under (a) or (b) of this section must contain a provision that the price to the state, including the contractor's profit or fee, will be adjusted to exclude any significant sums by which the state finds that the price is increased because the cost or pricing data furnished by the contractor or prospective contractor is inaccurate, incomplete, or not current as of the date agreed upon by the parties.

(d) The requirements of this section do not apply when

(1) the contract price is based on adequate price competition;

(2) the contract price is set by law or regulation; or

(3) it is determined by the procurement officer in writing and in accordance with regulations adopted by the commissioner that the requirements of this section may be waived, and the reasons for waiver are stated.

Sec. 36.30.410. RIGHT TO INSPECT PLANT. The state may, at reasonable times, inspect the part of the plant or place of business of a contractor or subcontractor that is related to the performance of a contract awarded or to be awarded by an agency.

Sec. 36.30.420. RIGHT TO AUDIT RECORDS. (a) The state may, at reasonable times and places, audit the books and records of a person who has submitted cost or pricing data under AS 36.30.400 to the extent that the books and records relate to the cost or pricing data. A person who receives a contract, change order, or contract modification for which cost or pricing data is required, shall maintain books and records that relate to the cost or pricing data for three years

after the date of final payment under the contract, unless a shorter period is authorized in writing by the commissioner.

(b) The state may audit the books and records of a contractor or a subcontractor to the extent that the books and records relate to the performance of the contract or subcontract. Books and records shall be maintained by the contractor for a period of three years after the date of final payment under the prime contract and by the subcontractor for a period of three years after the date of final payment under the subcontract, unless a shorter period is authorized in writing by the commissioner.

Sec. 36.30.430. STANDARD MODIFICATION CLAUSES FOR CONTRACTS. (a) The commissioner shall adopt regulations permitting the inclusion of clauses providing for adjustments in prices, time of performance, or other contract provisions as appropriate.

(b) The commissioner shall adopt regulations permitting or requiring the inclusion in state contracts of clauses providing for appropriate remedies and covering the following subjects:

(1) liquidated damages;

(2) specified excuses for delay or nonperformance;

(3) termination of the contract for default; and

(4) termination of the contract in whole or in part for the convenience of the state.

Sec. 36.30.460. MODIFICATION OF STANDARD CLAUSES. The procurement officer or the head of a contracting agency may vary the clauses adopted under AS 36.30.430 for inclusion in a particular state contract if the

(1) variations are supported by a written determination that states the circumstances justifying the variation; and

(2) approval required by AS 36.30.270 is obtained.

Sec. 36.30.470. FISCAL RESPONSIBILITY. A contract modification, change order, or contract price adjustment under a construction contract in excess of an amount established by regulation of the commissioner is subject to prior written certification by the fiscal officer of the agency responsible for funding the project or the contract, or other official responsible for monitoring and reporting upon the status of the costs of the total project budget or contract budget, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. If the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget or the total contract budget, the procurement officer may not approve the contract modification, change order, or adjustment in contract price unless sufficient funds are available, or the scope of the project or contract is adjusted to permit the degree of completion that is feasible within the total project budget or total contract budget as it existed before the contract modification, change order, or adjustment in contract price under consideration. A contract modification change order, or adjustment in contract that is signed by both parties and has been reasonably relied on by a contractor, is presumed to be valid even if the provisions of this section have not been met.

Sec. 36.30.480. COST PRINCIPLE REGULATIONS. The commissioner shall adopt regulations setting out cost principles that shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions that provide for the reimbursement of costs. If a written determination is approved at a level above the procurement officer, the cost principles may be modified by contract.

ARTICLE 6. PROCUREMENT RECORDS AND REPORTS.

Sec. 36.30.500. RETENTION OF PROCUREMENT RECORDS. Procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the state archivist. Retained documents shall be made available to the attorney general or a designee upon request and proper receipt.

Sec. 36.30.510. RECORDS OF CONTRACTS AWARDED UNDER COMPETITIVE SEALED PROPOSALS. A contract file open for public inspection must be kept by the commissioner and the contracting agency for each contract awarded under competitive sealed proposals. The file must contain

(1) a copy of the contract;

(2) the register of proposals prepared under AS 36.30.230 and a copy of each proposal submitted;

(3) the written determination to award the contract prepared under AS 36.30.250; and

(4) a summary of the information required under (1) - (3) of this section.

Sec. 36.30.520. RECORDS OF SOLE SOURCE AND EMERGENCY PROCUREMENTS. (a) The commissioner shall maintain for a minimum of five years a record listing all sole source procurement contracts made under AS 36.30.300 and emergency procurements made under AS 36.30.310. The record must contain

(1) each contractor's name;

(2) the amount and type of each contract; and

(3) a listing of the supplies, services, professional services, or construction procured under each contract.

(b) The Department of Transportation and Public Facilities and any agency to whom the commissioner of administration or the commissioner of transportation and public facilities has delegated

procurement authority under AS 36.30.015 shall, by October 1 of each year, submit to the commissioner of administration records of the type specified in (a) of this section. The commissioner of administration shall maintain these records as required by (a) of this section.

Sec. 36.30.530. PUBLIC ACCESS TO PROCUREMENT INFORMATION. Procurement information is public except as otherwise provided by law.

Sec. 36.30.540. REPORT TO LEGISLATURE. Beginning with December 1, 1989, the commissioner shall biennially report to the legislature concerning procurements by agencies. The report must include

(1) the records prepared under AS 36.30.510(4) and 36.30.-520(a) for the previous two fiscal years;

(2) recommendations for changes in this chapter or other laws based on implementation of this chapter in the previous two fiscal years; and

(3) a description of any matters that involved litigation concerning this chapter in the previous two fiscal years.

ARTICLE 7. LEGAL AND CONTRACTUAL REMEDIES.

Sec. 36.30.560. FILING OF A PROTEST. An interested party may protest the award of a contract, the proposed award of a contract, or a solicitation for supplies, services, professional services, or construction by an agency. The protest shall be filed with the procurement officer of the contracting agency in writing and include the following information:

(1) the name, address, and telephone number of the protester;

(2) the signature of the protester or the protester's representative;

(3) identification of the contracting agency and the solicitation or contract at issue;

(4) a detailed statement of the legal and factual grounds of the protest, including copies of relevant documents; and

(5) the form of relief requested.

Sec. 36.30.565. TIME FOR FILING A PROTEST. (a) A protest based upon alleged improprieties in a solicitation involving competitive sealed bidding that are apparent before the bid opening shall be filed before the bid opening. A protest based on alleged improprieties in a solicitation involving competitive sealed proposals that are apparent

(1) before the due date for receipt of initial proposals shall be filed before that due date;

(2) after the due date for receipt of initial proposals shall be filed before the next due date for receipt of adjusted proposals that occurs after the improprieties are apparent.

(b) In situations not covered under (a) of this section, protests shall be filed within 10 days after a notice of intent to award the contract is issued by the procurement officer.

(c) If the protester shows good cause, the procurement officer of the contracting agency may consider a filed protest that is not timely.

Sec. 36.30.570. NOTICE OF A PROTEST. The procurement officer shall immediately give notice of a protest filed under AS 36.30.565 to the contractor if a contract has been awarded or, if no award has been made, to all interested parties.

Sec. 36.30.575. STAY OF AWARD. If a protest is filed the award may be made unless the procurement officer of the contracting agency determines in writing that a

(1) reasonable probability exists that the protest will be sustained; or

(2) stay of the award is not contrary to the best interests

of the state.

Sec. 36.30.580. DECISION BY THE PROCUREMENT OFFICER. (a) The procurement officer of the contracting agency shall issue a written decision containing the basis of the decision within 14 days after a protest has been filed. A copy of the decision shall be furnished to the protester by certified mail or other method that provides evidence of receipt.

(b) The time for a decision may be extended up to 26 days for good cause by the commissioner of administration, or for protests involving construction or procurements for the state equipment fleet, the commissioner of transportation and public facilities. If an extension is granted, the procurement officer shall notify the protester in writing of the date the decision is due.

(c) If a decision is not made by the date it is due, the protester may proceed as if the procurement officer had issued a decision adverse to the protester.

Sec. 36.30.585. PROTEST REMEDIES. (a) If the procurement officer sustains a protest in whole or in part, the procurement officer shall implement an appropriate remedy.

(b) In determining an appropriate remedy, the procurement officer shall consider the circumstances surrounding the solicitation or procurement including the seriousness of the procurement deficiencies, the degree of prejudice to other interested parties or to the integrity of the procurement system, the good faith of the parties, the extent the procurement has been accomplished, costs to the agency and other impacts on the agency of a proposed remedy, and the urgency of the procurement to the welfare of the state.

Sec. 36.30.590. APPEAL ON A PROTEST. (a) An appeal from a decision of a procurement officer on a protest may be filed by the

protester with the commissioner of administration, or for protests involving construction or procurements for the state equipment fleet, the commissioner of transportation and public facilities. An appeal shall be filed within five days after the decision is received by the protester. The protester shall file a copy of the appeal with the procurement officer.

(b) An appeal must contain the information required under AS 36.30.560. In addition, the appeal must include

(1) a copy of the decision being appealed; and

(2) identification of the factual or legal errors in the decision that form the basis for the appeal.

Sec. 36.30.595. NOTICE OF A PROTEST APPEAL. (a) The procurement officer shall immediately give notice of an appeal filed under AS 36.30.590 to the contractor if a contract has been awarded or, if no award has been made, to all interested parties.

(b) The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall, on request, furnish a copy of the appeal to a person notified under (a) of this section, except that confidential material shall be deleted from the copy.

Sec. 36.30.600. STAY OF AWARD DURING PROTEST APPEAL. If a protest appeal is filed before a contract is awarded and the award was stayed under AS 36.30.575, the filing of the appeal automatically continues the stay until the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, makes a written determination that the award of the contract without further delay is necessary to protect substantial interests of the state.

Sec. 36.30.605. PROTEST REPORT. (a) The procurement officer of

the contracting agency shall file a complete report on the protest and decision with the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, within seven days after a protest appeal is filed. The procurement officer shall furnish a copy of the report to the protester and to interested parties that have requested a copy of the appeal under AS 36.30.595(b).

(b) The procurement officer may request an extension of time to prepare the protest report. The request must be in writing listing the reasons for the request. The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall respond to the request in writing. If an extension is granted, the commissioner shall list the reasons for granting the extension and indicate the date the protest report is due. The commissioner shall notify the protester in writing that the time for submission of the report has been extended and the date the report is due.

(c) The protester may file comments on the protest report with the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, within seven days after the report is received. The protester shall provide copies of the comments to the procurement officer and to interested parties that have requested a copy of the appeal under AS 36.30.595(b).

(d) The protester may request an extension of time to prepare the comments on the protest report. The request must be in writing listing the reasons for the request. The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall respond to the request in writing. If an extension is granted, the commissioner shall list the reasons for granting the extension and indicate the date the comments are due.

The commissioner shall notify the procurement officer in writing that the time for submission of the comments has been extended and the date the comments are due.

Sec. 36.30.610. DECISION WITHOUT HEARING. (a) The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall dismiss a protest appeal before a hearing is held if it is determined in writing that the appeal is untimely under AS 36.30.590(a).

(b) The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, may issue a decision on an appeal without a hearing if the appeal involves questions of law without genuine issues of fact.

Sec. 36.30.615. HEARING ON PROTEST APPEAL. A hearing on a protest appeal shall be conducted in accordance with AS 36.30.670 and regulations adopted by the commissioner.

Sec. 36.30.620. CONTRACT CONTROVERSIES. (a) A contractor shall file a claim concerning a contract awarded under this chapter with the procurement officer. The contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of the contractor's knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the state is liable.

(b) If a controversy asserted by a contractor concerning a contract awarded under this chapter cannot be resolved by agreement, the procurement officer shall, after receiving a written request by the contractor for a decision, issue a written decision. The decision shall be made no more than 90 days after receipt by the procurement officer of all necessary information from the contractor. Failure of the contractor to furnish necessary information to the procurement

officer constitutes a waiver of the claim. Before issuing the decision the procurement officer shall review the facts relating to the controversy and obtain necessary assistance from legal, fiscal, and other advisors.

(c) The time for issuing a decision under (b) of this section may be extended for good cause by the commissioner of administration, or for a controversy involving a construction contract or procurement for the state equipment fleet, the commissioner of transportation and public facilities, if the controversy concerns an amount in excess of $50,000. The procurement officer shall notify the contractor in writing that the time for the issuance of a decision has been extended and of the date by which a decision shall be issued.

(d) The procurement officer shall furnish a copy of the decision to the contractor by certified mail or other method that provides evidence of receipt. The decision shall include a

(1) description of the controversy;

(2) reference to the pertinent contract provisions;

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

(4) statement of reasons supporting the decision; and

(5) statement substantially as follows:

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

(e) If a decision is not made by the date it is due, the contractor may proceed as if the procurement officer had issued a decision adverse to the contractor.

(f) If a controversy asserted by the state concerning a contract awarded under this chapter cannot be resolved by agreement the matter shall be immediately referred to the commissioner of administration or the commissioner of transportation and public facilities, as appropriate.

Sec. 36.30.625. APPEAL ON A CONTRACT CONTROVERSY. (a) An appeal from a decision of the procurement officer on a contract controversy may be filed by the contractor with the commissioner of administration, or for a controvery involving a construction contract or procurement for the state equipment fleet, the commissioner of transportation and public facilities. The appeal shall be filed within five days after the decision is received by the contractor. The contractor shall file a copy of the appeal with the procurement officer.

(b) An appeal shall contain a copy of the decision being appealed and identification of the factual or legal errors in the decision that form the basis for the appeal.

