

48

45

HOUSE COMMITTEE REPORT

(11)

Date referred: 3/4/87

FURTHER REFERRALS:

DATE: 3/8/88
HB 45

The Finance Committee has considered

"An Act relating to an Alaska business bidder preference; and providing for an effective date."

RECOMMENDS:

- replace with CS HB 45 (Fin) the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published _____
- zero with analysis

SIGNING DO PASS:

[Signature]
 POLURCHOT
[Signature]
 LARSON
[Signature]
 SWALEC-HAMMER
[Signature]
 BROWN
[Signature]
 FRANK

SIGNING OTHER RECOMMENDATIONS:

[Signature] ADAMS Al Adams - No Rec
[Signature] RIEGER Steve Rieger -- Effective Date Must Need Amend'ment
[Signature] GULL Steve Gull OK
[Signature] BOYER Mark Boyer - Question tying effective date to
[Signature] WALLIS Kay Wallis' proposal of constitutional amend.
[Signature]
[Signature]
[Signature] DAVIS Mike Davis

[Signature]
Chairman's signature

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Department of Administration
 Title: An Act Relating To The Alaska Bidder Preference BRU: General Services & Supply
 Sponsor: Donley and Grussendorf Components: Purchasing
 Requestor: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

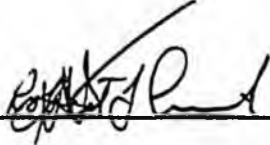
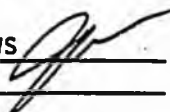
GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

(See Attached)

Prepared By: Robert J. Link, Director  Phone: 465-2250
 Division: General Services & Supply Date: 1-28-88
 Approved by Commissioner: John M. Andrews  Date: 1-28-88
 Agency: Department of Administration

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

ANALYSIS OF
HB 45 FISCAL NOTE

HB 45 has been reviewed to determine the fiscal impact in two areas. These areas are as follows:

A. Cost of conducting the procurement activity: HB 45 has negligible impact on the cost of conducting the procurement activity for the Department of Administration or any other Department's procurement offices. The current bidders preference requires a level of administrative activity that would be only minimally increased by the redefinition of the bidders preference in HB 45.

B. Increased or decreased cost of the actual items purchased: HB 45 would have some impact on the cost of the actual items purchased. The express purpose of the bill is to allow state agencies to lower prices submitted by in-state vendors by a fixed percentage when these prices are compared with out-of-state vendors during the bid evaluation process. If the lowering of the in-state bidders price allows the in-state vendors to win the bid, the state agency then awards the bid to the in-state bidder but pays the vendor at his higher original bid price. So the impact of HB 45 is such that the state would end up paying a "premium" on a per unit cost over what the state would have paid for an item without HB 45 in some cases. But the instance of this occurring is only when the lowering of evaluation prices actually impacts the outcome of the award. In some cases, the Alaska vendor would win with or without the preference.

Calculating the "increase" cost in this area is difficult at best. The response of most agencies to this "increase" would be to simply buy less of the product, because the "per unit" cost will increase. In a few cases, the increased cost would prevent the agency from awarding if costs exceed available budgeted funds. If this problem arises, the agency will have to revise their specifications or descriptions of the goods they desire to purchase.

The Department of Administration feels that the percentages allowed in HB 45, while larger than current law, are still low enough to avoid additional appropriations to each Department's budget. Only practice under HB 45 would provide us with the data to substantiate a claim that HB 45 would require additional appropriations.

During FY 87, General Services used a 5% bidders preference applied to all purchases irrespective of their size. During this period (7/1/86 to 6/30/87), 1301 contracts were issued--1081 contracts to Alaska vendors and 220 contracts to out-of-state vendors. Very few of the contracts issued

to Alaska vendors were the result of applying the 5% bidders preference. Alaska vendors for the most part won those contracts based upon their original bid price and consequently the 5% bidders preference did not materially affect the price paid for the goods. In the few cases where the Alaska Bidders Preference materially affected who actually won the award, the total price difference between what the state would have paid to out-of-state vendors if they had won versus what the state paid to in-state vendors was \$17,914.30.

In the attached analysis, we have applied the HB45 preference to the 220 contracts awarded to out-of-state vendors in FY 87. If the HB45 preferences had been in place, 48 of these 220 contracts would have gone to in-state vendors rather than out-of-state vendors. These contracts were worth \$793,500 to out-of-state vendors and would have been worth \$850,000 to in-state vendors. The state would have paid a premium of \$56,500 to move these contracts in-state.

ANALYSIS OF FY 87 BIDS FOR GOODS ISSUED BY GENERAL SERVICES
 (EXCLUDING CONSTRUCTION CONTRACTS AND PROFESSIONAL SERVICES CONTRACTS)

<u>OUT OF STATE BIDS BY DOLLAR BRACKET</u>						
<u># BIDS IN RANGE</u> <u>\$0-\$25K</u>	<u># BIDS IN RANGE</u> <u>\$25K-50K</u>	<u># BIDS IN RANGE</u> <u>\$100-500K</u>	<u># BIDS IN RANGE</u> <u>OVER 500K</u>	<u>TOTAL</u>	<u>%</u>	<u>"MATERIAL EFFECT"</u>
43	3	2	0	48	22%	48 OF 220 BIDS WOULD SHIFT FROM OUT OF STATE TO INSTATE BIDDERS.
25	10	2	0	37	17%	37 OF 220 BIDS WOULD REMAIN OUT OF STATE.
102	23	10	0	135	61%	135 OF 220 BIDS--THERE WERE <u>NO ALASKA BIDDERS</u>
<u>170</u>	<u>36</u>	<u>14</u>	<u>0</u>	<u>220</u>	<u>100%</u>	<u>TOTAL BIDS</u>

<u>DOLLAR AMOUNT OF BIDS (000) BY DOLLAR BRACKET</u>						
<u>BID RANGE</u> <u>\$0-\$25K</u>	<u>BID RANGE</u> <u>\$25K-50K</u>	<u>BID RANGE</u> <u>\$100-500K</u>	<u>BID RANGE</u> <u>OVER 500</u>	<u>TOTAL</u>	<u>%</u>	<u>"MATERIAL EFFECT"</u>
\$268.3	\$125.4	\$399.7	0	\$793.5	14%	\$793.5 WOULD SHIFT FROM OUT OF STATE TO INSTATE BIDDERS <u>THE AMT PAID WOULD BE 850.0 OR AN INCREASE OF \$56.5</u>
\$213.7	\$491.3	\$250.7	0	\$955.7	17%	\$955.7 OF 5637.5 WOULD REMAIN OUT OF STATE
\$755.4	\$919.8	\$2213.1	0	\$3888.3	69%	\$3888.3 OF 5637.5 NO ALASKA BIDDERS
<u>\$1237.4</u>	<u>\$1536.5</u>	<u>\$2863.5</u>	<u>0</u>	<u>\$5637.5</u>	<u>100%</u>	<u>TOTAL DOLLARS</u>

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 45 (Finance)

PUBLISH DATE:

REQUEST:

FISCAL NOTE

Revision Date:
Title: An Act Relating to an Alaska Business
Bidder Preference
Sponsor: Donley & Gruessendorf
Requestor: Adams

Agency Affected: DOT&PF
BRU: Engineering & Operations Stds.
Design & Construction Stds
Components:

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	2.0	0	0	0	0
CONTRACTURAL	0	3.0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	5.0	0	0	0	0

CAPITAL	0	50.0	50.0	50.0	50.0	50.0
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REVENUE	0	0	0	0	0	0
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FUNDING: (THOUSANDS OF DOLLARS)

GENERAL FUND	0	55.0	50.0	50.0	50.0	50.0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	55.0	50.0	50.0	50.0	50.0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Loren L. Rasmussen
Division: Engineering & Operations Standards
Approved by Commissioner: Mark S. Hickey
Agency: Department of Transportation and Public Facilities

Phone: 465-2960

Date: 3-7-88

Date: 3-7-88

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

House Bill No. 45

An Act Relating to an Alaska Business Bidder Preference

The bill was analyzed considering only State funded projects administered directly by DOT&PF. The preference could not be applied to any Federally assisted projects.

This analysis was based on contracts awarded during the 1987 calendar year (approximately \$17,000,000). Based on 1987 bid results, approximately 10% of the contracts could be non-residents. The additional cost (i.e. fiscal impact) would be as follows.:

Contract Range	Total contracts	Assume 10% Awards	Additional Costs
1 to 100,000	495,079	49,508 @ 10%	4,951
100,000 to 500,000	3,694,612	369,461 @ 5%	18,473
500,000 to 10,000,000	13,503,237	1,350,324 @ 2%	27,006
10,000,000	0	@ 1%	<u>0</u>
			50,430

Assuming State funded CIP is in the same level as last year the impact would be approximately \$50,000. This is the figures used in the fiscal note.

There would be some additional administrative cost associated with the preference. These include updating the Alaska Administrative Code, DOT&PF procedures and the impact on individual bid openings in determining the low bidder. For appropriate public input it is assumed that two public hearings will be required. The estimated total cost is \$5,000 and would be a one time only cost. The estimated cost of each hearing is \$1,000 for travel and \$500 for advertising, printing, etc. In addition \$2,000 is estimated for review by the Attorney General's Office.

The above analysis was based on the DOT&PF's very low volume year for construction. If there was a substantial increase in future years, this would obviously impact the costs.

For example, if the awards were \$50,000,000 annually and the range of out of state bidders was from 2% to 10%, the costs could vary from \$28,000 to \$140,000, as the following analysis shows:

\$50,000,000 in Contracts
10% Out of State Contractors

Contract Range	Total Contracts	Assume 10% Award	Additional Costs
1 to 100,000~(5%)(50,000,000)	= 2,500,000	250,000 @ 10%	25,000
100,000 to 500,000~(20%)(50,000,000)	=10,000,000	1,000,000 @ 5%	50,000
500,000 to 10,000,000~(55%)(50,000,000)	=27,500,000	2,750,000 @ 2%	55,000
10,000,000 + ~ (20%)(50,000,000)	=10,000,000	1,000,000 @ 1%	<u>10,000</u>
			\$140,000

\$50,000,000 In Contracts
2 % Out of State Contractors

Contract Range	Total Contracts	Assume 10% Award	Additional Costs
1 to 100,000~(5%)(50,000,000)	= 2,500,000	50,000 @ 10%	5,000
100,000 to 500,000~(20%)(50,000,000)	=10,000,000	200,000 @ 5%	10,000
500,000 to 10,000,000~(55%)(50,000,000)	=27,000,000	555,000 @ 2%	11,000
10,000,000 + ~(20%)(50,000,000)	=10,000,000	200,000 @ 1%	<u>2,000</u>
			\$28,000

Original sponsors: Donley, Grussendorf,
Gruenberg, et al.

1 IN THE HOUSE

BY THE FINANCE COMMITTEE

2 CS FOR HOUSE BILL NO. 45 (Finance)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to an Alaska business bidder prefer-
7 ence, an Alaska products preference, and to procure-
8 ment involving state money; and providing for an
9 effective date."

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

11 * Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that due
12 to the state's noncontiguous geographic location and unique climate, busi-
13 ness dealings with non-Alaskan firms produce administrative expenses not
14 commonly incurred in business dealings with resident businesses.

15 (b) The purpose of the Alaska business bidder preference when the
16 state acts as a market participant is to reduce state administrative costs,
17 strengthen the state's tax and revenue base, encourage local industry,
18 reduce the social ills created by unemployment and a depressed economy, and
19 to strengthen and stabilize the state's economy.

20 * Sec. 2. AS 36.15.050(e) is amended to read:

21 (e) An interested party [, AS DEFINED IN AS 36.30.699,] may seek
22 administrative or judicial review of the award of a contract in viola-
23 tion of this section and may recover damages and seek other remedies
24 provided by law for the violation of this section.

25 * Sec. 3. AS 36.15.050(g) is amended to read:

26 (g) In this section,

27 (1) "agricultural products" includes, but is not limited
28 to, dairy products, timber and lumber harvested in the state and
29 products manufactured in the state from timber and lumber that has

1 been harvested in the state;

2 (2) "interested party" has the meaning given in AS 36.30.-
3 699;

4 (3) "state money" includes state grants and reimbursement
5 to municipalities, [AND] school districts, and other entities for
6 school or related construction, foundation funding for education,
7 municipal assistance, revenue sharing, and state funds for capital
8 projects.

9 * Sec. 4. AS 36.30.170(b) is repealed and reenacted to read:

10 (b) The procurement officer shall award a contract based on
11 solicited bids to the lowest responsible and responsive Alaska bidder
12 if the bid, after receiving a preference applicable to the bid under
13 AS 36.30.322 - 36.30.338, is not more than

14 (1) one percent higher than the lowest nonresident bidder's
15 and the contract is \$10,000,000 or more;

16 (2) two percent higher than the lowest nonresident bidder's
17 and the contract is more than \$500,000 and less than \$10,000,000;

18 (3) five percent higher than the lowest nonresident bid-
19 der's and the contract is more than \$100,000 and \$500,000 or less; or

20 (4) 10 percent higher than the lowest nonresident bidder's
21 and the contract is \$100,000 or less.

22 * Sec. 5. AS 36.30.170(c) is amended to read:

23 (c) Notwithstanding (b) of this section, if [IF] a bidder qual-
24 ifies under (e) [(b)] of this section as an Alaska bidder, is offering
25 services through an employment program as defined under AS 36.30.-
26 100(c), and is the lowest responsible and responsive bidder with a bid
27 that is not more than 10 percent higher than the lowest bid of a
28 nonresident, the procurement officer shall award the contract to that
29 bidder.

1 * Sec. 6. AS 36.30.170 is amended by adding a new subsection to read:

2 (e) In this section, "Alaska bidder" means a person who

3 (1) holds a current Alaska business license;

4 (2) does more than \$1,000,000 worth of annual business in
5 the state or performs more than 50 percent of the person's annual
6 business in the state, whichever is less;

7 (3) has maintained a permanent place of business in the
8 state staffed by the bidder or an employee of the bidder for a period
9 of six months immediately preceding the date of the bid;

10 (4) submits a bid for goods or services under the name that
11 appears on the person's current Alaska business license;

12 (5) is incorporated or qualified to do business under the
13 laws of the state, is a sole proprietorship and the proprietor is a
14 resident of the state, or is a partnership and all partners are resi-
15 dents of the state;

16 (6) if a joint venture, is composed entirely of persons who
17 qualify under (1) - (5) of this subsection; and

18 (7) is an Alaska domestic insurer, if the contract is
19 insurance-related and the procurement is based on solicited bids.

20 * Sec. 7. AS 36.30.250(b) is amended to read:

21 (b) In determining whether a proposal is advantageous to the
22 state, the procurement officer shall take into account, in accordance
23 with regulations of the commissioner, whether the offeror qualifies as
24 an Alaska bidder under AS 36.30.170(e) [AS 36.30.170(b)] or is offer-
25 ing the services of an employment program as defined in AS 36.30.-
26 100(c).

27 * Sec. 8. AS 36.30.850(e) is amended to read:

28 (e) AS 36.30.170 and 36.30.322 - 36.30.338 apply [APPLIES] to
29 all [INSURANCE] contracts involving state money, including state

1 grants and reimbursement to municipalities, school districts, and
2 other entities for school or related construction, foundation funding
3 for education, municipal assistance, revenue sharing, and state funds
4 for capital projects.

5 * Sec. 9. AS 36.30 is amended by adding a new section to read:

6 Sec. 36.30.895. COMBINATION OF PREFERENCES. In the evaluation
7 of a bid or proposal, if a contractor qualifies as an Alaska bidder
8 under AS 36.30.170(e) and is also entitled to an Alaska products
9 preference under AS 36.30.328 for a contract, the procurement officer
10 shall decrease the bid or proposal price by the total of the two
11 applicable percentages.

12 * Sec. 10. AS 36.30.900 is amended to read:

13 Sec. 36.30.900. PREFERENCE FOR ALASKA PRODUCTS. This chapter
14 does not modify AS 36.15.010 and 36.15.020 regarding preference for
15 Alaska forest products, or AS 36.15.050 and 36.15.060, regarding
16 preference for Alaska agricultural and fisheries products [, EXCEPT AS
17 PROVIDED IN AS 36.30.170(b) AND (c)].

18 * Sec. 11. AS 36.30.170(d) is repealed.

19 * Sec. 12. Sections 1 - 3 of this Act take effect January 1 of the
20 calendar year that follows the calendar year in which the voters of the
21 state ratify the state constitutional amendment contained in the version of
22 HJR 18 that is passed by the Fifteenth Alaska State Legislature.

23 * Sec. 13. Sections 4 - 11 of this Act take effect upon the ratifica-
24 tion by the voters of the state of the state constitutional amendment
25 contained in the version of HJR 18 that is passed by the Fifteenth Alaska
26 State Legislature.

file 3/9/88
rev'd 3/11/88

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 45 (Finance)
PUBLISH DATE:

REQUEST: FISCAL NOTE

Revision Date:
Title: An Act Relating to an Alaska Business Bidder Preference
Sponsor: Donley & Gruessendorf
Requestor: Adams

Agency Affected: DOT&PF
BRU: Engineering & Operations Stds.
Design & Construction Stds
Components:

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERS_NAL SERVICES	0	0	0	0	0	0
TRAVEL	0	2.0	0	0	0	0
CONTRACTURAL	0	3.0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	5.0	0	0	0	0

CAPITAL	0	50.0	50.0	50.0	50.0	50.0
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REVENUE	0	0	0	0	0	0
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FUNDING: (THOUSANDS OF DOLLARS)

GENERAL FUND	0	55.0	50.0	50.0	50.0	50.0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	55.0	50.0	50.0	50.0	50.0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Loren L. Rasmussen
Division: Engineering & Operations Standards

Phone: 465-2960
Date: 3-7-88

Approved by Commissioner: Mark S. Hickey
Agency: Department of Transportation and Public Facilities

Date: 3-7-88

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

RECEIVED
MAR 10 1988

House Bill No. 45

An Act Relating to an Alaska Business Bidder Preference

The bill was analyzed considering only State funded projects administered directly by DOT&PF. The preference could not be applied to any Federally assisted projects.

This analysis was based on contracts awarded during the 1987 calendar year (approximately \$17,000,000). Based on 1987 bid results, approximately 10% of the contracts could be non-residents. The additional cost (i.e. fiscal impact) would be as follows.:

Contract Range	Total contracts	Assume 10% Awards	Additional Costs
1 to 100,000	495,079	49,508 @ 10%	4,951
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10,000,000	0	@ 1%	<u>0</u>
			50,430

Assuming State funded CIP is in the same level as last year the impact would be approximately \$50,000. This is the figures used in the fiscal note.

There would be some additional administrative cost associated with the preference. These include updating the Alaska Administrative Code, DOT&PF procedures and the impact on individual bid openings in determining the low bidder. For appropriate public input it is assumed that two public hearings will be required. The estimated total cost is \$5,000 and would be a one time only cost. The estimated cost of each hearing is \$1,000 for travel and \$500 for advertising, printing, etc. In addition \$2,000 is estimated for review by the Attorney General's Office.

The above analysis was based on the DOT&PF's very low volume year for construction. If there was a substantial increase in future years, this would obviously impact the costs.

For example, if the awards were \$50,000,000 annually and the range of out of state bidders was from 2% to 10%, the costs could vary from \$28,000 to \$140,000, as the following analysis shows:

\$50,000,000 in Contracts
10% Out of State Contractors

Contract Range	Total Contracts	Assume 10% Award	Additional Costs
1 to 100,000~(5%)(50,000,000)	= 2,500,000	250,000 @ 10%	25,000
100,000 to 500,000~(20%)(50,000,000)	=10,000,000	1,000,000 @ 5%	50,000
500,000 to 10,000,000~(55%)(50,000,000)	=27,500,000	2,750,000 @ 2%	55,000
10,000,000 + ~ (20%)(50,000,000)	=10,000,000	1,000,000 @ 1%	<u>10,000</u>
			\$140,000

\$50,000,000 In Contracts
2 % Out of State Contractors

Contract Range	Total Contracts	Assume 10% Award	Additional Costs
1 to 100,000~(5%)(50,000,000)	= 2,500,000	50,000 @ 10%	5,000
100,000 to 500,000~(20%)(50,000,000)	=10,000,000	200,000 @ 5%	10,000
500,000 to 10,000,000~(55%)(50,000,000)	=27,000,000	555,000 @ 2%	11,000
10,000,000 + ~(20%)(50,000,000)	=10,000,000	200,000 @ 1%	<u>2,000</u>
			\$28,000



Dept. of Transportation & Public Facilities

POSITION PAPER

BILL NO: CS HB 45 (Finance)

TITLE: An Act Relating to an Alaska Business
Bidder

Mark S. Hickey
APPROVED: Mark S. Hickey
Commissioner
DATE: March 7, 1988

House Bill 45 amends the procurement bill (which became effective January 1, 1988) to provide for a preference for an Alaska business in award on contracts. The preference is 1) 1% for contracts over \$10,000,000 2) 2% for contracts over \$500,000 but less than \$10,000,000 3) 5% for contracts over \$100,000 but less than \$500,000 4) 10% for contracts under \$100,000.

It appears that the Alaska bidder qualifications as written could be discriminatory toward any newly created Alaska firms desiring to bid on State projects. A new firm would first have to have a permanent place of business in the State for at least six months preceding the date of the bid. Then the bidder would have to have done more than \$1,000,000 worth of annual business or perform more than 50 percent of his or her annual business in Alaska, whichever is less. Taken literally, a new firm would have to be in business in Alaska for a period of at least one year before qualifying as an Alaska bidder.

The proposed revisions in HB 45 can be awkward to put into practice and can lead to delays in determining the low bidder.

We would propose to amend CS HB 45 (Finance), Sec. 3, AS 36.30.170(b) to read:

(b) The procurement officer shall award a contract based on solicited bids to the lowest responsive and responsible bidder after an Alaska bidder preference and an Alaska products preference as described in AS 36.30.222 -- 36.30.388 have been applied. The Alaska bidder preference shall be as follows:

1. one percent for the Alaska bidder's if the contract is \$10,000,000 or more;
2. two percent for the Alaska bidder's if the contract is more than \$500,000 and less than \$10,000,000;
3. five percent for the Alaska bidder's if the contract is more than \$100,000 and \$500,000 or less; or
4. ten percent for the Alaska bidder's if the contract is \$100,000 or less.

With this proposed amendment, at a bid opening, the apparent low bidder could be determined and announced easily and quickly. The language is compatible with the present procurement code.

We would prefer an Alaska bidder preference process that was included in the bid specifications and not be left to the bidders to determine. We would be willing to work with the Attorney General's office to propose some specific language.

_____ NEW LANGUAGE

[] DELETED LANGUAGE

Original sponsors: Donley, Grussendorf,
Gruenberg, et al.

1 IN THE HOUSE

BY THE FINANCE COMMITTEE

2 CS FOR HOUSE BILL NO. 45 (Finance)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to an Alaska business bidder prefer-
7 ence, an Alaska products preference, and to procure-
8 ment involving state money; and providing for an
9 effective date."

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

11 * Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that due
12 to the state's noncontiguous geographic location and unique climate, busi-
13 ness dealings with non-Alaskan firms produce administrative expenses not
14 commonly incurred in business dealings with resident businesses.

15 (b) The purpose of the Alaska business bidder preference when the
16 state acts as a market participant is to reduce state administrative costs,
17 strengthen the state's tax and revenue base, encourage local industry,
18 reduce unemployment and the social ills it creates, and to strengthen and
19 stabilize the state's economy.

20 * Sec. 2. AS 36.15.050(e) is amended to read:

21 (e) An interested party [, AS DEFINED IN AS 36.30.699,] may seek
22 administrative or judicial review of the award of a contract in viola-
23 tion of this section and may recover damages and seek other remedies
24 provided by law for the violation of this section.

25 * Sec. 3. AS 36.15.050(g) is amended to read:

26 (g) In this section,

1 been harvested in the state;

2 (2) "interested party" has the meaning given in AS 36.30.-
3 699;

4 (3) "state money" includes state grants and reimbursement
5 to municipalities, [AND] school districts, and other entities for
6 school or related construction, foundation funding for education,
7 municipal assistance, revenue sharing, and state funds for capital
8 projects.

9 * Sec. ^{LSI}4. AS 36.30.170(b) is repealed and reenacted to read:

10 (b) The procurement officer shall award a contract based on
11 solicited bids to the lowest responsible and responsive Alaska bidder
12 if the bid, after receiving a preference applicable to the bid under
13 AS 36.30.322 - 36.30.338, is not more than

14 (1) ^[five] one percent higher than the lowest nonresident bidder's
15 and the contract is ^[\$500,000] \$10,000,000 or more;

16 (2) ^[ten] two percent higher than the lowest nonresident bidder's
17 and the contract is more than ^[\$100,000] \$500,000 and less than ^[\$500,000] \$10,000,000;

18 (3) ^[15] five percent higher than the lowest nonresident bid-
19 der's and the contract is more than ^[\$25,000] \$100,000 and ^[\$100,000] \$500,000 or less; or

20 (4) ^[20] 10 percent higher than the lowest nonresident bidder's
21 and the contract is ^[\$25,000] \$100,000 or less.

22 * Sec. ^[4]5. AS 36.30.170(c) is amended to read:

23 (c) Notwithstanding (b) of this section, if [IF] a bidder qual-
24 ifies under ^[d](e) [(b)] of this section as an Alaska bidder, is offering
25 services through an employment program as defined under AS 36.30.-
26 100(c), and is the lowest responsible and responsive bidder with a bid

[5]

* Sec. 6. AS 36.30.170 is amended by adding a new subsection to read:

(e) In this section, "Alaska bidder" means a person who

(1) holds a current Alaska business license;

(2) does more than \$1,000,000 worth of annual business in the state or performs more than 50 percent of the person's annual business in the state, whichever is less;

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

(4) submits a bid for goods or services under the name that appears on the person's current Alaska business license;

(5) is incorporated or qualified to do business under the laws of the state, is a sole proprietorship and the proprietor is a resident of the state, or is a partnership and all partners are residents of the state;

(6) if a joint venture, is composed entirely of persons who qualify under (1) - (5) of this subsection; and

(7) is an Alaska domestic insurer, if the contract is insurance-related and the procurement is based on solicited bids.

* Sec. 7. AS 36.30.250(b) is amended to read:

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

[sec. 36.30.336. APPLICATION. Notwithstanding other provisions of thi

1 grants and reimbursement to municipalities, school districts, and
2 other entities for school or related construction, foundation funding
3 for education, municipal assistance, revenue sharing, and state funds
4 for capital projects.

5 * Sec. 9. AS 36.30 is amended by adding a new section to read:

6 Sec. 36.30.895. COMBINATION OF PREFERENCES. In the evaluation
7 of a bid or proposal, if a contractor qualifies as an Alaska bidder
8 under AS 36.30.170(e) and is also entitled to an Alaska products
9 preference under AS 36.30.328 for a contract, the procurement officer
10 shall decrease the bid or proposal price by the total of the two
11 applicable percentages.

12 * Sec. 10. AS 36.30.900 is amended to read:

13 Sec. 36.30.900. PREFERENCE FOR ALASKA PRODUCTS. This chapter
14 does not modify AS 36.15.010 and 36.15.020 regarding preference for
15 Alaska forest products, or AS 36.15.050 and 36.15.060, regarding
16 preference for Alaska agricultural and fisheries products [, EXCEPT AS
17 PROVIDED IN AS 36.30.170(b) AND (c)].

18 * Sec. 11. AS 36.30.170(d) is repealed.

19 * Sec. 12. Sections 1 - 3, and 12 - 13 of this Act take effect July 1,
20 1988.

21 * Sec. 13. Sections 4 - 11 of this Act take effect immediately under
22 AS 01.10.070(c).

**STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE**

REQUEST: _____
 Revision Date: _____
 Title: An Act Relating to an Alaska Business
 Bidder Preference
 Sponsor: Donley and Grussendorf
 Requestor: _____

Bill Version: House Bill No. 45
 Publish Date: 1/19/87

Agency Affected: DOT&PF
 BRU: Engineering and Operations Standards
 Design and Construction
 Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	2.0	0	0	0	0
CONTRACTUAL	0	3.0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	5.0	0	0	0	0

CAPITAL	0	300.0	300.0	300.0	300.0	300.0
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REVENUE	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	305.0	300.0	300.0	300.0	300.0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Loren L. Rasmussen 2/12/87

Prepared by: Loren L. Rasmussen Phone: 465-2960
 Division: Engineering & Operations Standards Date: 2/5/87

Approved by Commissioner: *Richard L. ...* Date: 2/9/87
 Agency: Department of Transportation and
 Public Facilities

- Distribution (by preparer):
- Legislative Finance
 - Legislative Sponsor
 - Requestor
 - Office of Management and Budget
 - Impacted Agency(ies)
 - Senate Secretary

House Bill No. 45

An Act Relating to an Alaska Business Bidder Preference

The bill was analyzed considering only State funded projects. The preference could not be applied to any Federally assisted projects.

This analysis was based on contracts awarded during the 1986 calendar year (Approximately \$64,000,000). Based on FY 86 bid results, approximately 10% of the contracts will be non-residents. The additional cost (i.e. fiscal impact) would be as follows:

<u>Contract Value</u>	<u>10% Awards</u>	<u>Additional Cost</u>
< 25,000	4,473 @ 20%	900
25,000 to 100,000	87,941 @ 15%	13,200
100,000 to 500,000	564,077 @ 10%	56,400
>500,000	5,793,574 @ 5%	<u>289,700</u>
		360,200

Assuming a State funded program in the range of 60 million the impact would be approximately 360,000±.

There would be some additional administrative cost associated with the preference. These include updating the Alaska Administrative Code, DOT&PF procedures and the impact on individual bid openings in determining the low bidder. For appropriate public input it is assumed that two public hearings will be required. The estimated total cost is \$5,000 and would be a one time only cost. The estimated cost of each hearing is \$1,000 for travel and \$500 for advertising, printing, etc. In addition \$2,000 is estimated for review by the Attorney General's Office.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 45
Publish Date: _____

REQUEST _____

Revision Date: _____
Title: An Act Relating to the Alaska Bidder Preference
Sponsor: Donley and Grussendorf
Requestor: _____

Agency Affected: Department of Administration
BRU: Division of General Services & Supply
Components: Purchasing

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
OPERATING						
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES	-0-	-0-	-0-	-0-	-0-	-0-
GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

We feel there would be a fiscal impact on departments purchasing goods and services but have no way to calculate it.

Prepared By: Bob Link *Bob Link* Phone: 465-2250
Division: General Services & Supply Date: February 4, 1987

Approved by Commissioner: Garrey Peska *GP* Date: 2/10/87
Agency: Department of Administration

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

No. 1

REQUEST: _____

Bill Version : CSHB 45(L&C)
Publish Date : HOUSE 3/4/87

Revision Date: _____

Agency Affected : DOT&PF

Title : An Act Relating to an Alaska Business Bidder Preference

BRU : Engineering and Operations Standards Design and Construction

Sponsor : Donley and Grussendorf

Components : _____

Requestor : _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	2.0	0	0	0	0
CONTRACTUAL	0	3.0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	5.0	0	0	0	0

CAPITAL	0	300.0	300.0	300.0	300.0	300.0
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REVENUE	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	305.0	300.0	300.0	300.0	300.0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Loren L. Rasmussen 2/12/87

Prepared by : Loren L. Rasmussen
Division : Engineering & Operations Standards

Phone : 465-2960
Date : 2/5/87

Approved by Commissioner : *R.D. Alvarado*
Agency : Department of Transportation and Public Facilities

Date : 2/12/87

- Distribution (by preparer):
- Legislative Finance
 - Legislative Sponsor
 - Requestor
 - Office of Management and Budget
 - Impacted Agency(ies)
 - Senate Secretary

An Act Relating to an Alaska Business Bidder Preference

The bill was analyzed considering only State funded projects. The preference could not be applied to any Federally assisted projects.

