SB

428

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No.: Senate Bill 428
Title : An Act relating to acquisition of right of way by DOT&PF and providing for an effective date
Sponsor : Coghill
Requestor : _____
Date of Request : _____

FISCAL DETAIL

Agency Affected : Department of Transportation & Public Facilities
BRU : _____

Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		-0-				
TRAVEL		-0-				
CONTRACTUAL		-0-				
SUPPLIES		-0-				
EQUIPMENT		-0-				
LAND & STRUCTURES		-0-				
GRANTS, CLAIMS		-0-				
MISCELLANEOUS		-0-				
TOTAL OPERATING		-0-				
CAPITAL		-0-				
REVENUE		-0-				

FUNDING : (Thousands of Dollars)

GENERAL FUND		-0-				
FEDERAL FUNDS		-0-				
OTHER		-0-				
TOTAL		-0-				

POSITIONS :

FULL-TIME		-0-				
PART-TIME		-0-				
TEMPORARY		-0-				

ANALYSIS : Attach a separate page if necessary

2/24/86

Prepared by : Milton H. Lentz, CRA (W) Phone : 465-2985
Division : Engineering & Operations Standards Date : 2/24/86

Approved by Commissioner : _____ Date : 2/25/86
Agency : Department of Transportation & Public Facilities

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. HB 600 and SB 428

The Department of Transportation and Public Facilities has some concern regarding the language of both House Bill No. 600 and Senate Bill 428. We do not understand the intent of these bills in view of present Alaska Statutes 44.42.020 and 09.55. Our major concern is with the words: "...prepared rights-of-way..." By statutes, acquisition would be limited to fair market value regardless of whether the right of way is "prepared" or not.

These bills appear to have no measurable fiscal impact on the Department of Transportation and Public Facilities as any funding for the acquisition would be by legislative appropriation.

CITY AND BOROUGH OF SITKA, State of Alaska, and Alaska Lumber and Pulp Co., Inc., a Corporation, Appellants,

v.

CONSTRUCTION AND GENERAL LABORERS LOCAL 942, International Unions of Operating Engineers Local 302, and Teamsters Local 959, State of Alaska, Appellees.

No. 5774/5811.

Supreme Court of Alaska.

May 7, 1982.

Unions filed complaint alleging various charges against a proposed timber contract between a lumber company and a city and alleging, in effect, that workers had received less than the prevailing wage in violation of statute. The Superior Court, First Judicial District, Sitka, Duane Craske, J., held that the unions were entitled to recover. Appeal was taken. The Supreme Court, Compton, J., held that: (1) the statute requiring payment by a contractor or a subcontractor who performs work on public construction in the state to pay not less than the prevailing rate of wages for work of similar nature in the region in which the work is done was applicable to a timber sale contract entered into by the lumber company and the city, since the clearing of timber pursuant to the contract was a substantial portion of a project for the construction of a hydroelectric dam, and (2) a stipulation entered into between the lumber company and the unions that, if the unions prevailed on the claim concerning the applicability of the statute, the remedy would be in the form of damages precluded a challenge to the issue whether the statute authorizes a private right of action.

Judgment affirmed.

1. Labor Relations ⇐1132

Timber sale contract is not generally subject to statute requiring payment by contractor or subcontractor who performs work on public construction in state to pay not less than prevailing rate of wages for work of similar nature in region in which work is done. AS 36.05.010.

2. Labor Relations ⇐1132

In determining whether timber sale contract between lumber company and city was subject to statute requiring contractor or subcontractor who performs work on public construction in state to pay not less than prevailing rate of wages for work of similar nature in region in which work is done, focus of inquiry was whether clearing of timber pursuant to contract related to construction of dam which was to be built on site. AS 36.05.010.

3. Labor Relations ⇐1132

Logging to be done pursuant to timber sale contract between lumber company and city was substantially related to construction of dam on that site and, therefore, was "public construction" subject to statute requiring contractor or subcontractor who performs work on public construction in state to pay not less than prevailing rate of wages for work of similar nature in region in which work is done. AS 36.05.010.

See publication Words and Phrases for other judicial constructions and definitions.

4. Labor Relations ⇐1132

Fact that timber sale contract between lumber company and city was separated from contract for construction of dam for hydroelectric project did not preclude determination that timber sale contract was subject to statute requiring contractor or subcontractor who performs work on public construction in state to pay not less than prevailing rate of wages for work of similar nature in region in which work is done. AS 36.05.010.

5. Labor Relations ⇐1132

Focus of statute requiring contractor or subcontractor who performs work on public construction in state to pay not less than prevailing rate of wages for work of

similar nature in region in which work is done is benefit of employees, not of contracting principals. AS 36.05.010.

6. Labor Relations ⇐1132

Whether government pays contractor or whether contractor pays public agency does not determine whether contract in question is subject to statute requiring contractor or subcontractor who performs work on public construction in state to pay not less than prevailing rate of wages for work of similar nature in region in which work is performed. AS 36.05.010.

7. Stipulations ⇐14(12)

Stipulation agreed to by lumber company that if unions prevailed in litigation seeking determination of whether statute requiring contractor or subcontractor who performs work on public construction in state to pay not less than prevailing rate of wages for work of similar nature in region in which work is done was applicable to timber sale contract between lumber company and city, remedy would be damages paid to workers, precluded lumber company from raising issue of whether statute authorized private right of action to recover back wages. AS 36.05.010.

James F. Clark, Robertson, Monagle, Eastaugh & Bradley, Juneau, and Peter S. Hallgren, Sitka, for appellants.

Bruce Monroe and Paul L. Dillon, Birch, Horton, Bittner, Monroe, Pestinger & Anderson, Juneau, for appellees.

Before BURKE, C. J., and RABINOWITZ, CONNOR, MATTHEWS and COMPTON, JJ.

OPINION

COMPTON, Justice.

This is an appeal from the judgment of the superior court which held that a timber sale contract executed between Alaska Lumber and Pulp Co., Inc. (ALP) and the City and Borough of Sitka (Sitka) was subject to the provisions of Alaska's "Little Davis-Bacon Act," AS 36.05.010.110. The logging and related clearing took place on land Sitka owned and upon which the Green Lake Hydroelectric Project, a dam, was to be built. The superior court further held that pursuant to a stipulation negotiated by the parties, the Unions were entitled to an award of damages. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

During 1974 Sitka began planning the Green Lake Project as a source of hydroelectric power. In 1977 the State of Alaska withdrew land needed for the Project from federal ownership pursuant to its statehood land acquisition rights. It then conveyed the land to Sitka on March 16, 1979.

In March 1979, Sitka published its intent to receive sealed bids through May 1 for the construction of the Green Lake Project. The bid offering, Contract No. 3, originally set out all the specifications for the construction of the dam, including the timber clearing specifications.[1]

On April 19, 1979, ALP submitted an irrevocable offer to pay Sitka two million dollars for the right to remove the commercial timber and to accomplish the clearing in accordance with the pertinent specifications set forth in Contract No. 3.

1. Sitka submits that it never intended to include the timber clearing with the dam construction bid offering. When Sitka Municipal Administrator, Fermin Gutierrez saw that the engineering consultant firm which had prepared the bid offering had included the timber clearing within Contract No. 3, Gutierrez directed the firm to analyze the cost differential between a separate timber sale contract and including the timber clearing in the dam contract. Ultimately, the firm concluded that a separate timber sale contract would be to Sitka's advantage, ostensibly because many dam contractors would not view the timber as a commercial asset.

The Unions dispute whether Sitka always intended for the timber contract to be separate from the dam construction contract. However, since the Unions obtained summary judgment below, we must construe all disputed factual inferences in Sitka's favor. *See Kodiak Island Borough v. Large*, 622 P.2d 440, 446 (Alaska 1981).

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Sitka promptly published Addendum No. 2 to Contract No. 3 in order to notify prospective bidders that Sitka would award a separate contract for substantially all of the reservoir clearing. Sitka stated that to be awarded this separate contract, the bidder would have to offer more than ALP offered. Addendum No. 2 noted that ALP had offered to pay $2,000,000.00 to perform the reservoir clearing pursuant to the requirements of Contract No. 3.

The bids were opened on May 15. Sitka awarded the dam construction contract to S. J. Groves and Company and the timber sale contract to ALP. Sitka and ALP signed on June 13, 1979 an agreement entitled "Timber Sale Contract." The ALP-Sitka contract provided that Contract No. 3 was incorporated by reference. The original bid offering, Contract No. 3, stipulated that Little Davis-Bacon was applicable.[2] All parties agree that the dam construction contract is subject to the Act. The parties dispute, however, whether Addendum No. 2 exempted from the wage provision employees engaged in the severed logging and clearing activities, the work ultimately performed by ALP.[3] The ALP–Sitka contract did not contain any express wage stipulations.

The Alaska Department of Labor has the authority pursuant to AS 36.05.030 to determine whether a contract is subject to Little Davis-Bacon.[4] In April 1979, Sitka received a form letter from the Wage and Hour Division of the Department stating that the proposed timber sale contract would be subject to the Act. Sitka disagreed with that conclusion, and persuaded the Director of the Division, Dale Cheek, to investigate the matter further. The Director subsequently stated his tentative opinion that the Act did not apply to the timber sale contract. An advisory memorandum issued by the Office of the Attorney General reached a similar result.[5]

The Department of Labor declined, however, to issue a formal determination of Little Davis-Bacon coverage.[6] As a result, in June 1979 two workers filed a complaint in superior court containing two causes of action against Sitka and ALP (hereafter collectively referred to as Sitka). The first

2. The relevant provision in Contract No. 3 provided:

   303.12 Section 205.10, "Wage Rates".

   a. The contractor or its subcontractor shall pay wages which are not less than the current prevailing rate of wages as determined by the Alaska Department of Labor for labor of a similar nature in the region in which the work is done. The rate of wages shall be adjusted to the wage rate for each pay period as applicable under AS 36.05.010.

3. The Unions submit that the reference to Contract No. 3 incorporated the general wage stipulation set forth in section 303.12 of the contract. Sitka contends that Addendum No. 2 distinguished between the Contractor and the Clearing Contractor. The Clearing Contractor, in Sitka's view, was bound only by those sections of Contract No. 3 *specifically* required of the Clearing Contractor. As a consequence, Sitka's interpretation of Addendum No. 2 is that only the Contractor was bound by the wage stipulation.

   For purposes of this appeal, we will accept Sitka's interpretation of Addendum No. 2. *See supra* note 1. Accordingly, our disposition of this appeal is not based upon an interpretation of the timber sale contract.

4. AS 36.05.030(a) provides in pertinent part: The Department of Labor has the authority to determine the prevailing wage, and whether or not sections 10–110 of the chapter are being violated.

   See Fowler v. City of Anchorage, 583 P.2d 817, 820 (Alaska 1978).

5. The relevant portion of the advisory memorandum provided:

   While it is apparent that the contract between AL&P and Sitka necessarily involves work preparatory to the construction of the Green Lake Hydro Project to be performed by a general contractor, it is equally apparent that the primary purpose of the contract is one involving timber sales, not construction of a public work.

   Accordingly, it is our view that the provisions of AS 36.05.010 do not apply to the contemplated contract between [Sitka] and [ALP].

   Memorandum from Bruce Botelho, Assistant Attorney General, to Dale Cheek (May 15, 1979).

6. The superior court requested briefing from the parties regarding the propriety of remanding the matter to the Department of Labor. Both parties opposed the remand.

   We do not decide whether the Department of Labor is required pursuant to AS 36.05.030 to issue a formal determination of Little Davis-Bacon coverage where such coverage is disputed.

cause of action set forth various charges against the proposed Sitka-ALP timber contract. The second cause of action alleged, in effect, that the workers had received less than the prevailing wage in violation of Little Davis-Bacon.

In August 1979 all parties entered into a stipulation which was then filed with the superior court and signed by the judge. Pursuant to the stipulation, the Construction and General Laborers Local 942, the International Union of Operating Engineers Local 302 and the Teamsters Local 959 (hereafter collectively referred to as the Unions) were substituted as plaintiffs. Both the Unions and Sitka gave up certain rights in the stipulation. The Unions agreed not to seek a preliminary injunction or other injunctive relief. Sitka agreed not to raise procedural defenses. The parties also stipulated as follows:

> 5. Plaintiffs seek declaratory relief in this case. In the event the court rules in Plaintiffs' favor, on those issues raised in Plaintiffs' Second Cause of Action, it is agreed that Plaintiffs' remedy will be in the form of damages to be paid to workers doing the work, which is the subject matter of this lawsuit, in accordance with Alaska law. Damages shall be paid to the workers as ordered by the Court, but in no event shall the sum ordered paid to the workers exceed the gross amount of Fifty One Thousand Dollars ($51,000.00).

After entering into the stipulation, both parties moved for summary judgment. The sole issue disputed was whether the Sitka-ALP timber contract was for "public construction" and thus covered by Little Davis-Bacon. The superior court ruled that the timber contract was for public construction. Accordingly, the court granted summary judgment to the Unions on November 3, 1980.

One portion of the judgment awarded the Unions as damages the back wages which the workers would have received if ALP had paid them the prevailing wage. On April 6, 1981, the United States Supreme Court held that the federal Davis-Bacon Act, 40 U.S.C. § 276a (1969), (hereafter referred to as Davis-Bacon), does not provide workers a private cause of action for back wages under a contract which administratively has been determined not to call for Davis-Bacon work. *Universities Research Association, Inc. v. Coutu*, 450 U.S. 754, 101 S.Ct. 1451, 67 L.Ed.2d 662 (1981). Relying on *Universities Research*, ALP filed a motion in superior court on April 24 to set aside the portion of the judgment which awarded the Unions damages. ALP argued that Little Davis-Bacon does not give the Unions a private right of action to recover back wages. ALP also contended that the award of damages should be set aside because no evidence on damages existed in the record. Sitka filed on May 8 a memorandum in support of ALP's motion. The superior court denied the motion on June 1, 1981, holding that paragraph 5 of the stipulation, quoted above, precluded consideration of the issue.

Sitka and ALP appeal. They submit (1) that the court erred in holding that the timber contract concerned public construction subject to Little Davis-Bacon coverage, and (2) that it was improper for the court to award the Union damages. For the reasons discussed below, we affirm the superior court judgment.

II. TIMBER SALE CONTRACT

The principal issue presented on appeal is whether the work performed pursuant to the ALP-Sitka contract was "public construction" subject to the wage protections afforded by Little Davis-Bacon.[7] AS 36.05.010 provides in part:

> A contractor or subcontractor who performs work on public construction in which the state, as defined by AS 36.95.010(3), shall pay not less than the current prevailing rate of wages for work of a similar nature in the region in which the work is done.

7. We employ de novo review to the question of law raised by the summary judgment motion. *See Armco Steel Corp. v. Isaacson Structural Steel Co.*, 611 P.2d 507, 516 n.22 (Alaska 1980).

Public construction is defined in AS 36.95.-010(3) as "the on-site field surveying, erection, rehabilitation, alteration, extension or repair, including painting or redecorating of buildings, of highways or other improvements to real property under contract for the state, a political subdivision of the state; . . ."

[1] All parties properly agree that a timber sale contract is typically not subject to the Act. Sitka, accordingly, labels the disputed contract a "timber sale contract," arguing that any site preparation work was incidental to the dominant purpose of the contract, the sale of timber. The Unions, on the other hand, argue that the sale of merchantable timber was incidental to the site preparation necessary for the construction of the Green Lake Project, and thus characterize the contract as a "clearing contract." The labels employed by the parties are merely the conclusions of a more substantive analysis. The dispositive issue in our view is whether a contract, which may independently be outside the scope of Little Davis-Bacon, may nonetheless be subject to the Act where the specified work is substantially related to "public construction."

No prior Alaska court has addressed this issue. We turn, therefore, to federal authorities pertaining to the federal Davis-Bacon Act, 40 U.S.C. § 276a (1969), the model of the Alaska statutory scheme. *See Fowler v. City of Anchorage*, 583 P.2d 817, 821 (Alaska 1978); *1961 Op. Att'y Gen. No. 17* at 4 (Alaska, August 8, 1961).[8]

The federal regulations, 29 C.F.R. §§ 4.116(b)(1), 5.2(f) and 5.2(g) (1980), clearly indicate that clearing done at a dam site in preparation for the dam's construction is "construction" within the purview of Federal Davis-Bacon.[9] Section 5.2(g) defines construction under Davis-Bacon as "all types of work done on a particular building or work at the site thereof." "Building" or "work" is defined in section 5.2(f) as including: [10]

> *without limitation*, buildings, structures, and improvements of all types, such as bridges, *dams*, plants, highways, park-

8. It is useful here to set out the statutory construction rules for Alaska statutes modelled after those of other jurisdictions. A rebuttable presumption arises that when Alaska bases a statute on one from another jurisdiction, it adopts into the Alaska statute all previous cases from the other jurisdiction's statute. *Zerbe v. State*, 583 P.2d 845 (Alaska 1978); *Nicholson v. Sorensen*, 517 P.2d 766, 770 n.9 (Alaska 1973). *See also Fowler v. City of Anchorage*, 583 P.2d 817 (Alaska 1978). There is no such presumption when the cases from the other jurisdiction are decided *after* Alaska adopts its statute, though such cases may be persuasive. *Nicholson v. Sorensen*, 517 P.2d at 770 n.9.

No federal cases address the question of whether logging preliminary to dam construction is subject to Davis-Bacon coverage. The most important federal authorities to have discussed this issue are 29 C.F.R. §§ 4.116(b)(1), 5.2(f) and 5.2(g) (1980). Sections 5.2(f) and (g) were promulgated in 1951, before AS 36.95.-010(3), which defines "public construction," became law in 1972, but after the original sections of Little Davis-Bacon became law in 1931. While this court is not bound by the federal regulations, we will look to the federal regulations construing Davis-Bacon for assistance in interpreting Little Davis-Bacon.