Sec. 36.30.630. HEARING ON A CONTRACT CONTROVERSY. (a) Except as provided in (b) of this section, a hearing shall be conducted according to AS 36.30.670 and regulations adopted by the commissioner of administration on a contract controversy appealed to the commissioner of administration or the commissioner of transportation and public facilities or referred to either commissioner under AS 36.30.620(f).

(b) Within 15 days after receipt of an appeal on a contract controversy the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, may adopt the decision of the procurement officer as the final decision without a hearing.

Sec. 36.30.632. DELEGATION. The commissioner of administration and the commissioner of transportation and public facilities may delegate responsibilities under AS 36.30.590 and 36.30.630 to the head of the contracting agency.

Sec. 36.30.635. AUTHORITY TO DEBAR OR SUSPEND. (a) After consultation with the using agency and the attorney general and after a hearing conducted according to AS 36.30.670 and regulations adopted by the commissioner of administration, the commissioner of administration or the commissioner of transportation and public facilities may debar a person for cause from consideration for award of contracts. Notice of a debarment hearing shall be provided in writing at least seven days before the hearing. The debarment may not be for a period of more than three years.

(b) The commissioner of administration or the commissioner of transportation and public facilities, after consultation with the using agency and the attorney general, may suspend a person from consideration for award of contracts if there is probable cause for debarment and compelling reasons require suspension to protect state interests. The suspension may not be for a period exceeding three months.

(c) The authority to debar or suspend shall be exercised in accordance with regulations adopted by the commissioner of administration.

Sec. 36.30.640. CAUSES FOR DEBARMENT OR SUSPENSION. The causes for debarment or suspension include the following:

(1) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of the contract or subcontract;

(2) conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or other offense indicating a lack of business integrity or business honesty that currently and seriously affects responsibility as a state contractor;

(3) conviction or civil judgment finding a violation under state or federal antitrust statutes;

(4) violation of contract provisions of a character that is regarded by the commissioner to be so serious as to justify debarment action, such as

(A) knowing failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

(B) failure to perform or unsatisfactory performance in accordance with the terms of one or more contracts, except that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor may not be considered to be a basis for debarment;

(5) for violation of the ethical standards set out in law or regulation;

(6) for a violation of this chapter punishable under AS 36.30.930(2); and

(7) any other cause listed in regulations of the commissioner determined to be so serious and compelling as to affect responsibility as a state contractor, including debarment by another governmental entity for a cause listed in the regulations.

Sec. 36.30.645. WRITTEN DETERMINATIONS. (a) The commissioner of administration or the commissioner of transportation and public facilities shall issue a written decision to debar or suspend. The

decision must

(1) state the reasons for the action taken; and

(2) inform the debarred person of rights to judicial appeal or inform the suspended person of rights to administrative and judicial appeal.

(b) A copy of the decision under (a) of this section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other intervening party.

Sec. 36.30.650. HEARING ON A SUSPENSION. (a) A person suspended under AS 36.30.635 is entitled to a hearing conducted according to AS 36.30.670 and regulations adopted by the commissioner of administration if the person files a written request for a hearing with the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, within seven days after receipt of the notice of suspension under AS 36.30.645.

(b) If a suspended person requests a hearing the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall schedule a prompt hearing unless the attorney general determines that a hearing at the proposed time is likely to jeopardize an investigation. A hearing may not be delayed longer than six months after notice of the suspension is provided under AS 36.30.645.

Sec. 36.30.655. LIST OF PERSONS DEBARRED OR SUSPENDED. The commissioner shall maintain a list of all persons debarred or suspended from consideration for award of contracts.

Sec. 36.30.660. REINSTATEMENT. (a) The commissioner of administration or the commissioner of transportation and public facilities may at any time after a final decision to debar a person from consideration for award of contracts reinstate the person after

determining that the cause for which the person was debarred no longer exists or has been substantially mitigated.

(b) A debarred person may request reinstatement by submitting a petition to the commissioner of administration or the commissioner of transportation and public facilities supported by evidence showing that the cause for debarment no longer exists or has been substantially mitigated.

(c) The commissioner of administration or the commissioner of transportation and public facilities may require a hearing on a reinstatement petition. A decision on reinstatement shall be made in writing within seven days after a reinstatement petition is submitted. The decision shall specify the factors on which it is based. A decision under this section is not subject to judicial appeal.

Sec. 36.30.665. LIMITED PARTICIPATION. The commissioner of administration or the commissioner of transportation and public facilities may permit a debarred person to participate in a contract on a limited basis during the debarment period if the commissioner determines in writing that the participation is advantageous to the state. The determination shall specify the factors on which it is based and the limits imposed on the debarred person.

Sec. 36.30.670. HEARING PROCEDURES. (a) The commissioner of administration or the commissioner of transportation and public facilities shall act as a hearing officer or appoint a hearing officer for a hearing conducted under this chapter. The hearing officer shall arrange for a prompt hearing and notify the parties in writing of the time and place of the hearing. The hearing shall be conducted in an informal manner. The provisions of AS 44.62 (Administrative Procedure Act) do not apply to a hearing conducted under this chapter.

(b) The hearing officer may

(1) hold prehearing conferences to settle, simplify, or identify the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(2) require parties to state their positions concerning the various issues in the proceeding;

(3) require parties to produce for examination those relevant witnesses and documents under their control;

(4) rule on motions and other procedural matters;

(5) regulate the course of the hearing and conduct of the participants;

(6) establish time limits for submission of motions or memoranda;

(7) impose appropriate sanctions against a person who fails to obey an order of the hearing officer, including

(A) prohibiting the person from asserting or opposing designated claims or defenses or introducing designated matters into evidence;

(B) excluding all testimony of an unresponsive or evasive witness; and

(C) excluding a person from further participation in the hearing;

(8) take official notice of a material fact not appearing in evidence, if the fact is among the traditional matters subject to judicial notice;

(9) administer oaths or affirmations.

(c) A transcribed record of the hearing shall be made available at cost to a party that requests it.

Sec. 36.30.675. RECOMMENDATION BY THE HEARING OFFICER. (a) If the commissioner of administration or the commissioner of

transportation and public facilities is not acting as hearing officer, the hearing officer shall recommend a decision to the commissioner based on the evidence presented. The recommendation shall include findings of fact and conclusions of law.

(b) The commissioner of administration or the commissioner of transportation and public facilities may affirm, modify, or reject the hearing officer's recommendation in whole or in part, may remand the matter to the hearing officer with instructions, or take other appropriate action.

Sec. 36.30.680. FINAL DECISION BY THE COMMISSIONER. A decision by the commissioner of administration or the commissioner of transportation and public facilities after a hearing under this chapter is final. A decision shall be sent within 20 days after the hearing to all parties by personal service or certified mail, except that a decision by the commissioner of transportation and public facilities involving procurement of construction shall be sent within 90 days after the hearing to all parties by personal service or certified mail.

Sec. 36.30.685. JUDICIAL APPEAL. (a) A final decision of the commissioner of administration or the commissioner of transportation and public facilities under AS 36.30.610, 36.30.635(a), 36.30.650, or 36.30.680 may be appealed to the superior court in accordance with the Alaska Rules of Appellate Procedure.

(b) A final decision of the commissioner of administration or the commissioner of transportation and public facilities under AS 36.30.630(b) may be appealed to the superior court for a trial de novo.

Sec. 36.30.690. EXCLUSIVE REMEDY. Notwithstanding AS 44.77 or other law to the contrary, AS 36.30.560 - 36.30.699 and regulations

adopted under those sections provide the exclusive procedure for asserting a claim against an agency arising in relation to a procurement under this chapter.

Sec. 36.30.695. OTHER RULES OF PROCEDURE. The commissioner may adopt by regulation additional rules of procedure providing for the expeditious administrative review of all contract claims or controversies, both before the contracting agency and through an appeal heard de novo.

Sec. 36.30.699. DEFINITION. In AS 36.30.560 - 36.30.695, "interested party" means an actual or prospective bidder or offeror whose economic interest may be affected substantially and directly by the issuance of a contract solicitation, the award of a contract, or the failure to award a contract; whether an actual or prospective bidder or offeror has an economic interest depends on the circumstances.

ARTICLE 8. INTERGOVERNMENTAL RELATIONS.

Sec. 36.30.700. COOPERATIVE PURCHASING AUTHORIZED. A public procurement unit may either participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of supplies, services, professional services, or construction with one or more public procurement units or external procurement activities in accordance with an agreement entered into between the participants. Cooperative purchasing may include joint or multi-party contracts between public procurement units and open-ended state public procurement unit contracts that are made available to local public procurement units.

Sec. 36.30.710. SALE, ACQUISITION, OR USE OF SUPPLIES BY A PUBLIC PROCUREMENT UNIT. (a) A public procurement unit may sell to, acquire from, or use any supplies belonging to another public

procurement unit or external procurement activity independent of the requirements of AS 36.30.070 and 36.30.100 - 36.30.280.

(b) A public procurement unit may enter into an agreement, independent of the requirements of AS 36.30.060 and 36.30.100 - 36.30.280, with another public procurement unit or external procurement activity for the cooperative use of supplies or services under the terms agreed upon between the parties.

Sec. 36.30.720. JOINT USE OF FACILITIES. A public procurement unit may enter into agreements for the common use or lease of warehousing facilities, capital equipment, and other facilities with another public procurement unit or an external procurement activity under the terms agreed upon between the parties.

Sec. 36.30.730. SUPPLY OF PERSONNEL, INFORMATION, AND TECHNICAL SERVICES. (a) A public procurement unit may, upon written request from another public procurement unit or external procurement activity, provide personnel to the requesting public procurement unit or external procurement activity. The public procurement unit or external procurement activity making the request shall pay the public procurement unit providing the personnel the direct and indirect cost of furnishing the personnel, in accordance with an agreement between the parties.

(b) The informational, technical, and other services of a public procurement unit may be made available to another public procurement unit or external procurement activity except that the requirements of the public procurement unit tendering the services has precedence over the requesting public procurement unit or external procurement activity. The requesting public procurement unit or external procurement activity shall pay for the expenses of the services so provided, in accordance with an agreement between the parties.

(c) Upon request, the commissioner may make available to public procurement units or external procurement activities the following services, among others:

(1) standard forms;

(2) printed manuals;

(3) product specifications and standards;

(4) quality assurance testing services and methods;

(5) qualified products lists;

(6) source information;

(7) common use commodities listings;

(8) supplier performance ratings;

(9) lists of persons debarred or suspended from consideration for award of state contracts;

(10) forms for invitations for bids, requests for proposals, instructions to bidders, general contract provisions, and other contract forms; and

(11) contracts or published summaries of them, including price and time of delivery information.

(d) The commissioner may provide the following technical services, among others:

(1) development of product specifications;

(2) development of quality assurance test methods, including receiving, inspection, and acceptance procedures;

(3) use of product testing and inspection facilities; and

(4) use of personnel training programs.

(e) The commissioner may enter into contractual arrangements and publish a schedule of fees for the services provided under (c) and (d) of this section.

Sec. 36.30.735. RESTRICTION ON CONTRACTING WITH OR EMPLOYING

EXPERTS ON RADIATION HAZARDS. (a) Except for the Department of Health and Social Services, the Department of Labor, the Department of Environmental Conservation, and the Department of Military and Veterans' Affairs, a state agency may not

(1) contract, other than with the Department of Health and Social Services, to have services performed that require expertise in determining or reducing the hazards of radiation; or

(2) employ a person whose duties require expertise in determining or reducing the hazards of radiation.

(b) In this section, "state agency" means a state department or agency, whether in the legislative, judicial, or executive branch, including such entities as the Alaska State Housing Authority, but not including the University of Alaska, a municipality, or an agency of a municipality.

(c) In this section, "radiation" does not include radiation emitted from a Federal Communications Commission licensed facility emitting radiation of a wave length longer than one centimeter and an average power output not exceeding two kilowatts.

Sec. 36.30.740. REVIEW OF PROCUREMENT REQUIREMENTS. To the extent possible, the commissioner may collect information concerning the type, cost, quality, and quantity of commonly used supplies, equipment for the state fleet, services, or construction being procured or used by state public procurement units. The commissioner may also collect this information from local public procurement units. The commissioner may make this information available to a public procurement unit upon request.

Sec. 36.30.750. CONTRACT CONTROVERSIES. (a) Under a cooperative purchasing agreement, controversies arising between an administering public procurement unit and its bidders, offerors, or

contractors shall be resolved in accordance with AS 36.30.560 - 36.30.699.

(b) A local public procurement unit that is not subject to AS 36.30.560 - 36.30.699 may enter into an agreement with another local public procurement unit or external procurement activity to establish procedures or use that unit's or activity's existing procedures to resolve controversies with contractors, whether or not the controversy arose under a cooperative purchasing agreement.

Sec. 36.30.790. DEFINITIONS. In AS 36.30.700 - 36.30.790

(1) "cooperative purchasing" means procurement conducted by, or on behalf of, more than one public procurement unit, or by a public procurement unit with an external procurement activity;

(2) "external procurement activity" means a buying organization not located in this state that, if located in this state, would qualify as a public procurement unit; an agency of the United States is an external procurement activity;

(3) "local public procurement unit" means a municipality or other subdivision of the state or other entity that expends public funds for the procurement of supplies, services, professional services, and construction, and any nonprofit corporation operating a charitable hospital;

(4) "public procurement unit" means either a local public procurement unit or a state public procurement unit;

(5) "state public procurement unit" means the Department of Administration and any other contracting agency of the state.

ARTICLE 9. GENERAL PROVISIONS.

Sec. 36.30.850. APPLICATION OF THIS CHAPTER. (a) This chapter applies only to contracts solicited or entered into after January 1, 1987, unless the parties agree to its application to a contract

solicited or entered into before that date.