This analysis was based on contracts awarded during the 1986 calendar year (Approximately \$64,000,000). Based on FY 86 bid results, approximately 10% of the contracts will be non-residents. The additional cost (i.e. fiscal impact) would be as follows:

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100,000 to 500,000	564,077 @ 10%	56,400
>500,000	5,793,574 @ 5%	<u>289,700</u>
		<u>360,200</u>

Assuming a State funded program in the range of 60 million the impact would be approximately 300,000±.

There would be some additional administrative cost associated with the preference. These include updating the Alaska Administrative Code, DOTSPF procedures and the impact on individual bid openings in determining the low bidder. For appropriate public input it is assumed that two public hearings will be required. The estimated total cost is \$5,000 and would be a one time only cost. The estimated cost of each hearing is \$1,000 for travel and \$500 for advertising, printing, etc. In addition \$2,000 is estimated for review by the Attorney General's Office.

**STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE**

No. 1

REQUEST: _____
 Revision Date: _____
 Title: An Act Relating to an Alaska Business Bidder Preference
 Sponsor: Donley and Grussendorf
 Requestor: _____

Bill Version: CSHB 45 (L&C)
 Publish Date: HOUSE 3/4/87

Agency Affected: DOT&PF
 BRU: Engineering and Operations Standards Design and Construction
 Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	2.0	0	0	0	0
CONTRACTUAL	0	3.0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	5.0	0	0	0	0

CAPITAL	0	300.0	300.0	300.0	300.0	300.0
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REVENUE	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	305.0	300.0	300.0	300.0	300.0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Loren L. Rasmussen
 Division: Engineering & Operations Standards

Phone: 465-2960
 Date: 2/5/87

Approved by Commissioner: [Signature]
 Agency: Department of Transportation and Public Facilities

Date: 2/10/87

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)
 Senate Secretary

An Act Relating to an Alaska Business Bidder Preference

The bill was analyzed considering only State funded projects. The preference could not be applied to any Federally assisted projects.

This analysis was based on contracts awarded during the 1986 calendar year (Approximately \$64,000,000). Based on FY 86 bid results, approximately 10% of the contracts will be non-residents. The additional cost (i.e. fiscal impact) would be as follows:

<u>Contract Value</u>	<u>10% Awards</u>	<u>Additional Cost</u>
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100,000 to 500,000	564,077 @ 10%	56,400
>500,000	5,793,574 @ 5%	289,700
		<u>360,200</u>

Assuming a State funded program in the range of 60 million the impact would be approximately 300,000±.

There would be some additional administrative cost associated with the preference. These include updating the Alaska Administrative Code, DOTSPF procedures and the impact on individual bid openings in determining the low bidder. For appropriate public input it is assumed that two public hearings will be required. The estimated total cost is \$5,000 and would be a one time only cost. The estimated cost of each hearing is \$1,000 for travel and \$500 for advertising, printing, etc. In addition \$2,000 is estimated for review by the Attorney General's Office.

Pouch V
Juneau, Alaska 99811

Alaska State Legislature
House of Representatives

Phone:
(907) 465-3892




Labor and Commerce Committee

February 4, 1987

M E M O R A N D U M

To: Grace Berg Schaible, Attorney General
State of Alaska - Department of Law

From: Representative Dave Donley, Chair 
House Labor and Commerce Committee

Re: Request for Attorney General opinion

I am writing to request an Attorney General's opinion on HB 45, relating to an Alaska business bidder preference.

Specifically, I'd like to know if there are any Constitutional concerns with HB 45 and, if so, whether there is anything we can do to amend the bill in Committee to better enable it to withstand a Constitutional challenge.

We will be hearing HB 45 on Tuesday, February 10, so I would appreciate an opinion as soon as possible.

Please call me or my House Labor and Commerce Committee aide, Ginger Baim at 3892, if you have any questions or need additional information.

And welcome.

REPRESENTATIVE DAVE DONLEY

ALASKA STATE LEGISLATURE
DISTRICT ELEVEN : SPENARD

P.O. BOX V, JUNEAU 99811
(907) 465-3892



CHAIRMAN
LABOR AND COMMERCE
COMMITTEE

MEMBER
STATE AFFAIRS COMMITTEE
HEALTH, EDUCATIONAL
AND SOCIAL SERVICES COMMITTEE
INTERNATIONAL TRADE
SUB-COMMITTEE

February 5, 1987

M E M O R A N D U M

To: All Members, Alaska State House of Representatives
From: Representative Dave Donley
Re: HB 45 - Alaska Bidder's Preference

HB 45, relating to an Alaska Bidder's Preference, will be heard Tuesday, February 10, at 1:30 p.m. before the House Labor and Commerce Committee.

HB 45, raises the existing bidder's preference given to Alaska companies. Current law allows contracts to be awarded to Alaska firms if their bid was not more than 5 percent higher than the lowest bid by a nonresident company.

HB 45 increases the preference through a sliding scale to 10 percent on bids over \$100,000 and less than \$500,000, 15 percent on contracts more than \$25,000 and less than \$100,000 and 20 percent on bids of \$25,000 or less.

The purpose of the bidder's preference is to reduce state administrative costs, strengthen our tax and revenue base, encourage local industry, and reduce our staggering unemployment rate and the social ills it creates.

HB 45 has been carefully drafted to avoid possible Constitutional problems. First, the courts have recognized that when a state operates as a market participant they are free to exercise their own independent discretion as to the parties with whom they deal and the conditions they set.

Second, the state has a legitimate and compelling interest in assuring that local businesses have an equitable chance to compete for public contracts. The findings section in HB 45 carefully identifies the public purpose at issue, then proposes a solution that is narrowly tailored to correct inequities in our competitive bidding process.

Finally, Alaskans have the right to get the best deal possible for their public money. There are extra administrative costs involved when the State contracts with nonresident bidders. Our current contracting procedures fail to recognize those extra costs, thus placing Alaska businesses at an unfair disadvantage.

Dealing with nonresident firms is more expensive for Alaska because there is more likely to be costly change orders and problems with long distance communication. In addition, the State has little recourse to collect on improper or incomplete contracts when we are dealing with nonresident businesses.

We've had some real problems in the past with "fly-by-night" contractors and HB 45 should help avoid those problems and assure that Alaska gets full benefit from our public dollars.

HB 45 will help boost our economy and protect the public from the extra costs involved in doing business with nonresident firms. I urge you to support this measure.

Please call me or my aide, Ginger Baim, at 3892 if you have any questions or need additional information.

1

A M E N D M E N T

Offered in the House

By Donley

TO: CSHB 45()

Page 4, line 19:

Delete ", 12, and 13"

Page 4, lines 19 and 20:

Delete "July 1, 1988"

Insert "January 1 of the calendar year that follows the calendar year in which the voters of the state ratify the state constitutional amendment contained in the version of HJR 18 that is passed by the Fifteenth Alaska State Legislature."

Page 4, line 21:

Delete "4 and 5 - 11"

Insert "4 - 11"

Page 4, lines 21 and 22:

Delete "immediately under AS 01.10.070(c)"

Insert "upon the ratification by the voters of the state of the state constitutional amendment contained in the version of HJR 18 that is passed by the Fifteenth Alaska State Legislature"

Adopted 3/8/88

5-0307B1
Bannister

A M E N D M E N T #2

Offered in the HOUSE

By Donley

TO: CSHB 45

Page 1, line 18:

Delete "unemployment and the social ills it creates"

Insert "the social ills created by unemployment and a depressed economy"



Dept. of Transportation & Public Facilities

POSITION PAPER

BILL NO: CS HB 45 (Finance)

TITLE: An Act Relating to an Alaska Business Bidder

W. H. Hickey
APPROVED: Mark S. Hickey

Commissioner

DATE: March 7, 1988

House Bill 45 amends the procurement bill (which became effective January 1, 1988) to provide for a preference for an Alaska business in award on contracts. The preference is 1) 1% for contracts over \$10,000,000 2) 2% for contracts over \$500,000 but less than \$10,000,000 3) 5% for contracts over \$100,000 but less than \$500,000 4) 10% for contracts under \$100,000.

It appears that the Alaska bidder qualifications as written could be discriminatory toward any newly created Alaska firms desiring to bid on State projects. A new firm would first have to have a permanent place of business in the State for at least six months preceding the date of the bid. Then the bidder would have to have done more than \$1,000,000 worth of annual business or perform more than 50 percent of his or her annual business in Alaska, whichever is less. Taken literally, a new firm would have to be in business in Alaska for a period of at least one year before qualifying as an Alaska bidder.

The proposed revisions in HB 45 can be awkward to put into practice and can lead to delays in determining the low bidder.

We would propose to amend CS HB 45 (Finance), Sec. 3, AS 36.30.170(b) to read:

(b) The procurement officer shall award a contract based on solicited bids to the lowest responsive and responsible bidder after an Alaska bidder preference and an Alaska products preference as described in AS 36.30.222 -- 36.30.388 have been applied. The Alaska bidder preference shall be as follows:

1. one percent for the Alaska bidder's if the contract is \$10,000,000 or more;
2. two percent for the Alaska bidder's if the contract is more than \$500,000 and less than \$10,000,000;
3. five percent for the Alaska bidder's if the contract is more than \$100,000 and \$500,000 or less; or
4. ten percent for the Alaska bidder's if the contract is \$100,000 or less.

With this proposed amendment, at a bid opening, the apparent low bidder could be determined and announced easily and quickly. The language is compatible with the present procurement code.

We would prefer an Alaska bidder preference process that was included in the bid specifications and not be left to the bidders to determine. We would be willing to work with the Attorney General's office to propose some specific language.

REPRESENTATIVE DAVE DONLEY

ALASKA STATE LEGISLATURE

DISTRICT ELEVEN • SPENARD

NORTHWOOD • SPENARD • THOMPSON • TURNAGAIN • UPPER MIDTOWN • WINDEMERE

P.O. BOX V, JUNEAU 99811

(907) 465-3892



CHAIRMAN
LABOR AND COMMERCE
COMMITTEE

MEMBER
STATE AFFAIRS COMMITTEE
HEALTH, EDUCATIONAL
AND SOCIAL SERVICES COMMITTEE

March 7, 1988

SECTIONAL ANALYSIS - CS HB 45 (FINANCE)

Prepared by Rep. Dave Donley

Prime Sponsor - HB 45

Section 1.

Section 1 outlines the findings and purposes of the legislature in adopting an Alaska bidders' preference and states that (a) the Legislature finds that Alaska's position results in additional costs when dealing with non-resident firms and that (b) the purpose of the bidders' preference established under this Act is to reduce state administrative costs, strengthen the state's tax and revenue base, encourage local industry, reduce social ills created by unemployment, and to strengthen and stabilize the state's economy.

Section 2.

Section 2 amends AS 36.15.050(e) to allow interested parties who seek an administrative or judicial review of an award under this Act to be entitled to damages and other remedies provided by law.

Section 3.

Section 3 amends AS 36.15.050 (g) to include a new paragraph (2) defining "interested party", and to amend paragraph (3) to clarify the definition of "state money" to include state grants and state money to other entities for school construction, foundation funding for education, municipal assistance, revenue sharing, and state funds for capital projects.

Section 4.

Section 4 repeals and reenacts AS 36.30.170(b) to establish a sliding scale for a bidders' preference that provides a preference of one percent for bids over \$10 million dollars, two percent for bids over \$500,000 but under \$10 million, five percent for bids over \$100,000 but under \$500,000 and ten percent for bids below \$100,000.

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Section 5.

Section 5 amends AS 36.30.170(c) to provide a ten percent preference for an Alaskan bidder offering services through a sheltered employment program.

Section 6.

Section 6 amends AS 36.30.170 to add a new subsection (e) to define an Alaska bidder as a person who (1) holds a current Alaska business license, (2) does more than \$1 million dollars worth of annual business in the state or performs more than 50 percent of the person's annual business in the state, whichever is less, (3) has maintained a permanent staffed place of business in the state for a period of six months or more, (4) submits a bid under the name that appears on their Alaska business license (5) is incorporated or qualified to do business under the laws of the state, is a sole proprietorship and the proprietor is a resident, or is a partnership and all partners are residents of the state, (6) if a joint venture, is composed entirely of persons who would qualify individually as an Alaska bidder, (7) is a Alaska domestic insurer and the contract is insurance-related and procurement is based on solicited bids.

Section 7.

Section 7 amends AS 36.30.250(b) to reflect the new definition of Alaska bidder under AS 36.30.170(e).

Section 8.

Section 8 amends AS 36.30.850(e) to require that AS 36.30.322-36.30.338 (statutes governing preferences for Alaska products and goods manufactured in Alaska) applies to all contracts involving state money, state grants and reimbursement to municipalities, school districts, and other entities for school or related construction, foundation funding for education, municipal assistance, revenue sharing, and state funds for capital projects.

Section 9.

Section 9 amends AS 36.30 to address a combination of preferences when a bidder may qualify for both an Alaska bidders' preference and an Alaska products preference. In this case, the procurement officer shall decrease the bid or proposal price by the total of the two applicable percentages.

Section 10.

Section 10 amends AS 36.30.900, governing preferences for Alaska products, to amend language to make this section consistent with the changes proposed in this Act.

Section 11.

Section 11 repeals AS 36.30.170(d) - relating to procurement of insurance-related contracts - that is inconsistent with language adopted in this Act under AS 36.30.170(e)(7).

Section 12.

Provides that sections 1-3, 12, and 13 of the Act take effect on July 1, 1988.

Section 13.

Provides that sections 4 and sections 5-11 have an immediate effective date.

REPRESENTATIVE DAVE DONLEY

ALASKA STATE LEGISLATURE

DISTRICT ELEVEN • SPENARD

NORTHWOOD • SPENARD • THOMPSON • TURNAGAIN • UPPER MIDTOWN • WINDEMERE

P.O. BOX V, JUNEAU 99811

(907) 465-3892



CHAIRMAN

LABOR AND COMMERCE
COMMITTEE

MEMBER

STATE AFFAIRS COMMITTEE
HEALTH, EDUCATIONAL
AND SOCIAL SERVICES COMMITTEE

March 7, 1988

M E M O R A N D U M:

To: Representative Al Adams, Chair
House Finance Committee

From: Representative Dave Donley

Re: HB 45 - Alaska Bidders' preference

A proposed House Finance Committee Substitute for HB 45, establishing an Alaska bidders' preference, is before the Committee today. I support the proposed CS and ask the Committee to adopt this measure today with the attached amendments.

Amendment #1 changes the effective date under sections 12 and 13 to provide that the measure does not become effective until the voters ratify the ballot proposition presented under HJR 18. HJR 18, currently pending before the House Finance Committee, would place a ballot proposition before the voters as to whether Alaska's constitution should be amended to authorize the state to grant certain preferences to its own citizens.

You are each familiar with the issues presented in HJR 18 as I am sure you are aware of the fact that Alaska's local hire law was turned down last week on the basis of equal protection clause in Alaska's constitution. Over 40 other states have some kind of resident bidder preference on their books but because few have ever gone to court, there is insufficient case law to judge the chances of HB 45 meeting constitutional muster under the federal constitution.

However, in a case before the Alaska Supreme Court, two justices expressed the opinion that a bidders' preference law would have a hard time meeting a constitutional challenge under the states constitution. As a result, it makes little sense to adopt HB 45 until the voters have had the opportunity to express their support for amending our state constitution so that our citizens can enjoy the protection of resident preference laws consistent with the standards established under the United State constitution.

Amendment #2 proposes changes to the intent and purpose section of the bill to make the language consistent with recent court rulings.

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Dept. of Transportation & Public Facilities

Position Paper

^{CS}
BILL NO: House Bill No. 45 (LTC)
TITLE: An Act Relating to an Alaska Business Bidder Preference

APPROVED: Rocky Gutierrez
Commissioner
DATE: February 5, 1987

House Bill 45 amends the procurement bill (which becomes effective July 1, 1987) to provide for a preference for an Alaska business in award of contracts. The preference is 1) 5% for contracts over \$500,000 2) 10% for contracts over \$100,000 but less than \$500,000 3) 15% for contracts over \$25,000 but less than \$100,000 4) 20% for contracts under \$25,000.

It appears that the Alaska bidder qualifications as written could be discriminatory toward any newly created Alaska firms desiring to bid on State projects. A new firm would first have to have a permanent place of business in the State for at least six months preceding the date of the bid. Then the bidder would have to have done more than \$1,000,000 worth of annual business or perform more than 20 percent of the his or her annual business in Alaska, whichever is less. Taken literally, a new firm would have to be in business in Alaska for a period of at least one year before qualifying as an Alaska bidder.

POSITION PAPER

CS HB 45 (LH)

The bill provides that an Alaska business will be awarded a contract if they are a responsive and responsible bidder and if their bid is not more than: 1) 5% higher than the lowest nonresident bidder's and the contract is \$50,000 or more; 2) 10% higher than the lowest nonresident bidder's and the contract is more than \$100,000 and less than \$500,000; 3) 15% higher than the lowest nonresident bidder's and the contract is more than \$25,000 and less than \$100,000; 4) 20% higher than the lowest nonresident bidder's and the contract is \$25,000 or less.

The impact of this provision of the bill may be reduced competition and there may be some increase in prices since out-of-state bidders may be unwilling to compete against in-state preferences of up to 20%. Another impact may be that Alaska businesses will face a corresponding preference when they attempt to sell to some other states since 19 states have a reciprocity law which requires that they impose a like penalty on bidders who reside in a state that has an in-state bidder's preference.

The bill also redefines what is required to be considered an "Alaskan bidder." These requirements state, in part, that an Alaskan bidder is one who ". . . 2) does more than \$1,000,000 worth of annual business in the state or performs more than 20% of the person's annual business in the state, whichever is less"

This requirement seems to be designed to discourage vendor "carpetbaggers" associated with businesses who primarily operate outside of Alaska from coming to the state and opening a "Post Office Box Number" business, merely for the purpose of qualifying for the bidder preference. The bill seems to require that a firm must do \$1,000,000 a year in business within Alaska or that the firm's Alaskan outlet does, at least, 20% of the firm's total business.


The impact of this provision may be that large companies, whose primary operation is outside of the state, may be discouraged from opening an Alaskan outlet since they will not qualify for the Alaska bidder's preference until their sales in Alaska reach \$1,000,000 or until the Alaskan outlet is producing 20% of the firm's total sales.



Robert J. Link, Director
Division of General Services & Supply

2/6/86

Date



Commissioner Garrey Peska
Department of Administration

2/10/87

Date

February 26, 1987

x P.O. Box K

465-3603

The Honorable Dave Donley
Alaska House of Representatives
P.O. Box V
Juneau, Alaska 99811

Re: HB 45, Alaska Bidder's
Preference

Dear Representative Donley:

On February 4, 1987, you sent a memorandum to the Attorney General requesting an opinion as to whether there were "any constitutional concerns with HB 45 and, if so, whether there is anything we can do to amend the bill in committee to better enable it to withstand a constitutional challenge." On February 10, 1987, I appeared before the House Labor and Commerce Committee to discuss in detail the provisions of HB 45 and to advise the committee on potential constitutional problems.

We discussed the concept of the state as a market participant versus a market regulator and considered three of the constitutional provisions which have in the past been used to challenge various types of laws which tended to economically favor residents. ^{1/} On February 14, 1987, you requested further clarification regarding the circumstances under which a state might be considered a market regulator and a market participant. You also asked that I elaborate on some of the discussion that we had during the committee hearing on February 10, 1986.

^{1/} Those constitutional provisions include the privileges and immunities clause of section 2, article IV, of the United States Constitution, the commerce clause under article I, section 8 of the United States Constitution, and the equal protection provisions of the 14th Amendment of the United States Constitution and article I, section 1, of the Alaska Constitution.

The Alaska Supreme Court has recently described in general how it distinguishes between a market participant and a market regulator. In Robison v. Francis, 713 P.2d 259, 264 (Alaska 1986), at note 4, the court stated:

When the state acts as an employer, a lender, a landlord, a buyer, a seller, or an owner of natural resources, it may be regarded as a market participant and for some purposes will be treated differently than when it acts solely as a sovereign body regulating the conduct of others within its jurisdiction.

This general statement by the court is consistent with the example which I gave you at the hearing regarding the difference between a market participant and a market regulator. As you may recall, if the state were simply to go out into the marketplace in order to purchase a number of motor vehicles for state use, it would certainly be considered a market participant. Likewise, when the state contracts for goods and services it also will normally be considered a market participant. 2/ The simple fact that the state is a market participant in a particular situation is not likely to be determinative of whether the Alaska bidder's preference law is constitutional. Being a market participant rather than a market regulator apparently had greater importance when defending commerce clause challenges to a statute. See, e.g., Reeves, Inc. v. State, et. al., 100 S.Ct. 2271 (1980); Hughes v. Alexandria Scrap Corp. 426 U.S. 794 (1976).

2/ Your memorandum of February 14, 1987, indicated that I thought the courts would consider the total volume of business in Alaska in relationship to the state's share thereof in determining whether or not it was a regulator or a participant in the marketplace. Indeed, as the state percentage of the total volume of business in a particular market increases, the natural conclusion is that it also has the ability (whether it does so or not) to regulate that market. In addition, I described the situation set up by a bidder preference statute where the state participates in a market which it has already regulated. It seems that a state either participates or regulates a market and so far, at least, the courts have not distinguished the situation where a state both regulates a market and then participates therein on the terms it has created. However, since the market

(footnote continued)

Other factors have taken on much more importance, especially since challenges under the commerce clause have in most cases been replaced by or supplemented with challenges under other constitutional provisions. See footnote 3.

As indicated earlier, even if legislation has been tailored to make it consistent with the conclusion that the State of Alaska is simply a market participant therein, this will not necessarily insure that the legislation will withstand challenge under the privileges and immunities or the equal protection provisions of the United States and Alaska Constitutions. 3/ There is only more deference given to the state in that situation. As the Alaska Supreme Court stated in Robison:

However, more leeway is granted the state in its perception of "local evils and prescribing appropriate cures" when it is acting in a proprietary capacity, as where it "is merely setting conditions on the expenditures of funds it controls." Camden, 465 U.S. at 223, 104 S.Ct. at 1030, 79 L.Ed.2d at 261 (citations omitted).

This analytical framework, except for the deference given to the state as a market participant, is quite similar to what has come to be called the level of intermediate scrutiny under the federal equal protection clause. Classifications may be made only for "important" purposes, and the means used to accomplish them must be "fairly and substantially related" to the achievement of those purposes. State of Alaska v. Ostrosky, 667 P.2d 1184, 1192 (Alaska 1983) (citations omitted) (footnote omitted).

(footnote continued)

participant/market regulator distinction has not been a decisive factor that distinction may not have any practical effect.

3/ For the most part, successful challenges have been on the basis of the privileges and immunities and equal protection provisions. We fully expect that a challenge to the Alaska bidder's preference law would be based on either or both of those two provisions, depending primarily on the situation which gives rise to the challenge.

The amount of deference due a state when acting as a market participant is not clear from federal cases. The state suggests, and we believe, that a variable standard must be employed. Thus, where the discrimination is far-reaching and exclusive in nature, and extends to the fringes of the state's proprietary interests, the state is entitled to little deference. On the other hand, where the discrimination is narrow in scope and involves a direct relationship between the state and affected individuals, greater deference is called for.



Robison, 713 P.2d at 264 (emphasis added).

The Alaska Supreme Court has thus indicated with at least some certainty the parameters by which it will determine the amount of leeway it will give the state in favoring its residents (whether they be persons or businesses) in the marketplace. The legislation must be tailored to fit within these parameters.

Beyond that, I must again point out to you what was said by Justice Rabinowitz, with whom Chief Justice Burke concurred in Irby-Northface v. Commonwealth Electric Company, 664 P.2d 557, 562 (Alaska 1983)(footnote omitted):

I would, however, address the clear unconstitutionality of the bidder preference statute under our precedent of Lynden Transport, Inc. v. State, 532 P.2d 700 (Alaska 1975) in Lynden we stated that:

A discrimination between residents and nonresidents based solely on the object of assisting the one class over the other economically cannot be upheld under either the privileges and immunities or equal protection clauses.

Id. at 710. In this case, "it is clear that the statute's purpose is to give Alaskan businesses a competitive chance with nonresident businesses in the award of state contracts," as noted by the majority. Under Alaska's equal protection clause, such a purpose does not justify a statute which

The Honorable Dave Donley
HB 45, Alaska Bidder's Preference

February 26, 1987
Page 5

discriminates against nonresidents. Lynden,
532 P.2d at 711.

We view this expression as a rather clear indication of the current thinking of the court and therefore must make it clear that the likelihood of any Alaska bidder's preference statute to withstand judicial scrutiny is at best, not good. }

I have discovered cases which have upheld bidder preference statutes in several other states. Although my research is far from exhaustive, I have enclosed copies of at least those cases in the hopes they may be of some help. Unfortunately, in light of Irby, Supra, I have my doubts about their impact on an Alaska challenge.

If you wish me to discuss this further with you or the committee, please feel free to contact my office at your convenience. In addition, if you have any further questions, please contact me at any time.

Sincerely yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By:



Gary I. Amendola
Assistant Attorney General

GIA:jh

cc: Jan DeYoung

GARY CONCRETE PRODUCTS, INC. v. RILEY S. C. 335

Cite as 331 S.E.2d 335 (S.C. 1985)

GARY CONCRETE PRODUCTS, INC., Appellant.

v.

Richard W. RILEY, Governor of South Carolina; Grady L. Patterson, Jr., Treasurer of South Carolina; Earle E. Morris, Jr., Comptroller General of South Carolina; Rembert C. Dennis, Chairman, Senate Finance Committee; and Tom Mangum, Chairman, House Ways and Means Committee, constituting the State Budget and Control Board, Respondents.

No. 22330.

Supreme Court of South Carolina.

Heard April 8, 1985.

Decided May 20, 1985.

Vendor brought action for declaratory judgment regarding the constitutionality of statute under procurement code. The Common Pleas Court of Richland County, Walter T. Cox, III, J., entered its order that said statute was not unconstitutional, and vendor appealed. The Supreme Court, Harwell, J., held that: (1) statute which gave preference to resident vendors, under certain circumstances, as applied to state's purchase of reinforced concrete pipe, did not have substantial regulatory effect outside of that particular market, and thus, did not violate the commerce clause, and (2) classifications established by statute between resident and nonresident vendors were rationally related to legitimate state interest in directing benefits, generated by state purchases, to state citizens and did not deny equal protection of the laws to nonresidents.

Affirmed.

Gregory, J., dissented and filed opinion, in which Chandler, J., concurred.

Bell and the rate imposed on retail businesses, hospitals, and others.

nized that a reasonable basis for the differential treatment was essential to the constitutionality thereof." *United States Fidelity and Guaranty Co. v. City of Newberry*, 257 S.C. 433, 186 S.E.2d 239, 242 (1972).

[5] The gross disparity in the license tax rate imposed by the Spartanburg ordinance is reflected by the fact that Southern Bell pays a tax of 1% of its gross receipts (\$238,375 in 1981 and \$267,262 in 1982), while a textile mill or manufacturing plant with the same revenue as Southern Bell pays a maximum of \$725.³ The city has advanced no reasonable basis for the differential treatment. The amendment was not part of any overall reform of the ordinance. Nor did the city prove that Southern Bell benefited more from city services than did other businesses. *United States Fidelity and Guaranty Co. v. City of Spartanburg*, 263 S.C. 169, 209 S.E.2d 36 (1974). Moreover, since Southern Bell is the highest *ad valorem* taxpayer in the city, it contributes greatly to the cost of city government. Apparently, the sole consideration in drastically increasing the tax on Southern Bell was that, since Duke Power had agreed by contract to pay the city 3% of its gross revenues, Southern Bell's taxes should be increased.

We conclude that the rate disparity between Southern Bell and other companies not parties to contracts with the city is palpably unreasonable and violative of equal protection of the laws.

The judgment below is, accordingly,

AFFIRMED.

LITTLEJOHN, C.J., and NESS, GREGORY and CHANDLER, JJ., concur.



3. In addition, the record reveals a great disparity between the tax rate imposed on Southern

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lative en- nstitution- r to prove reasonable i Corp. v. S.C. 470, r, "[i]n all fication in een chal- the equal has recog- service not

many years, n the city.

1. Commerce §12

States cannot pass any regulations which unduly burden the free flow of commerce between the states or with foreign country. U.S.C.A. Const. Art. 1, § 8, cl. 3.

2. Commerce §54

Commerce clause [U.S.C.A. Const. Art. 1, § 8] does not limit state's right to favor said state's own citizens over others, where state enters market in competition with other market participants.

3. Commerce §60(1)

Statute [Code 1976, § 11-35-1520(9)(d)] which gave preference to resident vendors, under certain circumstances, as applied to state's purchase of reinforced concrete pipe, did not violate the commerce clause [U.S.C.A. Const. Art. 1, § 8], as state was acting as market participant rather than regulating the market. U.S.C.A. Const. Art. 1, § 8, cl. 3.

4. Constitutional Law §213.1(2)

Determination of whether classification established by statute is reasonable is initially one for the legislature and classification will not be set aside by the courts unless there is no reasonable hypothesis to support it, so that it is plainly arbitrary. U.S.C.A. Const. Amend. 14; Const. Art. 1, § 3.

5. Constitutional Law §213.1(2)

Statute may be limited to particular class, provided there is reasonable relationship between said classification and proper legislative purpose.

6. Constitutional Law §225.4

States §98

Classifications between resident and nonresident vendors established by statute [Code 1976, § 11-35-1520(9)(d)] which gives preference to resident vendors, under certain circumstances, when the state purchases supplies, services and goods, are rationally related to state's legitimate interest to benefit its taxpayers, and thus, do not deny equal protection of the laws to nonresidents, even though nonresidents who maintain office in the state and pay state taxes are accorded preference over other nonresi-

dents. Code 1976, § 11-35-20(f); U.S.C.A. Const. Amend. 14.

Thomas H. Pope, of Pope and Hudgens, Newberry, for appellant.

Atty. Gen., T. Travis Medlock, Chief Deputy Atty. Gen. Joseph A. Wilson, and Asst. Atty. Gen. Charles W. Gambrell, Jr., Columbia, for respondents.

HARWELL, Justice:

The appellant Gary Concrete Products, Inc. initiated this action against the respondent State Budget and Control Board for a declaratory judgment regarding the constitutionality of S.C. Code Ann. § 11-35-1520(9)(d) (1984 Cum. Supp.). We affirm.

The appellant is a Georgia corporation which manufactures and sells reinforced concrete pipe. The appellant was invited to submit bids for state purchases during the year September 1, 1983 through August 31, 1984. On June 30, 1983, the appellant submitted its bid for pipe to be used in twenty-two counties. It was the low bidder in several counties; however, the State awarded the contracts to resident bidders as authorized by Code § 11-35-1520(9)(d) (1984).

We adopt the Order of the trial judge, as amended.

"The issue before this Court is whether or not S.C. Code Ann. § 11-35-1520(9)(d) violates the Commerce Clause of the United States Constitution or, alternatively, violates the Equal Protection Provisions of the United States Constitution or the South Carolina Constitution.

South Carolina Code § 11-35-1520(9)(d) provides:

Competitive procurements made by any governmental body shall be made from a responsive and responsible vendor resident in South Carolina: (i) for procurements under \$2,500,000, if such bid does not exceed the lowest qualified bid from a nonresident vendor by more than two percent of the latter bid, and if such resident vendor has made written claim for such preference at the time the bid

was submitted; (ii) for procurements in excess of \$2,500,000, if such bid does not exceed the lowest qualified bid from a nonresident vendor by more than one percent of the latter bid, and if such resident vendor has made written claim for such preference at the time the bid was submitted. A vendor shall be deemed to be a resident of this State if such vendor be an individual, partnership, association or corporation that is authorized to transact business within the State, maintains an office in the State, maintains a representative inventory of commodities on which the bid is submitted and has paid all taxes duly assessed. Preferences under this subsection shall not apply to either prime contractors or subcontractors as relates to the construction industry nor to a vendor of goods whether in quantity or not when the price of a single unit of the item involved is more than ten thousand dollars.

The effect of this section is to give a preference to South Carolinians, under certain circumstances, when the State of South Carolina purchases supplies, services and goods.