9. The parties refer to three position letters promulgated by the United States Solicitor of Labor. The most recent letter, dated December 13, 1961 states that the clearing and selling of timber preliminary to dam building is not itself "construction" under federal Davis-Bacon. That opinion, however, does not discuss 29 C.F.R. §§ 5.2(f) and (g). It is also noteworthy that the December 13, 1961 letter opinion is contradicted by two other Solicitor of Labor opinions. One opinion, dated May 23, 1961, was signed by Charles Donahue, the same Solicitor of Labor who signed the other opinion discussed above. The May 23 opinion discusses a contract in which the Forest Service permits Boise Cascade to log timber in exchange for money and the construction of permanent roads within the national forest. The opinion states that Davis-Bacon covers the logging of timber preliminary and necessary to build the roads but not the other logging. The second opinion, dated September 27, 1960, concluded that the clearing of timber necessary to build a runway and aircraft parking for the navy was public construction.

The parties do not cite to any more recent positions adopted by the United States Solicitor of Labor with respect to the scope of Davis-Bacon coverage.

10. The federal government has proposed changes in 29 C.F.R. Part 5 (1980). *See* 44 Fed. Reg. 77,080 (1979). Sections 5.2(f) and (g) remain unchanged, however, except that they are renumbered sections 5.2(i) and (j).

ways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, railways, airports, termir ls, docks, piers, wharves, ways, light houses, buoys, jetties, break-waters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, *clearing*, and landscaping. [Emphasis added.]

Section 4.116(b)(1) was promulgated in 1968 pursuant to the McNamara-O'Hara Act. This act regulates service contracts with the federal government. It exempts from its requirements the contracts which the Davis-Bacon Act covers. Section 4.116(b)(1) states in part:

For example, a contract for clearing timber or brush from land or for the demolition or dismantling of buildings or other structures may be a contract for construction activity subject to the Davis-Bacon Act where it appears that the clearing of the site is to be followed by the construction of a public building or public work at the same location. If, however, no further construction activity at the site is contemplated the Davis-Bacon Act may be considered inapplicable to such clearing....

[2] We conclude that the federal regulations set forth an appropriate test to establish the parameters of Little Davis-Bacon. Accordingly, the focus of inquiry in determining whether the ALP-Sitka contract concerned "public construction" subject to the Act is the extent to which the work relates to the construction of the dam.

[3] The superior court, properly employing this analytic approach, concluded that "the predominant characteristic [sic] is that the work to be done is an integral part of the dam construction and is therefore 'public construction'." We agree. The logging occurred on the dam site, land acquired from the state expressly for the purpose of constructing the dam and its watershed. Moreover, it is uncontroverted that the clearing specifications incorporated by reference in the contract were intended to render the site suitable for the construction of the dam. The fact that the clearing work was initially included in the bid offering is further evidence of the strong linkage between the ALP-Sitka contract and the construction of the dam. In sum, the logging and related clearing work performed by ALP pursuant to the contract was preliminary and essential to building the dam, and would not have occurred when it did but for the dam.

[4] Sitka rejects this mode of analysis. Sitka instead submits that the determination of Little Davis-Bacon coverage should only reflect the isolated characteristics of the timber contract without consideration of the broader context in which the contract arose. Sitka thus argues that once severed from the dam construction bid, the ALP-Sitka contract is essentially the same as any other timber sale contract, and is therefore outside the scope of Little Davis-Bacon coverage. We recognize, in this regard, that the disputed contract does in fact have many of the attributes of a prototypical timber sale contract.

Sitka's position, however, unduly exalts form over substance. Had the logging remained in the parent construction bid, it is clear that the wage protections would have been applicable. That Sitka determined that it was to its benefit to sever the logging and clearing work is functionally irrelevant. It is the nature of the work and the relationship of the logging work to the dam project which are the salient considerations.

[5] Sitka's reliance on the fact that the timber contract was severed from the dam contract is misplaced for the additional reason that such a rule would thwart the policies which underly Little Davis-Bacon. The fundamental purpose of Little Davis-Bacon is to assure that employees engaged in public construction receive at least the prevailing wage. The focus of the Act, quite clearly, is to the benefit of the employees, not the contracting principals.[11] To argue that Sitka should

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that Sitka should be allowed to maximize the economic benefit to be derived from the sale of merchantable timber simply miscasts the focus of the Act. Presumably, ALP would have payed Sitka less for the right to remove the timber had the timber contract been determined to be subject to Little Davis-Bacon wage guarantees. Quite unlike the mythical sailor torn between Scylla and Charybdis, Sitka found itself in the enviable position of having to choose whether to maximize the return from the sale of timber or whether to stipulate that Little Davis-Bacon wage guarantees attached to the contract. Where "public construction" is involved, however, the legislature has provided that the tension must be resolved in favor of the employees. Sitka's position, in essence, invites the government to sever from a public construction bid offering any aspect of the endeavor which may have an unrelated profit incentive, such as the removal of a natural resource. Such a rule impermissibly enables a public agency to profit at the expense of workers engaged in activities instrumental to a public construction project.

Sitka also argues that the logging should not be considered public construction because ALP paid Sitka to log the timber whereas in the typical public construction contract the public agency pays the contractor. Sitka notes that AS 36.05.070(a) applies only to "a public construction contract exceeding $2,000." The statutory language cited by Sitka is plainly intended to restrict Little Davis-Bacon coverage to "substantial" public construction projects, i.e., those in excess of $2,000. The ALP-Sitka contract concerns an activity which can hardly be characterized as insubstantial. Viewing only the timber transaction, Sitka has conferred on ALP a benefit, the merchantable timber, which is valued by the parties at two million dollars.[12]

[6] In support of its contention that it is the flow of money from the government to a private contractor which is determinative of Little Davis-Bacon coverage, Sitka notes that AS 36.05.070(c)(4) requires the contracting public agency to withhold payments to contractors who violate the Act by failing to pay the prevailing wage. Sitka argues that section 36.05.070(c)(4) is the enforcement mechanism of the Act. The mechanism fails to work when, as in the instant case, the contractor pays the public agency rather than vice versa. Actually AS 36.05.070(c)(4) is only one of several enforcement mechanisms under the Act. The other enforcement mechanisms work equally well whether the contractor pays the public agency or the public agency pays the contractor. Under AS 36.05.060, violators of Little Davis-Bacon can be prosecuted criminally. AS 36.05.080 permits the contracting agency to terminate the contract if the contractor violates the Act by not paying the prevailing wage. AS 36.05.090(b) permits the workers to sue for back wages.[13] Under AS 36.05.030 the Department of Labor has the power to investigate violations, including the power to hold hearings where it can compel the attendance of witnesses and the production of books, papers and documents. Thus, we conclude that adequate enforcement mechanisms exist regardless of whether the money flows from the government to a private contrac-

contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects." *U.S. v. Binghamton Cons. Co.*, 347 U.S. 171, 177, 74 S.Ct. 438, 441, 98 L.Ed. 594, 599 (1953). *See Walsh v. Schlecht*, 429 U.S. 401, 411, 97 S.Ct. 679, 686, 50 L.Ed.2d 641, 650 (1977).

12. Once a sufficient nexus has been established between a contract and a public construction project, we may look to the value of the entire endeavor to ascertain if the $2,000 threshold requirement has been satisfied.

13. AS 36.05.090(b) provides in part:

> If the accrued payments withheld under the contract are insufficient to reimburse all the laborers, mechanics, or field surveyors with respect to whom there has been a failure to pay the wages required under section 70 of this chapter, the laborers, mechanics or field surveyors have the right of action or intervention or both against the contractor and his sureties conferred by law upon persons furnishing labor or materials. . . .
>
> As we discuss in part III, *infra*, the scope of the workers' private right of action remains undetermined.

tor, or from the contractor to a public agency.

III. PRIVATE RIGHT OF ACTION

[7] Sitka next contends that even if the logging work is deemed to be public construction within the meaning of Little Davis-Bacon, the Act does not authorize a private right of action for back wages.[14] As a consequence, Sitka submits that the award of damages was inappropriate. In paragraph 5 of the 1979 stipulation, however, Sitka agreed that if the Unions prevailed in the litigation, the remedy would be damages paid to the workers. The threshold inquiry, therefore, is whether or not to give effect to the stipulation agreed to by the parties.

The parties dispute the nature of the stipulation. The Unions characterize the stipulation as an "issue stipulation," and thus invoke the settled rule that such stipulations are binding on the parties.[15] Sitka, on the other hand, submits that the question of whether or not Little Davis-Bacon authorizes employees or their representatives to maintain a private right of action to recover back wages is a legal issue and thus cannot be foreclosed by stipulation.[16]

In our prior cases we have dealt with stipulations which merely foreclose consideration of a legal issue in a different fashion than stipulations which seek to resolve without judicial scrutiny a legal question.

Issue stipulations, on the one hand, save time and money for the litigants and for the court. *Godfrey v. Hemenway*, 617 P.2d 3, 8 (Alaska 1980); *Interior Credit Bureau v. Bussing*, 559 P.2d 104, 106 (Alaska 1977); *Greater Anchorage Area Borough v. City of Anchorage*, 504 P.2d 1027, 1031 (Alaska 1972). Moreover, issue stipulations are oftentimes a negotiated compromise in the parties' respective legal positions. Accordingly, we have on several prior occasions given effect to a stipulation which foreclosed consideration of a legal issue. *Hilbers v. Municipality of Anchorage*, 611 P.2d 31, 39 n.19 (Alaska 1980), is a recent example. In that case the parties stipulated that plaintiffs would raise only four identified constitutional challenges to ordinances regulating and licensing massage parlours in Anchorage. We rejected on appeal the plaintiff's attempt to raise constitutional challenges not sanctioned by the stipulation. Similarly, we have enforced a stipulation which precluded consideration of a due process challenge to the composition of a medical review committee,[17] and one which precluded consideration of the respective rights of the City and Borough of Anchorage regarding the installation of utility lines.[18]

14. At issue is whether the right of action authorized in AS 36.05.090(b) where a contract contains wage stipulations is also available where the contract in dispute does not contain wage stipulations. The United States Supreme Court held that federal Davis-Bacon does not provide workers a private cause of action to recover back wages where there has been an administrative determination of no Davis-Bacon coverage. *Universities Research Association, Inc. v. Coutu*, 450 U.S. 754, 101 S.Ct. 1451, 67 L.Ed.2d 662 (1981). We do not reach this issue.

15. *Fieser v. Stinnett*, 509 P.2d 1156, 1159 (Kan. 1973). *See generally* 83 C.J.S. Stipulations § 22 (1953).

16. Sitka relies on *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 114, 60 S.Ct. 1, 6, 84 L.Ed. 110, 119 (1939) to support its contention that a stipulation which prevents consideration of a legal issue is void. In *Case*, one party argued that in a stipulation his adversary had waived his right to attack the fairness of a plan. The Supreme Court ruled that even if under the terms of the stipulation the adversary had waived his right to attack the plan's fairness, the court still would permit the adversary to make the attack. The court declared that as a matter of law "a stipulation does not foreclose legal questions."

In *Utah v. United States*, 394 U.S. 89, 89 S.Ct. 761, 22 L.Ed.2d 99 (1969), however, the Supreme Court implicitly overruled *Case*. The court ruled that parties to a lawsuit may generally limit the issues which are tendered to the court for decision. Specifically, the court found valid a stipulation between Utah and the United States which precluded the parties from raising certain legal issues. *See also Perera Co. v. Goldstone*, 491 F.2d 386, 388 (9th Cir. 1974).

17. *Storrs v. Lutheran Hosp. and Homes Soc'y of America, Inc.*, 609 P.2d 24, 28 (Alaska 1980).

18. *Greater Anchorage Area Borough v. City of Anchorage*, 504 P.2d 1027, 1031 (Alaska 1972). The court noted that "[s]ound judicial policy

We recently reiterated, on the other hand, that "[a]lthough the parties' efforts toward simplifying the issues in a case are always appreciated, stipulations as to the law are not binding upon the court." *Dresser Industries, Inc. v. Alaska Department of Labor*, 633 P.2d 998, 1004 (Alaska 1981). *See generally* 73 Am.Jur.2d. Stipulations § 5 (1974). Unlike stipulations which limit the issues presented to a court, stipulations as to questions of law may have a profound impact on third parties, the public, and the judicial process itself. Accordingly, we have refused to give effect to stipulations regarding a question of law which unduly interfere with vital interests of the public or which impermissibly impinge on judicial functions. *Dresser Industries, Inc. v. Alaska Department of Labor*, 633 P.2d at 1004 (Alaska 1981); *Harris v. Morris*, 531 P.2d 517, 519 (Alaska 1975); *Marks v. State*, 496 P.2d 66, 67 (Alaska 1972).[19]

We conclude that Sitka's agreement that the Unions' "remedy will be in the form of damages ... in accordance with Alaska law" necessarily encompassed a waiver of any legal issue which would defeat the award of damages. Sitka agreed not to raise procedural defenses and that damages would be the appropriate remedy were the Unions to prevail. The Unions, in return, agreed to dismiss the first cause of action, challenging the validity of the contract, and most importantly, to forego any attempt to obtain injunctive relief. Abandoning any entitlement to injunctive relief was a significant concession, since the cost attendant any delay in the construction of the project would undoubtedly have been substantial. The work now completed, it is of course impossible to "rescind" the stipulation and to return the parties to their respective status quo ante positions. It is particularly noteworthy that at the time the stipulation was negotiated, Sitka did not contend that the Unions could not maintain a private right of action to recover back wages. Only after the United States Supreme Court announced its decision in *Universities Research*, several months subsequent to the superior court's entry of summary judgment in favor of the Unions, did Sitka question the effect of the stipulation.

Sitka's attempt to classify the stipulation in dispute as one pertaining to a question of law is not persuasive. To be sure, the question of whether Little Davis-Bacon confers a private right of action to recover back wages is a question of general public importance. Yet resolution of the instant dispute by reference to the parties' stipulation does not in any manner taint the future consideration of that important issue. The impact on nonparties is inconsequential. Further, the stipulation between the parties does not impermissibly invade the prerogatives of this court.

We conclude that the stipulation precludes consideration of whether Little Davis-Bacon authorizes a private right of action to recover back wages. In accordance with the terms of the stipulation, therefore, the award of damages was appropriate.[20]

dictates that private settlements and sti lations between the parties are to be favored and should not be lightly set aside." *Id.* (footnote omitted.)

19. In *Harris* we refused to allow the parties to stipulate as to the content of jury instructions since "the trial judge has the direct responsibility of correctly instructing the jury." 531 P.2d at 519. Similarly, we declared in *Marks* that "[t]he public interest in criminal appeals does not permit their disposition by party stipulation." 496 P.2d at 67. And most recently, in *Dresser Industries* we rejected the parties' invitation to heed a stipulation which attempted to unduly restrict the judicial review of an administrative regulation.

In rejecting the stipulations at issue in *Dresser Industries* we noted the peculiar policy considerations implicated where stipulations impair a court's assessment of the validity of a regulation. "Laws are not to be declared invalid upon the consent of parties. We must determine their purpose and tendency for ourselves." 633 P.2d at 1005, *quoting, E. Fougera & Co. v. City of New York*, 224 N.Y. 269, 120 N.E. 642, 643 (1918).

20. The summary judgment order provides that the Unions will receive as damages the difference between what the employees would have received had the work been classified as public construction with the wage protections of Little Davis-Bacon and what the employees received pursuant to the contract. The order further

The judgment of the superior court is AFFIRMED.

STATE of Alaska, Appellant,

v.

ALASKA PUBLIC EMPLOYEES ASSOCIATION, Edward B. Coleman, Don Allen, Joe Anderson, Loy R. Bolt, Dwane Burgess, Frank Byerly, David Cooper, Harold Fencl, Fred C. Fowler, Tom Furbush, Steve Kosenic, Kurt Masingill, Homer Mayo, Ron Murry, Paul Tannenbaum, Jerry Velez, and Stan Wells, Appellees.

No. 5810.

Supreme Court of Alaska.

May 7, 1982.

Probation-parole officers and their employee association brought suit challenging firearms policy, promulgated by the Health and Social Services Commissioner, concerning the carrying of concealed firearms by probation-parole officers. The Superior Court, Third Judicial District, Anchorage, Ralph E. Moody, J., found the policy, which restricts the carrying of firearms to very limited circumstances, to be unworkable and, after reference of the dispute to a special master, propounded its own firearms policy and ordered the Commissioner to implement it. On the State's appeal, the Supreme Court, Matthews, J., held that the Commissioner, not the Superior Court, is charged with the responsibility for the day-to-day operation of the probation service, and the methods and equipment to be used by probation officers fall within the ambit of that responsibility; accordingly, the Superior Court may not, under the guise of an exercise of its authority to direct probation officers, propound a firearms policy, except in regard to firearms on court premises.

Reversed.

1. Courts ⇐55

Commissioner of the Department of Health and Social Services, not the superior court, is charged with the responsibility for the day-to-day operation of the probation service, and the methods and equipment to be used by probation officers fall within the ambit of that responsibility; accordingly, the superior court may not, under the guise of an exercise of its authority to direct probation officers, propound a firearms policy, except in regard to firearms on court premises. AS 33.05.010, 33.05.020, 33.05.030.

2. Courts ⇐55

Merely because probation officers are officers of the court and subject to its authority by virtue of statute does not mean that the court has administrative authority over them. AS 33.05.030.

3. Courts ⇐55

Superior court may direct individual probation officers to perform appropriate services, but it may not control the details by which those services are accomplished by establishing general policies. AS 33.05.010 et seq., 33.05.030.

provides that damages are to be paid directly to the workers who performed the reservoir clearing work. We note, though, that no evidence regarding the amount of damages exists in the record. The superior court ordered that the amount of damages will be determined through the submission of memoranda by the parties. We conclude that in the particular context of this case, such a procedure is adequate. The amount of damages can be readily and accurately ascertained since the Department of Labor determines the prevailing wage under 8 AAC 30.050 (Eff. 7/8/73), and both ALP and the Unions should have records which clearly indicate the wages previously received by the workers. If, however, the parties dispute the amount of damages, so that a genuine issue of material fact exists, the superior court must hold a hearing on this question.