(b) This chapter applies to the disposal of state supplies and every expenditure of state funds irrespective of their sources, including federal assistance except as otherwise specified in AS 36.30.890, by the state, acting through an agency, under a contract, except that this chapter does not apply to

(1) grants;

(2) contracts for professional witnesses to provide for professional services or testimony relating to existing or probable lawsuits in which the state is or may become a party;

(3) contracts of the University of Alaska where the work is to be performed substantially by students enrolled in the university;

(4) contracts for medical doctors and dentists;

(5) contracts for the purchase of residential child care services under AS 47.40;

(6) disposals of land or interests in land;

(7) disposals under AS 38.05;

(8) contracts for the preparation of ballots under AS 15.15.030;

(9) acquisitions or disposals of property and other contracts relating to airports under AS 02.15.070, 02.15.090, and 02.15.091;

(10) acquisitions of real property or disposals of obsolete property under AS 19.05.060, 19.05.100, 19.05.110, or 19.05.120;

(11) disposals of obsolete material or equipment under AS 35.20.060; or

(12) leases of ferry terminal facilities under AS 19.60.010.

(c) Except for AS 36.30.700 - 36.30.790, this chapter does not apply to contracts between two or more agencies, the state and its

political subdivisions, or the state and other governments.

(d) Nothing in this chapter or in regulations adopted under this chapter prevents an agency or political subdivision from complying with the terms and conditions of a grant, gift, bequest, or cooperative agreement.

Sec. 36.30.860. SUPPLEMENTARY GENERAL PRINCIPLES OF LAW APPLICABLE. Unless displaced by the particular provisions of this chapter, the principles of law and equity, including the Uniform Commercial Code (AS 45.01 - AS 45.09), the law merchant, and law relative to capacity to contract, agency, fraud, misrepresentation, duress, coercion, mistake, or bankruptcy shall supplement the provisions of this chapter.

Sec. 36.30.870. ADOPTION OF REGULATIONS. (a) Regulations under this chapter shall be adopted in accordance the Administrative Procedure Act (AS 44.62).

(b) Regulations under this chapter applicable to procurements of construction or procurements for or disposal of property of the state equipment fleet shall be adopted by the commissioner of administration only after consultation with the commissioner of transportation and public facilities.

Sec. 36.30.880. REQUIREMENT OF GOOD FAITH. All parties involved in the negotiation, performance, or administration of state contracts shall act in good faith.

Sec. 36.30.890. FEDERAL ASSISTANCE. If a procurement involves the expenditure of federal funds or federal assistance and there is a conflict between a provision of this chapter or a regulation adopted under a provision of this chapter and a federal statute or regulation the federal statute or regulation shall prevail.

Sec. 36.30.900. PREFERENCE FOR ALASKA PRODUCTS. This chapter

does not modify, amend, or alter AS 36.15.010 and 36.15.020 regarding preference for Alaska forest products, or AS 36.20.010 regarding preference to producers or dealers in Alaska except as provided in AS 36.30.170(b).

Sec. 36.30.910. PURCHASES THROUGH GENERAL SERVICES ADMINISTRATION. This chapter does not prevent purchasing through the general services administration as provided by law.

Sec. 36.30.920. REPORTING OF ANTICOMPETITIVE PRACTICES. When for any reason collusion or other anticompetitive practices are suspected among bidders or offerors, a notice of the relevant facts shall be transmitted to the attorney general by the person who suspects the collusion or other anticompetitive practices.

Sec. 36.30.930. CIVIL AND CRIMINAL PENALTIES. The following penalties apply to violations of this chapter:

(1) a person who contracts for or purchases supplies, equipment for the state fleet, services, professional services, or construction in a manner contrary to the requirements of this chapter or the regulations adopted under this chapter is personally liable for the recovery of all state money paid plus 20 percent of that amount, legal interest from the date of payment, and all costs and damages arising out of the violation;

(2) a person who intentionally or knowingly contracts for or purchases supplies, equipment for the state fleet, services, professional services, or construction under a scheme or artifice to avoid the requirements of this chapter is guilty of a class C felony.

Sec. 36.30.940. ENFORCEMENT. The attorney general on behalf of the state shall enforce the provisions of this chapter.

Sec. 36.30.990. DEFINITIONS. In this chapter, unless the context in which a term is used clearly requires a different meaning or a

different definition is prescribed for a particular provision,

(1) "agency" means a department, institution, board, commission, division, authority, public corporation, the Alaska Pioneers' Home, or other administrative unit of the executive branch of state government, including the University of Alaska; it does not include the Alaska Railroad Corporation;

(2) "change order" means a written order signed by the procurement officer, directing the contractor to make changes that the changes clause of the contract authorizes the procurement officer to order without the consent of the contractor;

(3) "commissioner" means the commissioner of the Department of Administration;

(4) "competitive sealed bidding" means the procedure under AS 36.30.100 - 36.30.190;

(5) "competitive sealed proposals" means the procedure under AS 36.30.200 - 36.30.270;

(6) "construction" means the process of building, altering, repairing, maintaining, improving, or demolishing a public highway, structure, building, or other public improvement of any kind to real property; it includes planning and design required for the construction; it does not include the routine operation of a public improvement to real property;

(7) "contract" means all types of state agreements, regardless of what they may be called, for the procurement or disposal of supplies, equipment for the state fleet, services, professional services, or construction;

(8) "contract modification" means a written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of a contract accomplished

by mutual action of the parties to the contract;

(9) "department" means the Department of Administration;

(10) "grant" means the furnishing by the state of assistance, whether financial or otherwise, to a person to support a program authorized by law; it does not include an award whose primary purpose is to procure an end product, whether in the form of supplies, services, professional services, or construction; a contract resulting from such an award is not a grant but a procurement contract;

(11) "person" means a business, individual, union, committee, club, other organization, or group of individuals;

(12) "procurement" means buying, purchasing, renting, leasing, or otherwise acquiring supplies, equipment for the state fleet, services, or construction; it also includes functions that pertain to the obtaining of a supply, equipment for the state fleet, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration;

(13) "procurement officer" means a person authorized to enter into and administer contracts for an agency and make written determinations with respect to them; it also includes an authorized representative of a procurement officer acting within the limits of authority;

(14) "professional services" means professional, technical, or consultant's services that are predominantly intellectual in character, result in the production of a report or the completion of a task, and include analysis, evaluation, prediction, planning, or recommendation; "professional services" does not include services performed under an employment contract for services to be performed under direct supervision, regardless of whether there is an employer-

employee relationship, if the person responsible for awarding the contract files with the commissioner of administration a written justification for the contract;

(15) "services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports that are merely incidental to the required performance; it does not include employment agreements or collective bargaining agreements;

(16) "supplies" means all property procured for the use of an agency, including equipment, materials, and insurance; it includes leases of privately owned real property for the use of agencies, such as office space, but does not include the procurement or disposition of other interests in land; and

(17) "using agency" means an agency that uses supplies, equipment from the state fleet, services, professional services, or construction procured under this chapter.

Sec. 36.30.995. SHORT TITLE. This chapter may be cited as the State Procurement Code.

* Sec. 3. AS 03.22.030 is amended to read:

Sec. 03.22.030. CENTER SITE, BUILDINGS AND EQUIPMENT. The department shall obtain a site, either by donation, lease, or purchase, and erect suitable buildings on the site, if they are needed for the use of the plant materials center. The department shall also acquire the agricultural land, scientific instruments and equipment necessary to carry on the work of the center. Acquisition of scientific instruments and equipment under this section is governed by AS 36.30 (State Procurement Code).

* Sec. 4. AS 05.20.040 is amended to read:

Sec. 05.20.040. PERSONNEL TO INSPECT DEVICES. The department

shall designate a person qualified in experience and training as the inspector of devices. The department may employ additional employees as are necessary to administer this chapter. The inspector and the employees may be hired on a temporary basis or borrowed from other state departments or political subdivisions of the state, or the department may contract with individuals or firms for the inspecting service on an independent basis. The department shall prescribe the salary or other remuneration for this service. Contracting under this section is governed by AS 36.30 (State Procurement Code).

* Sec. 5. AS 09.50.250 is amended to read:

Sec. 09.50.250. ACTIONABLE CLAIMS AGAINST THE STATE. A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in the superior court. A person who may present the claim under AS 44.77 may not bring an action under this section except as set out in AS 44.77.-040(c). A person who may bring an action under AS 36.30.560 - 36.30.-695 may not bring an action under this section except as set out in AS 36.30.685. However, no action may be brought under this section if the claim

(1) is an action for tort, and is based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused;

(2) is for damages caused by the imposition or establishment of a quarantine by the state;

(3) arises out of assault, battery, false imprisonment,

false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

* Sec. 6. AS 14.08.101 is amended to read:

Sec. 14.08.101. POWERS. A regional school board may

(1) sue and be sued;

(2) contract with the department, the Bureau of Indian Affairs, or any other school district, agency, or regional board for the provision of services, facilities, supplies or utilities;

(3) determine its own fiscal procedures including but not limited to policies and procedures for the purchase of supplies and equipment; the regional school boards are exempt from the Fiscal Procedures Act (AS 37.05) and the State Procurement Code (AS 36.30);

(4) appoint, compensate and otherwise control all school employees in accordance with this title; these employees are not subject to the State Personnel Act (AS 39.25);

(5) adopt regulations governing organization, policies and procedures for the operation of the schools;

(6) establish, maintain, operate, discontinue and combine schools subject to the approval of the commissioner;

(7) recommend to the department projects for construction, rehabilitation, and improvement of schools and education-related facilities as specified in AS 14.11.010(a), and plan, design, and construct the project when the responsibility for it is assumed under AS 14.11.020;

(8) exercise those other functions that may be necessary for the proper performance of its responsibilities;

(9) by resolution adopted by a majority of all the members of the board and provided to the commissioner of the department, assume ownership of all land and buildings used in relation to the

schools in the regional educational attendance area;

(10) provide housing for rental to teachers, by leasing existing housing from a local agency or individual, or by entering into contractual arrangements with a local agency or individual to lease housing that will be constructed by the local agency or individual for that purpose.

* Sec. 7. AS 16.05.050 is amended to read:

Sec. 16.05.050. POWERS AND DUTIES OF COMMISSIONER. The commissioner has, but not by way of limitation, the following powers and duties:

(1) assist the United States Fish and Wildlife Service in the enforcement of federal laws and regulations pertaining to fish and game;

(2) through the appropriate state agency and under the provisions of AS 36.30 (State Procurement Code), acquire by gift, purchase, or lease, or other lawful means, land, buildings, water, rights-of-way, or other necessary or proper real or personal property when the acquisition is in the interest of furthering an objective or purpose of the department and the state;

(3) under the provisions of AS 36.30, design and construct hatcheries, pipelines, rearing ponds, fishways, and other projects beneficial for the fish and game resources of the state;

(4) accept money from any person under conditions requiring the use of the money for specific purposes in the furtherance of the protection, rehabilitation, propagation, preservation, or investigation of the fish and game resources of the state or in settlement of claims for damages to fish or game resources;

(5) collect, classify, and disseminate statistics, data and information that, in the commissioner's discretion, will tend to

promote the purposes of this title except AS 16.51 and AS 16.52;

(6) capture, propagate, transport, buy, sell, or exchange fish or game or eggs for propagating, scientific or stocking purposes;

(7) under the provisions of AS 36.30, provide public facilities where necessary or proper to facilitate the taking of fish or game, and enter into cooperative agreements with any person to effect them;

(8) exercise administrative, budgeting, and fiscal powers;

(9) under the provisions of AS 36.30, construct, operate, supervise, and maintain vessels used by the Department of Fish and Game;

(10) authorize the holder of an interim-use permit under AS 16.43 to engage on an experimental basis in commercial taking of a fishery resource with vessel, gear, and techniques not presently qualifying for licensing under this chapter in conformity with standards established by the Alaska Commercial Fisheries Entry Commission;

(11) not later than January 31 of each year, provide to the commissioner of revenue the names of those fish and shellfish species which the commissioner of fish and game designates as developing commercial fish species for that calendar year; a fish or shellfish species is a developing commercial fish species if, within a specified geographical region,

(A) the optimum yield from the harvest of the species has not been reached;

(B) a substantial portion of the allowable harvest of the species has been allocated to fishing vessels of a foreign nation; or

(C) a commercial harvest of the fish species has recently developed;

(12) initiate or conduct research necessary or advisable to carry out the purposes of this title except AS 16.51 and AS 16.52;

(13) enter into cooperative agreements with agencies of the federal government, educational institutions, or other agencies or organizations, when in the public interest, to carry out the purposes of this title except AS 16.51 and AS 16.52.

* Sec. 8. AS 16.05.826(c) is amended to read:

(c) The department may contract to others the performance of the department's responsibilities under this section. Contracting under this subsection is governed by AS 36.30 (State Procurement Code), except that a [A] contract may include provisions for advance payment or reimbursement for services performed under the contract. All costs incurred under this section may be paid from the fish and game fund.

* Sec. 9. AS 18.15.120 is amended to read:

Sec. 18.15.120. TUBERCULOSIS CONTROL PROGRAM AUTHORIZED. The department may establish a comprehensive program for the control of tuberculosis in the state, and may

(1) arrange means by which persons in the state may be X-rayed to determine the presence of tuberculosis;

(2) establish necessary out-patient clinics for the care of tuberculosis;

(3) encourage and promote the establishment of adequate sanatorium facilities within the state to care for persons suffering from tuberculosis and allied conditions;

(4) under the provisions of AS 36.30 (State Procurement Code), obtain, by purchase or donation from surplus federal property or otherwise, medical supplies and equipment useful in carrying out this program and to allot or resell these supplies and equipment to private institutions engaged by the department to carry out this

program;

(5) under the provisions of AS 36.30, contract with hospitals, associations, or sanatoria qualified and equipped to give adequate care inside or outside the state;

(6) employ necessary and trained personnel to carry out the purposes of AS 18.15.120 - 18.15.140;

(7) pay the costs of care and incidental expenses for residents of the state, in whole or in part, depending on the ability of each patient to pay, and the temporary costs of care and transportation for nonresidents on the same basis until they can be transferred to their residence;

(8) enlist the cooperation of state and federal agencies operating in the state for the furtherance of this program;

(9) establish standards in accordance with department procedure for the care of tuberculars receiving treatment under AS 18.15.120 - 18.15.140.