COMMERCE CLAUSE

[1] The appellant alleges that S.C.Code Ann. § 11-35-1520(9)(d) imposes an unlawful burden upon interstate commerce, constituting a violation of Article I, § 8 of the United States Constitution. The Commerce Clause gives the federal government the power to regulate interstate and foreign commerce. The states cannot pass any regulations which unduly burden the free flow of commerce between the states or with a foreign country. *McCaw v. Fase*, 216 F.2d 700 (9th Cir.1954), cert. den., 348 U.S. 927, 75 S.Ct. 340, 99 L.Ed. 727 (1955).

[2] Admittedly, there are circumstances under which S.C.Code § 11-35-1520(9)(d) will operate to favor South Carolina vendors over out-of-state vendors and thereby arguably burden interstate commerce. However, if a state enters a market in

competition with other market participants, the Commerce Clause does not limit the state's ability to operate as freely within the market place as the other participants. *Reeves v. Stake*, 147 U.S. 429, 437, 100 S.Ct. 2271, 2277, 65 L.Ed.2d 244 (1980). This freedom includes the right to favor the state's own citizens over others. *White v. Mass. Council of Construction Employers*, 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976); *Carll v. South Carolina Jobs-Economic Development Authority*, 327 S.E.2d 331 (S.C.1985).

In *Reeves, Inc. v. Stake, supra*, the Supreme Court discussed the rights of a state as a market participant. South Dakota owned and operated a cement plant. In 1978 a cement shortage occurred and the state adopted a policy of supplying all South Dakota customers first and, thereafter, any out-of-state commitments would be met on a first come, first served basis. The plaintiff was an out-of-state distributor who had purchased cement from the South Dakota cement plant on a regular basis for twenty years. The Supreme Court held that the state had acted as a market participant and had not violated the Commerce Clause. It stated that the distinction drawn in *Alexandria Scrap* between states as market participants and market regulators was good law since the Commerce Clause is aimed principally at limiting state taxes and regulatory measures which impede free private trade, but places no similar limitations on the ability of states to operate freely in the open market. *Id.*, 447 U.S. at 437, 100 S.Ct. at 2277. The Court then gave several reasons for judicial restraint in this area.

Restraint in this area is also counseled by considerations of state sovereignty, the role of each State "as guardian and trustee for its people," and "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." Moreover, state

proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause. Finally, as this case illustrates, the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, *Alexandria Scrap* wisely recognizes that, as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court. [Footnotes and citations omitted.]

Id., 447 U.S. at 438-439, 100 S.Ct. at 2278-2279.

In the instant matter, the State of South Carolina is acting as a market participant by purchasing reinforced concrete pipe. As a market participant, South Carolina can impose restrictions on itself and not run afoul of the Commerce Clause. The present factual situation is virtually on all fours with the *Reeves* decision. South Carolina is preferring its own citizens in the purchasing process—a process which, by definition, vaults South Carolina into the marketplace as a market participant.

The Supreme Court's latest ruling on these issues came in the case of *South-Central Timber Development, Inc. v. Wunnicke*, — U.S. —, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984). The Court held the Alaska requirement that timber taken from state lands be processed within the State prior to export violative of the Commerce Clause. The Court also provided some guidelines.

The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of

that particular market. Unless the "market" is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible State purpose of fostering local industry. *Id.* at 83.

The Court concluded that Alaska was not only a seller in the timber market, but a regulator of the conditions downstream in the timber processing market.

[3] In the case at bar, the State of South Carolina is merely choosing its trading partners so as to favor residents. No regulation of the market is present. Therefore, the preference statute does not violate the Commerce Clause.

EQUAL PROTECTION

The appellant contends that the "preference" section is unconstitutional as violative of equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, § 3 of the South Carolina Constitution.

[4, 5] The determination of whether a classification is reasonable is initially one for the legislature and will not be set aside by the courts unless it is plainly arbitrary. *State ex rel. Medlock v. S.C. Family Farm Development Authority*, 279 S.C. 316, 321, 306 S.E.2d 605, 609 (1983). A statute may be limited to a particular class, provided the limitation established is for a proper public purpose. *Ex parte Hollman*, 79 S.C. 9, 60 S.E. 19 (1908); *Simmons v. Western Union Telegraph Co.*, 63 S.C. 425, 41 S.E. 521 (1902). Although the classification may not be arbitrary and there must be a reasonable relationship between the classification and a proper legislative purpose, *United States Fidelity and Guaranty Co. v. City of Newberry*, 257 S.C. 433, 186 S.E.2d 239 (1972), a classification will be sustained against constitutional attack if there is 'any reasonable hypothesis' to support it. *Thomas v. Spartanburg Railway, Gas & Electric Co.*, 100 S.C. 478, 85 S.E. 50

Cite as 331 S.E.2d 335 (S.C. 1985)

(1915). The South Carolina Supreme Court summarized the controlling principles as follows:

The requirements of equal protection are satisfied if (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis.

State ex rel. Medlock v. S.C. Family Farm Development Authority, supra.

The standard for determination of constitutionality on equal protection grounds under the Fourteenth Amendment was succinctly stated by the United States Supreme Court in *City of New Orleans v. Duke*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976):

When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determination as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economics under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.

... In short, the judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. In the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. [Citations and footnote omitted.]

Id. 427 U.S. at 303-304, 96 S.Ct. at 2516-2517. See also, *Fidelity Guarantee Mortgage Corp. v. Connecticut Housing Finance Authority*, 532 F.Supp. 81, 83 (D.Conn.1982).

The classifications established by S.C. Code Ann. § 11-35-1520(9)(d) are between resident and non-resident vendors. The statute is designed to protect South Carolina's legitimate interest in directing benefits, generated by state purchases, to the citizens of South Carolina—"the people who fund the state treasury from which the purchases are made and the people whom the state was created to serve."

Accordinging preference to resident bidders encourages local industry, thus stabilizing state and local economies. The money payable under the contracts is likely to remain within the state and enhance the tax base of state and local government. See *Galesburg Constr. Co. v. Bd. of Trustees*, 641 P.2d 745 (Wyo.1982).

The statute is tailored to meet these goals without substantially impeding the goal that state purchases be as economical as possible. S.C.Code Ann. § 11-35-20(f). The preference for residents applies only when their bids are, at most, two percent higher than those of non-residents. In addition, the preference does not apply to any unit costing \$10,000 or more or to prime or subcontractors in the construction industry.

[6] The appellant contends that the statutory definition of residents is irrational because it includes some non-residents. We disagree. The statute authorizes the state to prefer bids of non-residents only when they maintain an office in the state, as well as a representative inventory, and pay all assessed taxes. The differential treatment of the two groups of non-residents is rational because it favors those who pay taxes in South Carolina and who have manifested a desire to do business here. We conclude that the classifications made by § 11-35-1520(9)(d) are rationally related to a legitimate state interest and do not deny equal protection of the laws to non-residents.

The judgment below is, accordingly,
AFFIRMED.

LITTLEJOHN, C.J., and NESS, J., concur.

GREGORY and CHANDLER, JJ., concur in dissenting opinion.

GREGORY, Justice (dissenting):

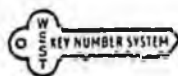
I dissent. I would hold the Statute [S.C. Code Ann. § 11-35-1520(9)(d) (Cum.Supp. 1984)] unconstitutional as a violation of equal protection under the State and Federal Constitutions.

The disputed section is in conflict with the entire Procurement Code [S.C. Code Ann. § 11-35-10, *et seq.* (Cum.Supp. 1984)]. One of the purposes of the Code is to require competition and fairness in procurement procedures. S.C. Code Ann. § 11-35-20(c) and (e) (Cum.Supp. 1984). Furthermore, the system is designed to maximize economy in the use of state funds. Section 11-35-20(f). To allow the preference of the disputed section to stand is to ignore the basic premise of the Code, thereby increasing the burden on the state treasury and all taxpayers to favor a small select group of South Carolina residents.

Under equal protection, the classification must bear a reasonable relation to the legislative purpose. *State ex rel. Medlock v. S.C. Family Farm Dev. Authority*, 279 S.C. 316, 306 S.E.2d 605 (1983). Section 11-35-1520(9)(d) not only fails to meet the reasonable relationship test, but is also in direct conflict with the *express* legislative purposes of the Procurement Code. Section 11-35-20.

I would reverse.

CHANDLER, J., concurs.



Jeffrey Hiram ANDERS, Respondent.

v.

Victoria Labell Watt
ANDERS, Appellant.

No. 22333.

Supreme Court of South Carolina.

Heard April 10, 1985.

Decided May 28, 1985.

Husband petitioned for a divorce on grounds of adultery, and wife petitioned for a divorce on grounds of physical cruelty. The Family Court, Greenville County, Larry R. Patterson, J., granted divorce to husband, awarded him custody of children, and distributed marital assets. Wife appealed. The Supreme Court held that: (1) circumstantial evidence was sufficient to support finding of adultery; (2) there was therefore no error in refusing wife's petition for a divorce; and (3) award of custody and distribution of property was within judge's discretion.

Affirmed.

Gregory, J., dissented and filed opinion.

1. Divorce §129(9)

Either circumstantial or direct evidence, or a combination of the two, may be sufficient to prove adultery as grounds for a divorce.

2. Divorce §129(9)

Circumstantial evidence that wife, while separated from husband, may have spent lengthy period of time in the early morning hours with another man in his apartment was sufficient to support finding of adultery as grounds for husband's petition for divorce.

3. Divorce §150.2

Where evidence was sufficient to support granting of divorce to husband on grounds of adultery and divorce was granted on that ground, trial court did not err in

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tated 151 A.L.R. 781, 796. In *Liberty Mutual Insurance Company v. Jones*, 344 Mo. 932, 130 S.W.2d 945, 125 A.L.R. 1149 (1939), annotated in 125 A.L.R. 1173, at 1182, it was said that an insurance adjuster should not state or act upon his own opinion as to the legal rights of the insured. Steps taken against the unauthorized practice of law are not primarily for the protection of attorneys but for the protection of the public from potential injury resulting from reliance on laymen for the performance of acts requiring the training, knowledge, and responsibility of a licensed attorney. *Herman v. Prudence Mutual Casualty Company*, 41 Ill.2d 468, 244 N.E.2d 809 (1969).

We, therefore, find an underlying reason why the adjuster would not authorize the contractor to proceed but required Moewes to do that. He was ignorant about materialmen's liens and not in a position to give Moewes any advice in that regard; and, if he had, he might have unlawfully engaged in the practice of law.

In *White v. Hartford Casualty Company*, La.App., 297 So.2d 744 (1974), it was held that a lay adjuster has no duty to advise claimants of the law, citing *Green v. Grain Dealers Mutual Insurance Company*, La. App., 144 So.2d 685 (1962), where it was said a simple inquiry to a Louisiana lawyer would have avoided the difficulty. In the case now before us, it is undisputed that Moewes and the adjuster were equally ignorant of the law of materialmen's liens. There was certainly no evidence that Moewes was deliberately or even, as the basis for an action, constructively lulled into any sense of security. In *Smith v. City of Dallas*, Tex.Civ.App., 425 S.W.2d 467 (1968) it was held an adjuster was under no duty in adjusting a claim to interpret for the claimant a notice provision of the city charter, of which he was not even aware, or even advise claimant to employ an attorney; his duty was to investigate and attempt to settle claims for the insurance company. That is all that the insurance adjuster here was doing.

We conclude and hold that an adjuster for an insurance company, under the cir-

cumstances of this case, is under no duty to give an insured the legal advice she claims should have been given.

Affirmed.



GALESBURG CONSTRUCTION COMPANY, INC. OF WYOMING, Plaintiff,

v.

The BOARD OF TRUSTEES OF MEMORIAL HOSPITAL OF CONVERSE COUNTY, Defendant.

No. 5607.

Supreme Court of Wyoming.

March 9, 1982.

A constitutional question was reserved from the District Court of Converse County, William A. Taylor, J., as to whether statute giving preference to residents on public contracts was unconstitutional. The Supreme Court, Raper, J., held that: (1) statute as applied to nonresident corporation did not warrant strict scrutiny analysis, because resident corporation was not a member of a suspect classification, and because the fundamental rights of interstate travel and the right to vote do not extend to a corporation; (2) as applied to nonresident corporation bidding on public contract, statute was not unconstitutional as violative of the equal protection clause of the Fourteenth Amendment, because the purpose of the statute, that is, to encourage local industry, was a legitimate state interest, and because the statute as drawn was rationally related to the advancement of that interest; and (3) argument by nonresident corporation that statute should be declared unconstitutional on a public policy basis would not be considered.

Question answered.

Rooney, J., dissented and filed opinion.

1. Constitutional Law ⇨48(1, 3)

When presented with a constitutionally based challenge to a statute, the Supreme Court presumes the statute to be constitutional unless the party mounting the challenge proves otherwise; any doubt in the matter must be resolved in favor of the statute's constitutionality.

2. Appeal and Error ⇨318

A constitutional question reserved to the Supreme Court from the district court is too important to be answered at random and it will not be answered unless fully presented and argued.

3. Constitutional Law ⇨213.1(2)

"Strict scrutiny," which is used when the statute in question employs a suspect classification or traverses a fundamental right, requires that before the statute can be upheld, the reviewing court must find that the statute serves some compelling state interest and that it is narrowly drawn so as to not unnecessarily interfere with a fundamental right or use a suspect classification. U.S.C.A.Const.Amend. 5, 14.

4. Constitutional Law ⇨225.4

Statute providing that public contracts shall be let, if advertisement for bids is not required, to a resident of the state, and that if advertisement for bids is required the contract shall be let to the responsible resident making the lowest bid if such resident's bid is not more than five percent higher than that of the lowest responsible nonresident bidder, did not warrant strict scrutiny analysis as applied to nonresident corporation challenging its constitutionality under the equal protection clause of the Fourteenth Amendment, because resident corporation was not a member of a suspect classification, and because the fundamental rights of interstate travel and the right to vote do not extend to corporations. W.S. 1977, § 9-8-302; U.S.C.A.Const.Amend. 5, 14.

5. Courts ⇨89

Opinions of the Attorney General construing statutes are entitled to weight, particularly when they have been weathered by time and where the legislature has failed

over a long period to make any change in the statute following its interpretation by the Attorney General.

6. Constitutional Law ⇨225.4

Public Contracts ⇨2

As applied to nonresident corporation bidding on public contract, statute providing that a public contract shall be let, if advertisement for bids is not required, to a resident of the state, and that if advertisement for bids is required the contract will be let to the responsible resident making the lowest bid if such resident's bid is not more than five percent higher than that of the lowest responsible nonresident bidder, was not unconstitutional as violative of the equal protection clause of the Fourteenth Amendment, because the purpose of the statute, that is, to encourage local industry, was a legitimate state interest, and because the statute as drawn was rationally related to the advancement of that interest. U.S.C.A.Const.Amend. 14; W.S.1977, § 9-8-302.

7. Constitutional Law ⇨38

Public policy is not a basis for declaring a statute unconstitutional.

8. Constitutional Law ⇨70.3(14)

Argument by nonresident corporation bidding on public contract that statute giving preference on public contracts to residents should be declared unconstitutional on a public policy basis would not be considered, because the legislature had announced the public policy with regard to the statute. W.S.1977, § 9-8-302.

Don W. Riske, Andrews, Andrews & Riske, P. C. (argued), Cheyenne, for plaintiff.

Steven F. Freudenthal, Atty. Gen., Bruce A. Salzburg, Senior Asst. Atty. Gen. (argued), and I. Vincent Case, Jr., Douglas, for defendant.

Before ROSE, C. J., and RAPER, THOMAS, ROONEY and BROWN, JJ.

RAPER, Justice:

We are presented with a reserved question. W.S.1977. The plaintiff's brief is whether it violates Art. I, § 2, subsection 3 and § 10 of the Constitution. The questioned statute provides:

"Whenever a contract is to be let for any department, city, town, or district, or other state for the creation, or repair, or other public structure in addition thereto, or improvement thereof, let, if advertisement is required, to a resident making the lowest bid is

1. Section 1-13-10

"When an important question is presented before the either party or judge of the district court, the question to be presented to the supreme court for

2. Article I, § 6, W

"No person shall be deprived of his or her property without

3. Article I, § 3, W

"Since equality of political rights and civil rights are essential to the political equality of citizens, the political rights of citizens shall be equal, and no citizen shall be denied the right to vote on account of race, color, sex, or any other whatsoever other than race, color, sex, or any other court of competent jurisdiction.

4. Section 1 of the United States

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the State in which they reside. No State shall make or enforce any law which shall abridge the privi-

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RAPER, Justice.

We are presented in this case with a reserved question pursuant to § 1-13-101, W.S.1977.¹ The question set out in plaintiff's brief is whether § 9-8-302, W.S.1977, violates Art. I, § 6, of the Wyoming Constitution,² Art. I, § 3, of the Wyoming Constitution³ and § 1 of the Fourteenth Amendment to the United States Constitution.⁴ The questioned statute, § 9-8-302, supra provides:

"Whenever a contract is let by the state, or any department thereof, or any county, city, town, school district, high school district, or other public corporation of the state for the erection, construction, alteration, or repair of any public building, or other public structure, or for making any addition thereto, or for any public work or improvements, such contract shall be let, if advertisement for bids is not required, to a resident of the state. If advertisement for bids is required the contract shall be let to the responsible resident making the lowest bid if such resident's bid is not more than five per-

cent (5%) higher than that of the lowest responsible nonresident bidder."

We shall uphold the statute.

On June 1, 1981, Galesburg Construction Company (Galesburg) was issued its Certificate of Incorporation by the Secretary of State for the State of Wyoming. In July of that year, the Board of Trustees of Memorial Hospital of Converse County (Hospital) announced bidding would be held for a construction project in Douglas. Galesburg submitted a bid on the project to the Hospital. On August 27, 1981, the bids were opened and it was discovered that Galesburg was the lowest bidder for the project. However, on September 14, 1981, the Hospital informed Galesburg that, since it did not qualify as a "resident" of the state of Wyoming, as that term is defined in § 9-8-301, W.S.1977,⁵ and because its bid was not more than five percent lower than the lowest resident bidder under § 9-8-302, supra, it would not be awarded the project.

On September 23, 1981, Galesburg filed suit seeking to have § 9-8-302 as applied to

1. Section 1-13-101, W.S.1977:

"When an important and difficult constitutional question arises in a proceeding pending before the district court on motion of either party or upon his own motion the judge of the district court may cause the question to be reserved and sent to the supreme court for its decision."

2. Article I, § 6, Wyoming Constitution:

"No person shall be deprived of life, liberty or property without due process of law."

3. Article I, § 3, Wyoming Constitution:

"Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction."

4. Section 1 of the Fourteenth Amendment to the United States Constitution:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citi-

zens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, § 34, Wyoming Constitution is the Wyoming version of the right to equal protection:

"All laws of a general nature shall have a uniform operation."

Washakie County School District Number One v. Herschler, infra.

5. Section 9-8-301, W.S.1977:

"As used in this act [§§ 9-8-301 to 9-8-304, 9-8-308] the word 'resident' means any person who shall have been a bona fide resident of the state for one (1) year or more immediately prior to bidding upon the contract; a partnership or association, each member of which shall have been a bona fide resident of the state for one (1) year or more immediately prior to bidding upon the contract; a corporation which has been organized under the laws of the state of Wyoming and has been in existence therein for one (1) year or more immediately prior to bidding upon the contract and which has its principal office and place of business within the state of Wyoming."

it declared unconstitutional.⁹ On October 7, 1981, the parties and the Wyoming Attorney General entered into a stipulation setting forth the uncontroverted facts and requesting that the question of the statute's constitutionality be reserved to this court. Pursuant to that request, the district judge filed his findings of fact and ordered that the constitutional question be reserved. The district court fully complied with the rule that all preliminary matters including factual questions must first be disposed of before the supreme court will consider a reserved constitutional question. *State v. Rosachi, Wyo.*, 549 P.2d 318 (1976).

I

[1] When presented with a constitutionally based challenge to a statute, this court presumes the statute to be constitutional unless the party mounting the challenge proves otherwise. *Nickelson v. People, Wyo.*, 607 P.2d 904 (1980). This is because there exists a strong presumption in favor of constitutionality. *Sorenson v. State, Wyo.*, 604 P.2d 1031 (1979). Any doubt in the matter must be resolved in favor of the statute's constitutionality. *Washakie County School District Number One v. Herschler, Wyo.*, 606 P.2d 310 (1980), cert. denied 449 U.S. 824, 101 S.Ct. 86, 66 L.Ed.2d 28. Thus, before we will strike down a statute we must find that it clearly violates one of the principles of our state and national constitutions by which we are bound. When there is a transgression of either of those documents, we must not and will not hesitate to declare the legislative enactment invalid. *Washakie County School District Number One v. Herschler, supra*.

II

[2] Though Galesburg stated the question for us in terms which included chal-

6. Galesburg's complaint stated in pertinent part:

"11. W.S. 9-8-302, on its face and as applied to the Plaintiff by the Defendant:

"a. violates Article I, Section 6 of the Constitution of the State of Wyoming by depriving the Plaintiff of its property rights without due process of law;

lenges based upon Art. I, §§ 3 and 6 of the Wyoming Constitution, these provisions were not argued as authority in the brief, and, in fact, were not mentioned other than in the statement of the issues. A constitutional question reserved to the supreme court from the district court is too important to be answered at random and it will not be answered unless fully presented and argued. *Salt Creek Transportation Company v. Public Service Commission, 37 Wyo.* 488, 263 P. 621 (1928). The real crux of Galesburg's challenge can be found in the two-tiered equal protection-due process analysis which has been developed by the United States Supreme Court in connection with the Fourteenth Amendment, *supra*. Galesburg has argued that under such an approach § 9-8-302, *supra*, must fall.

[3] The test for determining whether a legislative enactment passes muster under an equal-protection or due-process challenge exists on two levels. The decision as to which level of scrutiny should be employed has often been as important as the actual application of the test. Strict scrutiny, which requires a much more rigorous examination, is used when the statute in question employs a suspect classification or traverses a fundamental right. Under strict scrutiny, before the statute can be upheld, the reviewing court must find that the statute serves some compelling state interest and that it is narrowly drawn so as to not unnecessarily interfere with a fundamental right or use a suspect classification. *Washakie County School District Number One v. Herschler, supra*.

Under a lower level of scrutiny, the reviewing court must merely determine whether the statute serves a legitimate state interest. If so, all that is required is that the statute be rationally related to the advancement of that interest. Unless these

"b. violates the Plaintiff's due process and equal protection guarantees under Section 1, Amendment 14 to the Constitution of the United States;

"c. creates a classification which arbitrarily discriminates against the Plaintiff without any rational relationship to a legitimate state interest."

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conditions are shown not to exist, the statute must be upheld. *Washakie County School District Number One v. Herschler*, supra.⁷

III

[4] Galesburg argues that we should evaluate the constitutionality of § 9-8-302, supra, with strict scrutiny. It supports this position by string citing other cases in which durational residency requirements were subjected to strict scrutiny. However, Galesburg failed to carefully consider why each of those cases deserved the higher level of scrutiny.⁸

In each of the cited cases either a fundamental right or a suspect classification was implicated. The fundamental rights generally found injured by durational residency requirements in those cases were the right of interstate travel and the right to vote. *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1960); *State v. Van Dort*, Alaska, 502 P.2d 453 (1972); *Jarmel v. Putnam*, 179 Colo. 215, 499 P.2d 603 (1972); *Delgiorno v. Huisman*, Wyo., 498 P.2d 1246 (1972). These fundamental rights have never been extended to corporations under the Fourteenth Amendment. In fact, the language in the Amendment seemingly excludes corporations by referring to "[a]ll persons born or naturalized in the United States." Corporations are fictitious entities incapable of being born (in a biological sense), voting, or traveling. They do not possess those fundamental rights.

7. There have been some indications a third level may exist for gender-based classifications. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), i.e., "must serve important governmental objectives and must be substantially related to achievement of those objectives."

8. Not all the cases cited were right on point. One, *York v. State*, 53 Hawaii 557, 498 P.2d 644 (1972), found a three-year residency requirement for public employment not to require strict scrutiny; however, the court struck it down anyway using only the rationally-related test. Another case cited not belonging here was *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948). That case was

Neither can we accept that Galesburg is a member of a suspect classification. Such status is usually only awarded to racial and nationality minorities, victims of invidious discrimination. *McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S.Ct. 283, 288, 13 L.Ed.2d 222 (1964). There is nothing in the record showing Galesburg to belong to such a minority. Further, such status has never been given to corporations since the Fourteenth Amendment was designed to protect people not business organizations. Accordingly the statute as applied to Galesburg does not warrant strict scrutiny, and thus we must employ the lower level of scrutiny.

IV

[5, 6] The recognized testing criteria to determine whether a state statute violates equal protection rights under the rational-basis standard are summarized in *Morey v. Doud*, 354 U.S. 457, 463-464, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957):

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is

decided on the basis of the Privilege and Immunities Clause. However, that clause, which protects citizens of one state in regards to activities in another state, is not involved here because Galesburg is a Wyoming corporation trying to do business in Wyoming. We also can find no support for Galesburg's position in *Rayco Construction Company, Inc. v. Vorsanger*, 397 F.Supp. 1105 (ED Ark.1975). It held the statute in question discriminatory as to both domestic and foreign contractors and applied a strict construction test because of its criminal sanctions for violations. It did not hold that a proper preference may not be allowed and in fact intimated it could.

called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' [Citation.]"

Viewing the statute, as it is applied to Galesburg, under the lower level of scrutiny, we must determine whether the statute serves a legitimate state interest and whether it is rationally related to the advancement of that interest. Previously it has been said that the purpose of § 9-8-302, supra, was "to encourage local industry." Opinions, Attorney General of Wyoming, No. 49, June 24, 1963, at page 240.⁹ We agree that this appears to have been the legislature's likely intent. We further hold that this is definitely a legitimate state interest. Accordingly, the only question left is whether the statute as drawn is rationally related to the advancement of this state interest. We hold that it is.

By giving Wyoming corporations¹⁰ a handicap in bidding on public contracts, the statute in essence increases the likelihood that a Wyoming corporation will be awarded the contract. When contracts are awarded to Wyoming corporations, as opposed to out-of-state corporations, local industry is encouraged. This contributes to, strengthens, and stabilizes the state and

9. Opinions of the Attorney General construing statutes are entitled to weight, particularly when they have been weathered by time and where the legislature has failed over a long period to make any change in a statute following its interpretation by the Attorney General. Such acquiescence is worthy of careful consideration in an inquiry into the intent of that body. *School Districts Nos. 2, 3, 6, 9 and 10, Campbell County v. Cook*, Wyo., 424 P.2d 751 (1967). That construction has stood for nearly twenty years.

10. We note that Galesburg's challenge in this case is to § 9-8-302, supra. No challenge was made to § 9-8-301, supra, which defines a Wyoming corporation as one having been incorporated in Wyoming for more than one year. Thus, we need not evaluate the one-year requirement.

local economy—the primary interest is that of the public. *Equitable Shipyards, Inc. v. State*, 93 Wash.2d 465, 611 P.2d 396 (1980). A benefit to a particular person, be it corporate or natural, is only incidental and not lethal to constitutionality. The money payable under the contract is more likely to remain within the state, and enhance the tax base of state and local government.¹¹ Therefore, we conclude that, as applied to Galesburg, the statute does not run afoul of the Fourteenth Amendment.

Galesburg has failed to carry its burden that the statute is essentially arbitrary.

V

[7, 8] The remaining portion of Galesburg's argument is to the effect that we should declare the statute unconstitutional on a public policy basis. As stated earlier, we have no authority to overturn statutes enacted by the legislature merely because we believe that they are against public policy. The legislature announces public policy by its enactments. Statutes are entitled to a presumption of constitutionality unless the challenging party clearly establishes that constitutional principles are violated by the statute. Public policy is not a basis for declaring a statute unconstitutional. Wisdom or expediency of statutes is for the legislature and not the courts. *Denny v. Stevens*, 52 Wyo. 253, 75 P.2d 378, 113 A.L.R. 1337 (1933). Courts must not usurp or encroach upon the legislative function.

11. Arizona has a statute which specifically grants a 5% preference to contractors who have paid county and state taxes for two successive years previous to making the bid. In *Schrey v. Allison Steel Mfg. Co.*, 75 Ariz. 282, 255 P.2d 604 (1953), the statute was held constitutional as not discriminatory in that the legislature had a right to believe and it may be a fact that the interests of the state and the political subdivisions would be better served. The taxes requirement was held to be a reasonable test to determine the responsibility of the bidder. We note that § 9-8-302, supra, the Wyoming statute being questioned, requires that the contract must be let to a responsible bidder.

Kennedy v. S. (1977). We do not speak when the constitution is spoken. The legislature's public policy in this case we cannot construe.

We hold that the statute, § 9-8-302, supra,

Returned to the constitutionality of

ROONEY, Jr.

Although I do not believe that I can agree with the results from a person who has been in the public for many years. I do not believe that a public penalty, simply because of a privilege to do within the year, is accepting all of the opinion, I cannot state interest" basis for giving lived in Wyoming his bid on contracts as an individual Wyoming for a month prior to

That exact majority holding have an arbitrary and would be constitutional provisions here reserved

"IT IS THE JUDGED A following specification and the same to the Wyoming decision:

1. Section 9-8-302, supra. "As used in § 9-8-302] the person who shall be the state attorney prior to the partnership which shall

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Kennedy v. State, Wyo., 559 P.2d 1014 (1977). We only consider public policy when the constitution or statutes have not spoken. The legislature has announced the public policy in this instance. Accordingly, we cannot consider Galesburg's argument.

We hold that, as applied to Galesburg, § 9-8-302, *supra*, is constitutional.

Returned to the district court, reserved constitutional question argued, answered.

ROONEY, Justice, dissenting.

Although I agree that there is a definite state interest in encouraging local industry, I cannot agree that such encouragement results from a statute which prevents a person who has been a resident of the state for many years from bidding on construction of a public building contract, without penalty, simply because he exercised his privilege to do business as a corporation within the year previous to the bid. Accepting all of the law cited in the majority opinion, I cannot find either a "legitimate state interest" or a "reasonable/rational" basis for giving a preference to A, who has lived in Wyoming for two years and makes his bid on construction of a public building as an individual, over B, who has lived in Wyoming for thirty years but makes his bid under the name of a corporation wholly owned by him but incorporated only a month prior to the bid.

That exact situation can result from the majority holding. The statute, then, would have an arbitrary and capricious application and would be violative of all of the constitutional provisions set forth in the question here reserved to us by the district court:

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the following specific constitutional question be, and the same hereby is, reserved and sent to the Wyoming Supreme Court for its decision:

1. Section 9-8-301, W.S.1977, provides:
"As used in this act [§§ 9-8-301 to 9-8-304, 9-8-308] the word 'resident' means any person who shall have been a bona fide resident of the state for one (1) year or more immediately prior to bidding upon the contract; a partnership or association, each member of which shall have been a bona fide resident of

"WHETHER W.S. 9-8-302, WHICH STATES:

"Whenever a contract is let by the state, or any department thereof, or any county, city, town, school district, high school district, or other public corporation of the state for the erection, construction, alteration, or repair of any public building, or other public structure, or for making any addition thereto, or for any public work or improvements, such contract shall be let, if advertisement for bids is not required, to a resident of the state. If advertisement for bids is required the contract shall be let to the responsible resident making the lowest bid if such resident's bid is not more than five percent (5%) higher than that of the lowest responsible nonresident bidder."