NEGLIGENT MISREPRESENTATION — BREACH OF CONTRACT — INVESTMENT TAX CREDIT — DAMAGES

Orsini v. Bratten, Op. No. 3012, January 24, 1986

Investors sued investment consultant for negligent misrepresentation and breach of contract. The Superior Court, Van Hoomissen, J., entered judgment on behalf of investors. Rabinowitz, C.J., HELD:

(1) since consultant agreed to the amounts of lost investment tax credits, the court would not review the propriety of that award;

(2) the investors were not entitled to receive as damages interest repayed to federal or state governments since the investors had the use of such monies during the interim and were able to earn interest while they held it;

(3) given the record, the award for prospective tax liability could not be sustained; and

(4) the methods of calculating damages proposed by the investors were not appropriate since: (a) the investors were not entitled to be awarded what the consultant promised them since they did not bargain to receive a guaranteed return, but instead only bargained for investment advice, and (b) investors were not entitled to an amount representing the amount they would have received had they invested in real estate since that was too speculative a measure as a matter of law. AFFIRMED in part and MODIFIED.

PUBLIC CONTRACTS — BIDS — UNIT PRICES

Vintage Corporation, Inc. v. State, Op. No. 3013, January 31, 1986

Low bidder on a state project challenged award to bidder with lower unit prices. Van Hoomissen and Blair, JJ., granted summary judgment to the state. Matthews, J., HELD:

(1) the specifications applicable to the bids taken together clearly suggest that the total of the extensions of unit prices was to be used for informational and initial comparative purposes only — the critical terms are the written unit prices;

(2) in unit price contracts, the unit prices are written in words, while the total price is only written in figures — in bids for lump sum contracts, the total is required to be written in words as well as figures;

(3) the agency's interpretation that the specification addresses only discrepancies between prices in words and figures, rather than just unit price discrepancies, is reasonable and should control;

(4) a contracting officer, in determining whether a bidder obtained a competitive advantage because of such a discrepancy, must: (a) determine whether the bidder's claimed actual intent is apparent from the bid submitted; (b) if the contracting officer is unable to say from the documents that the bidder's intent was to bid the higher figure, no relief should be given and the unit prices bid should control; and (c) if the bidder's intent to bid at the higher figure is apparent, the officer must ask if it would be unconscionable to hold the bidder to his bid using the rule of construction that unit prices control — if not, no relief should be provided; and

(5) no competitive advantage was afforded here since: (a) the contracting officer could not say from reviewing the bid documents that the total bid figure, rather than the unit prices correctly added, was the bid apparently intended, and (b) thus, there was no occasion to consider the question of whether it would be unconscionable to hold the bidder to his bid despite his apparent intent. AFFIRMED. Compton, Burke, JJ., concurring, but arguing that resort to the specifications was inappropriate where there was no discrepancy in the bid — the error was, however, harmless.

LITTLE DAVIS-BACON ACT — ATTORNEY'S FEES — PUBLIC INTEREST LITIGANT

Alaska State Federation of Labor v. State, Op. No. 3014, January 31, 1986

Worker and labor federation sought declaratory and injunctive relief, alleging that Juneau construction project was subject to the Little Davis-Bacon Act. Superior Court, Carpeneti, J., granted summary judgment to the defendants. Burke, J., HELD:

(1) the project was not public construction subject to the act, even though expenditures of state monies occurred — the statute only applies to contracts with the state or a political subdivision;

(2) nor was the project primarily state funded — the state's funding by grant was indirect and relatively small;

(3) Civ. R. 82 gives the trial court broad discretion to award attorney's fees and such an award is reviewable only for an abuse of discretion — to constitute abuse, the discretion must be manifestly unreasonable or motivated by an inappropriate purpose;

(4) whether a party qualifies as a public interest litigant depends upon: (a) the effectuation of strong public policy; (b) the fact that numerous people would benefit from the litigation; (c) the fact that only a private party would have been expected to bring the action; and (d) the lack of economic incentives to bring the suit in the absence of important public issues;

(5) the trial court's award of attorney's fees was not an abuse of discretion since the federation was motivated primarily by private rather than public concerns; and

(6) there was no merit in the federation's argument that the work done by the defendants' attorneys was duplicative and excessive where no evidence of duplication was provided. AFFIRMED.

DIVORCE — PROPERTY DIVISION — EQUITABLE DIVORCE

Burcell v. Burcell, Op. No. 3015, January 31, 1986

Husband challenged property division by Superior Court, Souter, J., as clearly unjust and based on erroneous findings. Moore, J., HELD:

(1) the property division in a divorce proceeding is within the broad discretion of the trial court and will not be disturbed on appeal unless it is clearly unjust;

(2) AS 25.24.160(4) places all property acquired during a marriage, whether joint or separate, before the court for division — it also authorizes invasion of premarital holdings of either spouse when the balance of the equities requires;

(3) the trial court has broad discretion to invade premarital assets — some fact situations are sufficiently compelling that a refusal to invade is clearly unjust;

(4) on review, findings of fact are clearly erroneous if, based on the record as a whole, the court is left with a definite and firm conviction that a mistake has been made;

[2] Because the letters were not recorded, we agree with the Whites that they cannot revive any time-barred remedies based on the deed of trust, which is an "instrument affecting real estate" within the meaning of AS 09.10.200. The superior court reached the same conclusion in dictum in its opinion, and from our reading of the Walkers' briefs we believe they have conceded this point. Thus, we affirm the portion of the superior court's judgment enjoining the Walkers from seeking to enforce the deed of trust, and ordering them to request the trustee to reconvey the property at issue to the Whites.

[3] However, we have concluded that the portion of the judgment prohibiting the Walkers from acting to enforce their promissory note against the Whites personally must be reversed. Although this note was executed in connection with the sale of real estate, it is a personal note, and therefore is not subject to the recordation requirement of AS 09.10.200. Construing the letters most favorably to the Walkers,[4] we are of the opinion that excerpts from the letters of both William and Catherine White constitute, as a matter of law, acknowledgments of the debt within the intendment of AS 09.10.200.[5]

[4] The Whites contend that an acknowledgment under AS 09.10.200 must be "direct, unqualified and unconditioned." We cannot agree. The purpose of the statute of limitations is "to protect against the difficulties caused by lost evidence, faded memories and disappearing witnesses." *Byrne v. Ogle*, 488 P.2d 716, 718 (Alaska 1971). This purpose is not advanced by imposing rigorous requirements of formality on acknowledgments. Such requirements, in our opinion, would only heighten the statute's unfortunate effect of occasionally barring meritorious claims. *See* 1A A. Corbin, Corbin on Contracts § 223 (1963) (written promise or acknowledgment "may be sufficient even though it is informal and is in need of much explanatory evidence").

The judgment of the superior court is affirmed in part and reversed in part, and the case is remanded for further proceedings upon the Walkers' counterclaim based upon the subject promissory note.

BOOCHEVER, J., not participating.

Curwood GACKSTETTER and Betty Gackstetter, Appellants,

v.

STATE of Alaska, Appellee.

No. 4976.

Supreme Court of Alaska.

Oct. 24, 1980.

Owners appealed award of master in eminent domain proceeding. The Superior Court, Fourth Judicial District, Fairbanks, Warren W. Taylor, J., held that consideration of value to state of fill and gravel it received from the owners' land was an inappropriate measure of just compensation, and the owners appealed. The Supreme Court, Rabinowitz, C. J., held that the owners were justly compensated through employment of a fair market valuation measure for appropriated residential property,

4. In a motion for summary judgment, the trial court is required to draw all reasonable inferences in favor of the non-moving party and against the movant. *Alaska Rent-A-Car, Inc. v. Ford Motor Co.*, 526 P.2d 1136, 1139 (Alaska 1974).

5. William White wrote, "I would like to get things together and settle up with you in full. Or monthly or how ever." Catherine White's letter refers to "the debt owed herein," and calls her advice to the Walkers on how they might collect that debt "my last opportunity to try to help make it right." We observe that the note signed by the Whites made them jointly and severally liable to the Walkers, so that the Walkers need only show acknowledgment by either Mr. or Mrs. White, or both.

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Affirmed.

1. Eminent Domai

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and consideration of value to state of fill and gravel it received from the owners' land was an inappropriate measure of just compensation.

Affirmed.

1. Eminent Domain ⇐131

"Fair market value" is defined as the amount of money which a purchaser willing but not obliged to buy property would pay to an owner willing but not obliged to sell it, taking into consideration all uses for which the land was suited and might in reason be applied.

See publication Words and Phrases for other judicial constructions and definitions.

2. Eminent Domain ⇐122

The just compensation to which an owner is entitled when his property is taken by eminent domain is regarded in law from the point of view from the owner and not of the condemnor; just compensation in the constitutional sense is what the owner has lost, and not what the condemnor has gained.

3. Eminent Domain ⇐131

Fair market value is usually equated with just compensation, in a taking by eminent domain, as it provides an objective standard by which to measure the loss to the owner; fair market value is not the end in itself, but merely a means to achieve the goal of just compensation.

4. Eminent Domain ⇐131

Consideration of value to the state of fill and gravel it received from land taken by eminent domain was an inappropriate measure of just compensation to the owners, who were justly compensated through employment of a fair market valuation measure for appropriated residential property.

Teresa L. Foster, Cole & Downes, Fairbanks, for appellants.

William R. Satterberg, Jr., Asst. Atty. Gen., Fairbanks, and Avrum M. Gross, Atty. Gen., Juneau, for appellee.

Before RABINOWITZ, C. J., CONNOR, BURKE and MATTHEWS, JJ., and ROWLAND, Superior Court Judge.

OPINION

RABINOWITZ, Chief Justice.

This appeal arises from an eminent domain proceeding. In 1976, the State of Alaska, in connection with the construction of the New Steese Expressway, condemned 3.464 acres of Curwood and Betty Gackstetter's property. Dirt and gravel, useful as fill for the cuts and depressions created by the highway construction, were removed by the state and deposited elsewhere along the project.[1]

[1] The case was referred to a master for determination of just compensation to be paid to the Gackstetters. The master awarded the Gackstetters $24,740.00, based on a conclusion that the highest and best use of the property was residential. It is undisputed that applicable Fairbanks North Star Borough zoning ordinances and restrictions prohibited development of the subject property as a gravel pit. The award was reached by determining the fair market value of the Gackstetters' property before and after the taking.[2]

The Gackstetters appealed to the superior court. The state then moved for partial summary judgment, seeking a ruling that

1. The Gackstetters' property was bounded by Engineer Creek Basin to the north and the bowl occupied by Fairbanks to the south. Materials utilized from the Gackstetters' land were deposited elsewhere on the project to fill the depression existing in the adjacent valley. The Gackstetters maintain they should be compensated for the value of the material taken from their land.

2. Fair market value is defined as the amount of money "which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses for which the land was suited and might in reason be applied" 4 J. Sackman, Nichols on Eminent Domain § 12.-2[1] (rev. 3d ed. 1979) (footnotes omitted).

evidence of the value of the fill material would be inadmissible at trial. The superior court granted the motion, ordering that:

> Any evidence of special value or benefit to the property by virtue of the condemnation or due to the condemnor's needs or uses shall be inadmissible.

The Gackstetters have appealed this ruling of the superior court.[3]

On appeal, the Gackstetters do not contest the master's finding as to highest or best use of the property, nor do they dispute the compensation award as it was determined by the fair market value method. They admit that evidence of the value of the fill material was properly excluded from the determination of fair market value, since the value of the fill was created solely by the taker's demand for it. *United States v. Cors*, 337 U.S. 325, 332, 69 S.Ct. 1086, 1090, 93 L.Ed. 1392, 1399 (1949); *United States v. Miller*, 317 U.S. 369, 375, 63 S.Ct. 276, 280, 87 L.Ed. 336, 343 (1943). Instead, the Gackstetters proceed on the theory that fair market value is not constitutionally mandated, is inapplicable on the instant facts, and did not accord them just compensation. In their view, a form of unjust enrichment resulted from the state's non–compensable use of the fill material, and because of this, the measure of just compensation should be the value of the land to the condemnor. In addition, the Gackstetters contend there were material issues of fact in dispute which rendered summary judgment inappropriate.[4]

[2] We cannot agree that employment of the fair market value test in the case at bar precluded the Gackstetters from receiving just compensation. It is a basic tenet of eminent domain law that just compensation is determined by what the owner has lost and not by what the condemnor has gained. In *Nichols* it is stated that:

> The just compensation to which an owner is entitled when his property is taken by eminent domain is regarded in law from the point of view of the owner and not of the condemnor. In other words, just compensation in the constitutional sense is what the owner has lost, and not what the condemnor has gained.[5]

The United States Supreme Court defined just compensation in the following manner:

> The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.

Bauman v. Ross 167 U.S. 548, 574, 17 S.Ct. 966, 976, 42 L.Ed. 270, 283 (1897); *see also Kimball Laundry Co. v. United States*, 338 U.S. 1, 5, 69 S.Ct. 1434, 1437, 93 L.Ed. 1765, 1772 (1949). This court has followed the same principle in measuring just compensation:

> The term just compensation implies full indemnification to the owner for the property taken. In other words the property owner should be placed as fully as possible in the same position as he was prior to the taking of his property.

Ketchikan Cold Storage Co. v. State, 491 P.2d 143, 150 (Alaska 1971).

3. The order of partial summary judgment was entered on August 13, 1979. The final judgment was entered in this case on September 25, 1979, pursuant to a stipulation for entry of final judgment, signed by the parties on August 13, 1979. That stipulation provided that the Gackstetters retained the right to appeal the superior court's order of partial summary judgment, and that the final judgment would be regarded as the operative document for appeal time computations.

4. The Gackstetters raised the following issues:

1. Whether the highway project in question was designed to take advantage of fill material on Defendant's property.

2. Whether from a purely engineering standpoint, and taking into account the goals of the highway project, it was necessary for the route to cross Defendant's property.

3. The amount of fill removed and used in the project, and the dollar value of such fill.

5. 3 J. Sackman, Nichols on Eminent Domain § 8.61 (rev. 3d ed. 1979) (footnotes omitted). *See also id.* at § 12.21; Uniform Eminent Domain Code, committee comment to § 1004, reprinted in *id.*, App. D-3 at App. 344.133.

[3] Fair market value is usually equated with just compensation, as it provides an objective standard by which to measure the loss to the owner.[6] Nevertheless, as the Gackstetters point out, fair market value is not the end in itself, but merely a means to achieve the goal of just compensation. 4 J. Sackman, Nichols on Eminent Domain § 12.2 (rev. 3d ed. 1979); *see also Babinec v. State*, 512 P.2d 563, 570 (Alaska 1973) *appeal after remand*, 586 P.2d 966 (Alaska 1978).[7] However, none of the authorities cited by the Gackstetters support their contention that value–to–the–taker is an appropriate measure of just compensation in the factual context of this case. In particular, the Gackstetters' reliance on *State v. Hammer*, 550 P.2d 820 (Alaska 1976), is misplaced. In *Hammer* we held that a temporary loss of profits during relocation, necessitated by condemnation, was compensable. In criticizing the argument that no recovery should be had for the destruction of a business incidental to condemnation, we stated:

> This approach has several serious flaws. First, it conflicts with our principle of compensation, which, instead of looking at the benefit to the condemnor as a measure of compensation, looks to the loss to the owner, as measured by an objective standard.[8]

[4] In the case at bar, the state appropriated residential property from the Gackstetters for which the Gackstetters were justly compensated through employment of a fair market valuation measure. We thus conclude that the superior court did not err in its determination that consideration of value to the state of the fill and gravel it received from the Gackstetters' land was an inappropriate measure of just compensation.[9]

AFFIRMED.

BOOCHEVER, J., not participating.

Jim BOOKEY, d/b/a Bookeys, Appellant,

v.

KENAI PENINSULA BOROUGH, Appellee.

No. 4878.

Supreme Court of Alaska.

Oct. 24, 1980.

In an action in which municipality sought to impose a civil penalty for failure to remit sales taxes, appeal was taken from a judgment of the District Court, James C. Hornaday, J. The Superior Court, Third Judicial District, James A. Hanson, J., entered a judgment permitting the imposition of civil penalties, and appeal was taken. The Supreme Court, Matthews, J., held that municipality had power to impose a civil penalty for failure to remit sales tax.

Affirmed.

6. *Ketchikan Cold Storage Co. v. State*, 491 P.2d 143, 150 (Alaska 1971).

7. In 4 J. Sackman, Nichols on Eminent Domain § 12.1[5] (rev. 3d ed. 1979) (footnotes omitted), it is stated that:

> The basic concepts of value which have been developed with relation to property acquired by means of eminent domain fall generally into three categories:
> (a) Value to taker,
> (b) Value to owner,
> (c) Market value.
> Value to the taker, while ordinarily rejected as a standard, is occasionally considered as an element in the determination of value where, as a factual proposition, the present adaptability of the property for the projected use is a determinative factor in creating a demand for such property by purchasers in the ordinary market. In other words, where special availability of the property for public use is an element in the establishment of general market value it may be considered.

8. *State v. Hammer*, 550 P.2d 820, 824 (Alaska 1976).

9. Our holding makes it unnecessary to address the Gackstetters' contention that the existence of genuine issues of material fact precluded the entry of partial summary judgment.

Alaska Statutes

Title 19. Highways and Ferries.

Chapter
05. Administration (§ 19.05.040)
10. State Highway System (§§ 19.10.060, 19.10.170)
20. Cooperation by and with the State (§ 19.20.015)
30. Access Roads (§§ 19.30.080, 19.30.127, 19.30.241, 19.30.260 — 19.30.320)
40. James Dalton Highway (§§ 19.40.100, 19.40.200, 19.40.210)
60. Ferry Terminal Facilities (§ 19.60.070)
65. Alaska Marine Highway System (§ 19.65.010)

Chapter 05. Administration.

Article
1. Department of Transportation and Public Facilities (§ 19.05.040)

Article 1. Department of Transportation and Public Facilities.

Section
40. Powers of department

Sec. 19.05.040. Powers of department. The department may
(1) acquire property:
(2) exercise the power of eminent domain;
(3) take immediate possession of real property, or any interest in it under a declaration of taking or by other lawful means;
(4) acquire rights-of-way for present or future use;
(5) control access to highways;
(6) regulate roadside development;
(7) preserve and maintain the scenic beauty along state highways;
(8) dispose of property acquired for highway purposes;
(9) accept and dispose of federal funds or property available for highway construction, maintenance, or equipment;
(10) enter into contracts or agreements relating to highways with the federal government, municipalities, a political subdivision, or with a foreign government, if the contract is approved by the federal government;
(11) establish, levy, and collect tolls, fees, charges, and rentals for the use of state roads, highways, bridges, crossings, and causeways; and

(12) exercise any other power necessary to carry out the purpose of AS 19.05 — 19.25. (§ 2 art III title I ch 152 SLA 1957; am § 3 ch 35 SLA 1971; am § 2 ch 162 SLA 1984)

Effect of amendments. — The 1984 amendment deleted "and" at the end of paragraph (10), inserted present paragraph (11), and redesignated former paragraph (11) as present paragraph (12).