* Sec. 10. AS 18.55.100 is amended by adding a new subsection to read:

(d) The authority's power to contract, lease, rent, construct, acquire, procure, and provide for services under this section is governed by AS 36.30.

* Sec. 11. AS 19.05.020 is amended to read:

Sec. 19.05.020. REGULATIONS. The department shall adopt regulations necessary to carry out the purpose of AS 19.05 - AS 19.25. The regulations may not conflict with AS 36.30 (State Procurement Code) or regulations adopted by the Department of Administration to implement that chapter.

* Sec. 12. AS 19.05.080 is amended to read:

Sec. 19.05.080. ACQUISITION OF LAND, RIGHTS-OF-WAY, AND MATERIALS BY PURCHASE OR EMINENT DOMAIN. The department on behalf of the

state and as part of the cost of constructing or maintaining a highway may purchase in the open market, acquire, take over, or condemn under the right and power of eminent domain land in fee simple or easements which it considers necessary for present public use, either temporary or permanent, or which it considers necessary and reasonable for the public use. By the same means, the department may obtain material, including clay, gravel, sand, or rock, or the land necessary to obtain material, including access to it. The department may acquire the land or materials notwithstanding the fact that title to it is vested in the state or a department, agency, commission or institution of the state. Acquisition of materials by purchase in the open market under this section is governed by AS 36.30 (State Procurement Code).

* Sec. 13. AS 19.10.160 is amended to read:

Sec. 19.10.160. STANDARD PLANS AND SPECIFICATIONS. The department shall prepare and adopt uniform standard plans and specifications for the establishment, construction and maintenance of highways in the state. The department may amend the plans and specifications as it considers advisable. The standards shall conform as closely as practicable to those adopted by the American Association of State Highway and Transportation Officials.

* Sec. 14. AS 19.10.170(a) is amended to read:

(a) Except as provided in [AS 36.98 AND] AS 44.33.300, it is [SHALL BE] the general policy of the state [DEPARTMENT] to require the construction of all highways under bid contract in accordance with AS 36.30 (State Procurement Code). However, subject to the provisions of (b) of this section, when the estimated cost of a construction project is less than $100,000 or when it appears to be in the best interests of the state, the department may perform the work notwithstanding any other provisions of law.

* Sec. 15. AS 19.10.180 is repealed and reenacted to read:

Sec. 19.10.180. REQUEST FOR PUBLIC BIDS. Requests for public bids are governed by AS 36.30 (State Procurement Code). The request for public bids may require the contractor to furnish equipment, labor, materials, and supplies for the project, or it may state that the department will furnish the materials and supplies. If the department elects to provide materials and supplies for a project, it shall do so at the time it adopts the construction program. The department shall acquire these materials and supplies under AS 36.30 by requesting bids for them according to the class, type, and nature of the materials and supplies. The contract for materials and supplies may be awarded either upon the basis of delivery to the construction project directly or to a central storehouse or storehouses maintained by the department. Those materials and supplies so purchased by the department may be delivered to the project site without expense to the contractor, or it may sell them to the contractor at cost and make the materials and supplies a part of the construction cost.

* Sec. 16. AS 19.10.200 is repealed and reenacted to read:

Sec. 19.10.200. PROCEDURES FOR THE AWARD OF CONTRACTS. The award of a contract for highway construction work is governed by AS 36.30 (State Procurement Code), AS 19.05 - AS 19.25, and regulations adopted under those laws.

* Sec. 17. AS 19.30.070 is amended to read:

Sec. 19.30.070. CONTRACTS FOR CONSTRUCTION OF ROADS. The director of the division of lands may contract with private persons for the construction of roads to and on state lands programmed for surface disposal which are not more than six miles from existing roads or highways. Contracts under this section are governed by AS 36.30

(State Procurement Code).

* Sec. 18. AS 19.30.080 is amended to read:

Sec. 19.30.080. CONSTRUCTION STANDARDS AND MAINTENANCE. An access road constructed under AS 19.30.060 - 19.30.100 shall be of low standard, not necessarily suitable for all weather use. The state is not under obligation to maintain an access road constructed under AS 19.30.060 - 19.30.100. If an access road is constructed outside a municipality that has zoning ordinances, the right-of-way width for the road shall be determined by the division of lands and the Department of Transportation and Public Facilities. If an access road is constructed within the boundaries of a municipality that has zoning ordinances, the right-of-way width shall conform to the subdivision control ordinances of the municipality. Contracts for the work on an access road are governed by AS 36.30 (State Procurement Code) [SHALL BE AWARDED TO THE LOWEST RESPONSIBLE BIDDER QUALIFIED TO CONTRACT WITH THE STATE].

* Sec. 19. AS 19.60.010 is amended to read:

Sec. 19.60.010. ACQUISITION AND MAINTENANCE OF FERRY TERMINAL FACILITIES. The department shall construct, purchase or lease ferry terminal facilities at locations it selects for the loading and unloading of passengers and vehicles under their own power, on and off ferries. The department shall repair and maintain these facilities. Construction and purchasing under this section are governed by AS 36.30 (State Procurement Code).

* Sec. 20. AS 23.15.611(a) is amended to read:

(a) The department may [IS AUTHORIZED TO] participate in programs of manpower training if it finds they are necessary to meet the occupational needs of the state. This authorization includes authority to execute on behalf of the state agreements or contracts which may

be necessary or desirable to enable the state to participate in a program, to receive and expend all appropriate funds made available for programs by the state or from other sources, to supervise the expenditure of the funds and conduct of the programs by other public and private agencies of the state, and to make the reports and certificates which are called for, and in cooperative arrangements with the Department of Education. Contracts with private entities under this subsection are governed by AS 36.30 (State Procurement Code).

* Sec. 21. AS 23.20.075(a) is amended to read:

(a) The department may acquire in the name of the state by term purchase agreements based on competitive bids in accordance with AS 36.30 (State Procurement Code) land and buildings upon terms and conditions that [WHICH] are approved by the Bureau of Employment Security of the United States, or its successor, for the purpose of providing office space for the department at a place which the department finds necessary and suitable.

* Sec. 22. AS 23.35.110 is amended to read:

Sec. 23.35.110. CONTRACTS FOR CARE. In carrying out this chapter, the department may enter into contracts or other arrangements with hospitals and doctors in the state for furnishing care on an annual basis to persons entitled to benefits. Contracting under this section is governed by AS 36.30 (State Procurement Code).

* Sec. 23. AS 24.55.275 is amended to read:

Sec. 24.55.275. CONTRACT PROCEDURES. The ombudsman shall adopt by regulation procedures consistent with AS 36.30 [AS 24.23] to be followed by the office of the ombudsman in contracting for services. However, the procedure for requests for proposals does not apply to contracts for investigations under AS 24.55.100.

* Sec. 24. AS 24.60.040(a) is amended to read:

(a) A person to whom this chapter applies may not be a party to or have an interest in a state contract or lease unless the contract or lease is let under the competitive bid procedure in AS 36.30 (State Procurement Code) [AS 37.05.230] or the total annual amount of the state contract or lease is $1,000 or less, or is a standardized contract or lease which was developed under publicly established guidelines and is generally available to the public at large, members of a profession, occupation or group. A person has an interest in a state contract or lease under this section if the person receives direct or indirect financial benefits.

* Sec. 25. AS 26.05.230(a) is amended to read:

(a) Buildings and sites for armory purposes may be leased or constructed, based upon location and size of units to be organized, and shall be financed through state and federal appropriations or both. These facilities may be made available by local communities or by the cooperative arrangement between the state and the federal government and any local community. Leasing and construction under this subsection are governed by AS 36.30 (State Procurement Code).

* Sec. 26. AS 26.05.280 is amended to read:

Sec. 26.05.280. TRANSPORTATION, SUBSISTENCE, AND SUPPLIES. There shall be provided by the state, transportation and subsistence for all officers and enlisted persons who are ordered into active service by the state for encampment, field duty, or other duty. Necessary transportation, stores and subsistence for troops when ordered on duty shall be contracted by the proper officers and paid for as other military bills. Contracting under this section is governed by AS 36.30 (State Procurement Code).

* Sec. 27. AS 26.21.030 is amended to read:

Sec. 27.21.030. GENERAL POWERS. To accomplish the purposes of

this chapter, the commissioner may

(1) in accordance with the Administrative Procedure Act (AS 44.62) adopt, amend, and enforce regulations pertaining to surface coal mining and reclamation operations;

(2) issue permits;

(3) conduct hearings and conferences;

(4) issue orders requiring an operator to take the actions necessary to comply with this chapter and the regulations adopted under this chapter;

(5) issue orders modifying previous orders;

(6) after opportunity for a due process hearing, issue a final order revoking the permit of an operator who has failed to comply with an order of the commissioner to take action required by this chapter or regulations adopted under this chapter;

(7) order the immediate cessation of all or part of a surface coal mining and reclamation operation if the commissioner finds that the operation or part of the operation creates an imminent danger to the health or safety of the public or is causing or can reasonably be expected to cause significant imminent harm to land, air, or water resources, and, to the extent reasonably necessary to eliminate or alleviate those conditions, take other action or make changes in a permit, as provided in this chapter;

(8) hire and authorize the hiring of employees and private contractors, subject to the conflict of interest provisions of this chapter and subject to AS 36.30 (State Procurement Code), to assist in carrying out the requirements of this chapter;

(9) enter and inspect a surface coal mining operation that is subject to the provisions of this chapter to assure that the operation is in compliance with this chapter;

(10) conduct, encourage, request, and participate in studies, surveys, investigations, research, experiments, training, and demonstrations;

(11) prepare reports and require permittees to prepare reports;

(12) accept, receive, and administer grants, gifts, or other money made available for the purposes of this chapter regardless of the source of the grants, gifts, or money;

(13) take the steps necessary to allow the state to participate to the fullest extent practicable in the abandoned mine land program provided in Title IV of the Surface Mining Control and Reclamation Act of 1977, including engaged in any work and adopting, amending and enforcing regulations;

(14) take the actions necessary to establish and maintain exclusive jurisdiction over surface coal mining and reclamation operations in the state under the provisions of the Surface Mining Control and Reclamation Act of 1977, including making recommendations for legislation to clarify or amend this chapter to conform with the terms of the Surface Mining Control and Reclamation Act of 1977;

(15) contract with state agencies to obtain the professional and technical services necessary to carry out the provisions of this chapter;

(16) coordinate the review of applications and issuance of permits for surface coal mining and reclamation operations with other federal or state permit processes applicable to those operations;

(17) enter into cooperative agreements with the Secretary of the United States Department of the Interior for the regulation of surface coal mining operations on federal land in accordance with the Surface Mining Control and Reclamation Act of 1977; and

(18) perform other duties required by this chapter.

* Sec. 28. AS 33.30.050 is amended to read:

Sec. 33.30.050. COMMISSIONER TO PROVIDE MEDICAL SERVICES. The commissioner shall detail physicians, nurses, and psychiatrists, or their aides, and laboratory technicians, employed by the department to any prison facility where state prisoners are detained or confined, for the purpose of furnishing necessary medical services, including examinations for communicable and infectious diseases. However, if medical services cannot be furnished by physicians, nurses, psychiatrists, or their aides, and laboratory technicians, regularly employed by the department, the commissioner may contract with private practitioners located in the area of a prison facility to furnish these services. The cost of contracted services shall be paid out of appropriations made to the department. Contracting for services under this section is governed by AS 36.30 (State Procurement Code).

* Sec. 29. AS 33.30.062(a) is amended to read:

(a) The commissioner may enter into an agreement with a privately operated correctional facility, but only if the facility is located in the state and if the purpose of the agreement is to involve prisoners in a work or rehabilitation furlough program established under this chapter, to provide necessary facilities under AS 33.30.282 - 33.30.288, or to confine prisoners convicted of a misdemeanor. An [NOTWITHSTANDING AS 37.05.230(1)(B), AN] agreement awarded under this subsection is governed by AS 36.30 (State Procurement Code) [SHALL BE BASED ON COMPETITIVE BIDS].

* Sec. 30. AS 33.32.015(b) is amended to read:

(b) The commissioner of corrections may

(1) subject to AS 36.30 (State Procurement Code) [THE FISCAL PROCEDURES ACT (AS 37.05)], use, purchase, lease, equip, and

maintain buildings, machinery, and other equipment, and may purchase materials and enter into contracts, which may be necessary for the correctional industries program;

(2) provide for prisoners to be employed in rendering services and producing articles, materials, and supplies needed by a state agency, a political subdivision of the state, an agency of the federal government, other states or their political subdivisions, or for use by nonprofit organizations;

(3) if the Correctional Industries Commission established in AS 33.32.070 approves, employ prisoners to provide services or products as needed by private industry if the services or products have potential for contributing to the economy of the state and will have minimal negative impact on an existing private industry or labor force in the state.

* Sec. 31. AS 35.05.010 is amended to read:

Sec. 35.05.010. PLANNING AND CONSTRUCTION. The department is responsible for the planning and construction of public works except as provided for court facilities in AS 22.05.025. Contracts for planning and construction of public works are governed by AS 36.30 (State Procurement Code).

* Sec. 32. AS 35.05.020 is amended to read:

Sec. 35.05.020. RULES AND REGULATIONS. The department shall adopt [RULES AND] regulations that [WHICH] it considers necessary to carry out the purpose of this title. The regulations may not conflict with AS 36.30 (State Procurement Code) or the regulations adopted by the Department of Administration under that chapter.