"VIOLATES ARTICLE I, SECTION 6, OF THE WYOMING CONSTITUTION, AND/OR ARTICLE 1, SECTION 3, OF THE WYOMING CONSTITUTION AND/OR SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

It may be contended that I am assuming a fact not present—that the record does not reflect the plaintiff's stockholders to have been Wyoming residents for an extended period prior to incorporation. But the majority opinion makes a like assumption. The record does not reflect that such stockholders were *not* long-time residents of Wyoming. If this fact were necessary to resolve the constitutional question, the matter would not be ripe for answer to a reserved question. *State v. Rosachi*, Wyo., 549 P.2d 318 (1976). However, the intent of the legislature as indicated by the legislative history of § 9-8-301, W.S.1977¹ was to preclude

the state for one (1) year or more immediately prior to bidding upon the contract; a corporation which has been organized under the laws of the state of Wyoming and has been in existence therein for one (1) year or more immediately prior to bidding upon the contract and which has its principal office and

a long-time resident from bidding on construction of a public building contract, without penalty, through a wholly-owned corporation within a year after its incorporation. The following amendment to changes in § 9-8-301 was accepted on the House's second reading of the file in 1961, but was struck on the third reading:

"At the end of the last sentence strike the period insert a semi-colon and the following language: 'provided, however, that any corporation formed by persons who are bona fide residents of the State for one year or more immediately prior to bidding upon a contract and the corporate stock of which is owned in full by such bona fide residents shall be included within the meaning of the word "resident".'" Digest of Journals, 36th Legislature, p. 65 (1961).

Legislative intent may be determined through legislative history. *Saffels v. Bennett*, Wyo., 630 P.2d 505 (1981); *Sanchez v. Sanchez*, Wyo., 626 P.2d 61 (1981).

It may also be contended that the reserved question concerns an inquiry about § 9-8-302, W.S.1977² and that we should not consider the constitutionality of § 9-8-301, W.S.1977. Such contention overlooks the fact that § 9-8-301 defines the terms used in § 9-8-302. The meaning and legislative intent as expressed in § 9-8-302 cannot be ascertained without reference to the validity of § 9-8-301. Whether or not § 9-8-302 is violative of the Constitution depends upon the language thereof as defined by § 9-8-301. The word "resident" as used in § 9-8-302 makes the application of the section unconstitutional. Section 9-8-301 must be examined to determine the constitutionality of § 9-8-302. They must be considered *pari materia*.

"It is a fundamental principle of statutory construction that to ascertain the meaning of a given law all statutes relating to the same subject or having the

place of business within the state of Wyoming."

same general purpose shall be read in connection with it as constituting one law. They must be construed in harmony, else the law of the State would consist of disjointed and unharmonious parts with a conflicting and confusing result. . . ." *Stringer v. Board of County Commissioners of Big Horn County*, Wyo., 347 P.2d 197, 200 (1959). See *Kuntz v. Kinne*, Wyo., 395 P.2d 236 (1964); *Brinegar v. Clark*, Wyo., 371 P.2d 62 (1962).

Although upholding a state tax exemption for nonresidents on merchandise held in storage, the United States Supreme Court said, in applying the rational-basis test:

" . . . [T]here is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' . . ." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527, 79 S.Ct. 437, 441, 3 L.Ed.2d 480 (1959). See *York v. State*, 53 Hawaii 557, 498 P.2d 644 (1972).

I am not here addressing the reasonableness of the 5 percent figure vis-a-vis 4 percent, 1 percent, 25 percent, 65 percent, etc.—nor did the majority opinion—nor did the stipulation of facts upon which was based the finding of facts in the court's order. And I am not here addressing the constitutionality of the statute as it might pertain to a penalty applicable only to actual nonresident persons or entities. I note in this connection, however, that an arbitrary classification has been held to exist in a statute prohibiting employment of aliens on public works. *Purly & Fitzpatrick v. State*,

2. Section 9-8-302, W.S.1977, is quoted in the question as reserved. *supra*.

71 Cal.2d 5 (1969). See *Game Con* 1128, 92 L.

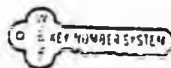
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GALESBURG CONST. CO. v. BOARD OF TRUSTEES Wyo. 753

Cite as: Wyo., 641 P.2d 745

71 Cal.2d 566, 79 Cal.Rptr. 77, 456 P.2d 645 (1969). See *Torao Takahashi v. Fish and Game Commission*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1473 (1948). Wyoming residents who have chosen to do business as a corporation within a year previous to the bids referred to in the statute.

I would answer the reserved question by holding the statute unconstitutional in denying equal protection to some persons to which it is applicable, i.e., those long-time



93 Wash.2d 465
**EQUITABLE SHIPYARDS,
 INC., Appellant,**

v.

The STATE of Washington, By and
 Through its DEPARTMENT OF
 TRANSPORTATION and the Wash-
 ington State Transportation Commis-
 sion, Respondent,

v.

**MARINE POWER & EQUIPMENT
 CO., Intervenor.**

No. 46330.

Supreme Court of Washington,
 En Banc.

May 8, 1980.

Action was brought by foreign shipbuilder complaining that State Transportation Commission acted arbitrarily and capriciously in awarding ferry construction contract to domestic shipbuilder and additionally challenging constitutionality of statute limiting review of Commission's administrative decision, constitutionality of bidding preference statute, and construction of that statute. The Superior Court, Thurston County, Gerry L. Alexander, J., rejected challenges, and the case came before the Supreme Court on certification from the Court of Appeals. The Supreme Court, Hicks, J., held that: (1) rational relation existed between purposes of statute establishing bidding preference for domestic shipbuilders and its classification of in-state and out-of-state shipbuilding firms, and thus bidding preference statute did not violate equal protection guarantees; (2) early hearing provision was not invalid under due process clause, particularly where foreign shipbuilder was previously given opportunity to be heard at an open public meeting and its appeal was heard approximately one month after it was filed; (3) Commission did not violate Open Public Meetings Act; and (4) State's method of evaluating proposal, by aggregating bid, life cycle cost and 6% preference impact for each proposal to determine most advantageous proposal, was correct.

Affirmed.

1. Public Contracts ⇨6

Primary purpose of public bidding is to benefit taxpayers by procuring best work or material at lowest price practicable; a secondary purpose is to provide bidders with fair forum for award of public contracts.

2. Administrative Law and Procedure ⇨760, 763

When applying arbitrary and capricious standard of review, reviewing court does not substitute its judgment for that of agency and, where there is room for two opinions, action is not arbitrary or capricious if exercised honestly and upon due consideration even if reviewing court believes erroneous conclusion was reached; when contracts are to be awarded on terms "most advantageous to" or "in the best interest of" the state, discretion in making award may be even somewhat broader.

3. States ⇨98

Arbitrary or capricious review standard provided by statute, which states that upon appeal from award of ferry contract, court may affirm decision of State Transportation Commission or it may reverse decision if it determines that action of Commission was arbitrary or capricious, does not include constitutional review. West's RCWA 47.60.650(6)(b).

4. Declaratory Judgment ⇨204

Statute which provides that, on appeal from award of ferry construction contract, court may affirm decision of State Transportation Commission or it may reverse Commission's decision if Commission's action was arbitrary or capricious, does not divest court of jurisdiction to hear constitutional challenges under Declaratory Judgment Act. West's RCWA 7.24.010 et seq. 47.60.650(6)(b).

5. Constitutional Law ⇨213.1(1)

Strict scrutiny is appropriate when statutory classification is based on suspect category or infringes upon fundamental right. West's RCWA Const. Art. 1, § 12; U.S.C.A.Const. Amend. 14.

6. Constitutional Law

Foreign shipbuilder designated a "foreign" as an "alien" for purpose of analysis since in context, alienage refers to citizenship. West's R. 12; U.S.C.A.Const. Art.

See publication for other judicial definitions.

7. Constitutional Law

Bidding preference favors domestic shipbuilders for purpose of construction contracts awarded on only rational basis if it violated equal RCWA 47.60.670; U. 14.

3. Constitutional Law

Rational basis of equal protection challenge whether classification members within designated some basis in reality distinguishing between without designated classification has rational challenged statute. 14.

9. Constitutional Law

There is strong constitutionality in economic and burden of refusal.

**10. Constitutional Law
 Public Contracts**

Rational relationship of bidding preference favors domestic shipbuilders for purpose of construction contracts of in-state and out-of-state firms, and thus preference violates equal protection. West's RCWA 47.60.670; U.S.C.A.Const. Art. 1, § 12; 14.

6. Constitutional Law ⇨210(1)

Foreign shipbuilder, which could be designated a "foreign corporation," was not an "alien" for purposes of equal protection analysis since in context of suspect categories, alienage refers to non-United States citizenship. West's RCWA Const. Art. 1, § 12; U.S.C.A.Const. Amend. 14.

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

7. Constitutional Law ⇨225.4

Bidding preference statute, which favors domestic shipbuilders over foreign shipbuilders for purposes of procuring ferry construction contracts, was most closely allied with economic legislation, thus requiring only rational basis scrutiny to determine if it violated equal protection. West's RCWA 47.60.670; U.S.C.A.Const. Amend. 14.

8. Constitutional Law ⇨213.1(2)

Rational basis inquiry applicable to equal protection challenge involves test whether classification applies alike to all members within designated class, whether some basis in reality exists for reasonably distinguishing between those within and without designated class, and whether classification has rational relation to purpose of challenged statute. U.S.C.A.Const. Amend. 14.

9. Constitutional Law ⇨48(1)

There is strong presumption of constitutionality in economic acts of legislature and burden of refutation is on challenger.

10. Constitutional Law ⇨225.4

Public Contracts ⇨2

Rational relation exists between purposes of bidding preference statute, which favors domestic shipbuilders over foreign shipbuilders for purposes of procuring ferry construction contracts, and its classification of in-state and out-of-state shipbuilding firms, and thus preference statute does not violate equal protection guarantees. West's RCWA 47.60.670; West's RCWA Const. Art. 1, § 12; U.S.C.A.Const. Amend. 14.

11. Statutes ⇨79(2)

Under constitutional prohibition of special law that grants corporate powers or privileges, a special law is one which arbitrarily separates some person, place or thing from those upon which it would otherwise operate and focuses upon what law excludes; if nothing is excluded that should be included, the law is general enactment and when only limitation is legitimate classification of law's objects, it is a general law. West's RCWA Const. Art. 2, § 28, subd. 6.

12. Statutes ⇨79(2)

Bidding preference statute, which related to particular bidders for ferry construction contracts as a class and not particular bidders of a class, did not separate out a particular person or entity for special treatment, and thus did not represent "special law" granting corporate powers or privileges in violation of the Constitution. West's RCWA 47.60.670; West's RCWA Const. Art. 2, § 28, subd. 6.

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

13. Records ⇨30

State Transportation Commission's refusal to disclose plans and specifications of one competitor to another in connection with award of ferry construction contract was not arbitrary and capricious where foreign shipbuilder made no allegation that Commission failed to give identical information to both competitors, where foreign shipbuilder obtained access to plans and specifications under court order and took full advantage of that access, and where it demonstrated no prejudice from Commission's refusal to allow it to review plans and specifications earlier. West's RCWA 42.17.250-42.17.340, 42.17.270.

14. States ⇨98

Action of State Transportation Commission in considering prequalification files in connection with award of ferry construction contract to domestic shipbuilder was not arbitrary or capricious where, to extent that certain commissioners may have intimated some question concerning prequalification criterion of financial responsibility,

this did not deflect focus of meetings, where no prejudice resulted, and where after examination was permitted, foreign shipbuilder did not identify any portion of files as objectionable or inaccurate.

15. Constitutional Law ⇨62(5)

States ⇨98

Statutory provision for hearing on appeal within ten days after award of ferry construction contract by State Transportation Commission did not violate separation of powers doctrine where statute was construed by trial court as directory, not mandatory, and where trial ultimately was held one month after appeal was filed and not ten days as statute provided. West's RCWA 47.60.650(6)(b).

16. Constitutional Law ⇨276(2)

States ⇨98

Where hearing date set one month after award of ferry construction contract to domestic shipbuilder by State Transportation Commission reflected conscientious effort by trial court to afford foreign shipbuilder a reasonable time to prepare, to allow for and to hear and decide matters, and still give some efficacy to statute which provided 90-day limitation on proposals, early hearing provision set by statute, which called for hearing on appeal within ten days, was not invalid under due process clause, particularly since foreign shipbuilder was previously afforded opportunity to be heard at open public meeting. West's RCWA 47.60.650(4)(i); U.S.C.A.Const. Amendments. 5, 14.

17. States ⇨98

Any independent examination by State Transportation Commission of domestic shipbuilder's plans and specifications constituted neither "action" nor "meeting" under Open Public Meetings Act, and thus Commission, which took its "action" in awarding ferry construction contract to domestic rather than foreign shipbuilder in open public meeting following presentation by both firms, experts and the public, did not violate the Act. West's RCWA 42.30.010, 42.30.020(3).

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

18. States ⇨98

State's method of evaluating shipbuilder's ferry construction proposal by aggregating bid, life cycle costs and 6% preference for domestic shipbuilders for each proposal to determine proposal most advantageous to state, rather than by determining contract award solely by comparing vessel price of the in-state proposal with vessel price of out-of-state proposal as enhanced by 6% preference penalty, constituted correct application of preference bidding statute. West's RCWA 47.60.650(5, 6), 47.60.-670.

Graham & Dunn, Charles S. Mullen, Seattle, for appellant.

Slade Gorton, Atty. Gen., Thomas R. Garlington, Sr., Atty. Gen., William G. Boland, Asst. Atty. Gen., Olympia, for respondent.

Aiken, St. Louis & Siljed, Wallace Aiken, Gregory L. Bertram, Seattle, for intervenor.

HICKS, Justice.

Equitable Shipyards, Inc., of New Orleans (Equitable), complains that the State Transportation Commission (Commission), the directing entity of the Department of Transportation (Department), acted arbitrarily and capriciously in awarding a ferry construction contract to Marine Power & Equipment Co., of Seattle (MP&E). Additionally, Equitable challenges: (1) the constitutionality of a statute limiting review of the Commission's administrative decision; (2) the constitutionality of a bidding preference statute; and (3) the construction of that statute. See RCW 47.60.650-670. The trial court rejected Equitable's challenges and the case is here upon certification from Division Two of the Court of Appeals. Equitable requests this court to direct that it be awarded the contract; remand to the trial court for further proceedings; or remand to the Commission for further proceedings. We affirm the trial court.

In the course of this opinion, for convenience and when appropriate, the Commission and the Department will be collectively referred to as the "State".

In 1977, the construction of additional award of a construction builder. Laws of p. 610; RCW 4 was to be selected design-bidding process to compete required to prequalify 47.60.660 before considered. An issued notice of for design and c By November prequalified, include.

Under RCW proposals (RFP) ry vessels was : The RFP required specifications to ferries be delivered from November Basic requirements meet to be considered RFP.

Those to the submit a base : The RFP included Commission work als.

On or about 1 and MP&E each Under RCW 47 substitute an offer days after submission provides for evaluation

The [Commission timely proposal with to the request : shall estimate nance costs

After evaluation select the firm "most advantageous into consideration and the in-st

1. The powers authority and by

EQUITABLE SHIPYARDS, INC. v. STATE, ETC. Wash. 399

Cite as, Wash., 011 P.2d 396

In 1977, the legislature authorized construction of additional ferries through an award of a construction contract to a shipbuilder. Laws of 1977, 1st Ex.Sess., ch. 166, p. 610; RCW 47.60.650.¹ The shipbuilder was to be selected through a competitive design-bidding procedure. Any firm desiring to compete for the contract was required to prequalify as prescribed in RCW 47.60.660 before a bid or proposal would be considered. August 1977, the Department issued notice of intent to request proposals for design and construction of ferry vessels. By November 1977, seven shipyards had prequalified, including MP&E and Equitable.

Under RCW 47.60.650(4), a request for proposals (RFP) for construction of six ferry vessels was issued to prequalified firms. The RFP required complete vessel design specifications to be furnished and that the ferries be delivered in 6-month intervals from November 30, 1979 to May 30, 1982. Basic requirements that the ferries must meet to be considered were set forth in the RFP.

Those to the RFP were authorized to submit a base proposal and two alternates. The RFP included copies of the forms the Commission would use in evaluating proposals.

On or about December 30, 1977, Equitable and MP&E each submitted three proposals. Under RCW 47.60.650(9), all proposals constitute an offer and remain open for 90 days after submission. RCW 47.60.650(5) provides for evaluation of proposals:

The [Commission] shall evaluate all timely proposals . . . for compliance with the requirements specified in the request for proposal, and, in addition, shall estimate the operation and maintenance costs of each firm's vessel design

After evaluation, the Commission was to select the firm presenting the proposals "most advantageous" to the state, taking into consideration the RFP requirements and the in-state preference provided in

1. The powers and duties of the toll bridge authority and highway department were transferred

RCW 47.60.670. RCW 47.60.650(6). RCW 47.60.670 establishes a "preference" for shipbuilding firms located in Washington, "providing such bid or proposed price does not exceed by more than six percent the lowest price proposal for a negotiated contract or the lowest comparable bid of any shipbuilding firm located outside the state of Washington."

The Department retained a naval architect to assist in evaluating the proposals. Evaluation meetings were held with each shipbuilder on January 25, 1978. The naval architect estimated the life cycle costs of each proposal and issued a report dated January 30, 1978. Based on this evaluation, recommended ranking of six proposals was:

- (1) MP&E Alternate A
- (2) Equitable Alternate A
- (3) MP&E Alternate B
- (4) Equitable Alternate B
- (5) MP&E Base proposal
- (6) Equitable Base proposal (not in compliance with RFP)

The rankings incorporated the 6 percent out-of-state "penalty" preference.

The report and recommendation were submitted to the Commission at an "adjourned regular meeting" on February 3, 1978. The Commission was responsible for evaluating and selecting the proposal most advantageous to the state. RCW 47.60.650(6)(a). By February 3rd all proposals satisfied the RFP, except the Equitable base proposal which was subsequently brought into compliance on February 17th.

The commissioners heard from the naval architect and representatives from both shipyards. Both firms were then permitted to submit additional information and provide their own evaluation of the proposals. Equitable introduced a memorandum objecting to the application of the 6 percent in-state preference. It also made repeated requests to review the plans and specifications of MP&E. The requests were denied.

red to the Department of Transportation. RCW 47.01.031.

Based on the additional information and the shipyard's evaluations, the naval architect reevaluated the proposals in a report dated February 17, 1978. The proposals were ranked as follows:

PROPOSAL	SINGLE VESSEL PRICE**	SINGLE VESSEL LIFE CYCLE COST**
MP&E - A	\$ 17,694,000	\$ 32,011,000
MP&E - B	17,237,000	32,162,000
Equitable - A	17,309,000	32,296,000 *
Equitable - Base	17,490,000	32,660,000 *
Equitable - B	17,316,000	32,750,000 *
MP&E - Base	17,983,000	33,013,000

* incorporates 6 percent out-of-state "penalty"

** rounded to the nearest \$1,000.

The Commission resumed its public meeting on February 20, 1978, hearing additional testimony from both shipyards. February 21, the Commission selected MP&E alternate A as the proposal most advantageous to the state, ranking the remaining proposals in the order recommended in the naval architect's report of February 17th.

February 27, 1978, Equitable filed notice of appeal² in Thurston County Superior Court under RCW 47.60.650(6)(b), which provides in part:

The [Commission's] decision shall be conclusive unless appeal therefrom shall be taken by an aggrieved firm to the superior court of Thurston county within five days after receiving notice of the [Commission's] final decision. The appeal shall be heard summarily within ten days after the same is taken and on five days notice thereof to the [Commission]. The court shall hear any such appeal on the administrative record which was before the

2. According to Equitable's notice of appeal in Thurston County Superior Court, it filed a declaratory judgment action in the Western District of Washington on February 24, 1978. *Equitable Shipyards, Inc. v. Bulley*, No. C78-123. Equitable noted this contemporaneous federal proceeding and expressly reserved "the right to have all its constitutional claims and its claims arising under Federal Statutes heard and adjudicated" in federal court. The claims were enumerated as follows: (1) violation of the commerce clause (U.S. Const. art. 1, § 8); (2) deprivation of due process (Fourteenth Amendment); (3) deprivation of equal protection (Fourteenth Amendment); (4) abridgment of privileges and immunities; (5) violation of Equitable's civil rights; (6) granting of special

[Commission]. The court may affirm the decision of the [Commission] or it may reverse the decision if it determines the action of the [Commission] is arbitrary or capricious.

By consent of all parties, MP&E intervened in the proceedings. In its original notice of appeal, Equitable alleged that the Commission acted arbitrarily and capriciously by: (1) incorrectly applying the 6 percent preference; (2) violating the Open Public Meetings Act; and (3) violating the public records act.

March 3, 1978, in the trial court hearing, it was agreed the State would not enter into a contract with MP&E until motions had been heard. At a March 10th hearing, Equitable moved to obtain: (1) plans and specifications of MP&E; (2) prequalification files; and (3) all matters and documents considered by the commissioners.

The plans submitted by both shipyards had previously been placed in escrow. The State and MP&E resisted disclosure, asserting a protected proprietary interest. The trial court ruled that the plans and specifications were part of the record and permitted inspection under court supervision.

Regarding the prequalification files, the trial court ruled that the issue of prequalification was not presently reviewable. Under the prequalification process of RCW 47.60.660, Equitable, MP&E, and five other firms had been deemed prequalified. The trial court noted that the firms were entitled to rely on that determination and to proceed with preparation of proposals.³

privileges and immunities not belonging equally to all citizens and corporations; (7) creating special law granting corporate powers and privileges. Although the record on appeal contains no copy of the federal complaint, apparently that action alleges state as well as federal constitutional infractions. The federal case is pending.

3. RCW 47.60.660 provides an independent appeal process by which an "aggrieved party" may obtain review of prequalification. We need not determine whether Equitable had the right to challenge the prequalification of another "bidder" under this statute.

Equitable asserted that the issuance of the bid by MP&E (a) became an issue and (b) was thus the file which was relevant. The financial data filed in support of Equitable's qualification determination was not at issue on March 21st, the date when the State was to examine MP&E's bid.

Equitable's "conclusion" that the State's matters and documents were not relevant on March 10th hearing, although there was no hearing between the court and the State, was not an issue. The time allotted for the State to prove inadequate prequalification in RCW 47.60.650(6)(b) appeal shall be ten days, set trial for March 21st, and the State's motion to present additional evidence or supplement the record was denied.

The trial court ruled that the constitutional claim under RCW 47.60.650(6)(b) limitation on the State's determination of the bid was arbitrary or capricious, and that the State's motion to raise the issue of arbitrariness on March 27th, the date when the issue of arbitrariness was argued, was denied. The issue regarding the 6 percent preference was argued on March 28th.

March 30th, the following conclusions:

4. Five requirements for prequalification: adequate experience, qualifications, performance, and otherwise. The State's motion to set aside the award under RCW 47.60.660 was denied.
5. Other public bidding considerations. See.

Equitable asserted that the financial ability of MP&E (a prequalification criterion) became an issue at the Commission hearing, thus the file which evaluated such matters was relevant. The trial court ruled that financial data filed subsequent to the prequalification determination would be reviewed in camera; however, prequalification was not at issue. Subsequently, on March 21st, the court permitted Equitable to examine MP&E's prequalification file.

Equitable's "catchall" request for "all matters and documents" was rejected at the March 10th hearing as too general. Although there was a general consensus between the court and the parties that the allotted time for trial preparation might prove inadequate, the court, noting the provision in RCW 47.60.650(6)(b) that "[t]he appeal shall be heard summarily within ten days," set trial for March 23rd (subsequently continued to March 27th). Equitable's motion to present expert testimony to interpret or supplement the administrative record was denied.

The trial court refused to entertain the constitutional challenge because RCW 47.60.650(6)(b) limited the scope of review to a determination of whether the action was arbitrary or capricious. The court noted, however, that the constitutional issue could be raised in a declaratory judgment action. March 27th, the trial began. On that date, the issue of arbitrariness and capriciousness was argued. The statutory interpretation issue regarding proper application of the 6 percent preference was heard the following day, March 28th.

March 30th, the trial court entered the following conclusions of law: (1) the court

4. Five requirements were set forth for prequalification: adequate financial resources; necessary experience, organization and technical qualifications; ability to comply with required performance schedule; satisfactory record of performance, integrity, judgment, and skills; and otherwise qualified and eligible to construct under applicable laws and regulations. RCW 47.60.660.

5. Other public bidding statutes authorize awarding contracts to the "lowest responsible bidder." See, e. g., RCW 52.12.110 (fire protec-

tion district); RCW 56.09.070 (sewer district); RCW 43.19.1911 (state division of purchasing); RCW 35.23.352, 35.22.620 (cities and towns). When bidding is tendered on plans and specifications submitted by the bidders, statutes permit an award to the "best bidder submitting his own plans and specifications." See, e. g., RCW 53.08.130 (port district); RCW 54.04.080 (public utility district); RCW 57.09.050 (water district); RCW 70.14.140 (public hospital district). See also RCW 86.09.178 ("lowest and best responsible bidder").

[1] The primary purpose of public bidding is to benefit the taxpayers by procuring the best work or material at the lowest price practicable. *Savage v. State*, 75 Wash.2d 618, 621, 453 P.2d 613 (1969). A secondary purpose of competitive bidding is to provide bidders with a fair forum for the award of public contracts. *Gostovich v. West Richland*, 75 Wash.2d 583, 587, 452 P.2d 737 (1969). See generally Comment, *Competitive Bidding—Public Construction Contracts In The State of Washington*, 39 Wash.L.Rev. 796 (1964).

The ferry procurement act, RCW 47.60.650-670, contemplates a negotiated contract with selection of the contractor based upon competitive design proposals. The act has several distinctive characteristics: (1) provisions for prequalification;⁴ (2) solicitation of competitive design proposals; (3) contract award to proposal "most advantageous to state";⁵ (4) inclusion of three

evaluation factors: vessel price, life cycle costs, in-state preference; and (5) expedited judicial review from award provided.

In a negotiated procurement procedure, evaluation of proposals is more complex than simply to rank bids. After discussion, proposals may be modified, as in the instant case. Factors other than bid price may be used in selection, e. g., life cycle costs.

Equitable's most strenuous objections seem directed to the constitutionality and application of RCW 47.60.670, the preference statute. Before reaching the constitutional issue, however, we examine the trial court's determination that it had no jurisdiction to hear the constitutional claims in this statutory review proceeding.

We begin by noting RCW 47.60.650(6)(b) provides that upon appeal from the award of the ferry contract, the court "may affirm the decision of the [Commission] or it may reverse the decision if it determines the action of the [Commission] is arbitrary or capricious." Equitable argues: (1) the arbitrary or capricious standard includes constitutional review; and (2) the arbitrary or capricious standard cannot derogate the power of the court to decide constitutional issues. We disagree as to (1) and agree as to (2).

Even so, in this case, general rules regarding appeals are qualified by legislative concern for prompt resolution. See, e. g., RCW 47.60.650(6)(b) (appeals shall be heard "summarily" within 10 days). In this instance, the necessity for prompt determination cannot be gainsaid in light of the limited life (90 days) of the submitted offers, escalating costs, and the urgency of the state's ferry needs.

Arbitrary and capricious action has been consistently defined by this court as "willful and unreasoning action, without consideration and in disregard of facts or circumstances." *DuPont-Ford Lewis School Dist. 7 v. Bruno*, 79 Wash.2d 736, 739, 489 P.2d 171 (1971). The arbitrary or capricious standard has been applied to challenges to bidding procedures even though there is no statutory provision affording review. See, e. g., *Butler v. Federal Way School Dist.*

210, 17 Wash.App. 233, 562 P.2d 271 (1977); see also *Savage v. State*, *supra* (reviewed for abuse of discretion).

[2, 3] When applying the "arbitrary and capricious" standard of review, a reviewing court does not substitute its judgment for that of the agency. *Deaconess Hosp. v. State Highway Comm'n*, 66 Wash.2d 378, 403 P.2d 54 (1965). Where there is room for two opinions, action is not arbitrary or capricious if exercised honestly and upon due consideration even if the reviewing court believes an erroneous conclusion was reached. *DuPont-Ford Lewis School Dist. 7 v. Bruno*, *supra*. When contracts are to be awarded on terms "most advantageous to" or "in the best interest of" the state, as in this case, the discretion in making the award may be even somewhat broader. See 64 Am.Jur.2d. *Public Works and Contracts* § 68 (1972). It does not seem to us that a constitutional infirmity fits readily within our concept of arbitrary or capricious.

Further, in RCW 34.04.130(6), a section of the administrative procedure act, the legislature set forth the grounds for challenging agency decisions. Arbitrary or capricious and constitutional violation were listed as distinct and separate bases upon which to contest an agency ruling. We are reluctant, therefore, to infer a legislative intent to embrace constitutional challenges under the rubric of arbitrary or capricious where the legislature has indicated otherwise. See, e. g., *Butler v. Federal Way School Dist. 210*, *supra*. Nevertheless, we do not believe that in this case the legislature impermissibly precluded judicial review of constitutional questions.

[4] We agree with the trial court's appraisal that the act does not divest courts of jurisdiction to hear constitutional challenges. The declaratory judgment act, RCW 7.24, was available for assertion of such claims. Equitable was aware of the preference provision no later than its reception of the RFP. As a prequalified firm against whom the preference would operate, presumably it could have initiated a

declaratory action December 30, 1977, proposals.

Nonetheless, Equitable chose to submit rules and await was not selected declaratory judgment trial court challenge state and federal

In its original ston County Superior Court however, Equitable constitutional issues. constitutional issues and argued before the significance consider the preference

CONSTITUTIONAL PREFERENCE

Although its argument the Superior Court constitutional provisions asserts an equal protection Fourteenth Amendment federal equal protection state privileges (Const. art. 1, § 1 cal. *Olsen v. De* P.2d 324 (1956). considering the not raised by Equitable we believe the

In other contexts Supreme Court has like private individuals enjoys the unrestricted own supplies, to whom it will deal conditions upon "purchases." *Per* 310 U.S. 113, 127. (1940). See also 175, 191, 36 S.Ct.

The State assurances are state acts in its purchaser of government state courts state purchasing

declaratory action at least as early as December 30, 1977, when it submitted its proposals.

Nonetheless, knowing the rules, Equitable chose to submit a proposal under those rules and await a determination. When it was not selected, Equitable then filed a declaratory judgment action in federal district court challenging the preference on state and federal constitutional grounds.

In its original notice of appeal to Thurston County Superior Court 3 days later, however, Equitable failed to raise any constitutional issues. Nevertheless, as the constitutional issues were extensively briefed and argued before this court, and in view of the significance of the question, we will consider the preference complaint.

CONSTITUTIONALITY OF PREFERENCE STATUTE

Although its amended notice of appeal in the Superior Court referred solely to state constitutional provisions, Equitable now asserts an equal protection claim under the Fourteenth Amendment. We have held the federal equal protection clause and the state privileges and immunities clause (Const. art. 1, § 12) are substantially identical. *Olsen v. Delmore*, 48 Wash.2d 545, 295 P.2d 324 (1956). While the State objects to considering the equal protection claim as not raised by Equitable in the trial court, we believe the issue should be addressed.

In other contexts, the United States Supreme Court has stated that government, like private individuals and businesses, "enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127, 60 S.Ct. 869, 84 L.Ed. 1108 (1940). See also *Heim v. McCall*, 239 U.S. 175, 191, 36 S.Ct. 78, 60 L.Ed. 206 (1915).

The State asserts that equal protection guaranties are not applicable when the state acts in its proprietary capacity as a purchaser of goods. Relying on *Heim*, other state courts have upheld statutory in-state purchasing preferences against both

equal protection and commerce clause challenges. See, e. g., *Denver v. Bossie*, 83 Colo. 329, 266 P. 214 (1928) ("the state may buy of whom it will"); *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 115 Miss. 254, 76 So. 258 (1917) (rejecting equal protection challenge to a statute prohibiting state contracting with nonresident bidders).

While the vitality of the proprietary rationale is questioned from time to time, its use continues. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976) (invokes proprietary rationale to forego traditional commerce clause analysis). In 1972, the Supreme Court summarily affirmed a lower federal court ruling which (1) distinguished state purchases in its proprietary capacity from other state functions, and (2) upheld a statute requiring in-state government printing against commerce clause and equal protection challenges. *American Yearbook Co. v. Askew*, 339 F.Supp. 719 (M.D.Fla.), *aff'd*, 409 U.S. 904, 93 S.Ct. 230, 34 L.Ed.2d 168 (1972). The district court in *American Yearbook Co.* recognized the authority of states to prescribe conditions under which work of a public character will be performed. See also *Phoenix v. Superior Court, Maricopa County*, 109 Ariz. 533, 514 P.2d 454 (1973).