Chapter 10. State Highway System.

Article 1. Designation, Marking and Use.

Sec. 19.10.010. Dedication of land for public highways.

NOTES TO DECISIONS

A utility may construct a powerline on an unused section line easement reserved for highway purposes under this section. Fisher v. Golden Valley Elec. Ass'n, Sup. Ct. Op. No. 2606 (File No. 5902), 658 P.2d 127 (1983).

AS 19.25.010 places Alaska among those states which permit powerline construction by a utility as an incidental and subordinate use of a highway easement. Fisher v. Golden Valley Elec. Ass'n, Sup. Ct. Op. No. 2606 (File No. 5902), 658 P.2d 127 (1983).

Sec. 19.10.060. Regulation of weight and load of vehicles and use of highways during certain seasons.

The department, with respect to highways under its jurisdiction, may

(1) establish limitations on weight, size, and load of vehicles;

(2) *[Repealed, § 25 ch 144 SLA 1977.]*

(3) prohibit the operation or impose restrictions on vehicular use of highways during certain seasons of the year. (§ 5 art III title II ch 152 SLA 1957; am § 1 ch 55 SLA 1963; am § 25 ch 144 SLA 1977; am § 2 ch 77 SLA 1982)

Cross references. For the duties of the Department of Commerce and Economic Development to operate weighing stations and enforce weight and load limitations based upon directions of the Department of Transportation and Public Facilities, see AS 44.33.020(25).

Effect of amendments. — The 1982 amendment inserted "size" in paragraph (1).

Article 3. Construction.

Sec. 19.10.170. Construction by department.

(a) Except as provided in AS 36.98 and AS 44.33.300, it shall be the general policy of the department to require the construction of all highways under bid contract. 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.

(b) Construction or professional services in connection with the construction of highways performed by the department under (a) of this section which have an estimated cost exceeding $5,000 may not be performed by the department unless the commissioner determines, in writing, that the cost to the state will be less than that incurred as a result of a formally advertised or negotiated contract. The determination of the commissioner shall be supported by findings of fact which shall set out enough facts and circumstances to clearly justify the determination. The determinations and findings shall be maintained as a permanent record of the department.

(c) In this section, "professional services" means architectural, engineering, or land surveying services. (§ 1 art III title IV ch 152 SLA 1957; am § 2 ch 277 SLA 1976; am §§ 1, 2 ch 104 SLA 1978; am § 1 ch 144 SLA 1982)

Effect of amendments. — The 1982 amendment inserted "AS 36.98 and" in the first sentence of subsection (a).

Chapter 20. Cooperation by and with the State.

Sec. 19.20.015. Local control of state transportation corridors.

(a) A municipality, by resolution of its governing body, may request of the department the assumption of the department's responsibilities relating to planning of transportation corridors which are to be located within the boundaries or operating area of the municipality. After receipt of the request, the department shall provide by agreement for assumption by the municipality of the department's responsibilities relating to planning of transportation corridors, unless the commissioner determines that assumption of

is vacated, title to the strip inures to the owner of the tract of which it formed a part by the original survey. (§ 1 ch 123 SLA 1951; am § 1 ch 35 SLA 1953)

Opinions of attorney general. — For opinion discussing section line dedications for construction of highways, see 1969 Op. Att'y Gen., No. 7.

NOTES TO DECISIONS

Acceptance of federal grant. — The enactment of ch. 35, SLA 1953, was a positive act clearly manifesting the territorial legislature's intent to accept the federal grant under 43 U.S.C. § 932 of right of way for the construction of highways over public lands, not reserved for public uses. Girves v. Kenai Peninsula Borough, Sup. Ct. Op. No. 1168 (File No. 2016), 536 P.2d 1221 (1975).

Scope of use of easement. — Although the state expressly reserved a section line easement of 100 feet for use as a public highway when it sold two parcels of land, a development corporation planning to construct a public road along the easement could clear only the amount of trees reasonably necessary to construct the roadway. Anderson v. Edwards, Sup. Ct. Op. No. 2274 (File No. 4586), 625 P.2d 282 (1981).

Applied in Wessells v. State, Dep't of Hwys., Sup. Ct. Op. No. 1402 (File No. 2834), 562 P.2d 1042 (1977).

Collateral references. — 39 Am. Jur. 2d, Highways, Streets and Bridges, §§ 22-24.

39A C.J.S., Highways, § 1.

Right of municipality or public to use of subsurface of street or highway for purposes other than sewers, pipes, conduits for wires and the like. 11 ALR2d 180.

Description with reference to highway as carrying title to center or side of highway. 49 ALR2d 982.

Sec. 19.10.015. Establishment of highway widths. (a) It is declared that all officially proposed and existing highways on public lands not reserved for public uses are 100 feet wide. This section does not apply to highways which are specifically designated to be wider than 100 feet.

(b) Notwithstanding (a) of this section, a municipality may designate the width of a road which is not a part of the state highway system if the municipality maintains the road. (§ 1 ch 35 SLA 1963; am § 1 ch 158 SLA 1980)

Effect of amendments. — The 1980 amendment added subsection (b).

Collateral references. — Width and boundaries of public highway acquired by prescription or adverse user. 76 ALR2d 535.

NOTES TO DECISIONS

Applied in State v. I'Anson, Sup. Ct. Op. No. 1102 (File No. 2032), 529 P.2d 188 (1974).

Sec. 19.10.020. Designation of state highway system. The department may designate, locate, create, and determine what highways constitute the state highway system. In designating, locating, creating and determining the several routes of the state highway system, the department shall strive to attain the purposes and objectives set out in AS 19.05.125. (§ 1 art III title II ch 152 SLA 1957)

Sec. 19.10.030. Responsibility for system. The department is responsible for the construction and maintenance of the state highway system. (§ 2 art III title II ch 152 SLA 1957)

Sec. 19.10.040. Uniform system of marking and posting. The department shall classify, designate and mark highways under its jurisdiction and shall provide a uniform system of marking and posting these highways. The system of marking and posting shall correlate with and shall, as far as possible, conform to the recommendations of the Manual on Traffic Control Devices as adopted by the American Association of State Highway Officials. (§ 3 art III title II ch 152 SLA 1957)

Sec. 19.10.050. Traffic control signals. The department shall prescribe types of traffic control signals to regulate traffic on highways. These signals shall correlate with and, as far as possible, conform to the recommendations of the Manual on Uniform Traffic Control Devices as adopted by the American Association of State Highway Officials. The department shall prescribe uniform rules for the placing and installation of traffic control signals. (§ 4 art III title II ch 152 SLA 1957)

NOTES TO DECISIONS

Quoted in State v. I'Anson, Sup. Ct. Op. No. 1102 (File No. 2032), 529 P.2d 188 (1974).

Sec. 19.10.052. Local control of traffic control device systems.

Transferred to AS 19.20.017.

Revisor's notes. — This section was renumbered by the revisor of statutes pursuant to AS 01.05.031.

To impose liability on the state for its negligent failure to maintain Alaska highways through the winter would not place an "impossible burden" on the state. State v. Abbott, Sup. Ct. Op. No. 804 (File Nos. 1463, 1467), 498 P.2d 712 (1972).

Sec. 19.05.040. Powers of department. The department may

(1) acquire property;

(2) exercise the power of eminent domain;

(3) take immediate possession of real property, or any interest in it under a declaration of taking or by other lawful means;

(4) acquire rights-of-way for present or future use;

(5) control access to highways;

(6) regulate roadside development;

(7) preserve and maintain the scenic beauty along state highways;

(8) dispose of property acquired for highway purposes;

(9) accept and dispose of federal funds or property available for highway construction, maintenance, or equipment;

(10) enter into contracts or agreements relating to highways with the federal government, municipalities, a political subdivision, or with a foreign government, if the contract is approved by the federal government; and

(11) exercise any other power necessary to carry out the purpose of chs. 5 — 25 of this title. (§ 2 art III title I ch 152 SLA 1957; am § 3 ch 35 SLA 1971)

Legislative history reports. — For report on ch. 35, SLA 1971 (HB 387), see 1971 House Journal, p. 776.

NOTES TO DECISIONS

Department may acquire real property for highway through eminent domain. — The Department of Highways [now Department of Transportation and Public Facilities] may acquire real property for the purpose of constructing a highway through the exercise of eminent domain power, under the authority of this section, AS 19.05.080 — 19.05.120 and AS 19.20.040. Babinec v. State, Sup. Ct. Op. No. 908 (File No. 1539), 512 P.2d 563 (1973), rev'd on other grounds, 586 P.2d 966 (1978).

Sec. 19.05.045. Relocation payments.

Repealed by § 2 ch 60 SLA 1969.

Editor's notes. — The repealed section derived from § 1, ch. 93, SLA 1968.

Sec. 19.05.050. Roads in tourist and trailer camps. The department may adopt regulations governing the use of roads in tourist, trailer and other camps when public and private roads in or through the camps are used by, or are open to, the general public. (§ 1 ch 59 SLA 1955)

Sec. 19.05.060. Sale of obsolete equipment and material. The department may sell, exchange or otherwise dispose of obsolete machinery, equipment and material no longer needed, required or useful for construction or maintenance purposes. Money derived from the sale of the property shall be credited to the funds from which the purchase was originally made. (§ 3 art IV title IV ch 152 SLA 1957)

Sec. 19.05.070. Vacating and disposing of land and rights in land. (a) The department may vacate land, or part of it, or rights in land acquired for highway purposes, by executing and filing a deed in the appropriate recording district. Upon filing, title to the vacated land or interest in land inures to the owners of the adjacent real property in the manner and proportion considered equitable by the commissioner and set out by him in the deed.

(b) If the department determines that land or rights in land acquired by the department are no longer necessary for highway purposes the department may:

(1) transfer the land or rights in land to the Department of Natural Resources for disposal, or

(2) sell, contract to sell, lease, or exchange land or rights in land according to terms, standards and conditions established by the commissioner.

(c) Proceeds received from disposal of land or rights in land as authorized by this section shall be credited to the funds from which the purchase of the land was made originally. (§ 4 art IV title IV ch 152 SLA 1957; am § 4 ch 35 SLA 1971)

Article 2. Acquisition of Property

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, 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. (§ 1 art I title IV ch 152 SLA 1957)

Cross references. — For general provisions concerning eminent domain, see AS 09.55.240 — 09.55.460. For power of department of transportation and public facilities to exercise power of eminent domain, see AS 44.42.020(b).

NOTES TO DECISIONS

Department may acquire real property for highway through eminent domain. — The Department of Highways [now Department of Transportation and Public Facilities] may acquire real property for the purpose of constructing a highway through the exercise of eminent domain power, under the authority of AS 19.05.040, this section through AS 19.05.120, and AS 19.20.040. Babinec v. State, Sup. Ct. Op. No. 908 (File No. 1539), 512 P.2d 563 (1973), rev'd on other grounds, 586 P.2d 966 (1978).

Construction of state lease reserving right to grant right-of-way. — Provision in a lease issued by the State of Alaska, division of lands, expressly reserving the right to grant an easement or right-of-way across the leased property was construed to include an interagency transfer of a right-of-way to the Department of Highways. Wessells v. State, Dep't of Hwys., Sup. Ct. Op. No. 1402 (File No. 2834), 562 P.2d 1042 (1977).

Collateral references. — 27 Am. Jur. 2d, Eminent Domain §§ 325-332. 39 Am. Jur. 2d, Highways, Streets and Bridges, §§ 32-40.

39A C.J.S., Highways, §§ 2, 25-36.

39 C.J.S., Highways, §§ 1, 2, 25, 39, 53, 67.

Constitutionality of statutory provisions as to political corporations or divisions which shall bear cost of establishing or maintaining highway. 2 ALR 746; 123 ALR 1462.

Classification as regards counties or other political subdivisions permissible in statute imposing cost of construction or maintenance of highways upon property specially benefited. 77 ALR 1285.

Jurisdiction and power in respect of street or road which is part of or touching upon state or federal highway. 144 ALR 307.

Construction of streets and roads constituting part of state highway. 144 ALR 312.

Electric light or power line in street or highway as additional servitude. 58 ALR2d 525.

Inclusion or exclusion of first and last days in computing time for giving notice of hearing for location of public highway, which notice must be given a certain number of days before a known future date. 98 ALR2d 1397.

Extent and reasonableness of use of private way in exercise of easement granted in general terms. 3 ALR3d 1256.

Sec. 19.05.090. Declaration of taking. A declaration of taking in the form of an order signed by the commissioner, or by a designee of the commissioner within the department, declaring that the real property, or interest in it, or an easement, is necessary for the public use of the state vests title in the state. However, a declaration of taking is not effective until eminent domain proceedings have been instituted in the proper court, and a copy of the declaration of taking has been filed in the office of the recorder in the district where the land is located. The department shall pay from the appropriate fund into court the amount it considers represents a reasonable valuation for the lands, easement or materials taken. (§ 1 art I title IV ch 152 SLA 1957; am § 1 ch 88 SLA 1967)

Cross references. — For general provisions concerning eminent domain, see AS 09.55.240 — 09.55.460. For power of department of transportation and public facilities to exercise power of eminent domain, including declaration of taking, see AS 44.42.020(b).

NOTES TO DECISIONS

Access. — Although the language granting access was erroneously included in the declaration of taking of property for a controlled access facility, a party who purchased the remainder of the adjoining parcel for his insurance business acted reasonably in believing that he would have direct access and was entitled to compensation because he did not receive direct access. State v. 18,018 square feet, more or less, Sup. Ct. Op. No. 2232 (File No. 4637), 621 P.2d 887 (1980).

Sec. 19.05.100. Acquisition of excess lands. When a part of a parcel of land is taken and the remainder is in such shape or condition as to be of little value to its owner, or give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel and may sell the remainder or exchange it for other property needed for state highway rights-of-way. (§ 2(1) art I title IV ch 152 SLA 1957; added by § 3 ch 122 SLA 1960)

Sec. 19.05.110. Authority to condemn or acquire publicly owned property for the purpose of exchange. When property, which is devoted to or held for another public use for which the power of eminent domain may be exercised, is taken for highway purposes, the department may, with the consent of the person or agency in charge of the other public use, condemn the real property to be exchanged for the real property so taken. This section does not limit the authorization of the department to acquire, other than by condemnation, property for that purpose in any other manner. (§ 2(2) art I title IV ch 152 SLA 1957; added by § 3 ch 122 SLA 1960)

Sec. 19.05.120. Authority to purchase property for the purpose of exchange. When the commissioner formally declares that it is in the best public interest of the state to do so, the department may acquire by purchase or otherwise privately or publicly owned land or an interest in it for the purpose of exchanging it for privately or publicly owned land which the department is authorized by law to acquire. (§ 2(3) art I title IV ch 152 SLA 1957; added by § 3 ch 122 SLA 1960)

Sec. 19.05.122. Utility corridor for extension of the Alaska Railroad. (a) Not later than April 1, 1982, the interior division of the department shall delineate a proposed utility corridor for the extension of the Alaska Railroad to the Canadian border. The proposed utility corridor shall include a complete legal description of the proposed railroad right-of-way.

(b) Within 90 days after receiving a report transmitting the work of the interior division of the department under (a) of this section, the

Cross references. — For appointment of masters, see Civ. R. 53; for hearing before master, see Civ. R. 72(h)(2).

NOTES TO DECISIONS

Judicial review inappropriate to proceedings under declaration of taking. — The concept of judicial review embodied in Alaska's general eminent domain statutes is inconsistent with, and inappropriate to, proceedings under a declaration of taking. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

The question of necessity under a declaration of taking is not one for initial judicial consideration as in the case of other condemnation proceedings. Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

For distinction between proceedings in condemnation under a declaration of taking and those under a complaint seeking condemnation and an order for possession, see Arco Pipeline Co. v. 3.60 Acres, More or Less, Sup. Ct. Op. No. 1177 (File No. 2419), 539 P.2d 64 (1975).

Determination of whether parcel is within original scope of public project. — A determination in a particular case of whether a parcel is within the original scope of a public project subsequently enlarged to require the taking of the tract is a question for the trier of fact. State v. Alaska Continental Dev. Corp., Sup. Ct. Op. No. 2254 (File Nos. 4121, 4122), 630 P.2d 977 (1980).

No finding necessary to issuance of order appointing master. — No "finding" seems to be necessary to the issuance of the order appointing commissioners (now master) to appraise damages. Alaska Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 655 (1927).

And such order is not appealable. — The order appointing commissioners (now master) cannot be regarded as appealable. Alaska Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 655 (1927).

Except for abuse of discretion. — An order appointing commissioners (now master) can only be reviewed for an abuse of discretion, if at all. Alaska Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 655 (1927).

"Owner" includes purchaser under contract. — An instruction "that the term 'owner' to whom compensation must be paid, may include a purchaser under contract who has an interest in the land sought to be taken or damaged," is entirely proper. State v. Bradshaw Land & Livestock Co., 43 P.2d 674 (Mont. 1935), construing the Montana statute.

Cited in State, Dep't of Transp. & Pub. Facilities v. 0.644 Acres, Sup. Ct. Op. No. 2118 (File No. 4861), 613 P.2d 829 (1980).

Collateral references. — Propriety of court's consideration of ecological effects of proposed project in determining right of condemnation, 47 ALR3d 1267.

Sec. 09.55.310. Hearing. (a) The jury or master shall hear the allegations and evidence of persons interested and shall ascertain and assess the following:

(1) the value of the property sought to be condemned, and all improvements on it pertaining to the realty, and of each separate estate or interest in it; if it consists of different parcels, the value of each parcel and each estate or interest in each parcel shall be separately assessed;

(2) if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought

to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff;

(3) separately, how much the portion not sought to be condemned and each estate or interest in it will be benefited, if at all, by the construction of the improvements proposed by the plaintiff; and, if the benefit is equal to the damages assessed under (2) of this section, the owner of the parcel shall be allowed no damages except the value of the portion taken; but if the benefits are less than the damages so assessed, the former shall be deducted from the latter and the remainder shall be the only damages allowed in addition to the value;

(4) if the property sought to be condemned is for a railroad, the cost of good and sufficient fences along the line of the railroad, and the cost of cattle guards where fences may cross the line of the railroad.