* Sec. 33. AS 35 is amended by adding a new section to read:

Sec. 35.10.195. CONFORMANCE WITH AS 36.30. The contractual techniques for the procurement of labor, materials, and contractual

services under the policies developed under this chapter must conform to the requirements of AS 36.30 (State Procurement Code).

* Sec. 34. AS 35.15.010(a) is amended to read:

(a) Except as provided in [AS 36.98 AND] AS 44.33.300, it is [SHALL BE] the general policy of the state [DEPARTMENT] to require the construction of all public works under bid contract in accordance with AS 36.30 (State Procurement Code). However, when the estimated cost of a construction project is less than $100,000, or when it appears to be in the best interests of the state, the department may perform the work, notwithstanding any other provisions of law. A complete record shall be kept by the commissioner or the commissioner's designee of all transactions entered into under this section including names of employees involved in the transactions.

* Sec. 35. AS 35.15.020 is repealed and reenacted to read:

Sec. 35.15.020. REQUEST FOR PUBLIC BIDS. The solicitation of bids for construction of public works is governed by AS 36.30 (State Procurement Code). The request for bids may require the contractor to furnish equipment, labor, materials, and supplies for the project, or it may state that the department will furnish the materials and supplies. If the department elects to provide materials and supplies for a project, it shall make the election at the time it adopts the construction program. The department shall acquire these materials and supplies under AS 36.30 by requesting bids for them according to the class, type, and nature of the materials and supplies. The contract may be awarded either upon the basis of delivery to the construction project directly or to a central storehouse or storehouses maintained by the department. Those materials and supplies so purchased by the department may be delivered to the project site without expense to the contractor, or it may sell them to the contractor at cost and make the

materials and supplies a part of the construction cost.

* Sec. 36. AS 35.15.040 is repealed and reenacted to read:

Sec. 35.15.040. PROCEDURES FOR THE AWARD OF CONTRACTS. Award of a contract for the construction of a public work shall comply with this title, AS 36.30 (State Procurement Code), and the regulations adopted under those laws.

* Sec. 37. AS 35.20.010 is amended to read:

Sec. 35.20.010. ACQUISITION OF LAND, RIGHTS-OF-WAY, AND MATERIALS BY PURCHASE OR EMINENT DOMAIN. The department, on behalf of the state and as part of the cost of constructing or maintaining a public work, may purchase <u>in the open market</u>, acquire, take over, or condemn under the right and power of eminent domain land in fee simple or easements which it considers necessary for present public use, either temporary or permanent, or which it considers necessary and reasonable for the public use. By the same means, the department may obtain material including clay, gravel, sand, or rock, or the land necessary to obtain the material, and the necessary land or easements to provide access to it. The department may acquire the land or material notwithstanding the fact that the title to it is in the state or a department, agency, commission or institution of the state. <u>Acquisition of material in the open market under this section is governed by AS 36.30 (State Procurement Code).</u>

* Sec. 38. AS 37.05 is amended by adding a new section to read:

Sec. 37.05.232. PETTY CASH ACCOUNTS. The department shall determine the amount of the petty cash accounts needed by each state agency and inspect the petty cash accounts at least once each year to determine that the total plus amounts of receipts for unreplenished disbursements is equal to the fixed sum of cash set aside. Shortages in petty cash accounts are a personal liability of the responsible

head of the agency to whom the account is set aside. The department shall adopt necessary regulations governing use and replenishment of petty cash funds.

* Sec. 39. AS 41.21.020(a) is amended to read:

(a) The Department of Natural Resources shall

(1) develop a continuing plan for the conservation and maximum use in the public interest of the scenic, historic, archaeologic, scientific, biological, and recreational resources of the state;

(2) plan for and develop a system of state parks and recreational facilities, to be established as the legislature authorizes and directs;

(3) acquire by gift, purchase, or transfer from state or federal agencies, or from individuals, corporations, partnerships or associations, land necessary, suitable and proper for roadside, picnic, recreational or park purposes;

(4) control, develop and maintain state parks and recreational areas;

(5) provide for the acquisition, care, control, supervision, improvement, development, extension and maintenance of public recreational land, and make necessary arrangements, contracts or commitments for the improvement and development of land acquired under AS 41.21.010 - 41.21.040; <u>contracting for improvement and development under this paragraph is governed by AS 36.30 (State Procurement Code);</u>

(6) adopt, in accordance with this section and the Administrative Procedure Act (AS 44.62), regulations governing the use and designating incompatible uses within the boundaries of state park and recreational areas to protect the property and to preserve the peace;

(7) cooperate with the United States and its agencies and local subdivisions of the state to secure the effective supervision, improvement, development, extension, and maintenance of state parks, state monuments, state historical areas, and state recreational areas, and secure agreements or contracts for the purpose of AS 41.21.010 - 41.21.040;

(8) encourage the organization of state public park and recreational activities in the local political subdivisions of the state;

(9) provide for consulting service designed to develop local park and recreation facilities and programs;

(10) provide clearing-house services for other state agencies concerned with park and recreation matters; and

(11) perform other duties as are prescribed by executive order or by law;

(12) maintain memorials to Alaska veterans located in state parks;

(13) adopt, in accordance with the Administrative Procedure Act (AS 44.62), regulations governing the use of the Chena River State Recreation Area and designating incompatible uses within the boundaries of the Chena River State Recreation Area in accordance with AS 41.21.490.

* Sec. 40. AS 42.40.920(b) is amended to read:

(b) Unless specifically provided otherwise in this chapter, the following laws do not apply to the operations of the corporation:

(1) AS 19;

(2) AS 30.15;

(3) AS 35;

(4) AS 36.30, except as specifically provided in AS 36.30

(State Procurement Code);

(5) AS 37.05;

(6) [(5)] AS 37.07;

(7) [(6)] AS 37.10.010 - 37.10.060;

(8) [(7)] AS 37.10.085;

(9) [(8)] AS 37.20;

(10) [(9)] AS 37.25;

(11) [(10)] AS 38;

(12) [(11)] AS 44.62.040 - 44.62.320.

* Sec. 41. AS 44.21.310(a) is amended to read:

(a) The telecommunications divisions, as directed by the deputy commissioner, shall

(1) advise the governor on matters of policy and comprehensive state planning for telecommunications services;

(2) make an annual report to the governor and to the legislature on the activities of the telecommunications divisions;

(3) coordinate, manage, and supervise state programs in telecommunications, including the management of those telecommunication services for the state obtained from common carriers and from the communications industry;

(4) when requested, provide technical and consulting assistance to the executive, judicial, and legislative branches of state government, to the University of Alaska, and to private noncommercial entities which request that assistance in facility procurement and leasing and in identifying long-range goals and objectives for the state and its political subdivisions in all aspects of telecommunications, including public, educational, and instructional telecommunications;

(5) prepare and maintain a state comprehensive

telecommunications development plan to further state telecommunications development and to meet state telecommunications needs and prepare and maintain a comprehensive inventory of all state communications facilities;

(6) whenever feasible, procure services from private enterprise or certified and franchised utilities and contract for the construction, management, operation and maintenance of telecommunications systems, and develop a procurement policy consistent with AS 36.30 (State Procurement Code) [UNDER AS 37.05.010 - 37.05.410]; the procurement policy must seek to achieve the maximum benefit to the public, and methods of procurement, including lease, purchase, rental, or combinations of lease, purchase, and rental, must be selected on the basis of factors such as the ratio of long-range costs versus benefits, life cycle costing, and the costs to the communications industry to the extent that these costs may affect local and long distance basic telephone rates; procurement, contracting, construction, and maintenance under this paragraph is governed by AS 36.30;

(7) provide information and assistance to state agencies to promote governmental coordination and unity in the preparation of agency plans and programs involving the use of telecommunications;

(8) apply for and accept federal and private money, property, or assistance, that may be appropriated, granted, or otherwise made available to the telecommunications divisions and use and disburse money and property for purposes consistent with AS 44.21.300 - 44.21.330 and AS 44.21.256 - 44.21.290, subject to reasonable limitations imposed by the grantor;

(9) participate with other governmental units in planning, and assist local governments and governmental conferences and councils in the state in planning and coordinating their activities relating to

telecommunications;

(10) provide for the orderly transition to new telecommunications services and systems by state agencies;

(11) serve as a clearinghouse for information, data, and other materials which may be necessary or helpful to federal, state, or local governmental agencies in the development of telecommunication systems;

(12) coordinate their services and activities with those of other state departments and agencies to the fullest extent possible to avoid unnecessary duplication; and

(13) provide that all activities of the telecommunications divisions are responsive to state statutes and regulations, and to the regulations and rulings of the Federal Communications Commission.

* Sec. 42. AS 44.19.144(b) is amended to read:

(b) The director may

(1) with the written concurrence of the governor, enter into contracts and subcontracts on behalf of the state to carry out the provisions of AS 44.19.141 - 44.19.152; <u>contracting under this paragraph is governed by AS 36.30 (State Procurement Code);</u>

(2) act for the state in the initiation, investigation, evaluation of or participation in any program relative to the stated purpose of AS 44.19.141 - 44.19.152 which may involve more than one government or governmental unit;

(3) on behalf of the state, accept and expend any gifts or grants made to the state with the approval of the governor where such gifts or grants were made for the purposes of furthering the objectives of the office.

* Sec. 43. AS 44.33.300 is amended to read:

Sec. 44.33.300. WAIVER OF CERTAIN PROVISIONS. When the

governor has by proclamation declared an area impacted by an economic disaster, the following provisions regarding public contracts may be waived to the extent specified in the proclamation:

(1) the requirement of a contractor's bond as prescribed in AS 36.25.010 may be waived if the contract amount does not exceed $100,000;

(2) the public bid requirements as contained in AS 19.10.-170, AS [19.10.190,] 19.30.191(b), AS 35.15.010 - 35.15.020, and AS 36.30 (State Procurement Code) [AND AS 35.15.010 - 35.15.030] may be waived if the contract is to be performed by a contractor whose principal office is in the designated area and the contract amount does not exceed $50,000;

(3) the general policy to require all construction to be under bid contract as contained in AS 19.10.170, AS 35.15.010, and AS 36.30 (State Procurement Code) may be waived if the contract is to be performed by the state, another governmental entity, or a nonprofit entity.

* Sec. 44. AS 44.47.250 is amended by adding a new subsection to read:

(c) Contracts with persons or nongovernmental entities under this section are governed by AS 36.30.

* Sec. 45. AS 44.47.490(a) is amended to read:

(a) The director may establish field offices under this chapter, may hire one or more lending officers, and, under AS 36.30 (State Procurement Code), may contract for the services of

(1) real property appraisers who are familiar with rural construction; and

(2) engineers who are familiar with engineering problems in arctic and subarctic regions.

* Sec. 46. AS 44.71.010 is amended to read:

Sec. 44.71.010. DISPOSITION OF OBSOLETE OR SURPLUS STATE PROPERTY. The Department of Administration shall take possession of obsolete or surplus property of the state for which there is no immediate or prospective use, except abandoned or obsolete school buildings and other school property. It shall also take possession of property remaining in the control of a commission or board of the state government after the commission or board stops functioning. The Department of Administration shall sell, lease, license, or dispose of the property on the terms it considers for the best interests of the state in conformance with regulations adopted under AS 36.30 (State Procurement Code).

* Sec. 47. AS 44.77.010(a) is amended to read:

(a) Except as provided in (d) of this section, every [EVERY] claim for reimbursement for money expended, or for compensation for labor, materials, or supplies furnished, or services given to or for the state, whether based on a contract or on a ratification, shall be promptly presented to the appropriate administrative or executive officer for approval and payment.

* Sec. 48. AS 44.77.010 is amended by adding a new subsection to read:

(d) A claim that is governed by AS 36.30.560 - 36.30.699 is not governed by this chapter.

* Sec. 49. AS 44.85.120 is amended to read:

Sec. 44.85.120. CARE AND CUSTODY OF BONDS. The bond bank authority, in accordance with AS 36.30 (State Procurement Code), may enter into agreements or contracts with a bank, trust company, banking or financial institution inside or outside the state as may be necessary, desirable or convenient, in the opinion of the bond bank authority, for rendering services in connection with the care, custody or safekeeping of municipal bonds or other investments held or owned by

the bond bank authority, for rendering services in connection with the payment or collection of amounts payable as to principal or interest, and for rendering services in connection with the delivery to the bond bank authority of municipal bonds or other investments purchased by it or sold by it, and to pay the cost of those services. The bond bank authority may also, in connection with any of the services to be rendered by a bank, trust company or banking or financial institution as to the custody and safekeeping of its municipal bonds or investments, require security in the form of collateral bonds, surety agreements or security agreements in such form and amount as, in the opinion of the bond bank authority, is necessary or desirable.

* Sec. 50. AS 44.99.001 is amended to read:

Sec. 44.99.001. ADMINISTRATION OF HIGHWAY SAFETY PROGRAM. The governor may contract and do all other things necessary on behalf of this state under 23 U.S.C. 401-404 (Highway Safety Act of 1966), and may cooperate with interested persons and agencies to effectuate the purposes of that Act. Contracting under this section is governed by AS 36.30 (State Procurement Code). The governor may designate a person to serve as the governor's highway safety representative; however, the governor is the official in this state having the ultimate responsibility for dealing with the federal government with respect to programs and activities under the Federal Highway Safety Act of 1966. The governor shall coordinate the activities relating to highway safety of state departments, agencies and subdivisions and of the Governor's Commission on Transportation Safety established in AS 44.19.190.