In this case, we need not go so far as to hold that because a contract is public and requires expenditure of public funds the legislature may, without reasonable basis, grant a preference. Here, as later discussed, a reasonable basis exists for the preference sufficient to withstand constitutional attack.

Equitable next attempts, relying on its out-of-state incorporation, to characterize itself as an alien. It uses this premise to assert that the preference statute's classification of in-state and out-of-state shipbuilding firms is based upon a suspect class, i. e., alienage. Therefore, the argument goes, the statute must be subjected to the rigors of strict scrutiny.

[5, 6] It is true, strict scrutiny is appropriate when a classification is based on a

suspect category or infringes upon a fundamental right. *Nielsen v. Washington State Bar Ass'n*, 90 Wash.2d 818, 585 P.2d 1191 (1978); see generally L. Tribe, *American Constitutional Law* § 16-22 (1978). It is also true, Equitable may be designated a "foreign corporation". Equitable, however, is not an "alien" for purposes of equal protection analysis. In the context of suspect categories, alienage refers to non-United States citizenship. *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971). Further, nonresidency and out-of-state citizenship have not been deemed suspect classifications for equal protection purposes. See generally L. Tribe, *supra*, § 6-33 at 411.

[7-9] We conclude the preference statute is most closely allied with economic legislation requiring only rational basis scrutiny. See *Lynden Transp., Inc. v. State*, 532 P.2d 700 (Alaska 1975). The rational basis inquiry involves a three-part test: (1) Does the classification apply alike to all members within the designated class? (2) Does some basis in reality exist for reasonably distinguishing between those within and without the designated class? (3) Does the classification have a rational relation to the purpose of the challenged statute? *Yakima County Deputy Sheriff's Ass'n v. Board of Comm'rs for Yakima County*, 92 Wash.2d 831, 601 P.2d 936 (1979). There is a strong presumption of constitutionality in economic acts of the legislature and the burden of refutation is on the challenger. *Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n*, 83 Wash.2d 523, 528, 520 P.2d 162 (1974).

[10] In considering whether the classification passes constitutional muster, we consider the purposes of the challenged statute. The plain object of the act is the procurement of ferries. It provides a procedure whereby public funds shall be expended for a public purpose. The primary interest is that of the public. An identifiable underlying policy is that of granting a preference to those who contribute to the economy through construction activities within the

state. RCW 47.60.670, as we interpret it, grants a preference for constructing vessels within the state.

Ferry construction activities are exempt from state sales tax and use tax. Laws of 1977, 1st Ex.Sess., ch. 166, §§ 6, 7, pp. 616, 620, amending RCW §2.08.030 and §2.12.030. Lost revenues from the tax exemption are partially offset if the shipbuilding activities occur within the state thereby generating secondary economic activity. The lower price preference partially compensates for the revenue loss if the vessels are constructed elsewhere. Finally, construction of ferries within the state strengthens state and local economies. Out-of-state construction results in increased inspection costs and greater potential for delay.

We are convinced that a rational relation exists between the purposes of RCW 47.60.670 and its classifications of in-state and out-of-state shipbuilding firms. See *Schrey v. Allison Steel Mfg. Co.*, 75 Ariz. 282, 255 P.2d 604 (1953); cf. *Lynden Transp., Inc. v. State*, *supra* (strikes down classification granting privilege to resident corporation with principal office and majority of shareholders in state). We find no violation of equal protection guaranties.

[11, 12] Equitable also asserts that RCW 47.60.670 is further constitutionally infirm in that it represents a "special" law "granting corporate powers or privileges" in violation of Const. art. 2, § 28(6). Under this constitutional prohibition, a special law is one which arbitrarily separates some person, place or thing from those upon which it would otherwise operate. The focus is upon what the law excludes. *YMCA v. Parish*, 89 Wash. 495, 154 P. 785 (1916). If nothing is excluded that should be included, the law is a general enactment. When the only limitation is a legitimate classification of the law's objects, it is a general law. *Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n*, *supra*. As stated above, in our view, the preference classification is valid. Further, the preference statute relates to particular bidders as a class and not particular bidders of a class. Assuming Equitable has adequately raised and presented

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this assignment of error, RCW 47.60.670 does not separate out a particular person or entity for special treatment and does not fall within the proscription of the cited constitutional provision.

PUBLIC RECORDS

[13] The certified administrative record contains 77 items of evidence considered by the Commission in its award of the contract. Of those items, Equitable asserts that the Commission's refusal to disclose MP&E's plans and specifications violated the public records provisions in RCW 42.17-250-.340, and was therefore arbitrary and capricious. Under the circumstances of this case (a design/bid competition), we disagree that the Commission's refusal to disclose the plans and specifications of one competitor to another was arbitrary or capricious.

In any event, January 11, 1978, the plans and specifications of both contending firms were placed in escrow. After filing of the appeal, the trial court ordered that the plans be made available for inspection by representatives of both shipyards. This order was later modified to permit unrestricted use of the plans. Thus, Equitable had access to the plans and specifications under the court order and it took full advantage of that access.

Equitable makes no allegation that the Commission failed to give identical information to both competitors. It demonstrates no prejudice from the Commission's refusal to allow it to review the plans and specifications earlier. The only authority it cites for the proposition that a public agency seeking competitive design bids has a duty to reveal the plans of one competitor to another is RCW 42.17.270 (general provision authorizing inspection and copying of public records).

In light of the foregoing, we deem it unnecessary to construe the limits of RCW 42.17.270 in this instance. Suffice to say, we do not find that the Commission's actions were either arbitrary or capricious at the time.

PREQUALIFICATION FILES

[14] Equitable argues that the Commission acted arbitrarily in considering prequalification files and the trial court erred in refusing to review the prequalification issue. To the extent certain commissioners may have intimated some question concerning a prequalification criterion (financial responsibility), this did not deflect the focus of the meetings. Even assuming that Equitable should have been granted access to the prequalification file earlier, we fail to see where prejudice resulted. The concern about financial responsibility involved MP&E, not Equitable. Further, after examination was permitted, Equitable has yet to identify any portion of the file as objectionable or inaccurate. Again, the Commission's action was not arbitrary or capricious.

EXPEDITED HEARING

[15] Equitable also asserts that the provision for a hearing on appeal within 10 days violates due process and separation of powers doctrines. RCW 47.60.650(6)(b). Inability to adequately prepare for the hearing is the gravamen of Equitable's complaint. The trial court avoided an interpretation which might have been found to be an unconstitutional usurpation of judicial power. The court construed the statute as directory, not mandatory. The trial ultimately was held 1 month after the appeal was filed, not 10 days as the statute provided. Thus, we find no violation of separation of powers.

Under the circumstances, we also find no violation of due process when the trial court denied Equitable's motion for continuance. One case is cited for the alleged violation, *In re Petrie*, 40 Wash.2d 809, 246 P.2d 465 (1952). It was there held, in a proceeding to deprive a mother of parental rights that service of a summons at 2 p. m. on a legal holiday returnable the following day at 10 a. m. was insufficient time and constituted denial of due process. Equitable asserts it is in the same position as *Petrie* and since it "was not afforded a meaningful opportunity to prepare, it was denied due process of law."

[16] The hearing date selected in this instance reflected a conscientious effort by the trial court to afford Equitable a reasonable time to prepare, to allow the court to hear and decide the matter and still give some efficacy to RCW 47.60.650(4)(i) (90-day limitation on proposals). Under the circumstances, we are unable to conclude that the early hearing provision is invalid under the due process clause, particularly where, as here, Equitable was previously afforded an opportunity to be heard at an open public meeting and its appeal was heard approximately 1 month after it was filed. *Cf. Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972). A prompt and expeditious resolution of the matter was in the best interest of all parties.

OPEN PUBLIC MEETINGS ACT

[17] We recognize the statutory statement of purpose in RCW 42.30.010, the Open Public Meetings Act of 1971 (OPMA), employs some of the strongest language used in any legislation. See *Cathcart v. Andersen*, 85 Wash.2d 102, 530 P.2d 313 (1975). The trial court concluded that within the scope of this statutory appeal it lacked jurisdiction to determine whether the Commission violated the OPMA. RCW 42.30. Regardless of the correctness of the trial court's view of its jurisdiction, Equitable has neither alleged, argued nor demonstrated that: (1) it was denied the right to be present at the adjourned regular meetings of the Commission; (2) it was denied the right to be heard during deliberations; (3) a "secret" Commission meeting was held; or (4) the Commission met impermissibly in executive session. Equitable does make some contention that the denial of access of MP&E's plans and specifications converted the meetings into violations of the act because certain members of the Commission independently and individually examined the documents. We do not find such independent examination, assuming it occurred, to be violative of this act. Independent separate examination of the documents constituted neither an "action" nor a "meeting" under the act. See RCW 42.30.

020(3) and (4). The Commission took its "action" in an open public meeting following presentations by both firms, experts and the public.

APPLICATION OF PREFERENCE STATUTE

[18] Equitable's final assignment of error relates not to the constitutionality of the preference statute as discussed earlier, but to its application. The trial court rejected Equitable's interpretation, and we affirm. At issue are (1) the evaluation and selection process set forth in RCW 47.60.650(5) and (6), and (2) the application of the 6 percent preference under RCW 47.60.670.

Conflicting interpretation results, depending upon which statute is focused upon. Equitable construes RCW 47.60.670, a single sentence statute, as a mandatory directive to award the construction contract to an in-state shipyard unless the out-of-state competitor's bid plus preference penalty is less than the bid of the in-state firm. It is Equitable's contention that the contract award is to be determined solely by comparing the vessel price of the best in-state proposal with the vessel price of the out-of-state proposal as enhanced by the 6 percent preference penalty. Equitable asserts that life cycle cost evaluation is to be used only in selecting the most advantageous in-state proposal for the final comparison with the out-of-state proposal. Accordingly, Equitable argues life cycle costs are of no concern to it as an out-of-state firm, and such costs are not to be considered in making a selection between in-state and out-of-state competitors.

The State, on the other hand, construes RCW 47.60.650(6) to be the contract "award" statute. Under that construction, the bid, life cycle costs and 6 percent preference impact for *each* proposal are aggregated to determine the proposal most advantageous to the State. RCW 47.60.650(6) refers to the preference statute only to obtain the "measure" (6 percent) of the preference. Parenthetically, we note that the State's construction was known to Equi-

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It is our function or intent of *Daly*, 81 Wash (1972). Equitable consideration of the most advantageous. To so read the general language does not differ out-of-state proposal based upon cycle costs. Since rendered superior 89 Wash.2d 315 it is read and given 670, we find that the proposal to be correct.

Affirmed.

UTTER, C. J.
LINI, WRIGH'
OWITZ, DOLI
concur.

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STATE v. PONCE

Wash. 407

Cite as, Wash., 611 P.2d 407

table from the beginning, as it was set forth in the RFP.

It is our function to effectuate the objective or intent of the legislature. *Amburn v. Daly*, 81 Wash.2d 241, 245, 501 P.2d 178 (1972). Equitable's interpretation limits consideration of life cycle costs to selecting the most advantageous in-state proposal. To so read the statute is to disregard the general language of RCW 47.60.650, which does not differentiate between in-state and out-of-state proposals for purposes of evaluation based upon price preference and *life cycle costs*. Since this section may not be rendered superfluous (*Taylor v. Redmond*, 39 Wash.2d 315, 571 P.2d 1388 (1977)), when it is read and given effect with RCW 47.60.670, we find the State's method of evaluating the proposal and awarding the contract to be correct.

Affirmed.

UTTER, C. J., and STAFFORD, ROSELLINI, WRIGHT, BRACHTENBACH, HOROWITZ, DOLLIVER and WILLIAMS, JJ., concur.



93 Wash.2d 553

The STATE of Washington, Respondent,

v.

Antonio Rodriguez PONCE, Petitioner.

The STATE of Washington, Respondent,

v.

Heriberto OZUNA, Petitioner.

No. 45897.

Supreme Court of Washington,
En Banc.

May 15, 1980.

The Superior Court, Walla County, James B. Mitchell, J., found that motorists

were habitual traffic offenders, and suspended right of each to drive for five years, and they appealed. The Court of Appeals, 21 Wash.App. 277, 584 P.2d 482, affirmed, and petition for review was granted. The Supreme Court, Hicks, J., held that: (1) where no actual imprisonment was imposed for any of the traffic convictions sustained by defendant in habitual traffic proceedings, there was no constitutional violation by failure to advise indigent defendant of his right to counsel, and (2) traffic conviction which was constitutionally invalid for failure of accused, who was imprisoned, to have counsel may not be considered in subsequent traffic offender proceeding and such conviction is void and subject to collateral attack.

Affirmed as to one petitioner and reversed as to other petitioner.

Brachtenbach, J., filed opinion concurring in part and dissenting in part in which Williams, Wright, and Rosellini, JJ., concurred.

Jerome M. Johnson, J. pro tem., filed opinion concurring in part and dissenting in part.

1. Criminal Law ≈641.2

Where no actual imprisonment was imposed for any of the traffic convictions sustained by defendant in habitual traffic offender proceeding, there was no constitutional violation by failure to advise indigent defendant of his right to counsel. West's RCWA 46.20.342, 46.52.020, 46.61.500, 46.61.515, 46.61.520, 46.65.010 et seq., 46.65.020; JCrR 2.11(a), (a)(1); U.S.C.A.Const. Amend. 6.

2. Criminal Law ≈641.1

Under court rule, right to counsel extends to any cause punishable by loss of liberty. JCrR 2.11(a); U.S.C.A.Const. Amend. 6.

3. Judgment ≈486(1)

Final judgment may be vacated during collateral proceeding only by demonstrating that it is void.

State v. Kruchten, 101 Ariz. 186, 417 P.2d 510 (1966), cert. denied, 385 U.S. 1043, 87 S.Ct. 784, 17 L.Ed. 2d 687 (1967).

[6.7] The fact that Savoy was not present during the replaying of the tapes is not reversible error. *Bustamante v. Eymann*, 456 F.2d 269 (9th Cir. 1972) held narrowly that in a capital case the defendant's right to be present in the courtroom is constitutional and cannot be waived. However, in less than a capital case it may be harmless error. Therefore Savoy's absence during the replaying of the tape falls under the rule of *State v. Bustamante*, supra and *State v. Cufio*, 12 Ariz.App. 461, 471 P.2d 763 (1970) holding that unless prejudice is shown the error is harmless. No prejudice was shown here.

Affirmed.

HAYS, C. J., CAMERON, V. C. J., and STRUCKMEYER, and HOLOHAN, JJ. concur.



109 Ariz. 533

CITY OF PHOENIX, a political subdivision of the State of Arizona, City of Mesa, a political subdivision of the State of Arizona, and Zurn Engineers, a corporation, Petitioners,

v.

The SUPERIOR COURT of the State of Arizona IN AND FOR the COUNTY OF MARICOPA and Morris Rozar, judge thereof, and M. M. Sundt Construction Co., an Arizona corporation, Respondents.

No. 11094.

Supreme Court of Arizona,
In Banc,
Sept. 20, 1973.

Special action to prevent the enforcement of the decision of Superior Court which ordered the award of certain construction contract by the city to certain

contractor. The Supreme Court, Holohan, J., held, inter alia, that the statute requiring that a contract for public work which would be paid from public funds be let to contractor who has paid certain state and county taxes in case a better bid from non-qualified contractor is less than 5% lower is not unconstitutional as denying equal protection of the laws or as violating the commerce clause of the Federal Constitution.

Relief sought denied.

1. Commerce \Rightarrow 54
Constitutional Law \Rightarrow 211
Municipal Corporations \Rightarrow 327

Statute providing, in letting of contracts for expenditure of public funds, for granting of 5% preference to contractors who had paid county and state taxes for two successive years immediately prior to making of bid is not unconstitutional as violating the equal protection provision of the Fourteenth Amendment and the commerce clause of the Federal Constitution. A.R.S. § 34-241, subd. B; U.S.C.A. Const. art. 1, § 8, cl. 3; Amend. 14.

2. Municipal Corporations \Rightarrow 336(1)

Proceeds of revenue bonds for construction of water treatment plant to supply domestic water for city constituted "public funds" within statute requiring a 5% preference to be given in letting bids on contracts for public work to be paid from public funds in case of contractors who have paid state and county taxes. A. R.S. §§ 9-521 et seq., 9-536, 34-241, subd. B.

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

3. Statutes \Rightarrow 219(1)

Courts give great weight to opinions of those charged with duty of administering the regulation of a pursuit involving technical expertise.

4. Appeal and Error \Rightarrow 1010.1(6)

The Supreme Court will not disturb findings of trial court when supported by substantial evidence.

5. Appeal and Error

The Supreme Court's legal conclusions of

6. Statutes \Rightarrow 226

Since Arizona contractors from a decision interpreting

7. Licenses \Rightarrow 11(5)

The purpose of letting contractors is the public that skill and ability work. A.R.S. § 3-

8. Licenses \Rightarrow 11(5)

Both a general contractor's license and construction license for construction of water building would have room, laboratory. A.R.S. § 32-1102,

Joe R. Purcell
Patrick E. Burke
nix, for petitioners
City of Mesa.

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Lewis & Roc
Mary M. Schroe
Molloy, Fickett
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5. Appeal and Error \S 842(2)

The Supreme Court is not bound by legal conclusions of trial court.

6. Statutes \S 226

Since Arizona took statutes governing contractors from California, California decision interpreting such statutes is persuasive.

7. Licenses \S 11(5)

The purpose of statute licensing building contractors is to provide protection for the public that contractors have requisite skill and ability to perform the required work. A.R.S. \S 32-1102, subds. 1, 2.

8. Licenses \S 11(5)

Both a general engineering contractor's license and a general building, heavy construction license were required for construction of water treatment plant, where building would have not only water treatment tanks but also offices, conference room, laboratory, shop area and lunchroom. A.R.S. \S 32-1102, subds. 1, 2.

Joe R. Purcell, Phoenix City Atty. by Patrick E. Burke, Asst. City Atty., Phoenix, for petitioners City of Phoenix and City of Mesa.

Monteleone & McCrory by Darrell P. McCrory, Los Angeles, Cal., Herbert Malamo, Phoenix, for petitioner Zurn Engineers.

Lewis & Roca by John P. Frank and Mary M. Schroeder, Phoenix, Robertson, Molloy, Fickett & Jones by John F. Molloy, Tucson, for respondent M. M. Sundt Const. Co.

Mariscal, Weeks, Lehman & Whitten by Phillip Weeks, Phoenix, for amicus curiae Wittman Contracting Co.

HOLOHAN, Justice.

Petitioners City of Phoenix and Zurn Engineers brought this Special Action to prevent the enforcement of the decision of the superior court which ordered the award of a certain construction contract by the City to Zurn Engineers set aside. Due

to the public importance of the questions presented we accepted jurisdiction, denied the request of the petitioners to set aside the order of the trial court, approved the findings of the superior court, and noted that a written decision would follow in due course.

The facts of the case are that the City of Phoenix advertised for bids for the construction of the Val Vista Water Treatment Plant to supply domestic water for the Cities of Phoenix and Mesa. The construction, supervision, operation and maintenance of the plant are to be within the exclusive control of the City of Phoenix, but the cost is to be borne in a percentage of 80% by the City of Phoenix and 20% by the City of Mesa. Petitioner, Zurn Engineers, submitted the lowest bid, with respondent, M. M. Sundt Construction Co. having the next lowest bid. Sundt protested the bid of Zurn Engineers, but the City of Phoenix accepted the Zurn bid. Sundt brought suit in the Superior Court of Maricopa County to restrain the City from allowing Zurn to proceed with the construction contract. Sundt also sought in the action to compel the City to award the bid to it as the lowest bidder under Arizona statutes.

Various grounds were offered by Sundt for invalidating the Zurn bid, but we need only consider those relied on by the superior court for its decision, namely, that Sundt was the lowest responsible bidder because A.R.S. \S 34-241 allows a 5% preference in this case to Sundt, and that Zurn did not have the proper contracting license to construct the project.

A.R.S. \S 34-241, subsec. B reads:

"B. In awarding the contract for work to be paid for from public funds, bids of contractors who have satisfactorily performed prior public contracts, and who have paid state and county taxes within the state for not less than two successive years immediately prior to submitting a bid on a plant and equipment such as is ordinarily required for performance of the contract for which

mean that the funds are not public. To the contrary, in *Humphrey v. City of Phoenix*, 55 Ariz. 374, 102 P.2d 82 (1940), this Court held that the funds from revenue bonds must be expended for a public purpose.

There is, of course, no question but that the bond funds in this case are for a public purpose—the construction of a water treatment plant for the production of potable water for the residents of the two cities. The funds to pay for this project are held by the City of Phoenix to discharge the payment of a clearly public purpose, and the fact that these funds are pledged for a particular purpose does not alter their character as public funds. *Louisville Bridge Commission v. Louisville Trust Co.*, 258 Ky. 846, 81 S.W.2d 894 (1935); *Commonwealth v. Howard*, Ky., 379 S.W.2d 475 (1964); 63 Am.Jur.2d 394, Public Funds, § 1.

[2] We hold that expenditure of funds for the construction of the project in this case are public funds for which the preference provided in A.R.S. § 34-241, subsec. B is applicable. Respondent Sundt being entitled to the preference thereby becomes the low bidder and entitled to be awarded the contract.

The trial court ruled that Zurn Engineers did not qualify to construct the project because it lacked the proper license from the Registrar of Contractors. Under A.R.S. § 34-241, subsec. A a bidder on public works must be a duly licensed contractor in this state or his bid cannot be considered. Zurn Engineers holds a Class A General Engineering contractor's license. Respondent Sundt contended before the trial court that an A license was not sufficient to construct the project, and it was necessary that the contractor have both a Class A and Class B General Building, Heavy Construction license.

The statute defining the two types of contractors is A.R.S. § 32-1102, subsecs. 1 and 2. The principal distinction between

the types of contractors is that the general building contractor builds structures for the support, shelter and enclosure of persons, animals, and chattels, and the general engineering contractor builds fixed works requiring specialized engineering knowledge and skill. At first blush it would appear that a water treatment plant would fall within the general engineering category requiring a Class A license, but the evidence discloses that there is an administration building to be constructed as part of the project which is a multipurpose building. The building will have not only water treatment tanks but also offices, conference room, laboratory, shop area, and lunch room. It is clear that the building will shelter and enclose persons and chattels. The building will cost in excess of one million dollars, and some 25% of the structure is devoted to the administration function of the treatment plant.

[3] The Registrar of Contractors is charged with the duty of adopting rules and regulations classifying contractors and limiting their field and scope of operation. A.R.S. § 32-1105, subsec. A. In this case two experts from the office of the Registrar testified that both a Class A and Class B license would be required before a contractor could undertake construction of the water treatment project. Courts give great weight to the opinions of those charged with the duty of administering the regulation of a pursuit involving technical expertise. *Arnold Construction Company, Inc. v. Arizona Board of Regents*, 109 Ariz. 495, 512 P.2d 1229 (1973). The trial judge ruled that two licenses were required to construct the project, and, since Zurn did not have a Class B license, he was not qualified to perform the contract. A.R.S. § 34-241, subsec. A.

[4.5] This Court will not disturb the findings of the trial court when supported by substantial evidence. *Cantlay & Tanzola, Inc. v. Senner*, 92 Ariz. 63, 373 P.2d 370 (1962). We are, of course, not bound

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Chapter 25. Contractors' Bonds.

Sec. 36.25.020. Rights of persons furnishing labor or material.

NOTES TO DECISIONS

Recovery subject to AS 08.18.151. — Recovery under this section is subject to, and not independent of, the express penalty of AS 08.18.151, which prohibits those contractors who fail to duly register from suing on the contracts in which they are unlawfully engaged. State ex rel.

Smith v. Tyonek Timber, Inc., Sup. Ct. Op. No. 2813 (File Nos. 7170, 7256), 680 P.2d 1148 (1984).

Quoted in State ex rel. Smith v. Tyonek Timber, Inc., Sup. Ct. Op. No. 2813 (File Nos. 7170, 7256), 680 P.2d 1148 (1984).

Chapter 30. State Procurement Code.

Article

1. Organization of State Procurement (§§ 36.30.005 — 36.30.080)
2. Competitive Sealed Bidding (§§ 36.30.100 — 36.30.190)
3. Competitive Sealed Proposals (§§ 36.30.200 — 36.30.270)
4. Other Procurement Methods (§§ 36.30.300 — 36.30.320)
5. Preference for Alaska Products (§§ 36.30.322 — 36.30.338)
6. Contract Formation and Modification (§§ 36.30.340 — 36.30.480)
7. Procurement Records and Reports (§§ 36.30.500 — 36.30.540)
8. Legal and Contractual Remedies (§§ 36.30.560 — 36.30.699)
9. Intergovernmental Relations (§§ 36.30.700 — 36.30.790)
10. General Provisions (§§ 36.30.850 — 36.30.995)

Cross references. — For statement of legislative purpose in enacting this chapter, see sec. 1, ch. 106, SLA 1986, in the Temporary and Special Acts.

Editor's notes. — Section 65, ch. 106, SLA 1986, provides: "REPORT. By December 1, 1988, the commissioner of administration and the commissioner of transportation and public facilities shall report to the legislature concerning pro-

urement by state agencies during the fiscal year 1988. The report must include (1) the records prepared under AS 36.30.540;

(2) recommendations for changes in AS 36.30 or other laws based on implementation of AS 36.30 in those 12 months; and (3) a description of any matters that involved litigation concerning AS 36.30 during those 12 months."

Article 1. Organization of State Procurement.

Section

05. Centralization of procurement authority
10. Chief procurement officer
15. Executive branch agencies
20. Legislature
30. Court system

Section

40. Procurement regulations
50. Lists of contractors
60. Specifications
70. Supply management
80. Leases

Effective date of article. — Section 69, ch. 106, SLA 1986, makes this article effective July 1, 1987.

Sec. 36.30.005. Centralization of procurement authority [Effective July 1, 1987]. (a) Except as otherwise provided, all rights, powers, duties, and authority relating to the procurement of supplies, services, and professional services, and the control over supplies, services, and professional services vested in or exercised by an agency on July 1, 1987, are transferred to the commissioner of administration and to the chief procurement officer. Authority granted under this subsection shall be exercised in accordance with this chapter.

(b) Except as otherwise provided, all rights, powers, duties, and authority relating to the procurement of construction and procurements of equipment or services for the state equipment fleet and the control over construction of state facilities and the state equipment fleet vested in or exercised by an agency on July 1, 1987, are transferred to the commissioner of transportation and public facilities, subject to regulations adopted by the commissioner of administration. Notwithstanding AS 44.71.010, authority relating to disposals from the state equipment fleet is vested in the commissioner of transportation and public facilities, subject to regulations adopted by the commissioner of administration. Authority granted under this subsection shall be exercised in accordance with this chapter.

(c) Notwithstanding other provisions of law, all rights, powers, duties, and authority relating to the procurement of supplies, services, professional services, and construction and the disposal of supplies for the University of Alaska are transferred to the Board of Regents. To the maximum extent possible, authority granted under this subsection shall be exercised in accordance with this chapter. The Board of Regents shall adopt regulations under this subsection that are substantially equivalent to the regulations adopted by the commissioner of administration to implement this chapter. For the purposes of this subsection, unless the context otherwise requires, in this chapter

- (1) "agency" means a subunit of the University of Alaska;
- (2) "attorney general" means the president of the University of Alaska;
- (3) "chief procurement officer" means a person designated by the president of the University of Alaska whose qualifications are substantially equivalent to those provided in AS 36.30.010(a);
- (4) "commissioner," "commissioner of administration," or "commissioner of transportation and public facilities" means the Board of Regents or the president of the University of Alaska if so designated by the Board of Regents by regulations adopted under this subsection;

(5) "department" means the University of Alaska. (§ 2 ch 106 SLA 1986)

Revisor's notes. — "July 1, 1987" was substituted for "January 1, 1987" in sub-sections (a) and (b) to correct a manifest error.

Sec. 36.30.010. Chief procurement officer [Effective July 1, 1987]. (a) The commissioner shall appoint to the partially exempt service the chief procurement officer of the state. The chief procurement officer must have at least five years of prior experience in public procurement, including large scale procurement of supplies, services, or professional services, and must be a person with demonstrated executive and organizational ability. The chief procurement officer may be removed by the commissioner only for cause. The term of office of the chief procurement officer is four years.

(b) Except as otherwise specifically provided in this chapter, the chief procurement officer shall

(1) procure or supervise the procurement of all supplies, services, and professional services needed by an agency;

(2) exercise general supervision and control over all inventories of supplies belonging to an agency and prescribe the manner in which supplies shall be purchased, delivered, stored, and distributed;

(3) prescribe the time, manner, authentication, and form of making requisitions for supplies and services;

(4) sell, trade, transfer between agencies, or otherwise dispose of surplus, obsolete, or unused supplies and make proper adjustments in the accounts of agencies concerned;

(5) establish and maintain programs for the inspection, testing, and acceptance of supplies and services and the testing of samples submitted with bids;

(6) prescribe standard forms for bids and contracts; and

(7) provide for other matters that may be necessary to carry out the provisions of this chapter and the regulations adopted under this chapter. (§ 2 ch 106 SLA 1986)

Sec. 36.30.015. Executive branch agencies [Effective July 1, 1987]. (a) The commissioner of transportation and public facilities may delegate to another agency the authority to contract for construction. Before delegating authority to an agency under this subsection, the commissioner of transportation and public facilities shall make a written determination that the agency is capable of implementing the delegated authority. Notwithstanding delegation of authority under this subsection, contracts for construction are governed by this chapter and regulations adopted by the commissioner of administration under this chapter.

(b) The commissioner of administration may delegate to an agency the authority to contract for and manage services, professional services, and supplies. Notwithstanding delegation of authority under this subsection, an agency's exercise of the authority is governed by this chapter and regulations adopted by the commissioner under this chapter. Before delegating authority to an agency under this subsection, the commissioner shall make a written determination that the agency is capable of implementing the delegated authority.

(c) The commissioner of administration may not delegate the authority to dispose of supplies or the authority to adopt regulations under this chapter.

(d) An agency may not contract for the services of legal counsel without the approval of the attorney general.

(e) The boards of directors of the Alaska Railroad Corporation and the Alaska State Building Authority shall adopt procedures to govern the procurement of supplies, services, professional services, and construction by the corporation. The procedures must be substantially equivalent to the procedures prescribed in this chapter and in regulations adopted under this chapter. (§ 2 ch 106 SLA 1986)

Sec. 36.30.020. Legislature [Effective July 1, 1987]. The Legislative Council shall adopt and publish procedures to govern the procurement of supplies, services, professional services, and construction by the legislative branch. The procedures must be based on the competitive principles consistent with this chapter and must be adapted to the special needs of the legislative branch as determined by the Legislative Council. (§ 2 ch 106 SLA 1986)

Sec. 36.30.030. Court system [Effective July 1, 1987]. The administrative director of courts shall adopt and publish procedures to govern the procurement of supplies, services, professional services, and construction by the judicial branch. The procedures must be based on the competitive principles consistent with this chapter and must be adapted to the special needs of the judicial branch as determined by the administrator of courts. (§ 2 ch 106 SLA 1986)

Sec. 36.30.040. Procurement regulations [Effective July 1, 1987]. (a) The commissioner shall adopt regulations governing the procurement, management, and control of supplies, services, professional services and construction by agencies. The commissioner may audit and monitor the implementation of the regulations and the requirements of this chapter with respect to using agencies.