(b) As far as practicable, compensation shall be assessed for each source of damages separately. (§ 13.08 ch 101 SLA 1962; am § 2 ch 138 SLA 1968)

Cross references. — For related court rules, see Civ. R. 72(e)(4) and (h).

NOTES TO DECISIONS

I. GENERAL CONSIDERATION.

Editor's notes. — All notes from Montana decisions appearing under this section are constructions of the Montana statute from which the section derives.

Measure of damages. — The measure of damages in a proceeding for the condemnation of land for public highway is the fair market value of the land sought to be condemned with the depreciation of such value of the land from which the strip is to be taken, less allowable deductions for benefits proven which values are to be determined as of the date of the commencement of the proceeding. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

Independent parcels. — When parts of the same establishment are separated by intervening private lands, they are generally considered as independent parcels. State v. Bradshaw Land & Livestock Co., 43 P.2d 674 (Mont. 1935).

Duty of master. — It is the commissioners (master's) duty to examine the lands sought to be condemned, hear the allegations and evidence of all parties interested, and ascertain and assess the damages done to the persons whose lands are sought to be appropriated. Spratt v. Helena Power Transmission Co., 94 P. 631 (Mont. 1908).

Applied in State v. Hammer, Sup. Ct. Op. No. 1268 (File Nos. 2500, 2660), 550 P.2d 820 (1976).

Cited in Scavenius v. City of Anchorage, Sup. Ct. Op. No. 1182 (File No. 2193), 539 P.2d 1161 (1975).

II. JUST COMPENSATION.

A. Generally.

Valuation of property. — See notes under AS 09.55.330, analysis line II, "Just Compensation."

Fair market value is an appropriate measure of the just compensation guaranteed by Alaska Const., art. I, § 18. Dash

v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

One criterion for determining value is what the property is worth on the market—its fair market value, and this is to be determined by a just consideration of all the uses for which a property is suitable. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

The essential difference between market price and market value lies in the premises of intelligence, knowledge and willingness, all of which are contemplated in market value but not in market price. Stated differently, at any given moment of time, market value connotes what a property is actually worth and market price what it may be sold for. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

"Best use" evidence. — See Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

In determining just compensation, usually measured by the "market value" of the property, the highest and most profitable use for which the land is adaptable may be considered to the extent that the prospective demand for such use affects the property's present market value. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

A truly speculative or imagined use should not be considered. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Evidence of use as subdivision. — Many courts, including Alaska's, have allowed evidence of a reasonably probable subdivision to be admitted to prove the adaptability of the land for subdivision use. Dash v. State, Sup. Ct. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

The majority of courts allow evidence of a potential subdivision only for the limited purpose of showing the adaptability of the land for subdivision purposes. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

The courts are much more liberal in admitting evidence of a potential subdivision when some preliminary steps have been taken to develop the land. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Where there is testimony that the highest and best use of the property is as an industrial subdivision, and evidence that other property in the immediate area was subdivided for industrial purposes, the proposed subdivision is not purely conjectural or speculative. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

If the land were adaptable for subdivision purposes, it would seem that the potential income to be derived from sales of the subdivided lots would be highly relevant to a determination of the "market value," especially to the extent that sophisticated investors who make decisions on the basis of income capitalization take part in market transactions. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Capitalization of income, in contexts other than proposed subdivisions, has been recognized as an accepted method of valuation by a number of jurisdictions. Although capitalization of anticipated proceeds from a proposed subdivision necessarily has a speculative element, it still has a direct impact on the property's market value since it will influence investment decisions and thereby affect supply and demand. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

To the extent that the "just compensation" guarantee in Alaska Const., art. I, § 18, comprises a notion of fair market value rather than merely the price the property will bring in an imperfect market, income capitalization must be considered particularly apposite. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Even in a market place where a parcel's price is unaffected by its income potential, income capitalization must be considered to have a bearing on "market value." The danger that market price will not closely reflect market value is enhanced when the property is not currently generating income. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

An expert's testimony which capitalized the anticipated rentals from a proposed recreational subdivision to arrive at an estimate of fair market value was properly admitted. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

As to admission of expert testimony on market value based on the development costs and income capitalization of a potential subdivision, see Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

Questions relative to revenue produced from the property taken is admissible for the purpose of arriving at the market value of the property. State v. Peterson, 328 P.2d 617 (Mont. 1958).

Value of improvements. — If improvements on the property enhance the market value then the value of those improvements is material; if improvements do not enhance the market value, they are not material. State v. Peterson, 328 P.2d 617 (Mont. 1958).

The true rule seems to be for the witness to testify as to the nature of the improvements, their use, and then, probably, state that the improvements enhance the market value of the land. He may then testify as to the consideration of the improvements and their condition and value at the time of the condemnation. State v. Peterson, 328 P.2d 617 (Mont. 1958).

Testimony as to amounts invested in the lands and improvements would be incompetent, for it is the value of all such at the time summons is served that counts. State v. Peterson, 328 P.2d 617 (Mont. 1958).

Loss of business by relocation of highway. — It is clear that compensation cannot be had for loss of business by relocation of a highway and diversion of traffic. State v. Peterson, 328 P.2d 617 (Mont. 1958).

The owner of land abutting on a highway established by the public has no property or other vested right in the continuance of it as a highway at public expense, and, at least in the absence of deprivation of ingress and egress, cannot claim damages for its mere discontinuance, although such discontinuance diverts traffic from his door and diminishes his trade and thus depreciates the value of his land. State v. Hoblitt, 288 P. 181 (Mont. 1930).

Sale fifteen months after date of taking. — As to admission into evidence of a sale taking place fifteen months after the date of the taking by the state, see Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

B. Damages to Remainder.

Assessment of damages refers to "portion sought to be condemned." — The assessment of damages the award of the commissioners (master) provided for in this section is made with reference to property sought to be appropriated or "portion sought to be condemned," not to property already condemned at the time of the appointment. Alaska Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 655 (1927).

The award of damages is a substantial fact, which fixes the just compensation to which relator is entitled, until revised on appeal. State ex rel. Volunteer Mining Co. v. McHatton, 38 P. 711 (Mont. 1894).

Recoverable damages must be the natural and proximate consequence of the action taken; they must be direct and certain, actual and reasonable, readily ascertainable, and not remote speculative or contingent. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928); State v. Bradshaw Land & Livestock Co., 43 P.2d 674 (Mont. 1935).

Not every possible element of depreciation is compensable. — It is not every possible element of depreciation in value for which compensation must be awarded in an eminent domain proceeding. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

And attempt to enumerate elements of depreciation is futile. — Any attempt to enumerate the various circumstances which may enter into depreciation of the market value of a tract of land would be futile. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

Highway destroying the close and requiring additional fencing. — One of the circumstances which directly depreciates the market value of land is that the opening of a highway through a fenced tract of land destroys the close and necessitates additional fencing in order to reestablish it. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

An item of damages which would enter into the depreciation of the value of a tract is the cost of constructing a fence along the highway to maintain an enclosure. State v. Hoblitt, 288 P. 181 (Mont. 1930).

The damage suffered and the amount of depreciation is readily ascertainable by testimony as to the reasonable cost of construction of fences to maintain enclosure and the consideration of such an item has generally been up held. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

Fence as fence. — In the absence of statutory justification therefor no allowance can be made for a fence as a fence. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

Necessity of fencing and cost goes only to show depreciation by reason of taking. — Proof of the necessity of such fencing, and its cost, is proper only as a means of showing the depreciation in market value of the land by reason of the taking and use of a part of the land. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

Maintenance of fences is too remote. — Maintenance of fences would be a known future burden upon the lands, but the claim should be disregarded as too remote, and as incapable of definite ascertainment or determination at the time the depreciation in value must be determined, i.e., as of the time of the commencement of the proceeding. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

Appraisal of damages prior to construction of improvements. — When damages are appraised prior to the construction of the improvements for which the land is condemned, the estimate should be made on the assumption that the improvements will be properly constructed; and, if they are constructed pending the condemnation proceedings, the rule should be the same. The actual effect of the properly constructed improvements in the manner proposed by plaintiff as to the larger parcels should control the appraisal. If the improvements are improperly or negligently constructed, no additional damage should be given for this reason. City of Anchorage v. Scavenius, Sup. Ct. Op. No. 1183 (File Nos. 2214, 2222), 539 P.2d 1169 (1975).

Depreciation of adjacent tract. — In arriving at a conclusion as to the damages to be awarded, the triers of facts should consider all of the circumstances which immediately and directly depreciate the present market value of the portions of the whole tract adjacent to the strip sought to be taken as a right-of-way. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

Costs and attorney's fees. — City was entitled to award of costs and attorney's fees for successful defense of negligence claim pertaining to pavement damage occurring when water main installed. City of Anchorage v. Scavenius, Sup. Ct. Op. No. 1183 (File Nos. 2214, 2222), 539 P.2d 1169 (1975).

C. Benefits to Remainder.

Effect of special benefits. — The rule in Alaska is that special benefits to the remainder can only be used to offset severance damages to the remainder. In the event that special benefits exceed severance damages, the landowner is still entitled to receive the full market value of the portion actually taken. Dash v. State, Sup. Ct. Op. No. 756 (File No. 1405), 491 P.2d 1069 (1971).

General enhancement of land values is not a proper element of benefit. — The general enhancement of values in land in the vicinity because of the construction of a road is not a proper element of benefit to be allowed. Gallatin Valley Elec. Ry. v. Neible, 186 P. 689 (Mont. 1919).

It may be stated as a general rule that general and neighborhood benefits resulting to the owner in common with others may not be set off against the damages to the owner. Gallatin Valley Elec. Ry. v. Neible, 186 P. 689 (Mont. 1919).

The benefits which may be deducted must be special or local, or such as result directly and peculiarly to the particular tract of which a part is taken. Gallatin Valley Elec. Ry. v. Neible, 186 P. 689 (Mont. 1919).

III. ROLE OF WITNESSES.

Role of expert witness in eminent domain proceedings. — See Dash v. State, Sup. Ct. Op. No. 756, (File No. 1405), 491 P.2d 1069 (1971).

Opinions of witnesses. — The opinions of witnesses must be resorted to determine (1) the value of the land taken; (2) the detriment, if any to the portion not taken, or, in other words the value of that not taken; and (3) the benefits, if any, to the portion not taken. Yellowstone Park R. Co. v. Bridger Coal Co., 87 P. 963 (Mont. 1906).

The right mode of proving value is to take the sworn opinions of those who are shown to be competent to give opinions on the subject, and let them be cross-examined as to the foundation of their opinions, their means of knowledge and the motives prompting them. Yellowstone Park R. Co. v. Bridger Coal Co., 87 P. 963 (Mont. 1906).

The question of how the taking of a right-of-way affects the premises in the market should logically be determined by testimony of qualified witnesses as to the cash market value of the premises today and what that value would be today considering the highway as constructed across them and permitting the witnesses, on cross-examination, to state the manner in which they arrived at their conclusion on the subject. Lewis & Clark County v. Nett, 263 P. 418 (Mont. 1928).

Competency of witnesses. — One who knows the real property in question and is familiar with the uses to which it may be put, may testify as to its market value. State v. Peterson, 328 P.2d 617 (Mont. 1958).

It must appear that the witness has some peculiar means of forming an intelligent and correct judgment as to the value of the property in question beyond what is

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presumed to be possessed by men generally. State v. Peterson, 328 P.2d 617 (Mont. 1958).

Value of real estate may be proved by witnesses other than experts. State v. Peterson, 328 P.2d 617 (Mont. 1958).

The witness need not know of any sales and he need not be a technical expert. State v. Peterson, 328 P.2d 617 (Mont. 1958).

A witness as to value of property need not to have been engaged in buying or selling the same. State v. Peterson, 328 P.2d 617 (Mont. 1958).

Who are competent to give opinions on value of property is generally in the discretion of the trial judge. State v. Peterson, 328 P.2d 617 (Mont. 1958).

Weight of testimony is jury question. — The question of what weight to give witness' testimony is one for the jury to decide upon the evidence produced at the trial and under the court's instructions on the law. Alaska State Hous. Auth. v. Vincent, Sup. Ct. Op. No. 261 (File No. 458), 396 P.2d 531 (1964).

Collateral references. — Admissibility of evidence of promissory statements of condemner as to character of use or undertakings to be performed by it, 5 ALR2d 381.

Admissibility in condemnation proceedings of opinion evidence as to probable profits derivable from land condemned if devoted to particular agricultural purposes, 16 ALR2d 1113.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility of hearsay evidence as to comparable sales of other land as basis for expert's opinion as to land value, 12 ALR3d 1064.

Propriety and effect, in eminent domain proceeding, of argument or evidence as to landowner's unwillingness to sell property, 17 ALR3d 1449.

Propriety and effect, in eminent domain proceeding, of argument or evidence as to source of funds to pay for property, 19 ALR3d 694.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 ALR3d 1081.

Propriety and effect of argument or evidence as to financial status of parties in eminent domain proceeding,. 21 ALR3d 936.

Admissibility, on issue of value of condemned real property, of rental value of other real property, 23 ALR2d 724.

Admissibility of photographs or models of property condemned, 23 ALR3d 825.

Admissibility of evidence of proposed or possible subdivision or platting of condemned land on issue of value in eminent domain proceedings, 26 ALR3d 780.

Right in eminent domain proceeding to call as witness expert engaged but not called as witness by opposing party, 71 ALR3d 1119.

Necessity of trial or proceeding, separate from main condemnation trial or proceeding, to determine divided interest in state condemnation award, 94 ALR3d 696.

Sec. 09.55.320. Right to jury trial as to damages and value of property. An interested party may appeal the master's award of damages and valuation of the property, in which case there shall be a trial by jury on the question of the amount of damages and the value of the property, unless the jury is waived by the consent of all parties to the appeal. (§ 13.09 ch 101 SLA 1962)

Cross references. — For related court rules, see Civ. R. 72(h)(4) and (5).

Opinions of attorney general. — A prequalification system would appear to be a reasonable measure to implement the power of the department to determine the lowest responsible bidder on any particular job. 1958 Op. Att'y Gen., No. 27.

Sec. 19.10.220. Prior contracts unaffected.

Obsolete.

Revisor's notes. — This section is obsolete. It reads as follows: "Sections 170-250 of this chapter do not apply to contracts entered into before April 1, 1957."

Editor's notes. — The obsolete section derived from § 8, art. III, title IV, ch. 152, SLA 1957.

Sec. 19.10.230. Method of construction of highway ditches. A highway constructed or reconstructed shall be designed to permit water to drain from it into ditches which shall drain into coulees, rivers and lakes according to the surface and terrain where the highway is constructed in accordance with scientific highway construction and engineering in order to prevent the water from overflowing onto adjacent and adjoining lands. The natural flow and drainage of surface water shall not be obstructed, but it shall be permitted to follow the natural course according to the surface and terrain. (§ 7 art IV title II ch 152 SLA 1957)

The legislature distinguished access roads from highways by AS 19.30.020 and AS 19.30.040. Mercer v. Yutan Constr. Co., Sup. Ct. Op. No. 371 (File No. 631), 420 P.2d 323 (1966).

Sec. 19.10.240. Warning signs of road construction. Whenever the department enters into a contract for the construction of a highway, it shall, as a condition of the contract, provide that the contractor shall place suitable warning signs which can be read from a distance of 100 feet in daytime, and that he shall erect and place at night a red and white lantern or a torch or other effective device, of a type approved by the department, at both ends of the construction work, not less than 300 feet from it, warning the public that the road is under construction or improvement and is closed, impassable, or dangerous for travel. Nothing in this section makes the state liable for the failure of a contractor to erect warning signs. (§ 9 art IV title II ch 152 SLA 1957)

Sec. 19.10.250. Penalty for failure to erect warning signs. A contractor, foreman, or person in charge of work or repairs on a highway who fails or neglects to erect and maintain suitable warning signs as provided in AS 19.10.240 is punishable by a fine of not less than $10 nor more than $50, or by imprisonment in jail for not more than 60 days, or by both. (§ 10 art IV title II ch 152 SLA 1957)

Sec. 19.10.260. Replacement of permanent markers and filing of right-of-way map after construction. The department shall:

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Sec. 19.10.260. Replacement of permanent markers and filing of right-of-way map after construction. The department shall:

Sec. 34.35.025. Parties to foreclosure. In an action to foreclose a lien created by AS 34.35.005 — 34.35.425, all persons personally liable and all lien holders whose claims have been filed, and all other persons interested in the matter in controversy or the property sought to be charged with the lien may be made parties. Persons who are not parties are not bound by the proceedings. (§ 26-9-6 ACLA 1949)

Collateral references. — 53 Am. Jur. 2d, Mechanics' Liens, §§ 359-373.

Sec. 34.35.030. Lien claim against different properties. If a lien claim is filed for the same labor against two separate kinds of property owned or claimed by different persons, the court shall determine the liability of each kind of property and designate which shall be sold first to discharge the amount of the lien claim. (§ 26-9-7 ACLA 1949)

Sec. 34.35.035. Several judgment for each claimant. In an action to enforce a lien judgment shall be given in favor of each person having a lien for the amount due the person, and the court shall order property subject to the lien to be sold by the peace officer in the same manner that property is sold on execution, or in any manner that the court considers proper. The proceeds of the sale shall be apportioned to the payment of each judgment pro rata, if the amount is insufficient to pay them in full. (§ 26-9-8 ACLA 1949)

Sec. 34.35.040. Order of priority and payment. [Repealed, § 19 ch 175 SLA 1978. For current law see AS 34.35.112.]

Sec. 34.35.045. Lienor's action on contract. Except as otherwise expressly provided, nothing in AS 34.35.005 — 34.35.425 may be construed to prevent a lienor under a contract from maintaining an action as if the lienor has no lien for the security of the debt and the bringing of this action does not prejudice rights under AS 34.35.005 — 34.35.425. (§ 26-9-11 ACLA 1949)

NOTES TO DECISIONS

Liens provided by statute create a cumulative remedy, and a lienor has the right to proceed by way of his lien or by an action at law. Mitchell v. Beaver Dredging Co., 8 Alaska 566 (1935).