* Sec. 51. AS 46.04.090(a) is amended to read:

(a) The department, when feasible, shall enter into contracts with persons or private organizations to provide the personnel,

equipment, or other services or supplies which may be required to carry out this chapter. Contracts under this section are governed by AS 36.30 (State Procurement Code). When private contracting is not feasible, the department may establish and maintain at ports, harbors, or other locations in the state, the cleanup personnel, equipment, and supplies which, in its judgment, are necessary to carry out this chapter.

* Sec. 52. AS 46.07.040(a) is amended to read:

(a) The commissioner shall provide for the construction of facilities under this chapter, and is authorized to provide for the construction by contract or through grants to public agencies or private nonprofit organizations, or otherwise. A [NO] contribution toward the cost of the construction of a facility may not be required from its users. Construction under this section by contract is governed by AS 36.30 (State Procurement Code).

* Sec. 53. AS 46.15.020(a) is amended to read:

(a) The commissioner shall exercise all those powers and do all those acts necessary to carry out the provisions and objectives of this chapter. The commissioner may

(1) subject to AS 36.30 (State Procurement Code), enter into contractual agreements necessary to carry out the provisions of this chapter including agreements with federal, state and local agencies;

(2) apply for, accept, administer and expend grants, gifts, and loans from the federal government and any other public or private sources for the purposes of this chapter, and adopt procedures and do acts not otherwise restricted by law which are necessary to qualify the state to receive grants, gifts and loans;

(3) establish a division of water in the Department of

Natural Resources and assign to that division the responsibility for carrying out the provisions of this chapter.

* Sec. 54. AS 47.05.015(c) is amended to read:

(c) A contract authorized under this section is exempt from the competitive bid requirements of AS 36.30 (State Procurement Code) [AS 37.05.230]. In awarding a contract under this section the department shall [PUBLISH A] request [FOR] proposals in accordance with regulations of the Department of Administration under AS 36.30 (State Procurement Code) [DEPARTMENT].

* Sec. 55. AS 47.30.350(a) is amended to read:

(a) The department shall

(1) develop and submit to the Surgeon General of the United States Public Health Service a comprehensive program for the constructing and equipping of hospitals and other facilities for the examination, observation, care, and treatment of the mentally ill;

(2) develop and submit to the Surgeon General plans and specifications for the constructing and equipping of the hospitals and other facilities;

(3) construct and equip the hospitals and other facilities in accordance with the program, plans, and specifications approved by the Surgeon General; construction and equipping under this paragraph is governed by AS 36.30 (State Procurement Code);

(4) cooperate, coordinate, and contract, wherever indicated and desirable, with other state boards, departments and agencies, and agencies of the United States in the construction program, and hire necessary personnel and enter into contracts with private individuals and companies, to the end that the hospitals and other facilities are constructed in the most economical and expeditious manner; contracting and construction under this section are governed by AS 36.30 (State

Procurement Code).

* Sec. 56. AS 47.30.660 is amended to read:

Sec. 47.30.660. POWERS AND DUTIES OF DEPARTMENT. The department is the mental health authority of the state and shall

(1) administer a comprehensive program for the prevention of mental illness and the care and treatment of the mentally ill, including inpatient and outpatient care and treatment and the procurement of services of specialists or other persons on a contractual or other basis;

(2) take the actions and undertake the obligations which are necessary to participate in federal grants-in-aid programs and accept federal or other financial aid from whatever sources for the study, examination, care, and treatment of the mentally ill;

(3) administer AS 47.30.660 - 47.30.915;

(4) designate, operate, and maintain treatment facilities equipped and qualified to provide inpatient and outpatient care and treatment for the mentally ill;

(5) provide for the placement of mentally ill patients in designated treatment facilities;

(6) enter into arrangements with governmental agencies for the care or treatment of the mentally ill in facilities of the governmental agencies in the state or in another state;

(7) enter into contracts with treatment facilities for the custody and care or treatment of the mentally ill; contracts under this paragraph are governed by AS 36.30 (State Procurement Code);

(8) enter into contracts which incorporate safeguards consistent with AS 47.30.660 - 47.30.915 and the preservation of the civil rights of the patients with another state for the custody and care or treatment of patients previously committed from this state

under 48 U.S.C., sec. 46 et seq., and P.L. 830, 84th Congress, 2nd Session, 70 Stat. 709;

(9) prescribe the form of applications records, reports, requests for release, and consents to medical or psychological treatment required by AS 47.30.660 47.30.915;

(10) require reports from the head of a treatment facility concerning the care of patients;

(11) visit each treatment facility at least annually to review methods of care or treatment for patients;

(12) investigate complaints made by a patient or an interested party on behalf of a patient;

(13) delegate upon mutual agreement to another officer or agency of it, or a political subdivision of the state, or a treatment facility designated, any of the duties and powers imposed upon it by AS 47.30.660 - 47.30.915; and

(14) adopt regulations to implement the provisions of AS 47.30.660 - 47.30.915.

* Sec. 57. AS 47.35.010(a) is amended to read:

(a) The department may

(1) license and supervise boarding homes, foster homes, group homes, nurseries, institutions caring for children and foster homes, group homes and institutions caring for dependent adults;

(2) investigate and supervise licensees;

(3) enforce the standards established by it;

(4) contract with private or municipal agencies to investigate and make recommendations to the department for the licensing and supervision of boarding homes, foster homes, group homes, nurseries, institutions caring for children and foster homes, group homes and institutions caring for dependent adults under procedures and

standards of operation established by the department; contracts with private agencies under this paragraph are governed by AS 36.30 (State Procurement Code).

* Sec. 58. AS 47.37.030 is amended to read:

Sec. 47.37.030. POWERS OF OFFICE. The office may

(1) plan, establish, and maintain treatment programs as appropriate;

(2) make contracts and award grants necessary or incidental to the performance of its duties and the execution of its powers, including contracts with and grants to public and private agencies, organizations, and individuals, to pay them for services rendered or furnished to alcoholics or intoxicated persons; to the maximum extent possible, contracts and grants shall be for a period of two years; contracts under this paragraph are governed by AS 36.30 (State Procurement Code);

(3) solicit and accept for use a gift of money or property or a grant of money, services, or property from the federal government, the state, or a political subdivision of it or a private source, and do all things necessary to cooperate with the federal government or any of its agencies in making an application for a grant;

(4) administer or supervise the administration of the provisions relating to alcoholics and intoxicated persons of any state plan submitted for federal funding under federal health, welfare, or treatment legislation;

(5) coordinate its activities and cooperate with alcoholism programs in this and other states, and make contracts and other joint or cooperative arrangements with state, local, or private agencies for the treatment of alcoholics and intoxicated persons and for the common advancement of alcoholism programs in this and other states;

(6) keep records and engage in research and the gathering of relevant statistics;

(7) do other acts necessary to implement the authority expressly granted to it;

(8) acquire, hold, or dispose of real property or any interest in it, and construct, lease, or otherwise provide treatment facilities for alcoholics and intoxicated persons; however, the office shall encourage local initiative, involvement and financial participation under grants-in-aid whenever possible in preference to the construction or operation of facilities directly by the office; contracting and construction under this paragraph are governed by AS 36.30.

* Sec. 59. AS 47.37.130(g) is amended to read:

(g) The office may contract for the use of any facility as an approved public treatment facility if the coordinator, subject to the regulations of the department, considers this an effective and economical course to follow. Contracting under this subsection is governed by AS 36.30 (State Procurement Code).

* Sec. 60. AS 47.90.010(a) is amended to read:

(a) The commissioner, in consultation with state and local government agencies, community groups, and groups concerned with displaced homemakers, may

(1) contract with eligible private profit and nonprofit corporations for multipurpose service centers for displaced homemakers; contracting under this paragraph is governed by AS 36.30 (State Procurement Code); and

(2) coordinate existing state programs for displaced homemakers.

* Sec. 61. AS 47.40.041(b) is amended to read:

(b) Notices published by the department concerning the opening

of the application process for a grant award shall specify the geographical area in which services are needed, the type of services, the number of beds anticipated to be needed, the maximum number of days of care, and any other requirements established by the department. Grants authorized under this section are exempt from AS 36.30 (State Procurement Code) [THE COMPETITIVE BID REQUIREMENTS OF AS 37.05.230].

* Sec. 62. REPORT. By December 1, 1987, the commissioner of administration and the commissioner of transportation and public facilities shall report to the legislature concerning procurements by state agencies during the first six months of 1987. The report must include

(1) the records prepared under AS 36.30.510(4);

(2) recommendations for changes in AS 36.30 or other laws based on implementation of AS 36.30 in those six months; and

(3) a description of any matters that involved litigation concerning AS 36.30 during those six months.

* Sec. 63. REGULATIONS DEADLINE. The regulations required under AS 36.30 as added by sec. 2 of this Act, shall be adopted by January 1, 1987 and shall be effective on that date. Regulations adopted under laws repealed in sec. 64 of this Act become ineffective January 1, 1987.

* Sec. 64. REPEALER. The following laws are repealed: AS 14.40.340; AS 19.10.190, 19.10.210; AS 24.23; AS 35.15.030, 35.15.050; AS 36.98; AS 37.05.220, 37.05.230, 37.05.231, 37.05.240, 37.05.250, 37.05.260, 37.05.270, 37.05.280, 37.05.290, 37.05.400(2) and (3); AS 44.65; AS 44.77.010(c); and AS 47.90.010(c).

* Sec. 65. Section 63 of this Act takes effect immediately in accordance with AS 01.10.070(c).

* Sec. 66. Except as provided in sec. 65, this Act takes effect January 1, 1987.

Cook
2/9/86

Original sponsor: Rules Committee
By Request

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 341 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to state procurement practices and procedures; and providing for an effective date."

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

* Section 1. PURPOSE. This Act shall be construed and applied to promote its underlying purposes and policies. The underlying purposes and policies of this Act are to

(1) simplify, clarify, and modernize the law governing procurement by the state;

(2) make as consistent as possible the procurement practices among the executive branch, the legislative branch, and the judicial branch of state government;

(3) provide for increased public confidence in the procedures followed in state procurement;

(4) ensure the fair and equitable treatment of all persons who deal with the procurement system of the state;

(5) provide increased economy in state procurement activities and maximize to the fullest extent practicable the purchasing value of state funds;

(6) foster effective broad-based competition within the free enterprise system;

(7) provide safeguards for the maintenance of a procurement system of quality and integrity;

(8) permit the continued development of state procurement practices and policies; and

(9) eliminate and prevent discrimination in state contracting because of race, religion, color, national origin, sex, age, marital status, pregnancy, parenthood, handicap, or political affiliation.

* Sec. 2. AS 36 is amended by adding a new chapter to read:

CHAPTER 30. STATE PROCUREMENT CODE.

ARTICLE 1. ORGANIZATION OF STATE PROCUREMENT.

Sec. 36.30.005. CENTRALIZATION OF PROCUREMENT AUTHORITY. (a) Except as otherwise provided, all rights, powers, duties, and authority relating to the procurement of supplies, services, and professional services, and the control over supplies, services, and professional services vested in or exercised by an agency on January 1, 1987, are transferred to the commissioner of administration and to the chief procurement officer.

(b) Except as otherwise provided, all rights, powers, duties, and authority relating to the procurement of construction and procurements of equipment or services for the state equipment fleet and the control over construction and the state equipment fleet vested in or exercised by an agency on January 1, 1987, are transferred to the commissioner of transportation and public facilities, subject to regulations adopted by the commissioner of administration. Notwithstanding AS 44.71.010, authority relating to disposals from the state equipment fleet is vested in the the commissioner of transportation and public facilities, subject to regulations adopted by the commissioner of administration.

Sec. 36.30.010. CHIEF PROCUREMENT OFFICER. (a) The commissioner shall appoint to the partially exempt service the chief procurement officer of the state. The chief procurement officer must have at least five years of prior experience in public procurement, including large scale procurement of supplies, services, or

professional services, and must be a person with demonstrated executive and organizational ability. The chief procurement officer may be removed by the commissioner only for cause. The term of office of the chief procurement officer expires when the term of the governor expires.

(b) Except as otherwise specifically provided in this chapter, the chief procurement officer shall

(1) procure or supervise the procurement of all supplies, services, and professional services needed by an agency;

(2) exercise general supervision and control over all inventories of supplies belonging to an agency and prescribe the manner in which supplies shall be purchased, delivered, stored, and distributed;

(3) prescribe the time, manner, authentication, and form of making requisitions for supplies and services;

(4) sell, trade, transfer between agencies, or otherwise dispose of surplus, obsolete, or unused supplies and make proper adjustments in the accounts of agencies concerned;

(5) establish and maintain programs for the inspection, testing, and acceptance of supplies and services and the testing of samples submitted with bids;

(6) prescribe standard forms for bids and contracts; and

(7) provide for other matters that may be necessary to carry out the provisions of this chapter and the regulations adopted under this chapter.

Sec. 36.30.015. EXECUTIVE BRANCH AGENCIES. (a) The commissioner of transportation and public facilities may delegate to another agency the authority to contract for construction. Before delegating authority to an agency under this subsection, the

commissioner of transportation and public facilities shall make a written determination that the agency is capable of implementing the delegated authority. Contracts for construction and procurements to the state equipment fleet are governed by this chapter and regulations adopted by the commissioner of administration under this chapter.

(b) The commissioner of administration may delegate to an agency the authority to contract for and manage services, professional services, and supplies. Notwithstanding delegation of authority under this subsection, an agency's authority to contract for supplies, services, and professional services, is governed by this chapter and regulations adopted by the commissioner under this chapter. Before delegating authority to an agency under this subsection, the commissioner shall make a written determination that the agency is capable of implementing the delegated authority.

(c) The commissioner of administration may not delegate the authority to adopt regulations under this chapter.

(d) An agency may not contract for the services of legal counsel without the approval of the attorney general.