(b) The commissioner shall adopt regulations pertaining to the following:

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- (1) suspension, debarment, and reinstatement of prospective bidders and contractors;
- (2) bid protests;
- (3) conditions and procedures for the procurement of perishables and items for resale;
- (4) conditions and procedures for the use of source selection methods authorized by this chapter, including sole source procurements, emergency procurements, and small procurements;
- (5) the opening or rejection of bids and offers, and waiver of informalities in bids and offers;
- (6) confidentiality of technical data and trade secrets submitted by actual or prospective bidders or offerors;
- (7) partial, progressive, and multiple awards;
- (8) storerooms and inventories, including determination of appropriate stock levels and the management of agency supplies;
- (9) transfer, sale or other disposal of supplies;
- (10) definitions and classes of contractual services and procedures for acquiring them;
- (11) providing for conducting price analysis;
- (12) use of payment and performance bonds in connection with contracts for supplies, services, and construction;
- (13) guidelines for use of cost principles in negotiations, adjustments, and settlements;
- (14) conditions under which an agency may use the services of an employment program as defined under AS 36.30.100(c);
- (15) a bidder's or offeror's duties under AS 36.30.115 and 36.30.210; and
- (16) the elimination and prevention of discrimination in state contracting because of race, religion, color, national origin, sex, age, marital status, pregnancy, parenthood, handicap, or political affiliation. (§ 2 ch 106 SLA 1986)

Editor's notes. — Section 66, ch. 106, SLA 1986, provides "REGULATIONS DEADLINE. The regulations required under AS 36.30 as added by sec. 2 of this Act, shall be adopted by July 1, 1987, and shall be effective on that date. Regulations accepted under laws repealed in sec. 67 of this Act become ineffective July 1, 1987."

Sec. 36.30.050. Lists of contractors [Effective July 1, 1987]. (a) The commissioner shall establish and maintain lists of persons who desire to provide supplies, services, professional services, or construction services to the state.

(b) A person who desires to be on a list shall submit to the commissioner evidence of a valid Alaska business license together with a biennial fee established by regulation in an amount reasonably calculated to pay the costs of administering this section. A construction

contractor shall also submit a valid certificate of registration issued under AS 08.18. The commissioner, by regulation, may require submission of additional information.

(c) The lists may be used by the chief procurement officer or an agency when issuing invitations to bid or requests for proposals under this chapter. The lists may be used by the Legislative Council, the court system, the Alaska State Building Authority, and the Alaska Railroad Corporation.

(d) The lists shall be used in providing notice of intent to make a small procurement to Alaska bidders as defined under AS 36.30.170(c). A procurement officer who intends to make a procurement under AS 36.30.320 shall request names from the appropriate list and the department shall furnish names of Alaska bidders on a rotating basis from the list in response to each request. (§ 2 ch 106 SLA 1986)

Sec. 36.30.060. Specifications [Effective July 1, 1987]. (a) The commissioner shall adopt regulations governing the preparation, revision, and content of specifications for supplies, services, professional services, and construction required by an agency. The commissioner shall monitor the use of these specifications.

(b) Specifications for construction of highways must conform as closely as practicable to those adopted by the American Association of State Highway and Transportation Officials.

(c) The commissioner may obtain expert advice and assistance from personnel of using agencies in the development of specifications. Specifications must promote overall economy for the purposes intended and encourage competition in satisfying the state's needs, and may not be unduly restrictive. The requirements of this subsection regarding the purposes and nonrestrictiveness of specifications apply to all specifications, including those prepared by architects, engineers, designers, and other professionals.

(d) In this section, "specification" means a description of the physical or functional characteristics, or of the nature of a supply, service, professional service, or construction project; it may include requirements for licensing, inspecting, testing, and delivery. (§ 2 ch 106 SLA 1986)

Sec. 36.30.070. Supply management [Effective July 1, 1987]. The commissioner shall adopt regulations governing the

- (1) management of supplies during their entire life cycle;
- (2) sale, lease, or disposal of surplus supplies by public auction, competitive sealed bidding, or other appropriate method;

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- (3) purchase of surplus supplies by an employee of the using or disposing agency; and
- (4) transfer of excess supplies. (§ 2 ch 106 SLA 1986)

Sec. 36.30.080. Leases [Effective July 1, 1987]. (a) The department shall lease space for the use of the state or an agency wherever it is necessary and feasible, subject to compliance with the requirements of this chapter. A lease may not provide for a period of occupancy greater than 40 years. An agency requiring office, warehouse, or other space shall lease the space through the department.

(b) The department may enter into lease-financing agreements, including lease-purchase agreements and agreements related to the issuance of certificates of participation. A lease-financing agreement must provide that lease payments are subject to annual appropriation.

(c) If the department intends to enter into a lease or lease-financing agreement with an annual rent to the state anticipated to exceed \$1,000,000, the department shall provide notice to the legislature. The notice must include the anticipated annual lease obligation amount and the anticipated total construction, acquisition, or other costs of the project. The department may not enter into an agreement under this subsection unless the project has been approved by the legislature by law. An appropriation for the project does not constitute approval of the project for purposes of this subsection. (§ 2 ch 106 SLA 1986)

Article 2. Competitive Sealed Bidding.

Section	Section
100. General policy	150. Bid acceptance and bid evaluation
110. Invitation to bid	160. Late bids; Correction or withdrawal of bids; Cancellation of awards
115. Subcontractors	170. Contract award after bids
120. Bid security	190. Multi-step sealed bidding
130. Public notice of invitation to bid	
140. Bid opening	

Effective date of article. — Section 69, ch. 106, SLA 1986, makes this article effective July 1, 1987.

Sec. 36.30.100. General policy [Effective July 1, 1987]. (a) Except as otherwise provided in this chapter, or unless specifically exempted by law, an agency contract shall be awarded by competitive sealed bidding.

- (b) Competitive sealed bidding is not required
 - (1) when the commissioner determines in writing that food, clothing, or medical supplies, or materials for use in laboratory or medical studies may be purchased otherwise to the best advantage of the state;

- (2) when rates are fixed by law or ordinance;
 - (3) for the purchase of products or services manufactured or provided by an employment program;
 - (4) for the purchase of products or services provided by the correctional industries program established under AS 33.32;
 - (5) for professional services; or
 - (6) for concessions operated on state property.
- (c) In this section "employment program" means a nonprofit program to increase employment opportunities for individuals with physical or mental disabilities that constitute substantial handicaps to employment. (§ 2 ch 106 SLA 1986)

Sec. 36.30.110. Invitation to bid [Effective July 1, 1987]. (a) When competitive sealed bidding is used, the procurement officer shall issue an invitation to bid. It must include a time, place and date by which the bid must be received, purchase description, and a description of all contractual terms and conditions applicable to the procurement.

(b) When responding to the invitation to bid, the bidder shall supply evidence of the bidder's valid Alaska business license. A bidder for a construction contract shall also submit evidence of the bidder's registration under AS 08.18. (§ 2 ch 106 SLA 1986)

Sec. 36.30.115. Subcontractors [Effective July 1, 1987]. (a) Within 24 hours after opening of bids, the two apparent low bidders shall submit a list of the subcontractors the bidders propose to use in the performance of the contract. The list shall include the name and location of the place of business for each subcontractor and evidence of the subcontractor's valid Alaska business license. A bidder for a construction contract shall also submit evidence of each subcontractor's registration under AS 08.18.

- (b) A bidder may replace a listed subcontractor if the subcontractor
- (1) fails to comply with AS 08.18;
 - (2) files for bankruptcy or becomes insolvent;
 - (3) fails to execute a contract with the bidder involving performance of the work for which the subcontractor was listed;
 - (4) fails to obtain bonding;
 - (5) fails to obtain insurance acceptable to the state;
 - (6) fails to perform the contract with the bidder involving work for which the subcontractor was listed;
 - (7) must be substituted in order for the prime contractor to satisfy required federal affirmative action requirements;
 - (8) refuses to agree or abide with the bidder's labor agreement; or
 - (9) is determined by the procurement officer not to be a responsible bidder.

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(c) If a bidder fails to list a subcontractor or lists more than one subcontractor for the same portion of work and the value of that work is in excess of half of one percent of the total bid, the bidder shall be considered to have agreed to perform that portion of work without the use of a subcontractor and to have represented the bidder to be qualified to perform that work.

(d) A bidder who attempts to circumvent the requirements of this section by listing as a subcontractor another contractor who, in turn, sublets the majority of the work required under the contract violates this section.

(e) If a contract is awarded to a bidder who violates this section, the purchasing officer may

- (1) cancel the contract; or
- (2) after notice and a hearing, assess a penalty on the bidder in an amount that does not exceed 10 percent of the value of the subcontract at issue. (§ 2 ch 106 SLA 1986)

Sec. 36.30.120. Bid security [Effective July 1, 1987]. (a) Bid security shall be required for all competitive sealed bidding for construction contracts when the price is estimated by the procurement officer to exceed an amount established by regulation of the commissioner. Bid security on construction contracts under the amount set by the commissioner may be required when the circumstances warrant. Bid security may be required for competitive sealed bidding for contracts for supplies, services, or professional services in accordance with regulations of the commissioner when needed for the protection of the state.

(b) Bid security must be a bond provided by a surety company authorized to do business in the state or otherwise supplied in a form satisfactory to the commissioner. Bid security must be in an amount equal to at least

- (1) 10 percent of the amount of the bid if the bid does not exceed \$100,000; or
- (2) 10 percent of the first \$100,000 and 5 percent of the amount of the bid over \$100,000 if the bid exceeds \$100,000 up to a maximum of \$200,000 in security.

(c) When the invitation to bid requires security, the procurement officer shall reject a bid that does not comply with the bid security requirement unless, in accordance with regulations, the officer determines that the bid fails to comply in a nonsubstantial manner with the security requirements. (§ 2 ch 106 SLA 1986)

Sec. 36.30.130. Public notice of invitation to bid [Effective July 1, 1987]. (a) The procurement officer shall give adequate public notice of the invitation to bid at least 21 days before the date for the opening of bids. If a determination is made in writing that a shorter notice period is necessary for a particular bid, the 21-day period may be shortened. The determination shall be made by the chief procurement officer for bids for supplies, services, or professional services. The determination shall be made by the commissioner of transportation and public facilities for bids for construction or acquisition of property for the state equipment fleet. Notice shall be published in the Alaska Administrative Journal. The time and manner of notice must be in accordance with regulations adopted by the commissioner of administration. When practicable, notice may include

- (1) publication in a newspaper calculated to reach prospective bidders;
- (2) notices posted in public places within the area where the work is to be performed or the material furnished; and
- (3) notices mailed to all active prospective contractors on the appropriate list maintained under AS 36.30.050.

(b) Failure to comply with the notice requirements of this section does not invalidate a bid or the award of a contract. If the state fails to substantially comply with the requirements of (a) of this section, the state is liable for damages caused by that failure. (§ 2 ch 106 SLA 1986)

Sec. 36.30.140. Bid opening [Effective July 1, 1987]. (a) The procurement officer shall open bids publicly in the presence of one or more witnesses at the time and place designated in the invitation to bid. The amount of each bid and other relevant information that is specified by regulation of the commissioner, together with the name of each bidder, shall be recorded.

(b) The information recorded under (a) of this section is open to public inspection as soon as practicable before the notice of intent to award a contract is given under AS 36.30.365. The bids are not open for public inspection until after the notice of intent to award a contract is given. To the extent the bidder designates and the procurement officer concurs, trade secrets and other proprietary data contained in a bid document are confidential. (§ 2 ch 106 SLA 1986)

Sec. 36.30.150. Bid acceptance and bid evaluation [Effective July 1, 1987]. (a) Bids shall be unconditionally accepted without alteration or correction, except as authorized in AS 36.30.160. The procurement officer shall evaluate bids based on the requirements set out in the invitation to bid, which may include criteria to determine ac-

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(b) A contract based on total or life cycle costs may be awarded only when the chief procurement officer or, for construction contracts or procurements for the state equipment fleet, the commissioner of transportation and public facilities, determines in writing at the time of contract solicitation that the contract promotes overall economy for the purposes intended, encourages competition, is not unduly restrictive, and is in the best interests of the state. (§ 2 ch 106 SLA 1986)

Sec. 36.30.160. Late bids; Correction or withdrawal of bids; Cancellation of awards [Effective July 1, 1987]. (a) Bids received after the bid due date and time indicated on the invitation to bid may not be accepted unless the delay was due to an error of the contracting agency.

(b) Correction or withdrawal of inadvertently erroneous bids before or after bid opening, or cancellation of awards or contracts based on bid mistakes may be permitted in accordance with regulations adopted by the commissioner. After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the state or fair competition may not be permitted. Except as otherwise provided by regulation, a decision to permit the correction or withdrawal of a bid, or to the cancel an award or contract based on a bid mistake, shall be supported by a written determination made by the procurement officer. If a bidder is permitted to withdraw a bid before award, an action may not be maintained against the bidder or the bid security. (§ 2 ch 106 SLA 1986)

Sec. 36.30.170. Contract award after bids [Effective July 1, 1987]. (a) Except as provided in (b) of this section, the procurement officer shall award a contract based on the solicited bids with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set out in the invitation to bid.

(b) Notwithstanding an Alaska product preference under AS 36.30.322 — 36.30.338, the procurement officer shall award a contract based on solicited bids to the lowest responsible and responsive Alaska bidder if the bid is not more than five percent higher than the lowest nonresident bidder's. In this subsection, "Alaska bidder" means a person who

- (1) holds a current Alaska business license;
- (2) submits a bid for goods, services, or construction under the name as appearing on the person's current Alaska business license;
- (3) has maintained a place of business within the state staffed by the bidder or an employee of the bidder for a period of six months immediately preceding the date of the bid;
- (4) is incorporated or qualified to do business under the laws of the state, is a sole proprietorship, and the proprietor is a resident of the state or is a partnership, and all partners are residents of the state; and
- (5) if a joint venture, is composed entirely of ventures that qualify under (1) — (4) of this subsection.

(c) If a bidder qualifies under (b) of this section as an Alaska bidder, is offering services through an employment program as defined under AS 36.30.100(c), and is the lowest responsible and responsive bidder with a bid that is not more than 10 percent higher than the lowest bid of a nonresident, the procurement officer shall award the contract to that bidder. (§ 2 ch 106 SLA 1986)

Sec. 36.30.190. Multi-step sealed bidding [Effective July 1, 1987]. When it is considered impractical to initially prepare a definitive purchase description to support an award based on price, the procurement officer may issue an invitation to bid requesting the submission of unpriced technical offers to be followed by an invitation to bid limited to the bidders whose offers are determined to be technically qualified under the criteria set out in the first solicitation. (§ 2 ch 106 SLA 1986)

Article 3. Competitive Sealed Proposals.

Section	Section
200. Conditions for use	250. Award of contract
210. Request for proposals	260. Contract execution
220. Standard overhead rate	270. Architectural, engineering, and land surveying contracts
230. Treatment of proposals	
240. Discussion with responsible offerors and revisions to proposals	

Effective date of article. — Section 69, ch. 106, SLA 1986, makes this article effective July 1, 1987.

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Sec. 36.30.200. Conditions for use [Effective July 1, 1987]. (a) Except as otherwise provided in this chapter, or unless specifically exempted by law, an agency contract shall be awarded by competitive sealed proposals if it is not awarded by competitive sealed bidding. Construction may only be procured by competitive sealed proposals if the conditions under (c) of this section are met.

(b) The commissioner may provide by regulation that it is either not practicable or not advantageous to the state to procure specified types of supplies, services, or construction by competitive sealed bidding that would otherwise be procured by that method. When the chief procurement officer, or for construction contracts or procurements for the state equipment fleet, the commissioner of transportation and public facilities, determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the state, a contract may be entered into by competitive sealed proposals in accordance with the regulations. When it is determined that it is practicable but not advantageous to use competitive sealed bidding, the chief procurement officer or commissioner of transportation and public facilities shall specify with particularity the basis for the determination.

(c) When the chief procurement officer determines that it is advantageous to the state, a procurement officer may issue a request for proposals requesting the submission of offers to provide construction in accordance with a design provided by the offeror. The request for proposals shall require that each proposal submitted contain a single price that includes the design/build. (§ 2 ch 106 SLA 1986)

Sec. 36.30.210. Request for proposals [Effective July 1, 1987].

(a) A request for competitive sealed proposals must contain the date, time and place for delivering proposals, a specific description of the supplies, construction, services, or professional services to be provided under the contract, and the terms under which the supplies, construction, services, or professional services are to be provided. The request shall require the offeror to submit evidence of the offeror's valid Alaska business license and, no later than the date by which proposals must be received, to list subcontractors the offeror proposes to use in the performance of the contract. The list shall include the name and location of the place of business for each subcontractor and evidence of the subcontractor's valid Alaska business license. An offeror for a construction contract shall also submit evidence of the offeror's registration under AS 08.18 and evidence of registration for each listed subcontractor.

(b) A request for proposals must contain that information necessary for an offeror to submit a proposal or contain references to any information that cannot reasonably be included with the request. The re-

quest must provide a description of the factors that will be considered by the procurement officer when evaluating the proposals received, including the relative importance of price and other evaluation factors.

(c) Notice of a request for proposals shall be given in accordance with procedures under AS 36.30.130. The procurement officer may use additional means considered appropriate to notify prospective offerors of the intent to enter into a contract through competitive sealed proposals.

(d) The provisions of AS 36.30.115(b) — (e) apply to competitive sealed proposals. (§ 2 ch 106 SLA 1986)

Sec. 36.30.220. Standard overhead rate [Effective July 1, 1987]. (a) An agency that provides services to another agency under a contract covered by this chapter shall establish a standard overhead rate. If an agency submits a proposal in response to a request for competitive sealed proposals, the agency must include its standard overhead rate within its proposal.

(b) In this section, "standard overhead rate" means a charge established for services and professional services from an agency that is designed to compensate the agency for administration and support services incidentally provided with the services contractor for. (§ 2 ch 106 SLA 1986)

Sec. 36.30.230. Treatment of proposals [Effective July 1, 1987]. The procurement officer shall open proposals so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals containing the name and address of each offeror shall be prepared in accordance with regulations adopted by the commissioner. The register and the proposals are open for public inspection after the notice of intent to award a contract is issued under AS 36.30.365. To the extent that the offeror designates and the procurement officer concurs, trade secrets and other proprietary data contained in the proposal documents are confidential. (§ 2 ch 106 SLA 1986)

Sec. 36.30.240. Discussion with responsible offerors and revisions to proposals [Effective July 1, 1987]. As provided in the request for proposals, and under regulations adopted by the commissioner, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors reasonably susceptible of being selected for award shall be ac-

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corded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before the award of the contract for the purpose of obtaining best and final offers. In conducting discussions, the procurement officer may not disclose information derived from proposals submitted by competing offerors. AS 44.62.310 does not apply to meetings with offerors under this section. (§ 2 ch 106 SLA 1986)

Sec. 36.30.250. Award of contract [Effective July 1, 1987]. (a) The procurement officer shall award a contract under competitive sealed proposals to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the state taking into consideration price and the evaluation factors set out in the request for proposals. Other factors and criteria may not be used in the evaluation. The contract file must contain the basis on which the award is made.

(b) In determining whether a proposal is advantageous to the state, the procurement officer shall take into account, in accordance with regulations of the commissioner, whether the offeror qualifies as an Alaskan bidder under AS 36.30.170(b) or is offering the services of an employment program as defined in AS 36.30.100(c). (§ 2 ch 106 SLA 1986)

Sec. 36.30.260. Contract execution [Effective July 1, 1987]. A contract awarded under competitive sealed proposals must contain

- (1) the amount of the contract stated on its first page;
- (2) the date for the supplies to be delivered or the dates for construction, services, or professional services to begin and be completed;
- (3) a description of the supplies, construction, services, or professional services to be provided; and
- (4) certification by the project director for the contracting agency, the head of the contracting agency, or a designee that sufficient funds are available in an appropriation to be encumbered for the amount of the contract. (§ 2 ch 106 SLA 1986)

Sec. 36.30.270. Architectural, engineering, and land surveying contracts [Effective July 1, 1987]. (a) Notwithstanding conflicting provisions of AS 36.30.100 — 36.30.260, a procurement officer shall negotiate a contract for an agency with the most qualified and suitable firm or person of demonstrated competence for architectural, engineering, or land surveying services. The procurement officer shall award a contract for those services at fair and reasonable compensation as determined by the procurement officer, after consideration of the estimated value of the services to be rendered, and the scope,

complexity, and professional nature of the services. When determining the most qualified and suitable firm or person, the procurement officer shall consider the

(1) proximity to the project site of the office of the firm or person unless federal law prohibits this factor from being considered in the awarding of the contract; and

(2) employment practices of the firm or person with regard to women and minorities.

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

(c) This section does not apply to contracts awarded in a situation of public necessity if the procurement officer certifies in writing that a situation of public necessity exists.

(d) Notwithstanding the other provisions of this section, a procurement officer may include price as an added factor in selecting architectural, engineering, and land surveying services when, in the judgment of the procurement officer, the services required are repetitious in nature, and the scope, nature, and amount of services required are thoroughly defined by measurable and objective standards to reasonably enable firms or persons making proposals to compete with a clear understanding and interpretation of the services required. In order to include price as a factor in selection, a majority of the persons involved by the procurement officer in evaluation of the proposals must be registered in the state to perform architectural, engineering, or land surveying services.

(e) This section does not apply to a contract that incorporates both design services and construction. (§ 2 ch 106 SLA 1986)

Cross references. — For professional registration requirements for contracts under this section, see AS 36.90.100.

Article 4. Other Procurement Methods.

Section

300. Sole source procurements

310. Emergency procurements

Section

320. Small procurements

Effective date of article. — Section 69, ch. 106, SLA 1986, makes this article effective July 1, 1987.

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Sec. 36.30.300. Sole source procurements [Effective July 1, 1987]. (a) A contract may be awarded for supplies, services, professional services, or construction without competitive sealed bidding, competitive sealed proposals, or other competition in accordance with regulations adopted by the commissioner of administration. A contract may be awarded under this section only when the chief procurement officer or, for construction contracts or procurements for the state equipment fleet, the commissioner of transportation and public facilities determines in writing that there is only one source for the required procurement or construction. A sole source procurement may not be awarded if a reasonable alternative source exists. The written determination must include findings of fact that support by clear and convincing evidence the determination that only one source exists. The authority to make the determination required by this subsection may not be delegated.

(b) The using agency shall submit written evidence to support a sole source determination. The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, may also require the submission of cost or pricing data in connection with an award under this section.

(c) The procurement officer shall negotiate with the single supplier, to the extent practicable, to obtain a contract advantageous to the state.

(d) Procurement requirements may not be artificially divided, fragmented, aggregated or structured so as to constitute a purchase under this section or to circumvent the source selection procedures required by AS 36.30.100 — 36.30.270. (§ 2 ch 106 SLA 1986)

Sec. 36.30.310. Emergency procurements [Effective July 1, 1987]. Procurements may be made under emergency conditions as defined in regulations adopted by the commissioner when there exists a threat to public health, welfare, or safety, when a situation exists that makes a procurement through competitive sealed bidding or competitive sealed proposals impracticable or contrary to the public interest, or to protect public or private property. An emergency procurement need not be made through competitive sealed bidding or competitive sealed proposals but shall be made with competition that is practicable under the circumstances. A written determination by the procurement officer of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The written determination must include findings of fact that support the determination. (§ 2 ch 106 SLA 1986)

Sec. 36.30.320. Small procurements [Effective July 1, 1987]. (a) A procurement for supplies, services, or construction that does not exceed an aggregate dollar amount of \$5,000 may be made in accordance with regulations adopted by the commissioner for small procurements.

(b) A contract for professional services that does not exceed \$25,000 may be made under regulations adopted by the commissioner for small procurements, except that an agency may not contract for the services of legal counsel without the approval of the attorney general.

(c) Small procurements need not be made through competitive sealed bidding or competitive sealed proposals but shall be made with competition that is practicable under the circumstances.

(d) Procurement requirements may not be artificially divided or fragmented so as to constitute a purchase under this section or to circumvent the source selection procedures required by AS 36.30.100 — 36.30.270.

(e) The procurement officer shall give adequate public notice of intent to make a procurement under this section in accordance with regulations adopted by the commissioner. Notices shall also be provided to those Alaska bidders designated by the commissioner under AS 36.30.050(d). (§ 2 ch 106 SLA 1986)

Article 5. Preference for Alaska Products.

Section

322. Use of local forest products
324. Use of Alaska products
326. Contract specifications
328. Grant of preference
330. Penalty for failing to use designated products

Section

332. Classification of Alaska products
334. Identification of Alaska products
336. Application
338. Definitions

Cross references. — For similar provisions related to Alaska forest, agriculture, and fisheries products, see AS 36.15.

Effective date of article. — Section 69, ch. 106, SLA 1986, makes this article effective July 1, 1987.

Sec. 36.30.322. Use of local forest products [Effective July 1, 1987]. (a) Only timber, lumber, and manufactured lumber products originating in this state from local forests may be procured by an agency or used in construction projects of an agency unless the commissioner of commerce and economic development certifies that the manufacturers and suppliers who have notified the commissioner of commerce and economic development of their willingness to manufacture or supply Alaska forest products

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(1) have been given reasonable notice of the forest product needs of the procurement or project; and

(2) are unable to supply the products at a cost that is within seven percent of the price offered by a manufacturer or supplier of non-Alaska forest products.

(b) The provisions of AS 36.30.326 — 36.30.332 do not apply to procurements of timber, lumber, and manufactured lumber products or the use of those items in construction projects of an agency. (§ 2 ch 106 SLA 1986)

Sec. 36.30.324. Use of Alaska products [Effective July 1, 1987]. Alaska products shall be used whenever practicable in procurements for an agency. (§ 2 ch 106 SLA 1986)

Sec. 36.30.326. Contract specifications [Effective July 1, 1987]. Contract specifications for a procurement for an agency must include a provision that a bidder or offeror that designates in a bid or proposal the use of Alaska products identified in the specifications will receive the preference granted under AS 36.15.328 in the evaluation of the bid or proposal if the designated Alaska products meet the contract specifications. (§ 2 ch 106 SLA 1986)

Sec. 36.30.328. Grant of preference [Effective July 1, 1987]. In the evaluation of a bid or proposal for a procurement for an agency, a bid or offer that designates the use of Alaska products identified in the contract specifications and designated as Class I, Class II, or Class III state products under AS 36.30.332 is decreased by the percentage of the value of the designated Alaska products under AS 36.30.332. (§ 2 ch 106 SLA 1986)

Sec. 36.30.330. Penalty for failing to use designated products [Effective July 1, 1987]. (a) If a successful bidder or offeror who designates the use of an Alaska product in a bid or proposal for a procurement for an agency fails to use the designated product for a reason within the control of the successful bidder or offeror, each payment under the contract shall be reduced according to the following schedule:

- (1) for a Class I designated Alaska product - four percent;
- (2) for a Class II designated Alaska product - six percent;
- (3) for a Class III designated Alaska product - eight percent.

(b) A person is not a responsible bidder or offeror if, in the preceding three years, the person has twice designated the use of an Alaska product in a bid or proposal for a procurement for an agency and has each time failed to use the designated Alaska product for reasons within the control of the bidder or offeror.

(c) The procurement officer shall report to the commissioner of commerce and economic development each contractor penalized under (a) of this section. The commissioner of commerce and economic development shall maintain a list of contractors determined not to be responsible bidders under (b) of this section. (§ 2 ch 106 SLA 1986)

Sec. 36.30.332. Classification of Alaska products [Effective July 1, 1987]. (a) The commissioner of commerce and economic development shall adopt regulations establishing the value added in the state for materials and supplies produced or manufactured in the state that are used in a state procurement and shall publish a list of the products annually. A supplier may request inclusion of its product on the appropriate list.

(b) Materials and supplies with value added in the state that are

- (1) more than 25 percent and less than 50 percent of the manufacturer's quoted price is a Class I product;
- (2) 50 percent or more and less than 75 percent of the manufacturer's quoted price is a Class II product; and
- (3) 75 percent or more of a manufacturer's quoted price is a Class III product.

(c) In a bid or proposal evaluation a

- (1) Class I product is given a three percent preference;
- (2) Class II product is given a five percent preference; and
- (3) Class III product is given a seven percent preference. (§ 2 ch 106 SLA 1986)

Sec. 36.30.334. Identification of Alaska products [Effective July 1, 1987]. An agency may identify specific Alaska products for use in making a procurement. (§ 2 ch 106 SLA 1986)

Sec. 36.30.336. Application [Effective July 1, 1987]. Notwithstanding other provisions of this chapter, AS 36.30.322 — 36.30.338 apply to all procurements subject to AS 36.30, except as provided in AS 36.30.170(b) and 36.30.322(b). (§ 2 ch 106 SLA 1986)

Sec. 36.30.338. Definitions [Effective July 1, 1987]. In AS 36.30.322 — 36.30.338

(1) "Alaska product" means a product produced or manufactured in the state if the value added in the state is not less than 25 percent of the quoted price of the manufacturer;

(2) "produced or manufactured" means processing, developing, or making an item into a new item with a distinct character and use through the application within the state of materials, labor, skill, or other services;

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(3) "product" means materials or supplies but does not include gravel and asphalt. (§ 2 ch 106 SLA 1986)

Revisor's notes. — Reorganized in 1986 to alphabetize the defined terms.

Article 6. Contract Formation and Modification.

Section	Section
340. Review and approval by the Attorney General	390. Multi-term contracts
350. Bid cancellation, rejection	400. Cost or pricing data
360. Determination of responsibility	410. Right to inspect plant
362. Determination to award a contract to a nonresident	420. Right to audit records
365. Notice of intent to award a contract	430. Standard modification clauses for contracts
370. Types of contracts	460. Modification of standard clauses
380. Approval of accounting system	470. Fiscal responsibility
	480. Cost principal regulations

Effective date of article. — Section 69, ch. 106, SLA 1986, makes this article effective July 1, 1987.

Sec. 36.30.340. Review and approval by the Attorney General [Effective July 1, 1987]. If a contract contains a term that is in conflict with a state standard form contract term or if a standard term is deleted or modified by a term that is not standard, the contract must be reviewed by the Attorney General and approved as to form. (§ 2 ch 106 SLA 1986)

Sec. 36.30.350. Bid cancellation, rejection [Effective July 1, 1987]. An invitation to bid, a request for proposals, or other solicitation may be cancelled or any or all bids or proposals may be rejected in whole or in part or the date for opening bids or proposals may be delayed when it is in the best interests of the state in accordance with regulations adopted by the commissioner. The reasons for cancellation, rejection, or delay in opening bids or proposals shall be made part of the contract file. (§ 2 ch 106 SLA 1986)

Sec. 36.30.360. Determination of responsibility [Effective July 1, 1987]. (a) A written determination of responsibility of a bidder or offeror shall be made by the procurement officer in accordance with regulations adopted by the commissioner. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility is grounds for a determination of nonresponsibility with respect to the bidder or offeror.

(b) Information furnished by a bidder or offeror under (a) of this section is confidential and may not be disclosed without prior written consent by the bidder or offeror. (§ 2 ch 106 SLA 1986)

Sec. 36.30.362. Determination to award a contract to a non-resident [Effective July 1, 1987]. If the procurement officer awards a contract to a person who does not reside or maintain a place of business in the state and if the supplies, services, professional services, or construction that is the subject of the contract could have been obtained from sources in the state, the procurement officer shall issue a written statement explaining the basis of the award. The statement required under this section shall be kept in the contract file. (§ 2 ch 106 SLA 1986)

Sec. 36.30.365. Notice of intent to award a contract [Effective July 1, 1987]. At least 10 days before the formal award of a contract under this chapter the procurement officer shall provide to each bidder or offeror notice of intent to award a contract. The notice shall conform to regulations adopted by the commissioner. (§ 2 ch 106 SLA 1986)

Sec. 36.30.370. Types of contracts [Effective July 1, 1987]. Subject to limitations of this section, any type of contract that will promote the best interests of the state may be used, except that the use of a cost-plus-a-percentage-of-cost contract is prohibited. A cost-reimbursement contract may be used only when a determination is made in writing by the procurement officer that a cost-reimbursement contract is likely to be less costly to the state than any other type or that it is impracticable to obtain the supplies, services, professional services, or construction required except under a cost-reimbursement contract. (§ 2 ch 106 SLA 1986)

Sec. 36.30.380. Approval of accounting system [Effective July 1, 1987]. Except for a contract awarded through competitive sealed bidding or a firm fixed-price contract, a contract type may not be used unless it has been determined in writing by the procurement officer that the proposed contractor's accounting system

(1) will permit timely development of all necessary cost data in the form required by the specific contract type contemplated; and

(2) is adequate to allocate costs in accordance with generally accepted accounting principles. (§ 2 ch 106 SLA 1986)

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Sec. 36.30.390. Multi-term contracts [Effective July 1, 1987].