Where the lien fails, the claimant may nevertheless have a personal judgment against the defendant personally liable in the cause. Mitchell v. Beaver Dredging Co., 8 Alaska 566 (1935).

Section
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Article 2. Mechanics and Materialmen.

Sec. 34.35.050. Lien for labor or materials furnished. A person has a lien, only to the extent provided under this chapter, to secure payment of the contract price if the person

(1) performs labor upon real property at the request of the owner or agent of the owner for the construction, alteration, or repair of a building or improvement;

(2) is a trustee of an employee benefit trust for the benefit of individuals performing labor on the building or improvement and has a direct contract with the owner or the agent of the owner for direct payments into the trust;

(3) furnishes materials that are delivered to real property under a contract with the owner or the agent of the owner that are incorporated in the construction, alteration or repair of a building or improvement;

(4) furnishes equipment that is delivered to and used upon real property under a contract with the owner or the agent of the owner for construction, alteration or repair of a building or improvement;

(5) performs services under a contract with the owner or the agent of the owner in connection with the preparation of plans, surveys, or architectural or engineering plans or drawings for the construction, alteration or repair of a building or improvement, whether or not actually implemented on that property; or

(6) is a general contractor. (§ 26-1-1 ACLA 1949; am § 1 ch 20 SLA 1953; am § 1 ch 14 SLA 1953; am § 1 ch 57 SLA 1959; am § 1 ch 106 SLA 1967; am § 1 ch 175 SLA 1978)

NOTES TO DECISIONS

Editor's notes. — Many of the cases annotated below were decided under this section as it existed before the 1978 amendment.

Constitutionality of lien laws. — See Nordstrom v. Sivertsen-Johnsen Mining & Dredging Co., 5 Alaska 210 (1915).

The mechanic's lien law of Alaska was adopted originally from the lien law of Oregon. Arctic Lumber Co. v. Borden, 211 F. 50 (9th Cir.), cert. denied, 235 U.S. 704, 35 S. Ct. 209, 59 L. Ed. 433 (1914).

Alaska mechanic's lien laws were derived from those of Oregon. Vaara v. Ketchikan Spruce Mills, Sup. Ct. Op. No. 441 (File No. 829), 432 P.2d 618 (1967).

The purpose of legislatures in enacting mechanic's and materialman's lien laws is for the protection of the mechanic, insuring to him the fruits of his labor and providing the materialman with a speedy and efficacious mode of collecting his pay for materials furnished. Jorgensen Co. v. Sheldon, 2 Alaska 607 (1905).

And to secure lien priority of payment. — It is the purpose of the lien law to secure priority of payment of the price and value of work performed and materials furnished in erecting and repairing a building or other structure. Cascaden v. Wimbish, 161 F. 241 (9th Cir. 1908).

This article relating to mechanics' liens should be liberally construed. Russell v. Hayner, 130 F. 90 (9th Cir. 1904); Arctic Lumber Co. v. Borden, 211 F. 50 (9th Cir.), cert. denied, 235 U.S. 704, 35 S. Ct. 209, 59 L. Ed. 433 (1914). But see Goldstein v. Noble, 6 Alaska 282 (1920).

The evident spirit and purpose of this article is to do substantial justice to all parties who may be affected by its provisions, and the courts should avoid unfriendly strictness and mere technicality. Russell v. Hayner, 130 F. 90 (9th Cir. 1904).

Mechanic's lien statutes are to be liberally construed, with a view to effect substantial justice, and the fact that the lien claimant includes in his claim an item of his services for which the law gives him no lien will not defeat the lien if due to an honest mistake, and his lien in such a case may be enforced pro tanto if the true amount for which he is entitled to a lien may be segregated from the remainder. Pioneer Mining Co. v. Delamotte, 185 F. 752 (9th Cir. 1911).

Except to protect against undue severity. — Where the particular enactment deals fairly and equitably with both the owner and the lienor, the liberal interpretation seems to be the rule adopted; but where the statute seems to be unnecessarily severe upon one, and in favor of the other, resulting in manifest injustice, the courts have endeavored to relieve the severity, holding the party favored to a strict compliance with the statute. Jorgensen Co. v. Sheldon, 2 Alaska 607 (1905).

And parts upon which existence of lien depends should be strictly construed. — The safe and proper rule of construction of mechanic's lien statutes is that, while the remedial portions of these statutes should be liberally construed with a view to avoid defeating the purpose of the statute, yet those parts upon which the right to the existence of a lien depends, being in derogation of the common law, should be strictly construed. Morris v. Marsh, 3 Alaska 140 (1906).

They must be substantially complied with. — A mechanic's lien is purely of statutory creation, and can only be maintained by a substantial observance and compliance with the provisions of the statute. Whatever is made necessary to the existence of the lien must be performed, or the attempt to create it will be futile. A substantial adherence to the terms of the statute in the notice of the lien is indispensable. Russell v. Hayner, 130 F. 90 (9th Cir. 1904).

Thus, this section should be strictly construed. Rivers v. Pastro, 11 Alaska 491 (1948).

A strained construction to bring a person within this section is not permissible. Rivers v. Pastro, 11 Alaska 491 (1948).

Prior law construed. — This section as it existed prior to 1978 prohibited the creation of a valid mechanic's lien prior to the commencement of work on the site and the effectuation of visible improvements to the property. Torkla-Korman/Engineers v. Penland Ventures, Sup. Ct. Op. No. 2757 (File No. 6469), 671 P.2d 769 (1983). See now paragraph (4), which allows liens for work done in the preparation of plans "whether or not [they were] actually implemented."

This article is not, of its own terms, made applicable to public property. University of Alaska v. Simpson Bldg. Supply Co., Sup. Ct. Op. No. 1113 (File No. 2196), 530 P.2d 1317 (1975).

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As to immunity of real prop University of Alaska from lien ment or foreclosure, see Unive Alaska v. Simpson Bldg. Supply C Ct. Op. No. 1113 (File No. 2196), 5 1317 (1975).

The landowner must have knowledge of the construction his interest can be subjected to a m man's lien. Vaara v. Ketchikan Mills, Sup. Ct. Op. No. 441 (File No 432 P.2d 618 (1967).

If the materialman relies on bo credit of the purchaser and the rity of the building, the materi can assert a lien. Dannemiller v. A Distribution Corp., Sup. Ct. Op. No (File No. 2895), 566 P.2d 645 (19).

Materialperson must demon that materials furnished were ally incorporated into the buildi project. Dannemiller v. AMFAC Dis tion Corp., Sup. Ct. Op. No. 1452 (Fil 2895), 566 P.2d 645 (1977).

No requirement that materia see that every piece used in struc — In the foreclosure of a materia lien, the materialman should not b quired to watch the progress of a stru to see that every piece of material plied by him was used therein, and if of the material has been used elsewh it rests with the defendant to show fact. Dannemiller v. AMFAC Distribu Corp., Sup. Ct. Op. No. 1452 (File 2895), 566 P.2d 645 (1977).

A materialperson has a burden to s by a preponderance that its mater were generally used in a project, bu need not show that each and every i was incorporated. Dannemiller v. AMF Distribution Corp., Sup. Ct. Op. No. 1 (File No. 2895), 566 P.2d 645 (1977).

A mechanic's lien will attach property for an improvement placed thereon if it has a physical beneficial connection therewith and essential to the convenient and comfo able use of the premises. Mitford v. Pri 353 F.2d 550 (9th Cir. 1965).

Lots in a subdivision are lienable f an engineer's labor on the subdivisio water and sewerage system. Mitford Prior, 353 F.2d 550 (9th Cir. 1965).

Effect of agreement establishin partnership. — For the purposes of th section, an agreement establishing a par nership or joint venturership does no affect one party's standing to file a lie against the other party's land. Urban Dev Co. v. Dekreon, Sup. Ct. Op. No. 108 (File No. 2028), 526 P.2d 325 (1974).

As to immunity of real property of University of Alaska from lien attachment or foreclosure, see University of Alaska v. Simpson Bldg. Supply Co., Sup. Ct. Op. No. 1113 (File No. 2196), 530 P.2d 387 (1975).

The landowner must have actual knowledge of the construction before his interest can be subjected to a materialman's lien. Vaara v. Ketchikan Spruce Mills, Sup. Ct. Op. No. 441 (File No. 829), 421 P.2d 618 (1967).

If the materialman relies on both the credit of the purchaser and the security of the building, the materialman may assert a lien. Dannemiller v. AMFAC Distribution Corp., Sup. Ct. Op. No. 1452 (File No. 2895), 566 P.2d 645 (1977).

Materialperson must demonstrate that materials furnished were generally incorporated into the building or project. Dannemiller v. AMFAC Distribution Corp., Sup. Ct. Op. No. 1452 (File No. 2895), 566 P.2d 645 (1977).

No requirement that materialman see that every piece used in structure. - In the foreclosure of a materialman's lien, the materialman should not be required to watch the progress of a structure to see that every piece of material supplied by him was used therein, and if some of the material has been used elsewhere, it rests with the defendant to show that fact. Dannemiller v. AMFAC Distribution Corp., Sup. Ct. Op. No. 1452 (File No. 2895), 566 P.2d 645 (1977).

A materialperson has a burden to show by a preponderance that its materials were generally used in a project, but it need not show that each and every item was incorporated. Dannemiller v. AMFAC Distribution Corp., Sup. Ct. Op. No. 1452 (File No. 2895), 566 P.2d 645 (1977).

A mechanic's lien will attach to property for an improvement not placed thereon if it has a physical or beneficial connection therewith and is essential to the convenient and comfortable use of the premises. Mitford v. Prior, 353 F.2d 550 (9th Cir. 1965).

Lots in a subdivision are lienable for an engineer's labor on the subdivision's water and sewerage system. Mitford v. Prior, 353 F.2d 550 (9th Cir. 1965).

Effect of agreement establishing partnership. — For the purposes of this section, an agreement establishing a partnership or joint ventureship does not affect one party's standing to file a lien against the other party's land. Urban Dev. Co. v. Dekreon, Sup. Ct. Op. No. 1083 (File No. 2028), 526 P.2d 325 (1974).

The meaning properly attaching to the word "contractor" as used in this section is one who has charge of the construction of the building, alteration, or repair by direction of or contract with the owner or his agent duly authorized to contract for him. Morris v. Marsh, 3 Alaska 140 (1906).

A lien of a contractor may include an item for supervision and overhead. Clay v. Sandal, Sup. Ct. Op. No. 74 (File Nos. 60 (a), (b)), 369 P.2d 890 (1962).

Labor for which lien is claim must come within statute. — While mechanic's lien statutes are to be liberally construed, so that their purpose may not be frustrated, and with a view to effecting substantial justice, yet, unless the labor performed for which the lien is claimed is such as comes within the contemplation of the statute, there can be no valid lien. Noble v. Gustafson, 204 F. 69 (9th Cir. 1913).

This section and AS 34.35.070 must be read and construed together, and as applied to an original contractor, in computing the time from which he must file his claim of lien, they provide that he must file it within 90 days from the date of the completion of his contract or within 90 days from the date of the construction of the building, or any part of such construction, under the contract. Bloom v. McCluskey, 7 Alaska 349 (1925).

There must be employment by the owner of the building or his agent. — To authorize a lien under the provisions of this section, there must be an employment by the owner of the building, or his authorized agent, and the employment of contractors by one who was occupying the land under a contract of purchase, does not constitute the employment contemplated by this section. Russell v. Hayner, 130 F. 90 (9th Cir. 1904).

Or owner must know of and fail to disclaim improvement. — If the person in charge is not in fact the agent of the owner, the interest of the owner shall, nevertheless, be liable for the improvement if it is constructed with his knowledge and he fails to post the required notice disclaiming responsibility. Cascaden v. Wimbish, 161 F. 241 (9th Cir. 1908).

Person in charge is prima facie owner's agent. — This section, AS 34.35.055 and 34.35.065, construed together, mean that the person in charge of the work shall prima facie be deemed to be the agent of the owner, and the prop-

erty of the latter shall be charged with the lien under the express provisions of this section. Cascaden v. Wimbish, 161 F. 241 (9th Cir. 1908). See AS 34.35.115.

Lessee is not owner's agent. — A lessee, contracting for improvements upon the demised premises, does not, merely by virtue of his relation as lessee, contract as the agent of the lessor, so as to subject the property to mechanics' liens therefor. Morris v. Marsh, 3 Alaska 140 (1906).

And lien is limited to leasehold unless owner fails to give notice of nonresponsibility. — If the work is done for a lessee of the property, liability is confined to the leasehold estate, if the owner had no knowledge of the construction of the improvement, or if, having such knowledge, he gave notice that he would not be responsible. Cascaden v. Wimbish, 161 F. 241 (9th Cir. 1908).

Or unless lease authorizes lessee to improve or improvements revert. — It is the general rule that where a lease contains a provision authorizing the lessee to make improvements by deducting the cost thereof from the rent, or where part of the consideration of the lease is the making by the lessee of improvements which become a part of the realty, or that the improvements made by the lessee shall revert to the lessor, a mechanic's lien may attach to the property for work done or materials furnished, pursuant to a contract with the lessee. Arctic Lumber Co. v. Borden, 211 F. 50 (9th Cir.), cert. denied, 235 U.S. 704, 35 S. Ct. 209, 59 L. Ed. 433 (1914).

It will attach to building erected by lessee that is to revert to lessor. — Where a lease provided that construction of a business building on the property by the lessee was a part of the consideration, but also provided that the building was to "attach to the said realty as a part thereof and become the property of lessor" upon the expiration or termination of the lease, as to a materialman's lien, the building had become an integral part of the leasehold estate, and was not an item of personal property to be considered separately from the realty upon which it was constructed and the lessee's interest in that realty. Clay v. Sandal, Sup. Ct. Op. No. 74 (File Nos. 60 (a), (b)), 369 P.2d 890 (1962).

Breach of contract bars enforcement of lien for work performed. — Where a contractor fails to perform a considerable part of the work required by his contract, his failure, regardless of his intentions, constitutes a bar to his enforcement of a lien for the work performed. Gillis v. Gillette, 13 Alaska 55, 184 F.2d 872 (9th Cir. 1950).

As where contract is willfully abandoned before completion. — See Gillis v. Gillette, 13 Alaska 55, 184 F.2d 872 (9th Cir. 1950).

Burden of proof on lien claimant to show compliance with statute. — Where the allegations of the complaint in regard to the work done upon a claim and the character thereof were put in issue by the answer, the burden of the proof is on the lien claimant to show by legally sufficient evidence the accrual of the lien under the terms of the statute which creates it, as well as under the terms of the contract under which the work was done. Pioneer Mining Co. v. Delamotte, 185 F. 752 (9th Cir. 1911).

Bare statement that other projects were being completed by a construction company at the same time that a particular project's modular units were being manufactured is insufficient, under the supreme court's precedents, to raise a triable issue of fact as to whether the material furnished to the construction company was actually incorporated into the particular project. University of Alaska v. Simpson Bldg. Supply Co., Sup. Ct. Op. No. 1113 (File No. 2196), 530 P.2d 1317 (1975).

A house builder's employee cannot recover back wages directly against the home buyers under a theory that the employee was a third-party beneficiary to a contract between the builder and the buyer. State v. Osborne, Sup. Ct. Op. No. 2034 (File No. 4385), 607 P.2d 369 (1980).

Applied in Kel Weatherstrip Co. v. Rankin, 15 Alaska 204, 124 F. Supp. 555 (D. Alaska 1954).

Quoted in Irvine v. McDougal, 8 Alaska 220 (1915); Mitchell v. Beaver Dredging Co., 8 Alaska 566 (1935); Brand v. First Fed. Sav. & Loan Ass'n, Sup. Ct. Op. No. 658 (File Nos. 1119, 1154), 537 P.2d 529 (1975).

Cited in First Nat'l Bank v. Stout, 9 Alaska 400 (1938); Spalding v. Martin, 241 F. 372 (9th Cir. 1917).

Collateral references. — 53 Am. Jur. 2d, Mechanics' Liens, § 1 et seq.

"Owner" within meaning of mechanic's lien statutes. 2 ALR 794; 95 ALR 1096.

Lien for labor or material entering into rejected work. 16 ALR 981.

Right to mechanic's lien. 83 ALR 11.

Inception of lien. 83 ALR 925.

Mechanics' liens: mortg
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Mechanics' liens: mortgagee-lender's duty, in disbursing funds, to protect mortgagor against outstanding or potential mechanics' liens against the mortgaged property. 30 ALR4th 134.

Sec. 34.35.055. Land subject to lien. (a) The land upon which a building or other improvement described in AS 34.35.0[illegible] is constructed, together with a convenient space about the building or other improvement or so much as is required for the convenient use and occupation of it (to be determined by the judgment of the court at the time of the foreclosure of the lien), and the mine on which the work is performed or for which the material is furnished is also subject to the lien created by AS 34.35.050 — 34.35.120 if, at the time the work is started or the materials for the building or other improvements are first furnished, the land belongs to the person who causes the building or other improvement to be constructed, altered, or repaired.

(b) If the person owns less than a fee simple estate in the land, then only the interest of the person in it is subject to the lien.

(c) If the interest is a leasehold interest, and the holder forfeits the rights of the holder to it, the purchaser of the building or improvement and leasehold term, or so much of it as remains unexpired at a sale under AS 34.35.050 — 34.35.120 is considered to be the assignee of the leasehold term, and may pay the lessor all arrears of rent or other money and costs due under the lease.

(d) If the lessor regains possession of the land and property, or obtains judgment for the possession of it before the commencement of the construction, alteration, or repair of the building or other improvement, the purchaser may only remove the building or other improvement within 30 days after the purchase, and the owner of the land shall receive the rent due payable out of the proceeds of the sale, according to the terms of the lease, down to the time of the removal. (§ 26-1-2 ACLA 1949)

NOTES TO DECISIONS

The object of this section is to declare to what land the lien shall attend. Cascaden v. Wimbish, 161 F. 241 (9th Cir. 1908).

The legislature intended to confer the right of lien upon every laborer or mechanic whose work tends to improve lands or mines. Morris v. Marsh, 3 Alaska 140 (1906).