(e) The board of directors of the Alaska Railroad Corporation shall adopt procedures to govern the procurement of supplies, services, professional services, and construction by the corporation. The procedures must be substantially equivalent to the procedures prescribed in this chapter and in regulations adopted under this chapter.

Sec. 36.30.020. LEGISLATURE. The Legislative Council shall adopt procedures to govern the procurement of supplies, services, professional services, and construction by the legislature, legislators, and legislative agencies and committees. The procedures must be substantially equivalent to the procedures prescribed in this chapter.

Sec. 36.30.030. COURT SYSTEM. The supreme court shall adopt

procedures to govern the procurement of supplies, services, professional services, and construction by the judicial branch. The procedures must be substantially equivalent to the procedures prescribed in this chapter.

Sec. 36.30.040. PROCUREMENT REGULATIONS. (a) The commissioner shall adopt regulations governing the procurement, management, and control of supplies, services, professional services and construction by agencies. The commissioner may audit and monitor the implementation of the regulations and the requirements of this chapter with respect to using agencies.

(b) The commissioner shall adopt regulations pertaining to the following:

(1) suspension, debarment, and reinstatement of prospective bidders and contractors;

(2) bid protests;

(3) conditions and procedures for the procurement of perishables and items for resale;

(4) conditions and procedures for the use of source selection methods authorized by this chapter, including sole source procurements, emergency procurements, and small procurements;

(5) the opening or rejection of bids and offers, and waiver of informalities in bids and offers;

(6) confidentiality of technical data and trade secrets submitted by actual or prospective bidders or offerors;

(7) partial, progressive, and multiple awards;

(8) storerooms and inventories, including determination of appropriate stock levels and the management, transfer, sale, or other disposal of agency supplies;

(9) definitions and classes of contractual services and

procedures for acquiring them;

(10) providing for conducting price analysis;

(11) use of payment and performance bonds in connection with contracts for supplies and services;

(12) guidelines for use of cost principles in negotiations, adjustments, and settlements; and

(13) the elimination and prevention of discrimination in state contracting because of race, religion, color, national origin, sex, age, marital status, pregnancy, parenthood, handicap, or political affiliation.

Sec. 36.30.050. LISTS OF CONTRACTORS. (a) The commissioner shall establish and maintain lists of persons who desire to provide supplies, services, professional services, or construction services to the state.

(b) A person who desires to be on a list shall submit to the commissioner evidence of a valid Alaska business license together with a biennial fee established by regulation in an amount reasonably calculated to pay the costs of administering this section. A construction contractor shall also submit a valid certificate of registration issued under AS 08.18. The commissioner, by regulation, may require submission of additional information.

(c) The lists may be used by the chief procurement officer or an agency when issuing invitations to bid or requests for proposals under this chapter. The lists may be used by the Legislative Council, the court system, and the Alaska Railroad Corporation.

(d) The lists shall be used in providing notice of intent to make a small procurement. A procurement officer who intends to make a procurement under AS 36.30.320 shall request names from the appropriate list and the department shall furnish names on a rotating

basis from the list in response to each request.

Sec. 36.30.060. SPECIFICATIONS. (a) The commissioner shall adopt regulations governing the preparation, revision, and content of specifications for supplies, services, professional services, and construction required by an agency. The commissioner shall monitor the use of these specifications.

(b) Specifications for construction of highways must conform as closely as practicable to those adopted by the American Association of State Highway and Transportation Officials.

(c) The commissioner may obtain expert advice and assistance from personnel of using agencies in the development of specifications. Specifications must promote overall economy for the purposes intended and encourage competition in satisfying the state's needs, and may not be unduly restrictive. The requirements of this subsection regarding the purposes and nonrestrictiveness of specifications apply to all specifications, including those prepared by architects, engineers, designers, and other professionals.

(d) In this section, "specification" means a description of the physical or functional characteristics, or of the nature of a supply, service, professional service, or construction project; it may include requirements for inspecting, testing, and delivery.

Sec. 36.30.070. SUPPLY MANAGEMENT. The commissioner shall adopt regulations governing the

(1) management of supplies during their entire life cycle;

(2) sale, lease, or disposal of surplus supplies by public auction, competitive sealed bidding, or other appropriate method designated by regulation;

(3) purchase of surplus supplies by an employee of the using or disposing agency; and

(4) transfer of excess supplies.

Sec. 36.30.080. LEASES. (a) The department shall lease space for the use of the state or an agency wherever it is necessary and feasible, subject to compliance with the requirements of this chapter. A lease may not provide for a period of occupancy greater than 40 years. An agency requiring office, warehouse, or other space shall lease the space through the department.

(b) The department may enter into lease-financing agreements, including lease-purchase agreements and agreements related to the issuance of certificates of participation. A lease-financing agreement must provide that lease payments are subject to annual appropriation.

(c) If the department intends to enter into a lease or lease-financing agreement with an annual rent to the state anticipated to exceed $1,000,000, the department shall provide notice to the legislature. The notice must include the anticipated annual lease obligation amount and the anticipated total construction, acquisition, or other costs of the project. The department may not enter into an agreement under this subsection unless the project has been approved by the legislature by law. An appropriation for the project does not constitute approval of the project for purposes of this subsection.

ARTICLE 2. COMPETITIVE SEALED BIDDING.

Sec. 36.30.100. GENERAL POLICY. (a) Except as otherwise provided in this chapter, or unless specifically exempted by law, an agency contract shall be awarded by competitive sealed bidding.

(b) Competitive sealed bidding is not required

(1) when the commissioner determines in writing that food, clothing, or medical supplies, or materials for use in laboratory or medical studies may be purchased otherwise to the best advantage of

the state;

(2) when rates are fixed by law or ordinance;

(3) for the purchase of products or services manufactured or provided by a sheltered workshop;

(4) for the purchase of products or services provided by the correctional industries program established under AS 33.32;

(5) for professional services; or

(6) for concessions operated on state property.

(c) In this section "sheltered workshop" means a place where manufacture or handiwork is carried on, and that is operated for the primary purpose of providing remunerative employment to individuals with physical or mental disabilities that constitute substantial handicaps to employment.

Sec. 36.30.110. INVITATION TO BID. (a) When competitive sealed bidding is used, the procurement officer shall issue an invitation to bid. It must include a time, place and date by which the bid must be received, purchase description, and all contractual terms and conditions applicable to the procurement.

(b) The invitation to bid shall require the bidder to list subcontractors the bidder proposes to use in the performance of the contract. When responding to the invitation, the bidder shall also supply evidence of the bidder's valid Alaska business license and evidence of a valid Alaska business license for each listed subcontractor. A bidder for a construction contract shall also submit evidence of the bidder's registration under AS 08.18 and evidence of registration for each listed subcontractor.

Sec. 36.30.120. BID SECURITY. (a) Bid security shall be required for all competitive sealed bidding for construction contracts when the price is estimated by the procurement officer to exceed an

amount established by regulation of the commissioner. Bid security on construction contracts under the amount set by the commissioner may be required when the circumstances warrant. Bid security may be required for competitive sealed bidding for contracts for supplies, services, or professional services in accordance with regulations of the commissioner when needed for the protection of the state.

(b) Bid security must be a bond provided by a surety company authorized to do business in the state or otherwise supplied in a form satisfactory to the commissioner. Bid security must be in an amount equal to at least

(1) 10 percent of the amount of the bid if the bid does not exceed $100,000; or

(2) 10 percent of the first $100,000 and five percent of the amount of the bid over $100,000 if the bid exceeds $100,000 up to a maximum of $200,000 in security.

(c) When the invitation to bid requires security, the procurement officer shall reject a bid that does not comply with the bid security requirement unless, in accordance with regulations, the officer determines that the bid fails to comply in a nonsubstantial manner with the security requirements.

Sec. 36.30.130. PUBLIC NOTICE OF INVITATION TO BID. (a) The procurement officer shall give adequate public notice of the invitation to bid at least 21 days before the date for the opening of bids. If a determination is made in writing that a shorter notice period is necessary for a particular bid, the 21-day period may be shortened. The determination shall be made by the chief procurement officer for bids for supplies, services, or professional services. The determination shall be made by the commissioner of transportation and public facilities for bids for construction or acquisition of property

for the state equipment fleet. Notice shall be published in the Alaska Administrative Journal. The time and manner of notice must be in accordance with regulations adopted by the commissioner of administration. When practicable, notice may include

(1) publication in a newspaper calculated to reach prospective bidders;

(2) notices posted in public places within the area where the work is to be performed or the material furnished; and

(3) notices mailed to all active prospective contractors on the appropriate list maintained under AS 36.30.050.

(b) Failure to comply with the notice requirements of this section does not invalidate a bid or the award of a contract. The state is not liable for damages caused by failure to comply with this section.

Sec. 36.30.140. BID OPENING. (a) The procurement officer shall open bids publicly in the presence of one or more witnesses at the time and place designated in the invitation to bid. The amount of each bid and other relevant information that is specified by regulation of the commissioner, together with the name of each bidder, shall be recorded.

(b) The information recorded under (a) of this section is open to public inspection as soon as practicable before the notice of intent to award a contract is given under AS 36.30.365. The bids are not open for public inspection until after a contract is awarded. To the extent the bidder designates and the procurement officer concurs, trade secrets and other proprietary data contained in a bid document are confidential.

Sec. 36.30.150. BID ACCEPTANCE AND BID EVALUATION. Bids shall be unconditionally accepted without alteration or correction, except

as authorized in AS 36.30.160. The procurement officer shall evaluate bids based on the requirements set out in the invitation to bid, which may include criteria to determine acceptability such as inspection, testing, quality, delivery, and suitability for a particular purpose. The criteria that will affect the bid price and be considered in evaluation for award must be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation to bid must set out the evaluation criteria to be used. Criteria may not be used in bid evaluation if they are not set out in the invitation to bid.

Sec. 36.30.160. LATE BIDS; CORRECTION OR WITHDRAWAL OF BIDS; CANCELLATION OF AWARDS. (a) Bids received after the bid due date and time indicated on the invitation to bid may not be accepted unless the delay was due to an error of the contracting agency.

(b) Correction or withdrawal of inadvertently erroneous bids before or after bid opening, or cancellation of awards or contracts based on bid mistakes may be permitted in accordance with regulations adopted by the commissioner. After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the state or fair competition may not be permitted. Except as otherwise provided by regulation, a decision to permit the correction or withdrawal of a bid, or to cancel an award or contract based on a bid mistake, shall be supported by a written determination made by the procurement officer. If a bidder [illegible]rmitted to withdraw a bid before award, an action may not b[illegible]ained against the bidder or the bid security.

Sec. 36.30.170. CONTRACT AWARD AFTER BIDS. (a) Except as provided in (b) of this section, the procurement officer shall award a contract based on the solicited bids with reasonable promptness by

written notice to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set out in the invitation to bid.

(b) The procurement officer shall award a contract based on solicited bids to the lowest responsible and responsive Alaska bidder if the bid is not more than five percent higher than the lowest non-resident bidder's. In this subsection, "Alaska bidder" means a person who

(1) holds a current Alaska business license;

(2) submits a bid for goods, services, or construction under the name as appearing on the person's current Alaska business license;

(3) has maintained a place of business within the state for a period of six months immediately preceding the date of the bid; and

(4) if a joint venture, is composed entirely of ventures that qualify under (1) - (3) of this subsection.

(c) The provisions of (b) of this section do not apply to construction contracts for highways and public works if the construction contract exceeds $5,000.

Sec. 36.30.190. MULTI-STEP SEALED BIDDING. When it is considered impractical to initially prepare a definitive purchase description to support an award based on price, the procurement officer may issue an invitation to bid requesting the submission of unpriced technical offers to be followed by an invitation to bid limited to the bidders whose offers are determined to be technically qualified under the criteria set out in the first solicitation.

ARTICLE 3. COMPETITIVE SEALED PROPOSALS.

Sec. 36.30.200. CONDITIONS FOR USE. (a) Except as otherwise provided in this chapter, or unless specifically exempted by law, an

agency contract shall be awarded by competitive sealed proposals if it is not awarded by competitive sealed bidding.

(b) The commissioner may provide by regulation that it is either not practicable or not advantageous to the state to procure specified types of supplies, services, or construction by competitive sealed bidding that would otherwise be procured by that method. When the chief procurement officer, or for construction contracts or procurements for the state equipment fleet, the commissioner of transportation and public facilities, determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the state, a contract may be entered into by competitive sealed proposals in accordance with the regulations. When it is determined that it is practicable but not advantageous to use competitive sealed bidding, the chief procurement officer or commissioner of transportation and public facilities shall specify with particularity the basis for the determination.

Sec. 36.30.210. REQUEST FOR PROPOSALS. (a) A request for competitive sealed proposals must contain the date by which the proposal must be received, a description of the supplies, construction, services, or professional services to be provided under the contract, and the terms under which the supplies, construction, services, or professional services are to be provided. The request shall require the offeror to list subcontractors the offeror proposes to use in the performance of the contract. The offeror must also supply evidence of the offeror's valid Alaska business license together with evidence of a valid Alaska business license for each listed subcontractor. An offeror for a construction contract shall also submit evidence of the offeror's registration under AS 08.18 and evidence of registration for each listed subcontractor.

(b) A request for proposals must contain that information necessary for an offeror to submit a proposal or contain references to any information that cannot reasonably be included with the request. The request must provide a description of the factors that will be considered by the procurement officer when evaluating the proposals received, including the relative importance of price and other evaluation factors.

(c) Notice of a request for proposals shall be given in accordance with procedures under AS 36.30.130. The procurement officer may use additional means considered appropriate to notify prospective offerors of the intent to enter into a contract through competitive sealed proposals.

Sec. 36.30.220. STANDARD OVERHEAD RATE. (a) An agency that provides services to another agency under a contract covered by this chapter shall establish a standard overhead rate. If an agency submits a proposal in response to a request for competitive sealed proposals, the agency must include its standard overhead rate within its proposal.