(a) Unless otherwise provided by law, a contract for supplies, services, or professional services may be entered into for any period of time considered to be in the best interests of the state provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds for them.

(b) Before using a multi-term contract, the procurement officer shall determine in writing that

(1) estimated requirements cover the period of the contract and are reasonably firm and continuing; and

(2) the contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economies in state procurement.

(c) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled. The contractor may only be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies, services, or professional services delivered under the contract that are not otherwise recoverable. The cost of cancellation may be paid from any appropriations available for these purposes. (§ 2 ch 106 SLA 1986)

Sec. 36.30.400. Cost or pricing data [Effective July 1, 1987].

(a) Before an award of a contract or a change order or contract modification, the contractor or prospective contractor shall submit cost and pricing data. The contractor or prospective contractor shall certify that, to the best of the contractor's or prospective contractor's knowledge and belief, the data submitted is accurate, complete, and current as of a mutually determined specified date and will continue to be accurate and complete during the performance of the contract.

(b) When a contractor becomes aware of a situation that may form the basis of a claim for compensation that exceeds the amount designated as the base amount of the contract and before performing additional work or supplying additional materials, the contractor shall submit cost and pricing data on the additional work or materials. The contractor shall certify that, to the best of the contractor's knowledge and belief, the data submitted is accurate, complete, and current and is the actual cost to the contractor of performing the additional work or supplying the additional materials.

(c) A contract, change order, or contract modification under which a certificate is required under (a) or (b) of this section must contain a provision that the price to the state, including the contractor's profit

or fee, will be adjusted to exclude any significant sums by which the state finds that the price is increased because the cost or pricing data furnished by the contractor or prospective contractor is inaccurate, incomplete, or not current as of the date agreed upon by the parties.

(d) The requirements of (a) of this section do not apply when

(1) the contract price is based on adequate price competition;

(2) the contract price is set by law or regulation; or

(3) it is determined by the procurement officer in writing and in accordance with regulations adopted by the commissioner that the requirements of (a) of this section may be waived, and the reasons for waiver are stated. (§ 2 ch 106 SLA 1986)

Sec. 36.30.410. Right to inspect plant [Effective July 1, 1987]. The state may, at reasonable times, inspect the part of the plant or place of business of a contractor or subcontractor that is related to the performance of a contract awarded or to be awarded by an agency. (§ 2 ch 106 SLA 1986)

Sec. 36.30.420. Right to audit records [Effective July 1, 1987]. (a) The state may, at reasonable times and places, audit the books and records of a person who has submitted cost or pricing data under AS 36.30.400 to the extent that the books and records relate to the cost or pricing data. A person who receives a contract, change order, or contract modification for which cost or pricing data is required, shall maintain books and records that relate to the cost or pricing data for three years after the date of final payment under the contract, unless a shorter period is authorized in writing by the commissioner.

(b) The state may audit the books and records of a contractor or a subcontractor to the extent that the books and records relate to the performance of the contract or subcontract. Books and records shall be maintained by the contractor for a period of three years after the date of final payment under the prime contract and by the subcontractor for a period of three years after the date of final payment under the subcontract, unless a shorter period is authorized in writing by the commissioner. (§ 2 ch 106 SLA 1986)

Sec. 36.30.430. Standard modification clauses for contracts [Effective July 1, 1987]. (a) The commissioner shall adopt regulations permitting the inclusion of clauses providing for adjustments in prices, time of performance, or other contract provisions as appropriate.

(b) The commissioner shall adopt regulations permitting or requiring the inclusion in state contracts of clauses providing for appropriate remedies and covering the following subjects:

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- (1) liquidated damages;
- (2) specified excuses for delay or nonperformance;
- (3) termination of the contract for default; and
- (4) termination of the contract in whole or in part for the convenience of the state. (§ 2 ch 106 SLA 1986)

Sec. 36.30.460. Modification of standard clauses [Effective July 1, 1987]. The procurement officer or the head of a contracting agency may vary the clauses adopted under AS 36.30.430 for inclusion in a particular state contract if the

(1) variations are supported by written determination that states the circumstances justifying the variation; and

(2) approval required by AS 36.30.340 is obtained. (§ 2 ch 106 SLA 1986)

Sec. 36.30.470. Fiscal responsibility [Effective July 1, 1987]. A contract modification, change order, or contract price adjustment under a construction contract in excess of an amount established by regulation of the commissioner is subject to prior written certification by the fiscal officer of the agency responsible for funding the project or the contract, or other official responsible for monitoring and reporting upon the status of the costs of the total project budget or contract budget, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. If the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget or the total contract budget, the procurement officer may not approve the contract modification, change order, or adjustment in contract price unless sufficient funds are available, or the scope of the project or contract is adjusted to permit the degree of completion that is feasible within the total project budget or total contract budget as it existed before the contract modification, change order, or adjustment in contract price under consideration. A contract modification change order, or adjustment in contract that is signed by both parties and has been reasonably relied on by a contractor, is presumed to be valid even if the provisions of this section have not been met. (§ 2 ch 106 SLA 1986)

Sec. 36.30.480. Cost principle regulations [Effective July 1, 1987]. The commissioner shall adopt regulations setting out cost principles that shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions that provide for the reimbursement of costs. If a written determination is approved at a level above the procurement officer, the cost principles may be modified by contract. (§ 2 ch 106 SLA 1986)

Article 7. Procurement Records and Reports.

Section	Section
500. Retention of procurement records	530. Public access to procurement information
510. Records of contracts awarded under competitive sealed proposals	540. Report to legislature
520. Records of sole source and emergency procurements	

Effective date of article. — Section 69, ch. 106, SLA 1986, makes this article effective July 1, 1987.

Sec. 36.30.500. Retention of procurement records [Effective July 1, 1987]. Procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the state archivist. Retained documents shall be made available to the attorney general or a designee upon request and proper receipt. (§ 2 ch 106 SLA 1986)

Sec. 36.30.510. Records of contracts awarded under competitive sealed proposals [Effective July 1, 1987]. A contract file open for public inspection shall be kept by the commissioner and the contracting agency for each contract awarded under competitive sealed proposals. The file kept by the commissioner shall contain a summary of the information in the file of the contracting agency. The file kept by the contracting agency must contain

- (1) a copy of the contract;
- (2) the register of proposals prepared under AS 36.30.230 and a copy of each proposal submitted; and
- (3) the written determination to award the contract prepared under AS 36.30.250. (§ 2 ch 106 SLA 1986)

Sec. 36.30.520. Records of sole source and emergency procurements [Effective July 1, 1987]. (a) The commissioner shall maintain for a minimum of five years a record listing all sole source procurement contracts made under AS 36.30.300 and emergency procurements made under AS 36.30.310. The record must contain

- (1) each contractor's name;
- (2) the amount and type of each contract; and
- (3) a listing of the supplies, services, professional services, or construction procured under each contract.

(b) The Department of Transportation and Public Facilities and any agency to whom the commissioner of administration or the commissioner of transportation and public facilities has delegated procure-

ment authority under AS 36.30.015 shall, by October 1 of each year, submit to the commissioner of administration records of the type specified in (a) of this section. The commissioner of administration shall maintain these records as required by (a) of this section. (§ 2 ch 106 SLA 1986)

Sec. 36.30.530. Public access to procurement information [Effective July 1, 1987]. Procurement information is public except as otherwise provided by law. (§ 2 ch 106 SLA 1986)

Sec. 36.30.540. Report to legislature [Effective July 1, 1987]. Beginning with December 1, 1989, the commissioner shall biennially report to the legislature concerning procurements by agencies. The report must include

(1) the records maintained by the commissioner under AS 36.30.510 and the records maintained under AS 36.30.520(a) for the previous two fiscal years;

(2) recommendations for changes in this chapter or other laws based on implementation of this chapter in the previous two fiscal years;

(3) a description of any matters that involved litigation concerning this chapter in the previous two fiscal years;

(4) a list of procurements made under this chapter from out-of-state sources during the previous two fiscal years together with the total number of procurement contracts entered into during that period with out-of-state contractors and the total value of these contracts; this paragraph does not apply to procurements made under AS 36.30.320; and

(5) a list of procurements made under this chapter from state sources during the previous two fiscal years together with the total number of procurement contracts entered into during that period with state contractors and the total value of these contracts; this paragraph does not apply to procurements made under AS 36.30.320. (§ 2 ch 106 SLA 1986)

Article 8. Legal and Contractual Remedies.

Section

560. Filing of a protest
565. Time for filing a protest
570. Notice of a protest
575. Stay of award
580. Decision by the procurement officer
585. Protest remedies
590. Appeal on a protest
595. Notice of a protest appeal
600. Stay of award during protest appeal

Section

605. Protest report
610. Decision without hearing
615. Hearing on protest appeal
620. Contract controversies
625. Appeal on a contract controversy
630. Hearing on a contract controversy
632. Delegation
635. Authority to debar or suspend
640. Causes for debarment or suspension

Section

645. Written determinations
 650. Hearing on a suspension
 655. List of persons debarred or suspended
 660. Reinstatement
 665. Limited participation
 670. Hearing procedures
 675. Recommendation by the hearing officer

Section

680. Final decision by the commissioner
 685. Judicial appeal
 687. Misrepresentations and fraudulent claims
 690. Exclusive remedy
 695. Other rules of procedure
 699. Definition

Effective date of article. — Section 69, ch. 106, SLA 1986, makes this article effective July 1, 1987.

Sec. 36.30.560. Filing of a protest [Effective July 1, 1987]. An interested party may protest the award of a contract, the proposed award of a contract, or a solicitation for supplies, services, professional services, or construction by an agency. The protest shall be filed with the procurement officer of the contracting agency in writing and include the following information:

- (1) the name, address, and telephone number of the protester;
- (2) the signature of the protester or the protester's representative;
- (3) identification of the contracting agency and the solicitation or contract at issue;
- (4) a detailed statement of the legal and factual grounds of the protest, including copies of relevant documents; and
- (5) the form of relief requested. (§ 2 ch 106 SLA 1986)

Sec. 36.30.565. Time for filing a protest [Effective July 1, 1987]. (a) A protest based upon alleged improprieties in a solicitation involving competitive sealed bidding that are apparent before the bid opening shall be filed before the bid opening. A protest based on alleged improprieties in a solicitation involving competitive sealed proposals that are apparent

(1) before the due date for receipt of initial proposals shall be filed before that due date;

(2) after the due date for receipt of initial proposals shall be filed before the next due date for receipt of adjusted proposals that occurs after the improprieties are apparent.

(b) In situations not covered under (a) of this section, protests shall be filed within 10 days after a notice of intent to award the contract is issued by the procurement officer.

(c) If the protester shows good cause, the procurement officer of the contracting agency may consider a filed protest that is not timely. (§ 2 ch 106 SLA 1986)

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Sec. 36.30.570. Notice of a protest [Effective July 1, 1987]. The procurement officer shall immediately give notice of a protest filed under AS 36.30.565 to the contractor if a contract has been awarded or, if no award has been made, to all interested parties. (§ 2 ch 106 SLA 1986)

Sec. 36.30.575. Stay of award [Effective July 1, 1987]. If a protest is filed the award may be made unless the procurement officer of the contracting agency determines in writing that a

(1) reasonable probability exists that the protest will be sustained; or

(2) stay of the award is not contrary to the best interests of the state. (§ 2 ch 106 SLA 1986)

Sec. 36.30.580. Decision by the procurement officer [Effective July 1, 1987]. (a) The procurement officer of the contracting agency shall issue a written decision containing the basis of the decision within 14 days after a protest has been filed. A copy of the decision shall be furnished to the protester by certified mail or other method that provides evidence of receipt.

(b) The time for a decision may be extended up to 26 days for good cause by the commissioner of administration, or for protests involving construction or procurements for the state equipment fleet, the commissioner of transportation and public facilities. If an extension is granted, the procurement officer shall notify the protester in writing of the date the decision is due.

(c) If a decision is not made by the date it is due, the protester may proceed as if the procurement officer had issued a decision adverse to the protester. (§ 2 ch 106 SLA 1986)

Sec. 36.30.585. Protest remedies [Effective July 1, 1987]. (a) If the procurement officer sustains a protest in whole or in part, the procurement officer shall implement an appropriate remedy.

(b) In determining an appropriate remedy, the procurement officer shall consider the circumstances surrounding the solicitation or procurement including the seriousness of the procurement deficiencies, the degree of prejudice to other interested parties or to the integrity of the procurement system, the good faith of the parties, the extent the procurement has been accomplished, costs to the agency and other impacts on the agency of a proposed remedy, and the urgency of the procurement to the welfare of the state. (§ 2 ch 106 SLA 1986)

Sec. 36.30.590. Appeal on a protest [Effective July 1, 1987]. (a) An appeal from a decision of a procurement officer on a protest may be filed by the protester with the commissioner of administration, or for protests involving construction or procurements for the state equipment fleet, the commissioner of transportation and public facilities. An appeal shall be filed within five days after the decision is received by the protester. The protester shall file a copy of the appeal with the procurement officer.

(b) An appeal must contain the information required under AS 36.30.560. In addition, the appeal must include

- (1) a copy of the decision being appealed; and
- (2) identification of the factual or legal errors in the decision that form the basis for the appeal. (§ 2 ch 106 SLA 1986)

Sec. 36.30.595. Notice of a protest appeal [Effective July 1, 1987]. (a) The procurement officer shall immediately give notice of an appeal filed under AS 36.30.590 to the contractor if a contract has been awarded or, if no award has been made, to all interested parties.

(b) The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall, on request, furnish a copy of the appeal to a person notified under (a) of this section, except that confidential material shall be deleted from the copy. (§ 2 ch 106 SLA 1986)

Sec. 36.30.600. Stay of award during protest appeal [Effective July 1, 1987]. If a protest appeal is filed before a contract is awarded and the award was stayed under AS 36.30.575, the filing of the appeal automatically continues the stay until the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, makes a written determination that the award of the contract without further delay is necessary to protect substantial interests of the state. (§ 2 ch 106 SLA 1986)

Sec. 36.30.605. Protest report [Effective July 1, 1987]. (a) The procurement officer of the contracting agency shall file a complete report on the protest and decision with the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, within seven days after a protest appeal is filed. The procurement officer shall furnish a copy of the report to the protester and to interested parties that have requested a copy of the appeal under AS 36.30.595(b).

(b) The procurement officer may request an extension of time to prepare the protest report. The request must be in writing listing the reasons for the request. The commissioner of administration or the commissioner of transportation and public facilities, as appropriate,

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shall respond to the request in writing. If an extension is granted, the commissioner shall list the reasons for granting the extension and indicate the date the protest report is due. The commissioner shall notify the protester in writing that the time for submission of the report has been extended and the date the report is due.

(c) The protester may file comments on the protest report with the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, within seven days after the report is received. The protester shall provide copies of the comments to the procurement officer and to interested parties that have requested a copy of the appeal under AS 36.30.595(b).

(d) The protester may request an extension of time to prepare the comments on the protest report. The request must be in writing listing the reasons for the request. The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall respond to the request in writing. If an extension is granted, the commissioner shall list the reasons for granting the extension and indicate the date the comments are due. The commissioner shall notify the procurement officer in writing that the time for submission of the comments has been extended and the date the comments are due. (§ 2 ch 106 SLA 1986)

Sec. 36.30.610. Decision without hearing [Effective July 1, 1987]. (a) The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall dismiss a protest appeal before a hearing is held if it is determined in writing that the appeal is untimely under AS 36.30.590(a).

(b) The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, may issue a decision on an appeal without a hearing if the appeal involves questions of law without genuine issues of fact. (§ 2 ch 106 SLA 1986)

Sec. 36.30.615. Hearing on protest appeal [Effective July 1, 1987]. A hearing on a protest appeal shall be conducted in accordance with AS 36.30.670 and regulations adopted by the commissioner. (§ 2 ch 106 SLA 1986)

Sec. 36.30.620. Contract controversies [Effective July 1, 1987]. (a) A contractor shall file a claim concerning a contract awarded under this chapter with the procurement officer. The contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of the contractor's knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the state is liable.

(b) If a controversy asserted by a contractor concerning a contract awarded under this chapter cannot be resolved by agreement, the procurement officer shall, after receiving a written request by the contractor for a decision, issue a written decision. The decision shall be made no more than 90 days after receipt by the procurement officer of all necessary information from the contractor. Failure of the contractor to furnish necessary information to the procurement officer constitutes a waiver of the claim. Before issuing the decision the procurement officer shall review the facts relating to the controversy and obtain necessary assistance from legal, fiscal, and other advisors.

(c) The time for issuing a decision under (b) of this section may be extended for good cause by the commissioner of administration, or for a controversy involving a construction contract or procurement for the state equipment fleet, the commissioner of transportation and public facilities, if the controversy concerns an amount in excess of \$50,000. The procurement officer shall notify the contractor in writing that the time for the issuance of a decision has been extended and of the date by which a decision shall be issued.

(d) The procurement officer shall furnish a copy of the decision to the contractor by certified mail or other method that provides evidence of receipt. The decision shall include a

- (1) description of the controversy;
- (2) reference to the pertinent contract provisions;
- (3) statement of the agreed upon and disputed facts;
- (4) statement of reasons supporting the decision; and
- (5) statement substantially as follows:

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

(e) If a decision is not made by the date it is due, the contractor may proceed as if the procurement officer had issued a decision adverse to the contractor.

(f) If a controversy asserted by the state concerning a contract awarded under this chapter cannot be resolved by agreement the matter shall be immediately referred to the commissioner of administration or the commissioner of transportation and public facilities, as appropriate. (§ 2 ch 106 SLA 1986)

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Sec. 36.30.625. Appeal on a contract controversy [Effective July 1, 1987]. (a) An appeal from a decision of the procurement officer on a contract controversy may be filed by the contractor with the commissioner of administration, or for a controversy involving a construction contract or procurement for the state equipment fleet, the commissioner of transportation and public facilities. The appeal shall be filed within 14 days after the decision is received by the contractor. The contractor shall file a copy of the appeal with the procurement officer.

(b) An appeal shall contain a copy of the decision being appealed and identification of the factual or legal errors in the decision that form the basis for the appeal. (§ 2 ch 106 SLA 1986)

Sec. 36.30.630. Hearing on a contract controversy [Effective July 1, 1987]. (a) Except as provided in (b) of this section, a hearing shall be conducted according to AS 36.30.670 and regulations adopted by the commissioner of administration on a contract controversy appealed to the commissioner of administration or the commissioner of transportation and public facilities or referred to either commissioner under AS 36.30.620(f).

(b) Within 15 days after receipt of an appeal on a contract controversy the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, may adopt the decision of the procurement officer as the final decision without a hearing. (§ 2 ch 106 SLA 1986)

Sec. 36.30.632. Delegation [Effective July 1, 1987]. The commissioner of administration and the commissioner of transportation and public facilities may delegate responsibilities under AS 36.30.590 and 36.30.630 to the head of the contracting agency. (§ 2 ch 106 SLA 1986)

Sec. 36.30.635. Authority to debar or suspend [Effective July 1, 1987]. (a) After consultation with the using agency and the attorney general and after a hearing conducted according to AS 36.30.670 and regulations adopted by the commissioner of administration, the commissioner of administration or the commissioner of transportation and public facilities may debar a person for cause from consideration for award of contracts. Notice of a debarment hearing shall be provided in writing at least seven days before the hearing. The debarment may not be for a period of more than three years.

(b) The commissioner of administration or the commissioner of transportation and public facilities, after consultation with the using agency and the attorney general, may suspend a person from consideration for award of contracts if there is probable cause for debarment and compelling reasons require suspension to protect state interests. The suspension may not be for a period exceeding three months.

(c) The authority to debar or suspend shall be exercised in accordance with regulations adopted by the commissioner of administration. (§ 2 ch 106 SLA 1986)

Sec. 36.30.640. Causes for debarment or suspension [Effective July 1, 1987]. The causes for debarment or suspension include the following:

(1) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of the contract or subcontract;

(2) conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or other offense indicating a lack of business integrity or business honesty that currently and seriously affects responsibility as a state contractor;

(3) conviction or civil judgment finding a violation under state or federal antitrust statutes;

(4) violation of contract provisions of a character that is regarded by the commissioner to be so serious as to justify debarment action, such as

(A) knowing failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

(B) failure to perform or unsatisfactory performance in accordance with the terms of one or more contracts, except that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor may not be considered to be a basis for debarment;

(5) for violation of the ethical standards set out in law or regulation;

(6) for a violation of this chapter punishable under AS 36.30.930(2); and

(7) any other cause listed in regulations of the commissioner determined to be so serious and compelling as to affect responsibility as a state contractor, including debarment by another governmental entity for a cause listed in the regulations. (§ 2 ch 106 SLA 1986)

Sec. 36.30.645. Written determinations [Effective July 1, 1987]. (a) The commissioner of administration or the commissioner of transportation and public facilities shall issue a written decision to debar or suspend. The decision must

(1) state the reasons for the action taken; and

(2) inform the debarred person of rights to judicial appeal or inform the suspended person of rights to administrative and judicial appeal.

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(b) A copy of the decision under (a) of this section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other intervening party. (§ 2 ch 106 SLA 1986)

Sec. 36.30.650. Hearing on a suspension [Effective July 1, 1987]. (a) A person suspended under AS 36.30.635 is entitled to a hearing conducted according to AS 36.30.670 and regulations adopted by the commissioner of administration if the person files a written request for a hearing with the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, within seven days after receipt of the notice of suspension under AS 36.30.645.

(b) If a suspended person requests a hearing the commissioner of administration or the commissioner of transportation and public facilities, as appropriate, shall schedule a prompt hearing unless the attorney general determines that a hearing at the proposed time is likely to jeopardize an investigation. A hearing may not be delayed longer than six months after notice of the suspension is provided under AS 36.30.645. (§ 2 ch 106 SLA 1986)

Sec. 36.30.655. List of persons debarred or suspended [Effective July 1, 1987]. The commissioner shall maintain a list of all persons debarred or suspended from consideration for award of contracts. (§ 2 ch 106 SLA 1986)

Sec. 36.30.660. Reinstatement [Effective July 1, 1987]. (a) The commissioner of administration or the commissioner of transportation and public facilities may at any time after a final decision to debar a person from consideration for award of contracts reinstate the person after determining that the cause for which the person was debarred no longer exists or has been substantially mitigated.

(b) A debarred person may request reinstatement by submitting a petition to the commissioner of administration or the commissioner of transportation and public facilities supported by evidence showing that the cause for debarment no longer exists or has been substantially mitigated.

(c) The commissioner of administration or the commissioner of transportation and public facilities may require a hearing on a reinstatement petition. A decision on reinstatement shall be made in writing within seven days after a reinstatement petition is submitted. The decision shall specify the factors on which it is based. A decision under this section is not subject to judicial appeal. (§ 2 ch 106 SLA 1986)

Sec. 36.30.665. Limited participation [Effective July 1, 1987]. The commissioner of administration or the commissioner of transportation and public facilities may permit a debarred person to participate in a contract on a limited basis during the debarment period if the commissioner determines in writing that the participation is advantageous to the state. The determination shall specify the factors on which it is based and the limits imposed on the debarred person. (§ 2 ch 106 SLA 1986)

Sec. 36.30.670. Hearing procedures [Effective July 1, 1987]. (a) The commissioner of administration or the commissioner of transportation and public facilities shall act as a hearing officer or appoint a hearing officer for a hearing conducted under this chapter. The hearing officer shall arrange for a prompt hearing and notify the parties in writing of the time and place of the hearing. The hearing shall be conducted in an informal manner. The provisions of AS 44.62 (Administrative Procedure Act) do not apply to a hearing conducted under this chapter.

(b) The hearing officer may

(1) hold prehearing conferences to settle, simplify, or identify the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(2) require parties to state their positions concerning the various issues in the proceeding;

(3) require parties to produce for examination those relevant witnesses and documents under their control;

(4) rule on motions and other procedural matters;

(5) regulate the course of the hearing and conduct of the participants;

(6) establish time limits for submission of motions or memoranda;

(7) impose appropriate sanctions against a person who fails to obey an order of the hearing officer, including

(A) prohibiting the person from asserting or opposing designated claims or defenses or introducing designated matters into evidence;

(B) excluding all testimony of an unresponsive or evasive witness; and

(C) excluding a person from further participation in the hearing;

(8) take official notice of a material fact not appearing in evidence, if the fact is among the traditional matters subject to judicial notice;

(9) administer oaths or affirmations.

(c) A transcribed record of the hearing shall be made available at cost to a party that requests it. (§ 2 ch 106 SLA 1986)

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Sec. 36.30.675. Recommendation by the hearing officer [Effective July 1, 1987]. (a) If the commissioner of administration or the commissioner of transportation and public facilities is not acting as hearing officer, the hearing officer shall recommend a decision to the commissioner based on the evidence presented. The recommendation shall include findings of fact and conclusions of law.

(b) The commissioner of administration or the commissioner of transportation and public facilities may affirm, modify, or reject the hearing officer's recommendation in whole or in part, may remand the matter to the hearing officer with instructions, or take other appropriate action. (§ 2 ch 106 SLA 1986)

Sec. 36.30.680. Final decision by the commissioner [Effective July 1, 1987]. A decision by the commissioner of administration or the commissioner of transportation and public facilities after a hearing under this chapter is final. A decision shall be sent within 20 days after the hearing to all parties by personal service or certified mail, except that a decision by the commissioner of transportation and public facilities involving procurement of construction shall be sent within 90 days after the hearing to all parties by personal service or certified mail. (§ 2 ch 106 SLA 1986)

Sec. 36.30.685. Judicial appeal [Effective July 1, 1987]. (a) A final decision of the commissioner of administration or the commissioner of transportation and public facilities under AS 36.30.610, 36.30.635(a), 36.30.650, or 36.30.680 may be appealed to the superior court in accordance with the Alaska Rules of Appellate Procedure.

(b) A final decision of the commissioner of administration or the commissioner of transportation and public facilities under AS 36.30.630(b) may be appealed to the superior court for a trial de novo. (§ 2 ch 106 SLA 1986)

Sec. 36.30.687. Misrepresentations and fraudulent claims [Effective July 1, 1987]. (a) A person who makes or uses in support of a contract claim under this chapter, a misrepresentation, or who practices or attempts to practice a fraud, at any stage of proceedings relating to a procurement or contract controversy under this chapter:

- (1) forfeits all claims relating to that procurement or contract; and
- (2) is liable to the state for reimbursement of all sums paid on the claim, for all costs attributable to review of the claim, and for a civil penalty equal to the amount by which the claim is misrepresented.

(b) The procurement officer, commissioner or court shall make specific findings of misrepresentation, attempted fraud or fraud before declaring a forfeiture under (a)(1) of this section.

(c) Suits to recover costs and penalties under (a)(2) of this section must be commenced within six years after the discovery of the misrepresentation, fraud, or attempted fraud.

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

(e) In this section, "misrepresentation" means a false or misleading statement of material fact, or conduct intended to deceive or mislead concerning material fact, whether it succeeds in deceiving or misleading. (§ 2 ch 106 SLA 1986)

Sec. 36.30.690. Exclusive remedy [Effective July 1, 1987]. Notwithstanding AS 44.77 or other law to the contrary, AS 36.30.560 — 36.30.699 and regulations adopted under those sections provide the exclusive procedure for asserting a claim against an agency arising in relation to a procurement under this chapter. (§ 2 ch 106 SLA 1986)

Sec. 36.30.695. Other rules of procedure [Effective July 1, 1987]. The commissioner may adopt by regulation additional rules of procedure providing for the expeditious administrative review of all contract claims or controversies, both before the contracting agency and through an appeal heard de novo. (§ 2 ch 106 SLA 1986)

Sec. 36.30.699. Definition [Effective July 1, 1987]. In AS 36.30.560 — 36.30.695, "interested party" means an actual or prospective bidder or offeror whose economic interest may be affected substantially and directly by the issuance of a contract solicitation, the award of a contract, or the failure to award a contract; whether an actual or prospective bidder or offeror has an economic interest depends on the circumstances. (§ 2 ch 106 SLA 1986)

Article 9. Intergovernmental Relations.

Section

700. Cooperative purchasing authorized
 710. Sale, acquisition, or use of supplies
 by a public procurement unit
 720. Joint use of facilities
 730. Supply of personnel, information,
 and technical services
 735. Restriction on contracting with or

Section

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 740. Review of procurement require-
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 750. Contract controversies
 790. Definitions

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Effective date of article. — Section
69, ch. 106, SLA 1986, makes this article
effective July 1, 1987.

Sec. 36.30.700. Cooperative purchasing authorized [Effective July 1, 1987]. A public procurement unit may either participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of supplies, services, professional services, or construction with one or more public procurement units or external procurement activities in accordance with an agreement entered into between the participants. Cooperative purchasing may include joint or multi-party contracts between public procurement units and open-ended state public procurement unit contracts that are made available to local public procurement units. (§ 2 ch 106 SLA 1986)

Sec. 36.30.710. Sale, acquisition, or use of supplies by a public procurement unit [Effective July 1, 1987]. (a) A public procurement unit may sell to, acquire from, or use any supplies belonging to another public procurement unit or external procurement activity independent of the requirements of AS 36.30.060 and 36.30.100 — 36.30.260.

(b) A public procurement unit may enter into an agreement, independent of the requirements of AS 36.30.060 and 36.30.100 — 36.30.260, with another public procurement unit or external procurement activity for the cooperative use of supplies or services under the terms agreed upon between the parties. (§ 2 ch 106 SLA 1986)

Sec. 36.30.720. Joint use of facilities [Effective July 1, 1987]. A public procurement unit may enter into agreements for the common use or lease of warehousing facilities, capital equipment, and other facilities with another public procurement unit or an external procurement activity under the terms agreed upon between the parties. (§ 2 ch 106 SLA 1986)

Sec. 36.30.730. Supply of personnel, information, and technical services [Effective July 1, 1987]. (a) A public procurement unit may, upon written request from another public procurement unit or external procurement activity, provide personnel to the requesting public procurement unit or external procurement activity. The public procurement unit or external procurement activity making the request shall pay the public procurement unit providing the personnel the direct and indirect cost of furnishing the personnel, in accordance with an agreement between the parties.

(b) The informational, technical, and other services of a public procurement unit may be made available to another public procurement unit or external procurement activity except that the requirements of the public procurement unit tendering the services has precedence over the requesting public procurement unit or external procurement activity. The requesting public procurement unit or external procurement activity shall pay for the expenses of the services so provided, in accordance with an agreement between the parties.

(c) Upon request, the commissioner may make available to public procurement units or external procurement activities the following services, among others:

- (1) standard forms;
- (2) printed manuals;
- (3) product specifications and standards;
- (4) quality assurance testing services and methods;
- (5) qualified products lists;
- (6) source information;
- (7) common use commodities listings;
- (8) supplier performance ratings;
- (9) lists of persons debarred or suspended from consideration for award of state contracts;
- (10) forms for invitations for bids, requests for proposals, instructions to bidders, general contract provisions, and other contract forms; and
- (11) contracts or published summaries of them, including price and time of delivery information.

(d) The commissioner may provide the following technical services, among others:

- (1) development of product specifications;
- (2) development of quality assurance test methods, including receiving, inspection, and acceptance procedures;
- (3) use of product testing and inspection facilities; and
- (4) use of personnel training programs.

(e) The commissioner may enter into contractual arrangements and publish a schedule of fees for the services provided under (c) and (d) of this section. (§ 2 ch 106 SLA 1986)

Sec. 36.30.735. Restriction on contracting with or employing experts on radiation hazards [Effective July 1, 1987]. (a) Except for the Department of Health and Social Services, the Department of Labor, the Department of Environmental Conservation, and the Department of Military and Veterans' Affairs, a state agency may not

- (1) contract, other than with the Department of Health and Social Services, to have services performed that require expertise in determining or reducing the hazards of radiation; or

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(2) employ a person whose duties require expertise in determining or reducing the hazards of radiation.