The purpose of extending a statutory lien to the land is because the value of the land is increased when a materialperson provides labor or material for a structure which is attached to the land. The lien should extend to the land, which is benefited by the materialperson. Dannemiller v. AMFAC Distribution Corp., Sup. Ct. Op. No. 1452 (File No. 2895), 566 P.2d 645 (1977).

Complaint is defective unless it alleges labor went to improvement. — The absence of an allegation that the labor went to the improvement of the owner's lands or mines is of itself fatal to the complaint. Morris v. Marsh, 3 Alaska 140 (1906).

And so is lien notice. —A lien notice simply to the effect that materials were

constructed or renovated by the state unless a certificate that the facility complies with adopted facility procurement has been issued. (§ 1 ch 216 SLA 1975)

Sec. 35.10.200. Definitions. In AS 35.10.160 — 35.10.200,

(1) "life cycle costs" means analytic techniques which provide data to describe the first cost of procurement of public facilities and the maintenance cost, operation cost and occupancy cost of the facilities;

(2) "policies" includes but is not limited to budget accounting and cost planning techniques, facility design techniques, and contractual techniques for the procurement of labor, materials and contractual services;

(3) Repealed by § 35 ch 168 SLA 1978. (§ 1 ch 216 SLA 1975; am § 35 ch 168 SLA 1978)

Effect of amendment. — The 1978 amendment deleted paragraph (3), which read "'public facilities' does not include highways or vessels of the marine highway system."

Chapter 15. Construction Procedures.

Sec. 35.15.010. Construction by department. (a) Except as provided in AS 44.33.300, it shall be the general policy of the department to require the construction of all public works under bid contract. 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 his designee of all transactions entered into under this section including names of employees involved in the transactions.

(b) Construction or professional services in connection with the construction of a public work performed by the department under (a) of this section which have an estimated cost exceeding $5,000 may not be performed by the department unless the commissioner determines, in writing, that the cost to the state will be less than that incurred as a result of a formally advertised or negotiated contract. The determination of the commissioner shall be supported by findings of fact which shall set out enough facts and circumstances to clearly justify the determination. The determinations and findings shall be maintained as a permanent record of the department.

(c) In this section, "professional services" means architectural, engineering, or land surveying services. (§ 1 art III title IV ch 152 SLA 1957; am § 5 ch 277 SLA 1976; am § 1 ch 143 SLA 1977; am § 4 ch 104 SLA 1978)

Cross reference. — For provisions requiring consistency with local government plans and ordinances before commencing construction of a public project, see AS 35.30.010 et seq.

Effect of amendments. — The 1976 amendment, in present subsection (a), added "Except as provided in AS 44.33.300" to the beginning of the first sentence.

The 1977 amendment, in present subsection (a), substituted "$100,000" for "$20,000" in the second sentence and added the third sentence.

The 1978 amendment added subsections (b) and (c).

Am. Jur. 2d and C.J.S. references. — 64 and 65 Am. Jur. 2d, Public Works and Contracts, §§ 105, 119, 211, 229.

72 C.J.S. Supplement, Public Contracts, § 1 et seq.

Sec. 35.15.020. Request for public bids. The department may request bids and award contracts for construction work. The department may require the contractor to furnish equipment, labor, materials, and supplies for the project, or it may elect to 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 request bids for the total of the materials and supplies for a project according to the class, type, and nature of the materials and supplies, and may award a contract upon the basis it considers efficient and economical, whether 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. (§ 3 art III title IV ch 152 SLA 1957)

ALR references. — Right of public authorities to reject all bids for public work or contract, 31 ALR2d 469.

Revocation, prior to execution of formal written contract, of vote or decision of public body awarding contract to bidder, 1 ALR3d 864.

Sec. 35.15.030. Advertisement, bids, contracts, and informal bids. When the estimated cost of any construction under this chapter exceeds $100,000, the department shall, except as provided in AS 35.15.010 and in AS 44.33.300, proceed to advertise, request bids, and award the contract in the manner provided in §§ 40 and 50 of this chapter. When any proposed construction contract is for a sum less than $100,000, it is discretionary with the department whether the contract is advertised and awarded in accordance with AS 35.15.040 and 35.15.050. In all events the department shall request informal bids from as many contractors as can be requested conveniently. A complete

record shall be kept by the commissioner or his designee of all transactions entered into under this section including names of employees involved in the transactions. (§ 4 art III title IV ch 152 SLA 1957; am § 31 ch 71 SLA 1972; am § 6 ch 277 SLA 1976; am § 2 ch 143 SLA 1977)

Effect of amendments. — The 1976 amendment inserted "and in AS 44.33.300" in the first sentence.

The 1977 amendment substituted "under this chapter exceeds $100,000" for "exceeds $20,000" in the first sentence, substituted "$100,000" for "$20,000" in the second sentence, and added the fourth sentence.

Legislative history report. — For report on ch. 71, SLA 1972 (HCSSB 383 am H), see 1972 House Journal, p. 899.

Am. Jur. 2d, ALR and C.J.S. references. — 64 Am. Jur. 2d, Public Works and Contracts, §§ 30-59.

Determination of amount involved in contract within statutory provision requiring public contracts involving sums exceeding specified amount to be let to lowest bidder, 53 ALR2d 498.

72 C.J.S. Supplement, Public Contracts, §§ 7-14, 17.

Sec. 35.15.040. Procedures for the award of contracts. (a) If federal funds are used, the award of the contract shall comply with federal law and the rules and regulations promulgated under it and with state law to the extent it is consistent with federal law.

(b) In all other cases, the award of the contract shall comply with this title, and AS 37.05, and the rules and regulations promulgated under them and which are consistent with this title. (§ 5 art III title IV ch 152 SLA 1957)

ALR references. — Validity of governmental requirement of oath of allegiance or loyalty, 18 ALR2d 302.

Construction and operation of "equal opportunities clause" requiring pledge against racial discrimination in hiring under construction contract, 44 ALR3d 1283.

Sec. 35.15.050. Award of contracts. The department shall award the contract to the lowest responsible bidder, or it may reject all bids. If no satisfactory bid is received, the department may readvertise the project. The department shall make the award in compliance with applicable federal law and the regulations promulgated under it, with this title, and in compliance with AS 37.05, and the rules and regulations promulgated under it, where they are not in conflict with this title and federal law. (§ 6 art III title IV ch 152 SLA 1957)

The purpose of this section and the Fiscal Procedures Act (AS 37.05) is not only to protect the state and the public purse from uneconomic contracts let because of failure to request competitive bids and because of possible favoritism, but also to insure that contractors are insured a certain amount of "fair play" in dealing with the state government and in competing with one another for state contracts. 1959 Op. Atty. Gen., No. 27.

The department has authority to require contractors to set up a system of prequalification of contractors as a prerequisite for bidding on state construction projects. 1959 Op. Atty. Gen., No. 27.

And under such system to require contractors to furnish periodic and financial statement. — 1959 Op. Atty. Gen., No. 27.

Without following the Administrative Procedure Act. — The department would not be required to follow the Administrative Procedure Act (AS 44.62) in adopting regulations to implement a program of prequalification of contractors. 1959 Op. Atty. Gen., No. 27.

Publication of regulations concerning bidding and letting of contracts in Administrative Code. — A policy of publishing regulations concerning bidding and letting of contracts in the Administrative Code is consistent with the Alaska Administrative Procedure Act, since these regulations are regulations in which an important portion of the public has a vital interest and since they are of great use to the portion of the public interested in dealing and contracting with the state. 1959 Op. Atty. Gen., No. 27.

Am. Jur. 2d, ALR and C.J.S. references. — 64 Am. Jur. 2d, Public Works and Contracts, §§ 63-81.

Delays caused by change in plan or specifications of a public construction contract as coming within "no damage" clause with respect to delay appearing in the contract, 10 ALR2d 810.

Differences in character or quality of materials, articles, or work as affecting acceptance of bid for public contract, 27 ALR2d 917.

Right of public authorities to reject all bids for public work or contract, 31 ALR2d 469.

Rights and remedies of bidder for a public contract who has not entered into a contract, where bid was based on his own mistake of fact or that of his employee, 52 ALR2d 792.

"Changed conditions" clause in a public works or construction contract, construction and effect of, 85 ALR2d 211.

Effect of stipulation, in public building or construction contract, that alterations or extras must be ordered in writing, 1 ALR3d 1273.

Revocation, prior to execution of formal written contract, of vote or decision of public body awarding contract to bidder, 3 ALR3d 864.

The validity and construction of "no damage" clause with respect to delay in building or construction contract, 74 ALR3d 187.

Construction contract provision excusing delay caused by "severe weather", 85 ALR3d 1085.

72 C.J.S. Supplement, Public Contracts, §§ 15-17.

Sec. 35.15.060. Prior contracts unaffected [Obsolete].

Revisor's note. — This section is obsolete. It read as follows: "Sections 10-60 of this chapter do not apply to contracts entered into before April 1, 1957."

Editor's note. — The obsolete section derived from § 8 art. III title IV ch. 152 SLA 1957.

Sec. 35.15.080. Local control of state public works projects. (a) A municipality or, if the public work is an educational facility, a regional educational attendance area established under AS 14.08 may, by resolution of its governing body, request the assumption of all of the department's responsibilities relating to the planning and construction of a public works project of the state which is to be located within the boundaries or operating area of the municipality or regional educational attendance area and which would otherwise be constructed in the manner provided in AS 35.15.010. After receipt of the request, the department

(1) shall provide for the assumption by the municipality or regional educational attendance area of all of the department's responsibilities relating to the planning, design and construction of an educational facility;

(2) may provide by agreement for transfer to and assumption by the municipality of the department's responsibilities relating to the

(3) "municipality" means a general law or home rule city or organized borough, including but not limited to a unified municipality organized under AS 29.68.240 — 29.68.440. (§ 1 ch 57 SLA 1976; am § 2 ch 62 SLA 1978)

Effect of amendment. — The 1978 amendment deleted "on behalf of the state" following "rights-of-way and easements" in paragraph (1).

Chapter 20. Acquisition and Disposition of Property.

Section
10. Acquisition of land, rights-of-way, and materials by purchase or eminent domain
20. Declaration of taking
30. Acquisition of excess lands
40. Authority to condemn or acquire publicly owned property for the purpose of exchange
50. Authority to purchase property for the purpose of exchange
60. Sale of obsolete equipment and material
70. Vacating of lands or rights in land

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, 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. (§ 1 art I title IV ch 152 SLA 1957)

Cross reference. — For provisions relating to eminent domain proceedings, see AS 09.55.240 — 09.55.460.

This section and AS 35.20.020 grant to the Department of Public Works eminent domain powers, as well as the right to employ a declaration of taking in eminent domain proceedings. Tallman v State, Sup. Ct. Op. No. 862 (File No. 1612), 506 P.2d 679 (1973).

Am. Jur. 2d and C.J.S. references. — 26 Am. Jur. 2d, Eminent Domain, § 1 et seq.

29A C.J.S., Eminent Domain, § 1 et seq

Sec. 35.20.020. Declaration of taking. A declaration of taking, in the form of an order signed by the commissioner of the department, declaring that the real property, or an interest in it, or any easement is necessary for the public use of the state is sufficient to vest title in the state. However, a declaration of taking is not effective until eminent domain proceedings have been instituted in the proper court,

Right of employee of public contractor to maintain action against latter based upon statutory obligation as to rate of wages or upon provisions in that regard in the contract between contractor and the public. 144 ALR 1035.

Validity of statute, ordinance, or charter provision requiring that workmen on public works be paid the prevailing or current rate of wages. 18 ALR3d 944.

Construction and operation of "equal opportunities clause" requiring pledge against racial discrimination in hiring under construction contract. 44 ALR3d 1283.

Sec. 36.05.010. Wage rates on public construction. A contractor or subcontractor who performs work on public construction in the state, as defined by AS 36.95.010(3), shall pay not less than the current prevailing rate of wages for work of a similar nature in the region in which the work is done. The current prevailing rate of wages for each pay period is that contained in the latest determination of prevailing rate of wages issued by the Department of Labor before the end of the pay period. (§ 14-2-1 ACLA 1949; am § 1 ch 142 SLA 1972; am § 1 ch 89 SLA 1976)

Cross references. — As to wage rates for laborers and mechanics on public contracts, see AS 36.05.070.

NOTES TO DECISIONS

City's duty to publish applicable minimum wage schedules as part of bid specifications. — See notes under heading "Duty to publish minimum wage schedules," Fowler v. City of Anchorage, Sup. Ct. Op. No. 1699 (File No. 3586), 583 P.2d 817 (1978). AS 36.05.070.

Quoted in City of Sitka v. Construction & Gen. Laborers Local 942, Sup. Ct. Op. No. 2495 (File Nos. 5774, 5811), 644 P.2d 227 (1982).

Sec. 36.05.020. Basis for determining wage. A subcontract which is performed on public construction may be reduced to a basis of day labor for the purpose of determining whether or not the subcontractor or contractors have paid at not less than the prevailing scale of wage. (§ 14-2-2 ACLA 1949)

Sec. 36.05.030. Authority. (a) The Department of Labor has the authority to determine the prevailing wage, and whether or not this chapter is being violated. The department may when necessary for the enforcement of this chapter

(1) conduct investigations and hold hearings concerning wages;

(2) compel the attendance of witnesses and the production of books, papers and documents;

(3) promulgate regulations.

(b) If a person violates this chapter the attorney general shall, when requested by the Department of Labor, enforce these provisions. (§ 14-2-3 ACLA 1949; am § 2 ch 142 SLA 1972)

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officer in the case of a political subdivision contract shall pay directly to laborers, mechanics or field surveyors from accrued payments withheld under the terms of the contract the wages due laborers, mechanics or field surveyors under AS 36.05.070.

(b) The state disbursing officer or the local fiscal officer shall distribute to all departments of the state government and to all political subdivisions of the state a list giving the names of persons who have disregarded their obligations to employees. No person appearing on this list and no firm, corporation, partnership or association in which the person has an interest may work as a contractor or subcontractor on a public construction contract for the state or a political subdivision of the state until three years after the date of publication of the list. If the accrued payments withheld under the contract are insufficient to reimburse all the laborers, mechanics, or field surveyors with respect to whom there has been a failure to pay the wages required under AS 36.05.070, the laborers, mechanics or field surveyors have the right of action or intervention or both against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in the proceedings it is not a defense that the laborers, mechanics or field surveyors accepted or agreed to accept less than the required rate of wages or voluntarily made refunds. (§ 3 ch 52 SLA 1959; am § 9 ch 142 SLA 1972)

NOTES TO DECISIONS

Quoted in City of Sitka v. Construction & Gen. Laborers Local 942, Sup. Ct. Op. No. 2495 (File Nos. 5774, 5811), 644 P.2d 227 (1982).

Sec. 36.05.100. Effect of AS 36.05.070 — 36.05.110 on other laws. AS 36.05.070 — 36.05.110 do not supersede or impair authority granted by state law to provide for the establishment of specific wage rates. (§ 4 ch 52 SLA 1959; am § 10 ch 142 SLA 1972)

Sec. 36.05.110. Contracts entered into without advertising. The fact that a public contract authorized by law is entered into upon a cost-plus-a-fixed-fee basis or otherwise, without advertising for proposals, does not make AS 36.05.070 — 36.05.110 inapplicable if they are otherwise applicable to the contract. (§ 5 ch 52 SLA 1959)

Sec. 36.05.120. Regulations governing contractors.

Repealed by § 17 ch 142 SLA 1972.

Editor's notes. — The repealed section derived from § 6, ch. 52, SLA 1959.

Chapter 10. Employment Preference.

Chapter 25. Contractors' Bonds.

NOTES TO DECISIONS

This chapter is modeled after the federal Miller Act. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op. No. 1583 (File No. 2816), 575 P.2d 1213 (1978).

Collateral references. — 17 Am. Jur. 2d, Contractors' Bonds, §§ 43-138; 64 Am. Jur. 2d, Public Works and Contracts, §§ 105-136.

72 C.J.S. Supplement, Public Contracts, §§ 41-61; 81A C.J.S., States, §§ 172-193.

Right of contractor with federal, state, or local public body to latter's immunity from tort liability. 9 ALR3d 382.

Sec. 36.25.010. Bonds of contractors for public buildings or works. (a) Except as provided in AS 44.33.300, before a contract exceeding $100,000 for the construction, alteration, or repair of a public building or public work of the state or a political subdivision of the state is awarded to a general or specialty contractor, the contractor shall furnish to the state or a political subdivision of the state the following bonds, which become binding upon the award of the contract to that contractor:

(1) a performance bond with a corporate surety qualified to do business in the state, or at least two individual sureties who shall each justify in a sum equal to the amount of the bond; the amount of the performance bond shall be equivalent to the amount of the payment bond;

(2) a payment bond with a corporate surety qualified to do business in the state, or at least two individual sureties who shall each justify in a sum equal to the amount of the bond for the protection of all persons who supply labor and material in the prosecution of the work provided for in the contract; when the total amount payable by the terms of the contract is not more than $1,000,000, the payment bond shall be in a sum of one-half the total amount payable by the terms of the contract; when the total amount payable by the terms of the contract is more than $1,000,000 and not more than $5,000,000, the payment bond shall be in a sum of 40 percent of the total amount payable by the terms of the contract; when the total amount payable by the terms of the contract is more than $5,000,000, the payment bond shall be in the sum of $2,500,000.

(b) This section does not limit the authority of a contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in (a) of this section.

(c) When no payment bond has been furnished, the contracting department shall not approve final payments to the contractor until the contractor files a written certification that all persons who supplied labor or material in the prosecution of the work provided for in the contract have been paid. (§ 1 ch 49 SLA 1953; am § 1 ch 77 SLA 1964; am § 14 ch 142 SLA 1972; am §§ 1, 2 ch 180 SLA 1976; am § 8 ch 277 SLA 1976; am 34 ch 108 SLA 1982)

Revisor's notes. — Subsection (a)(2) of this section has the figure of $2,500,000 as in the enrolled bill. The 1953 session laws incorrectly carried the figure as $2,800,000.

Effect of amendments. — The 1982 amendment substituted "$100,000" for "$50,000" near the beginning of the introductory paragraph of subsection (a).