(b) In this section, "standard overhead rate" means a charge established for services and professional services from an agency that is designed to compensate the agency for administration and support services incidentally provided with the services contracted for.

Sec. 36.30.230. TREATMENT OF PROPOSALS. The procurement officer shall open proposals so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals containing the name and address of each offeror shall be prepared in accordance with regulations adopted by the commissioner. The register and the proposals are open for public inspection after the contract is awarded. To the extent that the offeror designates and

the procurement officer concurs, trade secrets and other proprietary data contained in the proposal documents are confidential.

Sec. 36.30.240. DISCUSSION WITH RESPONSIBLE OFFERORS AND REVISIONS TO PROPOSALS. As provided in the request for proposals, and under regulations adopted by the commissioner, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors reasonably susceptible of being selected for award shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before the award of the contract for the purpose of obtaining best and final offers. In conducting discussions, the procurement officer may not disclose information derived from proposals submitted by competing offerors.

Sec. 36.30.250. AWARD OF CONTRACT. The procurement officer shall award a contract under competitive sealed proposals to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the state taking into consideration price and the evaluation factors set out in the request for proposals. Other factors and criteria may not be used in the evaluation. The contract file must contain the basis on which the award is made.

Sec. 36.30.260. CONTRACT EXECUTION. A contract awarded under competitive sealed proposals must contain

(1) the amount of the contract stated on its first page;

(2) the date for the supplies to be delivered or the dates for construction, services, or professional services to begin and be

completed;

(3) a description of the supplies, construction, services, or professional services to be provided; and

(4) certification by the project director for the contracting agency, the head of the contracting agency, or a designee that sufficient funds are available in an appropriation to be encumbered for the amount of the contract.

Sec. 36.30.270. REVIEW AND APPROVAL BY DEPARTMENT OF LAW. If a contract contains a term that is in conflict with a state standard form contract term or if a standard term is deleted or modified by a term that is not standard, the contract must be reviewed by the Department of Law and approved as to form.

ARTICLE 4. OTHER PROCUREMENT METHODS.

Sec. 36.30.300. SOLE SOURCE PROCUREMENTS. (a) A contract may be awarded for supplies, services, professional services, or construction without competitive sealed bidding, competitive sealed proposals, or other competition in accordance with regulations adopted by the commissioner of administration. A contract may be awarded under this section only when the chief procurement officer or, for construction contracts or procurements for the state equipment fleet, the commissioner of transportation and public facilities determines in writing that there is only one source for the required procurement or construction. A sole source procurement may not be awarded if a reasonable alternative source exists. The written determination must include findings of fact that support by clear and convincing evidence the determination that only one source exists. The authority to make the determination required by this subsection may not be delegated.

(b) The using agency shall submit written evidence to support a sole source determination. The commissioner of administration or the

commissioner of transportation and public facilities, as appropriate, may also require the submission of cost or pricing data in connection with an award under this section.

(c) The procurement officer shall negotiate with the single supplier, to the extent practicable, to obtain a contract advantageous to the state.

Sec. 36.30.310. EMERGENCY PROCUREMENTS. Procurements may be made under emergency conditions as defined in regulations adopted by the commissioner when there exists a threat to public health, welfare, or safety, when a situation exists that makes a procurement through competitive sealed bidding or competitive sealed proposals impracticable or contrary to the public interest, or to protect public or private property. An emergency procurement need not be made through competitive sealed bidding or competitive sealed proposals but shall be made with competition that is practicable under the circumstances. A written determination by the procurement officer of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The written determination must include findings of fact that support the determination.

Sec. 36.30.320. SMALL PROCUREMENTS. (a) A procurement for supplies, services, or construction that does not exceed an aggregate dollar amount of $5,000 may be made in accordance with regulations adopted by the commissioner for small procurements.

(b) A contract for professional services that does not exceed $25,000 may be made under regulations adopted by the commissioner for small procurements, except that an agency may not contract for the services of legal counsel without the approval of the attorney general.

(c) Small procurements need not be made through competitive

sealed bidding or competitive sealed proposals but shall be made with competition that is practicable under the circumstances.

(d) Procurement requirements may not be artificially divided or fragmented so as to constitute a purchase under this section or to circumvent the source selection procedures required by AS 36.30.100 - 36.30.270.

(e) The procurement officer shall give adequate public notice of intent to make a procurement under this section in accordance with regulations adopted by the commissioner. Notices shall be mailed to those active prospective contractors on the appropriate list maintained under AS 36.30.050 designated by the commissioner.

ARTICLE 5. CONTRACT FORMATION AND MODIFICATION.

Sec. 36.30.350. BID CANCELLATION, REJECTION. An invitation to bid, a request for proposals, or other solicitation may be cancelled or any or all bids or proposals may be rejected in whole or in part or the date for opening bids or proposals may be delayed when it is in the best interests of the state in accordance with regulations adopted by the commissioner. The reasons for cancellation, rejection, or delay in opening bids or proposals shall be made part of the contract file.

Sec. 36.30.360. DETERMINATION OF RESPONSIBILITY. (a) A written determination of responsibility of a bidder or offeror shall be made by the procurement officer in accordance with regulations adopted by the commissioner. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility is grounds for a determination of nonresponsibility with respect to the bidder or offeror.

(b) Information furnished by a bidder or offeror under (a) of this section is confidential and may not be disclosed without prior

written consent by the bidder or offeror.

Sec. 36.30.365. NOTICE OF INTENT TO AWARD A CONTRACT. At least 10 days before the formal award of a contract under this chapter the procurement officer shall provide to each bidder or offeror notice of intent to award a contract. The notice shall conform to regulations adopted by the commissioner.

Sec. 36.30.370. TYPES OF CONTRACTS. Subject to limitations of this section, any type of contract that will promote the best interests of the state may be used, except that the use of a cost-plus-a-percentage-of-cost contract is prohibited. A cost-reimbursement contract may be used only when a determination is made in writing by the procurement officer that a cost-reimbursement contract is likely to be less costly to the state than any other type or that it is impracticable to obtain the supplies, services, professional services, or construction required except under a cost-reimbursement contract.

Sec. 36.30.380. APPROVAL OF ACCOUNTING SYSTEM. Except for a contract awarded through competitive sealed bidding or a firm fixed-price contract, a contract type may not be used unless it has been determined in writing by the procurement officer that the proposed contractor's accounting system

(1) will permit timely development of all necessary cost data in the form required by the specific contract type contemplated; and

(2) is adequate to allocate costs in accordance with generally accepted accounting principles.

Sec. 36.30.390. MULTI-TERM CONTRACTS. (a) Unless otherwise provided by law, a contract for supplies, services, or professional services may be entered into for any period of time considered to be in the best interests of the state provided the term of the contract

and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds for them.

(b) Before using a multi-term contract, the procurement officer shall determine in writing that

(1) estimated requirements cover the period of the contract and are reasonably firm and continuing; and

(2) the contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economies in state procurement.

(c) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled. The contractor may only be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies, services, or professional services delivered under the contract that are not otherwise recoverable. The cost of cancellation may be paid from any appropriations available for these purposes.

Sec. 36.30.400. COST OR PRICING DATA. (a) Before an award of a contract or a change order or contract modification, the contractor or prospective contractor shall submit cost and pricing data. The contractor or prospective contractor shall certify that, to the best of the contractor's or prospective contractor's knowledge and belief, the data submitted is accurate, complete, and current as of a mutually determined specified date and will continue to be accurate and complete during the performance of the contract.

(b) When a contractor becomes aware of a situation that may form

the basis of a claim for compensation that exceeds the amount designated as the base amount of the contract and before performing additional work or supplying additional materials, the contractor shall submit cost and pricing data on the additional work or materials. The contractor shall certify that, to the best of the contractor's knowledge and belief, the data submitted is accurate, complete, and current and is the actual cost to the contractor of performing the additional work or supplying the additional materials.

(c) A contract, change order, or contract modification under which a certificate is required under (a) or (b) of this section must contain a provision that the price to the state, including the contractor's profit or fee, will be adjusted to exclude any significant sums by which the state finds that the price is increased because the cost or pricing data furnished by the contractor or prospective contractor is inaccurate, incomplete, or not current as of the date agreed upon by the parties.

(d) The requirements of (a) of this section do not apply when

(1) the contract price is based on adequate price competition;

(2) the contract price is set by law or regulation; or

(3) it is determined by the procurement officer in writing and in accordance with regulations adopted by the commissioner that the requirements of (a) of this section may be waived, and the reasons for waiver are stated.

Sec. 36.30.410. RIGHT TO INSPECT PLANT. The state may, at reasonable times, inspect the part of the plant or place of business of a contractor or subcontractor that is related to the performance of a contract awarded or to be awarded by an agency.

Sec. 36.30.420. RIGHT TO AUDIT RECORDS. (a) The state may, at

reasonable times and places, audit the books and records of a person who has submitted cost or pricing data under AS 36.30.400 to the extent that the books and records relate to the cost or pricing data. A person who receives a contract, change order, or contract modification for which cost or pricing data is required, shall maintain books and records that relate to the cost or pricing data for three years after the date of final payment under the contract, unless a shorter period is authorized in writing by the commissioner.

(b) The state may audit the books and records of a contractor or a subcontractor to the extent that the books and records relate to the performance of the contract or subcontract. Books and records shall be maintained by the contractor for a period of three years after the date of final payment under the prime contract and by the subcontractor for a period of three years after the date of final payment under the subcontract, unless a shorter period is authorized in writing by the commissioner.

Sec. 36.30.430. STANDARD MODIFICATION CLAUSES FOR CONTRACTS. (a) The commissioner shall adopt regulations permitting the inclusion of clauses providing for adjustments in prices, time of performance, or other contract provisions as appropriate.

(b) The commissioner shall adopt regulations permitting or requiring the inclusion in state contracts of clauses providing for appropriate remedies and covering the following subjects:

(1) liquidated damages;

(2) specified excuses for delay or nonperformance;

(3) termination of the contract for default; and

(4) termination of the contract in whole or in part for the convenience of the state.

Sec. 36.30.460. MODIFICATION OF STANDARD CLAUSES. The

procurement officer or the head of a contracting agency may vary the clauses adopted under AS 36.30.430 for inclusion in a particular state contract if the

(1) variations are supported by a written determination that states the circumstances justifying the variation; and

(2) approval required by AS 36.30.270 is obtained.

Sec. 36.30.470. FISCAL RESPONSIBILITY. A contract modification, change order, or contract price adjustment under a construction contract in excess of an amount established by regulation of the commissioner is subject to prior written certification by the fiscal officer of the agency responsible for funding the project or the contract, or other official responsible for monitoring and reporting upon the status of the costs of the total project budget or contract budget, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. If the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget or the total contract budget, the procurement officer may not approve the contract modification, change order, or adjustment in contract price unless sufficient funds are available, or the scope of the project or contract is adjusted to permit the degree of completion that is feasible within the total project budget or total contract budget as it existed before the contract modification, change order, or adjustment in contract price under consideration. A contract modification change order, or adjustment in contract that is signed by both parties and has been reasonably relied on by a contractor, is presumed to be valid even if the provisions of this section have not been met.

Sec. 36.30.480. COST PRINCIPLE REGULATIONS. The commissioner

shall adopt regulations setting out cost principles that shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions that provide for the reimbursement of costs. If a written determination is approved at a level above the procurement officer, the cost principles may be modified by contract.

ARTICLE 6. PROCUREMENT RECORDS AND REPORTS.

Sec. 36.30.500. RETENTION OF PROCUREMENT RECORDS. Procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the state archivist. Retained documents shall be made available to the attorney general or a designee upon request and proper receipt.

Sec. 36.30.510. RECORDS OF CONTRACTS AWARDED UNDER COMPETITIVE SEALED PROPOSALS. A contract file open for public inspection shall be kept by the commissioner and the contracting agency for each contract awarded under competitive sealed proposals. The file kept by the commissioner shall contain a summary of the information in the file of the contracting agency. The file kept by the contracting agency must contain

(1) a copy of the contract;

(2) the register of proposals prepared under AS 36.30.230 and a copy of each proposal submitted; and

(3) the written determination to award the contract prepared under AS 36.30.250.

Sec. 36.30.520. RECORDS OF SOLE SOURCE AND EMERGENCY PROCUREMENTS. (a) The commissioner shall maintain for a minimum of five years a record listing all sole source procurement contracts made under AS 36.30.300 and emergency procurements made under AS 36.30.310. The record must contain

(1) each contractor's name;

(2) the amount and type of each contract; and

(3) a listing of the supplies, services, professional services, or construction procured under each contract.

(b) The Department of Transportation and Public Facilities and any agency to whom the commissioner of administration or the commissioner of transportation and public facilities has delegated procurement authority under AS 36.30.015 shall, by October 1 of each year, submit to the commissioner of administration records of the type specified in (a) of this section. The commissioner of administration shall maintain these records as required by (a) of this section.

Sec. 36.30.530. PUBLIC ACCESS TO PROCUREMENT INFORMATION. Procurement information is public except as otherwise provided by law.

Sec. 36.30.540. REPORT TO LEGISLATURE. Beginning with December 1, 1989, the commissioner shall biennially report to the legislature concerning procurements by agencies. The report must include

(1) the records maintained by the commissioner under AS 36.30.510 and the records maintained under AS 36.30.520(a) for the previous two fiscal years;

(2) recommendations for changes in this chapter or other laws based on implementation of this chapter in the previous two fiscal years;

(3) a description of any matters that involved litigation concerning this chapter in the previous two fiscal years;

(4) a list of procurements made under this chapter from out-of-state sources during the previous two fiscal years together with the total number of procurement contracts entered into during that period with out-of-state contractors and the total value of these contracts; and