(b) In this section, "state agency" means a state department or agency, whether in the legislative, judicial, or executive branch, including such entities as the Alaska State Building Authority, but not including the University of Alaska, a municipality, or an agency of a municipality or the Alaska State Building Authority.

(c) In this section, "radiation" does not include radiation emitted from a Federal Communications Commission licensed facility emitting radiation of a wave length longer than one centimeter and an average power output not exceeding two kilowatts. (§ 2 ch 106 SLA 1986)

Sec. 36.30.740. Review of procurement requirements [Effective July 1, 1987]. To the extent possible, the commissioner may collect information concerning the type, cost, quality, and quantity of commonly used supplies, equipment for the state fleet, services, or construction being procured or used by state public procurement units. The commissioner may also collect this information from local public procurement units. The commissioner may make this information available to a public procurement unit upon request. (§ 2 ch 106 SLA 1986)

Sec. 36.30.750. Contract controversies [Effective July 1, 1987].

(a) Under a cooperative purchasing agreement, controversies arising between an administering public procurement unit and its bidders, offerors, or contractors shall be resolved in accordance with AS 36.30.560 — 36.30.699.

(b) A local public procurement unit that is not subject to AS 36.30.560 — 36.30.699 may enter into an agreement with another local public procurement unit or external procurement activity to establish procedures or use that unit's or activity's existing procedures to resolve controversies with contractors, whether or not the controversy arose under a cooperative purchasing agreement. (§ 2 ch 106 SLA 1986)

Sec. 36.30.790. Definitions [Effective July 1, 1987]. In AS 36.30.700 — 36.30.790

(1) "cooperative purchasing" means procurement conducted by, or on behalf of, more than one public procurement unit, or by a public procurement unit with an external procurement activity;

(2) "external procurement activity" means a buying organization not located in this state that, if located in this state, would qualify as a public procurement unit; an agency of the United States is an external procurement activity;

(3) "local public procurement unit" means a municipality or other subdivision of the state or other entity that expends public funds for the procurement of supplies, services, professional services, and construction, and any nonprofit corporation operating a charitable hospital;

(4) "public procurement unit" means either a local public procurement unit or a state public procurement unit;

(5) "state public procurement unit" means the Department of Administration and any other contracting agency of the state. (§ 2 ch 106 SLA 1986)

Article 10. General Provisions.

Section	Section
850. Application of this chapter	920. Reporting of anticompetitive practices
360. Supplementary general principles of law applicable	930. Civil and criminal penalties
870. Adoption of regulations	940. Enforcement
880. Requirement of good faith	950. Severability
890. Federal assistance	990. Definitions
900. Preference for Alaska products	995. Short title
910. Purchases through general services administration	

Effective date of article. — Section 69, ch. 106, SLA 1986, makes this article effective July 1, 1987.

Sec. 36.30.850. Application of this chapter [Effective July 1, 1987]. (a) This chapter applies only to contracts solicited or entered into after July 1, 1987, unless the parties agree to its application to a contract solicited or entered into before that date.

(b) This chapter applies to every expenditure of state funds irrespective of their sources, including federal assistance except as otherwise specified in AS 36.30.890, by the state, acting through an agency, under a contract, except that this chapter does not apply to

- (1) grants;
- (2) contracts for professional witnesses to provide for professional services or testimony relating to existing or probable lawsuits in which the state is or may become a party;
- (3) contracts of the University of Alaska where the work is to be performed substantially by students enrolled in the university;
- (4) contracts for medical doctors and dentists;
- (5) acquisitions or disposals of real property or interest in real property, except as provided in AS 36.30.080;
- (6) disposals under AS 38.05;
- (7) contracts for the preparation of ballots under AS 15.15.030;

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(8) acquisitions or disposals of property and other contracts relating to airports under AS 02.15.070, 02.15.090, and 02.15.091;

(9) disposals of obsolete property under AS 19.05.060;

(10) disposals of obsolete material or equipment under AS 35.20.060;

(11) agreements with providers of services under AS 47.07; AS 47.08; AS 47.10; AS 47.17; AS 47.24; AS 47.25.195, and 47.25.310;

(12) contracts of the Department of Fish and Game for flights that involve specialized flying and piloting skills and are not point-to-point;

(13) purchases of income-producing assets for the state treasury or a public corporation of the state.

(c) Except for AS 36.30.700 — 36.30.790, this chapter does not apply to contracts between two or more agencies, the state and its political subdivisions, or the state and other governments.

(d) Nothing in this chapter or in regulations adopted under this chapter prevents an agency or political subdivision from complying with the terms and conditions of a grant, gift, bequest, cooperative agreement or federal assistance agreement. (§ 2 ch 106 SLA 1986)

Revisor's notes. — "July 1, 1987" was substituted for "January 1, 1987" in subsection (a) to correct a manifest error.

Sec. 36.30.860. Supplementary general principles of law applicable [Effective July 1, 1987]. Unless displaced by the particular provisions of this chapter, the principles of law and equity, including the Uniform Commercial Code (AS 45.01 — AS 45.09), the law merchant, and law relative to capacity to contract, agency, fraud, misrepresentation, duress, coercion, mistake, or bankruptcy shall supplement the provisions of this chapter. (§ 2 ch 106 SLA 1986)

Sec. 36.30.870. Adoption of regulations [Effective July 1, 1987]. (a) Regulations under this chapter shall be adopted in accordance with the Administrative Procedure Act (AS 44.62).

(b) Regulations under this chapter applicable to procurements of construction or procurements for or disposal of property of the state equipment fleet shall be adopted by the commissioner of administration only after consultation with the commissioner of transportation and public facilities. (§ 2 ch 106 SLA 1986)

Sec. 36.30.880. Requirement of good faith [Effective July 1, 1987]. All parties involved in the negotiation, performance, or administration of state contracts shall act in good faith. (§ 2 ch 106 SLA 1986)

Sec. 36.30.890. Federal assistance [Effective July 1, 1987]. If a procurement involves the expenditure of federal funds or federal assistance and there is a conflict between a provision of this chapter or a regulation adopted under a provision of this chapter and a federal statute regulation, policy or requirement, the federal statute regulation, policy or requirement, shall prevail. (§ 2 ch 106 SLA 1986)

Sec. 36.30.900. Preference for Alaska products [Effective July 1, 1987]. This chapter does not modify, amend, or alter AS 36.15.010 and 36.15.020 regarding preference for Alaska forest products, or AS 36.20.010 regarding preference to producers or dealers in Alaska except as provided in AS 36.30.170(b) and (c). (§ 2 ch 106 SLA 1986)

Sec. 36.30.910. Purchases through general services administration [Effective July 1, 1987]. This chapter does not prevent purchasing through the general services administration as provided by law. (§ 2 ch 106 SLA 1986)

Sec. 36.30.920. Reporting of anticompetitive practices [Effective July 1, 1987]. When for any reason collusion or other anticompetitive practices are suspected among bidders or offerors, a notice of the relevant facts shall be transmitted to the attorney general by the person who suspects the collusion or other anticompetitive practices. (§ 2 ch 106 SLA 1986)

Sec. 36.30.930. Civil and criminal penalties [Effective July 1, 1987]. The following penalties apply to violations of this chapter:

(1) a person who contracts for or purchases supplies, equipment for the state fleet, services, professional services, or construction in a manner the person knows to be contrary to the requirements of this chapter or the regulations adopted under this chapter is liable for all costs and damages to the state arising out of the violation;

(2) a person who intentionally or knowingly contracts for or purchases supplies, equipment for the state fleet, services, professional services, or construction under a scheme or artifice to avoid the requirements of this chapter is guilty of a class C felony. (§ 2 ch 106 SLA 1986)

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Sec. 36.30.940. Enforcement [Effective July 1, 1987]. The attorney general on behalf of the state shall enforce the provisions of this chapter. (§ 2 ch 106 SLA 1986)

Sec. 36.30.950. Severability [Effective July 1, 1987]. If any provision of this chapter or any application of this chapter to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter that can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared severable. (§ 2 ch 106 SLA 1986)

Sec. 36.30.990. Definitions [Effective July 1, 1987]. In this chapter, unless the context in which a term is used clearly requires a different meaning or a different definition is prescribed for a particular provision,

(1) "agency" means a department, institution, board, commission, division, authority, public corporation, the Alaska Pioneers' Home, or other administrative unit of the executive branch of state government, except for the University of Alaska, the Alaska State Building Authority and the Alaska Railroad Corporation; it does not include a regional Native housing authority created under AS 18.55.996, or a regional electrical authority created under AS 18.57.020;

(2) "change order" means a written order signed by the procurement officer, directing the contractor to make changes that the changes clause of the contract authorizes the procurement officer to order without the consent of the contractor;

(3) "commissioner" means the commissioner of the Department of Administration;

(4) "competitive sealed bidding" means the procedure under AS 36.30.100 — 36.30.190;

(5) "competitive sealed proposals" means the procedure under AS 36.30.200 — 36.30.260;

(6) "construction" means the process of building, altering, repairing, maintaining, improving, or demolishing a public highway, structure, building, or other public improvement of any kind to real property other than privately owned real property leased for the use of agencies; it includes services and professional services relating to planning and design required for the construction; it does not include the routine operation of a public improvement to real property nor does it include the construction of public housing;

(7) "contract" means all types of state agreements, regardless of what they may be called, for the procurement or disposal of supplies, equipment for the state fleet, services, professional services, or construction;

(8) "contract modification" means a written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of a contract accomplished by mutual action of the parties to the contract;

(9) "department" means the Department of Administration;

(10) "grant" means property furnished by the state, whether real or personal, designated by law, including an appropriation Act, as a grant;

(11) "person" means a business, individual, union, committee, club, other organization, or group of individuals;

(12) "procurement" means buying, purchasing, renting, leasing, or otherwise acquiring supplies, equipment for the state fleet, services, or construction; it also includes functions that pertain to the obtaining of a supply, equipment for the state fleet, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration;

(13) "procurement officer" means a person authorized to enter into and administer contracts for an agency and make written determinations with respect to them; it also includes an authorized representative of a procurement officer acting within the limits of authority;

(14) "professional services" means professional, technical, or consultant's services that are predominantly intellectual in character, result in the production of a report or the completion of a task, and include analysis, evaluation, prediction, planning, or recommendation;

(15) "services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports that are merely incidental to the required performance; it does not include employment agreements or collective bargaining agreements;

(16) "supplies" means all property of an agency, including equipment, materials, and insurance; it includes privately owned real property leased for the use of agencies, such as office space, but does not include the acquisition or disposition of other interests in land. (§ 2 ch 106 SLA 1986)

Sec. 36.30.995. Short title [Effective July 1, 1987]. This chapter may be cited as the State Procurement Code. (§ 2 ch 106 SLA 1986)

Chapter 90. Miscellaneous Provisions.

Section	Section
01. [Renumbered]	50. Maintenance of state marine vessels
10. Public construction contract payments	100. Compliance of contracts with professional registration requirements

Sec. 36.90.001. [Renumbered as AS 36.90.010.]

Sec. 36.90.010. Public construction contract payments. (a) The state shall initiate procedures to pay the contractor under a public construction or public work contract within 15 days after the contractor submits to the state a bill for materials provided or services performed and a sworn statement that all employees employed on the project by the contractor and all subcontractors have been paid not less than the established prevailing rate of pay as determined and published by the Department of Labor.

(b) If the state fails to make a payment due the contractor under this section within 30 days after receiving a contractor's billing, the state shall pay interest to the contractor under AS 45.45.010(a) on the amount due.

(c) The state or a political subdivision of the state is liable to a contractor registered under AS 08.18 for interest at the rate provided in AS 45.45.010(a) on retainage on a contract for public works or public construction. Interest on retainage accrues from the date of approval of a pay estimate until the date of payment to the contractor. A contract provision purporting to waive the interest provisions of this subsection is void as contrary to public policy.

(d) A political subdivision that has a population of 500 or less is exempt from the payment of interest provided in (c) of this section.

(e) A political subdivision that receives a state grant for a public construction or public works project may use money from the state grant to pay the interest on retainage under contracts for the project as required by (c) of this section. (§ 1 ch 85 SLA 1982)

Revisor's notes. — Formerly AS 36.90.001. Renumbered in 1986.

Sec. 36.90.050. Maintenance of state marine vessels [Repealed effective August 30, 1992]. (a) A marine vessel owned by the state may not be transported outside of the state for the purpose of maintenance or repair unless the commissioner of transportation and public facilities determines that there is no facility in the state able to perform the maintenance at a price that is in the state's best interests. In making this determination, the commissioner shall consider, and document through written findings

(1) the amount of money the state has granted to, or otherwise invested in, marine vessel maintenance facilities in the state;

(2) the amortization, overhead, and start-up costs of the facilities in the state; and

(3) the direct and indirect benefits to the economy and labor force of the state that may be obtained by contracting with a facility in the state.

(b) AS 37.05.230 and the competitive bidding provisions of any other law do not apply to a contract for the maintenance or repair of a marine vessel owned by the state if the contract is awarded to a facility in the state. (§ 1 ch 57 SLA 1986; r § 2 ch 57 SLA 1986)

Repeal of section. — Section 2, ch. 57, SLA 1986 provides: "AS 36.90.050 is repealed August 30, 1992."

Revisor's notes. — Enacted as AS 36.20.020. Renumbered in 1986.

Editor's notes. — AS 37.05.230, referred to in subsection (b) is repealed by § 67, ch. 106, SLA 1986, effective July 1, 1987.

Sec. 36.90.100. Compliance of contracts with professional registration requirements. The state or a municipality may not award a contract for architectural, engineering, or land surveying services to

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

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

(3) a corporation that is not authorized under AS 08.48.241 to offer the architectural, engineering, or land surveying services required by the contract. (§ 1 ch 54 SLA 1986)

Effective dates. — Section 5, ch. 54, May 30, 1986, in accordance with AS SLA 1986 makes this section effective 01.10.070(c).

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

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PUBLIC CONTRACTS

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(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;

(4) "resident" means a person who establishes residency under AS 01.10.055;

(5) "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;

(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. (§ 16 ch 142 SLA 1972; am § 3 ch 89 SLA 1976; am § 16 ch 147 SLA 1978; am § 2 ch 85 SLA 1982; am § 92 ch 6 SLA 1984; am §§ 6, 11 ch 33 SLA 1986)

Revisor's notes. — Reorganized in 1986 to alphabetize the defined terms.

Effect of amendments. — The 1984 amendment deleted "with respect to an educational facility under AS 14.08.161" at the end of paragraph (3).

The 1986 amendment, effective May 25, 1986, deleted former paragraphs (4) and (5), which defined "qualified" and "resident" respectively, and added present paragraph (4).

Chapter 98. Professional Services Contracts.

Section

10. Application of chapter

20 — 40. [Repealed]

43. Architectural, engineering, and land surveying contracts

Section

45 — 60. [Repealed]

70. Regulations governing contract procedures

80. [Repealed]

Repeal of chapter. — Section 67, ch. 106, SLA 1986 repeals this chapter, effective July 1, 1987.

Sec. 36.98.010. Application of chapter [Repealed effective July 1, 1987]. Except as otherwise provided in AS 36.98.043, this chapter applies to contracts for professional services provided to a state agency unless

- (1) the total amount of the contract does not exceed \$25,000;
- (2) the contract is an employment contract for services to be performed under direct supervision regardless of the existence of an employer-employee relationship and a written justification signed by the person responsible for awarding the contract is filed with the commissioner;
- (3) the contract is awarded based on competitive bids obtained under the procedure provided in AS 37.05.230. (§ 5 ch 144 SLA 1982; am § 2 ch 54 SLA 1986; r § 67 ch 106 SLA 1986)

Cross references. — For provisions concerning legislative contract procedure, see AS 24.23.010 — 24.23.070.

Effect of amendments. — The 1986

amendment, effective May 30, 1986, substituted "Except as otherwise provided in AS 36.98.043, this" for "This" at the beginning of the section.

Sec. 36.98.020. Professional services contractors register. [Repealed, § 67 ch 106 SLA 1986, effective July 1, 1987.]

Sec. 36.98.030. Solicitation of proposals. [Repealed, § 67 ch 106 SLA 1986, effective July 1, 1987.]

Sec. 36.98.035. Standard overhead rate. [Repealed, § 67 ch 106 SLA 1986, effective July 1, 1987.]

Sec. 36.98.040. Evaluation of proposals and award of contract. [Repealed, § 67 ch 106 SLA 1986, effective July 1, 1987.]

NOTES TO DECISIONS

Unexcused violation of this section. Sup. Ct. Op. No. 3005 (File No. S-720), — See State, Dep't of Educ. v. Nickerson, 711 P.2d 1165 (1985).

Sec. 36.98.043. Architectural, engineering, and land surveying contracts [Repealed effective July 1, 1987]. (a) Notwithstanding the provisions of AS 36.98.010(3) and 36.98.040, a state agency shall negotiate a contract with the most qualified and suitable firm or person of demonstrated competence for architectural, engineering, or land surveying services. The state agency shall award a contract for those services at fair and reasonable compensation as determined by the state agency, after consideration of the estimated value of the services to be rendered, and the scope, complexity, and professional nature of the services. When determining the most qualified and suitable firm or person, the state agency shall consider the

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(1) proximity to the project site of the office of the firm or person unless federal law prohibits this factor from being considered in the awarding of the contract; and

(2) employment practices of the firm or person with regard to women and minorities.

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

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

(d) Notwithstanding the other provisions of this section, a state agency may include price as an added factor in selecting architectural, engineering, and land surveying services when, in the judgment of the state agency, the services required are repetitious in nature, and the scope, nature, and amount of services required are thoroughly defined by measurable and objective standards to reasonably enable firms and persons making proposals to compete with a clear understanding and interpretation of the services required. In order to include price as a factor in selection, a majority of the members of the state agency selection committee involved in the evaluation of the proposals must be persons who are registered in the state to perform architectural, engineering, or land surveying services.

(e) This section does not apply to a contract that incorporates both design services and construction. (§ 3 ch 54 SLA 1986; r § 67 ch 106 SLA 1986)

Cross references. — For corresponding provisions after the July 1, 1987, repeal of this section, see AS 36.30.270. Effective dates. — Section 5, ch. 54, SLA 1986, makes this section effective May 30, 1986, in accordance with AS 01.0070(c).

Editor's notes. — Section 4, ch. 54, SLA 1986 provides that this section "applies to requests for bids or proposals for architectural, engineering, and land surveying services issued after May 30, 1986."

Sec. 36.98.045. Review and approval by Department of Law. [Repealed, § 67 ch 106 SLA 1986, effective July 1, 1987.]

Sec. 36.98.050. Contract administration. [Repealed, § 67 ch 106 SLA 1986, effective July 1, 1987.]

Sec. 36.98.060. Filing of proposal and contract. [Repealed, § 67 ch 106 SLA 1986, effective July 1, 1987.]

Sec. 36.98.070. Regulations governing contract procedures [Repealed effective July 1, 1987]. The commissioner shall, by regulation adopted in accordance with the Administrative Procedure Act (AS 44.62), establish the manner and form by which state professional services contracts shall be prepared and processed, including, but not limited to, a review process for persons aggrieved under this chapter. (§ 5 ch 144 SLA 1982; r § 67 ch 106 SLA 1986)

Sec. 36.98.080. Definitions. [Repealed, § 67 ch 106 SLA 1986, effective July 1, 1987.]

Original sponsors: Donley and Grussendorf

1 IN THE HOUSE

BY THE LABOR AND
COMMERCE COMMITTEE

2

CS FOR HOUSE BILL NO. 45 (L&C)

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act relating to an Alaska business bidder prefer-
7 ence; and providing for an effective date."

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

9 * Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that due
10 to the state's noncontiguous geographic location and unique climate, busi-
11 ness dealings with non-Alaskan firms produce administrative expenses not
12 commonly incurred in business dealings with resident businesses.

13 (b) The purpose of the Alaska business bidder preference when the
14 state acts as a market participant is to reduce state administrative costs,
15 strengthen the state's tax and revenue base, encourage local industry,
16 reduce unemployment and the social ills it creates, and to strengthen and
17 stabilize the state's economy.

18 * Sec. 2. AS 36.30.170(a) is amended to read:

19 (a) Except as provided in (b) and (c) of this section, the
20 procurement officer shall award a contract based on the solicited bids
21 with reasonable promptness by written notice to the lowest responsible
22 and responsive bidder whose bid conforms in all material respects to
23 the requirements and criteria set out in the invitation to bid.

24 * Sec. 3. AS 36.30.170(b) is repealed and reenacted to read:

25 (b) The procurement officer shall award a contract based on
26 solicited bids to the lowest responsible and responsive Alaska bidder
27 if the bid, after receiving a preference applicable to the bid under
28 AS 36.30.322 - 36.30.338, is not more than

29 (1) five percent higher than the lowest nonresident

1 bidder's and the contract is \$500,000 or more;

2 (2) 10 percent higher than the lowest nonresident bidder's
3 and the contract is more than \$100,000 and less than \$500,000;

4 (3) 15 percent higher than the lowest nonresident bidder's
5 and the contract is more than \$25,000 and \$100,000 or less; or

6 (4) 20 percent higher than the lowest nonresident bidder's
7 and the contract is \$25,000 or less.

8 * Sec. 4. AS 36.30.170(c) is amended to read:

9 (c) Notwithstanding (b)(1) of this section, if [IF] a bidder
10 qualifies under (d) [(b)] of this section as an Alaska bidder, is
11 offering services through an employment program as defined under
12 AS 36.30.100(c), [AND] is the lowest responsible and responsive bidder
13 with a bid that is not more than 10 percent higher than the lowest bid
14 of a nonresident, and the contract is \$500,000 or more, the procure-
15 ment officer shall award the contract to that bidder. If the contract
16 is less than \$500,000, the provisions of (b)(2) - (4) of this section
17 apply to the contract.

18 * Sec. 5. AS 36.30.170 is amended by adding a new subsection to read:

19 (d) In this section, "Alaska bidder" means a person who

20 (1) holds a current Alaska business license;

21 (2) does more than \$1,000,000 worth of annual business in
22 the state or performs more than 50 percent of the person's annual
23 business in the state, whichever is less;

24 (3) has maintained a permanent place of business in the
25 state staffed by the bidder or an employee of the bidder for a period
26 of six months immediately preceding the date of the bid;

27 (4) submits a bid for goods or services under the name that
28 appears on the person's current Alaska business license;

29 (5) is incorporated or qualified to do business under the

1 laws of the state, is a sole proprietorship and the proprietor is a
2 resident of the state, or is a partnership and all partners are resi-
3 dents of the state; and

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

6 * Sec. 6. AS 36.30.336 is amended to read:

7 Sec. 36.30.336. APPLICATION. Notwithstanding other provisions
8 of this chapter, AS 36.30.322 - 36.30.338 apply to all procurements
9 subject to AS 36.30, except as provided in AS 36.30.322(b) [AS 36.30.-
10 170(b) AND 36.30.322(b)].

11 * Sec. 7. AS 36.30.900 is amended to read:

12 Sec. 36.30.900. PREFERENCE FOR ALASKA PRODUCTS. This chapter
13 does not modify, amend, or alter AS 36.15.010 and 36.15.020 regarding
14 preference for Alaska forest products, or AS 36.20.010 regarding
15 preference to producers or dealers in Alaska [EXCEPT AS PROVIDED IN
16 AS 36.30.170(b) AND (c)].

17 * Sec. 8. This Act takes effect July 1, 1987.

Original sponsors: Donley and Grussendorf

1 IN THE HOUSE

BY THE LABOR AND
COMMERCE COMMITTEE

2

CS FOR HOUSE BILL NO. 45 (L&C)

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act relating to an Alaska business bidder prefer-
7 ence; and providing for an effective date."

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

9 * Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that due
10 to the state's noncontiguous geographic location and unique climate, busi-
11 ness dealings with non-Alaskan firms produce administrative expenses not
12 commonly incurred in business dealings with resident businesses.

13 (b) The purpose of the Alaska business bidder preference when the
14 state acts as a market participant is to reduce state administrative costs,
15 strengthen the state's tax and revenue base, encourage local industry,
16 reduce unemployment and the social ills it creates, and to strengthen and
17 stabilize the state's economy.

18 * Sec. 2. AS 36.30.170(a) is amended to read:

19 (a) Except as provided in (b) and (c) of this section, the
20 procurement officer shall award a contract based on the solicited bid's
21 with reasonable promptness by written notice to the lowest responsible
22 and responsive bidder whose bid conforms in all material respects to
23 the requirements and criteria set out in the invitation to bid.

24 * Sec. 3. AS 36.30.170(b) is repealed and reenacted to read:

25 (b) The procurement officer shall award a contract based on
26 solicited bids to the lowest responsible and responsive Alaska bidder
27 if the bid, after receiving a preference applicable to the bid under
28 AS 36.30.322 - 36.30.338, is not more than

29 (1) five percent higher than the lowest nonresident

1 bidder's and the contract is \$500,000 or more;

2 (2) 10 percent higher than the lowest nonresident bidder's
3 and the contract is more than \$100,000 and less than \$500,000;

4 (3) 15 percent higher than the lowest nonresident bidder's
5 and the contract is more than \$25,000 and \$100,000 or less; or

6 (4) 20 percent higher than the lowest nonresident bidder's
7 and the contract is \$25,000 or less.

8 * Sec. 4. AS 36.30.170(c) is amended to read:

9 (c) Notwithstanding (b)(1) of this section, if [IF] a bidder
10 qualifies under (d) [(b)] of this section as an Alaska bidder, is
11 offering services through an employment program as defined under
12 AS 36.30.100(c), [AND] is the lowest responsible and responsive bidder
13 with a bid that is not more than 10 percent higher than the lowest bid
14 of a nonresident, and the contract is \$500,000 or more, the procure-
15 ment officer shall award the contract to that bidder. If the contract
16 is less than \$500,000, the provisions of (b)(2) - (4) of this section
17 apply to the contract.

18 * Sec. 5. AS 36.30.170 is amended by adding a new subsection to read:

19 (d) In this section, "Alaska bidder" means a person who

20 (1) holds a current Alaska business license;

21 (2) does more than \$1,000,000 worth of annual business in
22 the state or performs more than 50 percent of the person's annual
23 business in the state, whichever is less;

24 (3) has maintained a permanent place of business in the
25 state staffed by the bidder or an employee of the bidder for a period
26 of six months immediately preceding the date of the bid;

27 (4) submits a bid for goods or services under the name that
28 appears on the person's current Alaska business license;

29 (5) is incorporated or qualified to do business under the

1 laws of the state, is a sole proprietorship and the proprietor is a
2 resident of the state, or is a partnership and all partners are resi-
3 dents of the state; and

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

6 * Sec. 6. AS 36.30.336 is amended to read:

7 Sec. 36.30.336. APPLICATION. Notwithstanding other provisions
8 of this chapter, AS 36.30.322 - 36.30.338 apply to all procurements
9 subject to AS 36.30, except as provided in AS 36.30.322(b) [AS 36.30.-
10 170(b) AND 36.30.322(b)].

11 * Sec. 7. AS 36.30.900 is amended to read:

12 Sec. 36.30.900. PREFERENCE FOR ALASKA PRODUCTS. This chapter
13 does not modify, amend, or alter AS 36.15.010 and 36.15.020 regarding
14 preference for Alaska forest products, or AS 36.20.010 regarding
15 preference to producers or dealers in Alaska [EXCEPT AS PROVIDED IN
16 AS 36.30.170(b) AND (c)].

17 * Sec. 8. This Act takes effect July 1, 1987.

Introduced: 1/19/87
Referred: Labor & Commerce
and Finance

1 IN THE HOUSE

BY DONLEY AND GRUSSENDORF

2

HOUSE BILL NO. 45

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act relating to an Alaska business bidder prefer-
7 ence; and providing for an effective date."

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

9 * Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that due
10 to the state's noncontiguous geographic location and unique climate, busi-
11 ness dealings with non-Alaskan firms produce administrative expenses not
12 commonly incurred in business dealings with resident businesses.

13 (b) The purpose of the Alaska business bidder preference when the
14 state acts as a market participant is to reduce state administrative costs,
15 strengthen the state's tax and revenue base, encourage local industry,
16 reduce unemployment and the social ills it creates, and to strengthen and
17 stabilize the state's economy.

18 * Sec. 2. AS 36.30.170(b) is repealed and reenacted to read:

19 (b) Notwithstanding an Alaska product preference under AS 36.-
20 30.322 - 36.30.338, the procurement officer shall award a contract
21 based on solicited bids to the lowest responsible and responsive
22 Alaska bidder if the bid is not more than

23 (1) five percent higher than the lowest nonresident bid-
24 der's and the contract is \$500,000 or more;

25 (2) 10 percent higher than the lowest nonresident bidder's
26 and the contract is more than \$100,000 and less than \$500,000;

27 (3) 15 percent higher than the lowest nonresident bidder's
28 and the contract is more than \$25,000 and \$100,000 or less; or

29 (4) 20 percent higher than the lowest nonresident bidder's

1 and the contract is \$25,000 or less.

2 * Sec. 3. AS 36.30.170 is amended by adding a new subsection to read:

3 (d) In this section, "Alaska bidder" means a person who

4 (1) holds a current Alaska business license;

5 (2) does more than \$1,000,000 worth of annual business in
6 the state or performs more than 20 percent of the person's annual
7 business in the state, whichever is less;

8 (3) certifies under penalty of perjury that the bidder will
9 employ Alaska residents in the performance of the contract unless
10 resident laborers are unqualified or unavailable;

11 (4) has maintained a permanent place of business in the
12 state for a period of six months immediately preceding the date of the
13 bid; and

14 (5) submits a bid for goods or services under the name that
15 appears on the person's current Alaska business license.

16 * Sec. 4. This Act takes effect July 1, 1987.

1 IN THE HOUSE BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

2 HOUSE BILL NO. 192

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act postponing the effective date of the State
7 Procurement Code; and providing for an effective
8 date."

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

10 * Section 1. AS 36.30.005(a) is amended to read:

11 (a) Except as otherwise provided, all rights, powers, duties,
12 and authority relating to the procurement of supplies, services, and
13 professional services, and the control over supplies, services, and
14 professional services vested in or exercised by an agency on July 1,
15 1989 [1987], are transferred to the commissioner of administration and
16 to the chief procurement officer. Authority granted under this sub-
17 section shall be exercised in accordance with this chapter.

18 * Sec. 2. AS 36.30.005(b) is amended to read:

19 (b) Except as otherwise provided, all rights, powers, duties,
20 and authority relating to the procurement of construction and procure-
21 ments of equipment or services for the state equipment fleet and the
22 control over construction of state facilities and the state equipment
23 fleet vested in or exercised by an agency on July 1, 1989 [1987], are
24 transferred to the commissioner of transportation and public facil-
25 ities, subject to regulations adopted by the commissioner of adminis-
26 tration. Notwithstanding AS 44.71.010, authority relating to dis-
27 posals from the state equipment fleet is vested in the commissioner of
28 transportation and public facilities, subject to regulations adopted
29 by the commissioner of administration. Authority granted under this

1 Sec. 65. REPORT. By December 1, 1990 [1988], the commissioner
2 of administration and the commissioner of transportation and public
3 facilities shall report to the legislature concerning procurements by
4 state agencies during fiscal year 1989 [1987]. The report must in-
5 clude

6 (1) the records prepared under AS 36.30.510(4);

7 (2) recommendations for changes in AS 36.30 or other laws
8 based on implementation of AS 36.30 in those 12 months; and

9 (3) a description of any matters that involved litigation
10 concerning AS 36.30 during those 12 months.

11 * Sec. 6. Section 66, ch. 106, SLA 1986 is amended to read:

12 Sec. 66. REGULATIONS DEADLINE. The regulations required under
13 AS 36.30 as added by sec. 2 of this Act, shall be adopted by July 1,
14 1989 [1987] and shall be effective on that date. Regulations adopted
15 under laws repealed in sec. 67 of this Act become ineffective July 1,
16 1989 [1987].

17 * Sec. 7. Section 69, ch. 106, SLA 1986 is amended to read:

18 Sec. 69. Except as provided in sec. 68, this Act takes effect
19 July 1, 1989 [1987].

20 * Sec. 8. This Act takes effect immediately under AS 01.10.070(c).