NOTES TO DECISIONS

Purpose. — The purpose of this section and AS 36.25.020 is to protect persons who furnish labor or material for a state public works project from the risks of nonpayment. In exchange for providing such protection, the state is assured that material and labor will be readily furnished for its projects. State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).

Like its federal counterpart, Alaska's statute is designed to protect persons who furnish labor or material for a state public works project from the risks of nonpayment. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op. No. 1583 (File No. 2816), 575 P.2d 1213 (1978).

Weight given to federal case law interpreting federal act. — In resolving disputes brought under this section, the supreme court will give more weight to principles derived from federal case law interpreting the Miller Act than to general common-law principles governing debtor-creditor relations. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op. No. 1583 (File No. 2816), 575 P.2d 1213 (1978).

Rights of persons furnishing labor or material. — See notes under AS 36.25.020.

Bonds required. — A payment bond as well as a performance bond is required for public contracts by this section. State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).

Presumption. — Since under this section the awarding of the contract, and necessarily the making of payments under the contract, is conditioned upon the furnishing of a payment and performance bond, it may be concluded from the fact that payments were made under the contract that the required bond had been furnished the state. Such a conclusion is based upon the presumption that official duty has been regularly performed and that state officials would not have awarded the contract and made progress payments had the required bond not been filed. United Bonding Ins. Co. v. Castle, Sup. Ct. Op. No. 497 (File No. 876), 444 P.2d 454 (1968).

State duty to investigate validity of bonds. — The State of Alaska has the duty to investigate the validity of payment and performance bonds on state construction projects. Arctic Contractors v. State, Sup. Ct. Op. No. 1420 (File Nos. 2595, 2657), 564 P.2d 30 (1977).

For cases arising after 1972, there is no doubt about who has the duty to check the validity of public construction contract bonds, since in 1972 AS 36.05.035 was enacted, placing the burden of verifying such bonds on the state or its political subdivision. Arctic Contractors v. State, Sup. Ct. Op. No. 1420 (File Nos. 2595, 2657), 564 P.2d 30 (1977).

Although absent from this section, the burden on the contracting officer to determine the vitality of the surety can be read into the language "the contractor shall furnish to the state . . . a performance bond with a corporate surety qualified to do

business in the state..." Arctic Contractors v. State, Sup. Ct. Op. No. 1420 (File Nos. 2595, 2657), 564 P.2d 30 (1977).

Construction contractors have a continuing obligation to provide the required bonds even if the state does not discover defects in the bonds until after their acceptance. Arctic Contractors v. State, Sup. Ct. Op. No. 1420 (File Nos. 2595, 2657), 564 P.2d 30 (1977).

Burden of proof as to agency. — The purpose of this section and AS 36.25.020 is best served by placing the burden of proof as to agency on the insurance company, particularly in light of the insurance company's far superior access to the facts surrounding the agency. State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).

Subrogation right of surety. — A surety who completes a contract or satisfies the claims of laborers and materialmen has established a subrogation right to all funds, progress payments, or retained percentages which are in the hands of the contractee. Reliance Ins. Co. v. Alaska State Hous. Auth., 323 F. Supp. 1370 (D. Alas. 1971).

Subrogation right of surety. — A surety who completes a contract or who satisfies the claims of laborers and materialmen has a superior equitable interest over one who made a loan to the contractor of monies which did not have to be applied to the construction contract. The surety, in such cases, has established a subrogation right to those funds retained by the obligee containing retained percentages. Reliance Ins. Co. v. Alaska State Hous. Auth., 323 F. Supp. 1370 (D. Alas. 1971).

The contractor or principal of the surety agreement cannot give an assignee a greater right in a retained percentage than that given the surety so long as the surety performs under the agreement. Reliance Ins. Co. v. Alaska State Hous. Auth., 323 F. Supp. 1370 (D. Alas. 1971).

Where the surety had assumed and completed the principal's contract and claimed monies due and payable to the contractor in the way of a progress payment at the time of default, and the assignee of the contractor had also made claim to the progress payment, the surety's claim to the progress payments was granted. Reliance Ins. Co. v. Alaska State Hous. Auth., 323 F. Supp. 1370 (D. Alas. 1971).

Debtor's power to designate account to which his payment should be applied. — A debtor, who is under a duty to a third person to apply funds he tenders to his creditor to a particular account, has the power to so designate that account as the one to which payment should be applied. The creditor is under a correlative duty to apply the money as directed by his debtor, even though he does not consent to the debtor's wishes. This principle does not depend upon misconduct or fraud. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op. No. 1583 (File No. 2816), 575 P.2d 1213 (1978).

Creditor's duty to apply payment to certain account. — Where there is sufficient evidence that a creditor knew or at least had reason to know that money received from a debtor came from a third party for application to a particular job account, the creditor was under a duty to apply the payment to such account. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op. No. 1583 (File No. 2816), 575 P.2d 1213 (1978).

Cases interpreting the Miller Act hold that when a creditor knows, or has reason to know, that the money paid to him is received from a particular bonded project, it is the creditor's duty to apply the payment received against the account for that project. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op. No. 1583 (File No. 2816), 575 P.2d 1213 (1978).

State did not waive right to require replacement bonds. — State did not waive its right to require and was not estopped from requiring the contractor on a 1962 construction project to obtain new bonds as replacements for bonds found defective after they had been accepted by the state and after the contractor had commenced work. Arctic Contractors v. State, Sup. Ct. Op. No. 1420 (File Nos. 2595, 2657), 564 P.2d 30 (1977).

Collateral references. — What is "accident" within provision of bond or contract indemnifying against damage or injury to person or property by accident in performance of building or construction contract. 12 ALR 1409.

Validity of condition in bond of contractor for public work which is beyond requirements of statute or ordinance with respect to claims of third persons. 18 ALR 1227.

Recovery of premiums paid on bond of contractor for public improvement not legally authorized. 42 ALR 307.

Rental of equipment as within contractor's bond. 44 ALR 381.

Contractor's bond as covering clothing, food, or lodging for laborers. 46 ALR 511, 65 ALR 260.

Effect of affirmative provision in public contractor's bond excluding statutory conditions. 47 ALR 502; 89 ALR 457.

Contractor's bond, and claims for injuries to person or property. 67 ALR 990.

Claims for repairs or replacements of machinery, tools, and equipment as within contractor's bond. 67 ALR 1232.

Availability in action by third person for damages against public contractor, of provisions in contract as to care to be exercised or precautions to be taken for protection of third persons. 69 ALR 522.

Effect of payment to subcontractors or materialmen by owner or contractor, or by sureties on contractor's bond, within four months of principal contractor's bankruptcy, as a voidable preference. 70 ALR 983.

Construction of paving contract or contractor's bond in respect of the contractor's obligation as to repairs. 72 ALR 644.

Right as between surety on contractor's bond and assignee of money to become due on contract. 76 ALR 917.

Effect of recitals or provisions of bond to secure performance of contract as an interpretation of the terms of the contract. 76 ALR 941.

Construction and effect of provision in bond purporting to protect contractee in building contract against release of surety. 77 ALR 229.

Claim for medical or hospital services to employees as within coverage of contractor's bond. 81 ALR 1051.

Statutory conditions prescribed for public contractor's bond as part of bond which does not in terms include them. 89 ALR 446.

Necessity of giving obligee notice of claim or action or making it a party to action by laborer, materialman or subcontractor upon bond of contractor for public work. 96 ALR 1185.

What constitutes "public work" within statute relating to contractor's bond. 101 ALR 565.

Workmen's compensation insurance premiums as within coverage of contractor's bond. 102 ALR 135; 164 ALR 1468.

Loss of profit of subcontractor, laborer, or materialman as within coverage of contractor's bond. 119 ALR 1281.

Money loaned or advanced to contractor as within coverage of bond of building or construction contractor. 127 ALR 974; 164 ALR 782.

Contractor's bond as covering insurance premiums other than workmen's compensation insurance. 129 ALR 1087.

Who is contractor or subcontractor, as distinguished from materialman, for purposes of mechanic's lien, contractor's bond, or other provision or securing compensation under construction contract. 141 ALR 321.

Bond of contractor for eradication or control of termites or other pests or vermin. 43 ALR2d 1237.

Liability on bid bond for public works. 70 ALR2d 1370.

Responsibility of construction contractor or his bond to contractee for defects or insufficiency of work attributable to plans and specifications furnished by latter, his engineer or architect. 6 ALR3d 1394.

Construction of attorneys' fees provision in contractor's bond. 8 ALR3d 1438.

Building contractor's liability, upon bond or other agreement to indemnify owner, for injury to death of third persons resulting from owner's negligence. 27 ALR3d 663.

Liability of builder or subcontractor for insufficiency of building resulting from latent defects in materials used. 61 ALR3d 792.

Liability of subcontractor upon bond or other agreement indemnifying general contractor against liability for damage to person or property. 68 ALR3d 7.

Validity and construction of "no damage" clause with respect to delay in building or construction contract. 74 ALR3d 187.

Construction contract provision excusing delay caused by "severe weather". 85 ALR3d 1085.

Sec. 36.25.020. Rights of persons furnishing labor or material. (a) A person who furnishes labor or material in the prosecution of the work provided for in the contract for which a payment bond is furnished under AS 36.25.010 and who is not paid in full before the expiration of 90 days after the last day on which the labor is performed or material is furnished for which the claim is made, may sue on the payment bond for the amount unpaid at the time of the suit.

Chapter 95. General Provisions.

Section
10. Definitions

Sec. 36.95.010. Definitions. In this title unless the context requires otherwise.

(1) "contractor" means the contractor including subcontractors performing work necessary to facilitate public construction;

(2) "laborer, mechanic, or field surveyor" means a person who engages in work which is basically physical or unskilled in nature; or who engages in work, requiring the use of tools or machines, which basically consists of the shaping and working of materials into some type of structure, machine or other object; or who engages in outdoor tasks related to the operation of findings and delineating contour, dimensions, position, topography, as of any part of the earth's surface, by preparation of measured plan or description of any area or other portion of country or of road or line through any area or other portion of country;

(3) "public construction" or "public works" means the on-site field surveying, erection, rehabilitation, alteration, extension or repair, including painting or redecorating of buildings, highways or other improvements to real property under contract for the state, a political subdivision of the state, or a regional school board with respect to an educational facility under AS 14.08.161;

(4) "qualified" means a person who, except for apprentices, is a journeyman mechanic in that person's particular trade;

(5) "resident" means a person who maintains a domicile in the state; domicile is the true and permanent home of a person from which that person has no present intention of removing and to which that person intends to return whenever away from that home;

(6) "state or a political subdivision of the state" means any state department, state agency, state university, borough, city, village, school district or other state subdivision;

(7) "wages" includes fringe benefits;

(8) "retainage" means money withheld from a contractor until completion of a contract or satisfaction of other contingency as evidenced by approval of the applicable pay estimate. (§ 16 ch 142 SLA 1972; am § 3 ch 89 SLA 1976; am § 16 ch 14 SLA 1978; am § 2 ch 85 SLA 1982)

Effect of amendments. — The 1978 amendment, in paragraph (3) deleted "or" following "for the state" and added "or a regional school board with respect to an educational facility under AS 14.08.161" to the end.

The 1982 amendment, effective July 1, 1982, substituted "this title" for "AS 36.05 — 36.25" in the introductory language and added the definition of "retainage" in paragraph (8).

Editor's notes. — Section 3, ch. 85, SLA 1982, provides that the 1982 amendment to this section applies to contracts entered into after the effective date of this act [July 1, 1982].

This section was redrafted by the revisor of statutes to remove personal pronouns in conformity with AS 01.05.031(c) and § 4, Chapter 58, SLA 1982.

AS 14.08.161 referred to in (3) of this section was repealed by § 10, ch. 92, SLA 1982.

Opinions of attorney general. — Alaska State Housing Authority is a state agency within the definition of AS 36.95.010(6). May 28, 1974, Op. Att'y Gen.

NOTES TO DECISIONS

Applied in Hicklin v. Orbeck, Sup. Ct. Op. No. 1435 (File No. 3025), 565 P.2d 159 (1977), rev'd, 437 U.S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978).

Quoted in City of Sitka v. Construction & Gen. Laborers Local 942, Sup. Ct. Op. No. 2495 (File Nos. 5774, 5811), 644 P.2d 227 (1982).

Collateral references. — 64 Am. Jur. 2d, Public Works and Contracts, §§ 1-238.

65 Am. Jur. 2d, Public Works and Contracts, §§ 1-238.

72 C.J.S. Supplement, Public Contracts, §§ 1-61.

Differences in character or quality of materials, articles, or work as affecting acceptance of bid for public contract. 27 ALR2d 917.

Right of public authorities to reject all bids for public work or contract. 31 ALR2d 469.

Determination of amount involved in contract within statutory provision requiring public contracts involving sums exceeding specified amount to be let to lowest bidder. 53 ALR2d 498.

Amount of compensation of attorney for services as to public contract, in absence of contract or statute fixing amount. 56 ALR2d 195.

"Changed conditions" clause in a public works or construction contract, construction and effect of. 85 ALR2d 211.

Effect of stipulation, in public building or construction contract, that alterations or extras must be ordered in writing. 1 ALR3d 1273.

Revocation, prior to execution of formal written contract, of vote or decision of public body awarding contract to bidder. 3 ALR3d 864.

Right of contractor with federal, state, or local public body to latter's immunity from tort liability. 9 ALR3d 382.

Contract for personal services as within requirement of submission of bids as condition of public contract. 15 ALR3d 733.

Requirement that public contract be awarded on competitive bidding as applicable to contract for public utility. 81 ALR3d 979.

Duty of public authority to disclose to contractor information, allegedly in its possession, affecting cost or feasibility of project. 86 ALR3d 182.

Right of bidder for state or municipal contract to rescind bid on ground that bid was based upon his own mistake or that of his employee. 2 ALR4th 991.

Chapter 98. Professional Services Contracts.

Section

10. Application of chapter
20. Professional services contractors register
30. Solicitation of proposals
35. Standard overhead rate
40. Evaluation of proposals and award of contract
45. Review and approval by Department of Law
50. Contract administration
60. Filing of proposal and contract
70. Regulations governing contract procedures
80. Definitions

Collateral references. — 39 Am. Jur. 2d, Highways, Streets, and Bridges, § 1 et seq.
39A C.J.S., Highways, § 1 et seq.

Sec. 44.42.010. Commissioner of transportation and public facilities. The principal executive officer of the Department of Transportation and Public Facilities is the commissioner of transportation and public facilities. (E.O. No. 39, § 2 (1977))

Sec. 44.42.020 Powers and duties. (a) The department shall

(1) plan, design, construct and maintain all state modes of transportation and transportation facilities and all docks, floats, breakwaters, buildings and similar facilities;

(2) study existing transportation modes and facilities in the state to determine how they might be improved or whether they should continue to be maintained;

(3) study alternative means of improving transportation in the state with regard to the economic costs of each alternative and its environmental and social effects;

(4) develop a comprehensive, long-range intermodal transportation plan for the state;

(5) study alternatives to existing modes of transportation in urban areas and develop plans to improve urban transportation;

(6) cooperate and coordinate with and enter into agreements with federal, state and local government agencies and private organizations and persons in exercising its powers and duties;

(7) manage, operate, and maintain state transportation facilities and all docks, floats, breakwaters and buildings, including all state highways, vessels, railroads, pipelines, airports, and aviation facilities;

(8) study alternative means of transportation in the state, considering the economic, social, and environmental impacts of each alternative;

(9) coordinate and develop state and regional transportation systems, considering deletions, additions, and the absence of alternatives;

(10) develop facility program plans for transportation and state buildings, docks and breakwaters required to implement the duties set out in this section, including but not limited to (A) functional performance criteria; and (B) schedules for completion;

(11) supervise and maintain all state automotive and mechanical equipment, aircraft, and vessels, except vessels and aircraft used by the Department of Fish and Game or the Department of Public Safety;

(12) supervise aeronautics inside the state, under AS 02.10;

(13) complete and maintain a current inventory of public facilities, including a projection of the serviceability of the facilities and projections of replacements and additions to facilities needed to provide the level of services programmed by the various user agencies, for municipalities with populations of less than 12,000 and for unincorporated communities, and perform those duties on a cooperative basis with larger municipalities;

(14) adopt energy performance standards for public facilities of the state, the construction of which begins after July 1, 1980; the standards shall be based on thermal and lighting energy standards established by the American Society of Heating, Refrigeration and Air Conditioning Engineers as adapted for application in high latitude, cold climate environs;

(15) provide planning assistance, including but not limited to energy audits and related technical services, to school districts and regional educational attendance areas to develop and implement

(A) standards for the design, construction and operation of rural educational facilities; and

(B) energy conservation measures for rural educational facilities.

(b) The department may

(1) engage in experimental projects relating to available or future modes of transportation and any means of improving existing transportation facilities and service;

(2) exercise the power of eminent domain, including the declaration of taking as provided in AS 09.55. (E.O. No. 39, § 2 (1977); am § 13 ch 168 SLA 1978; am § 12 ch 83 SLA 1980; am E.O. No. 50, § 10 (1981))

Cross references. — For the responsibility and authority of the supreme court over state court facilities, see AS 22.05.025.

Effect of amendments. — The 1980 amendment added paragraphs (14) and (15) to subsection (a).

The 1981 amendment, in subsection (a), deleted "communication facilities" following "transportation facilities" in paragraph (1), deleted "and communication facilities" following "modes and facilities" in paragraph (2), deleted "and communication" following "improving transportation" in paragraph (3), deleted "communication facilities" following "transportation facilities" in paragraph (7), deleted "and communication facilities" following "plans for transportation" in paragraph (10), deleted "and" at the end of paragraph (11), deleted "and communications" following "aeronautics" and substituted a semicolon for a period near the end of paragraphs (12) and (13). The amendment also deleted "and communication" following "facilities and service" in paragraph (1) of subsection (b).

Sec. 44.42.030. Regulations. The department may adopt regulations under the Administrative Procedure Act (AS 44.62) to implement, interpret, or make more specific its powers and duties. (E.O. No. 39, § 2 (1977))

Sec. 44.42.040. Departmental organization. The commissioner shall establish regions within the state. The functions of the department within each region shall be performed, to the maximum extent