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COPY

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907 465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 15, 1989

SUBJECT: Bidder's preference--constitutional
question (SB 58, Work Order No. 6-0200A)

TO: Senator Dick Eliason

FROM: Theresa Bannister
Legislative Counsel

You have requested an opinion on the constitutional questions raised by the legal counsel for Dames & Moore regarding the bidder's preference in AS 36.30.170 as it presently applies to partnerships. The position in the letter is that the bidder's preference discriminates against partnerships. It is my understanding that you do not want this opinion to address the constitutionality of resident bidder preference in general.

I agree with Mr. O'Donnell that the differing treatment of entities under AS 36.30.170 can produce some results that undermine the purpose of the statute and discriminate unreasonably against partnerships. If handled under the state's equal protection provision, a challenge to the treatment of partnerships on this basis would have a good possibility of being successful. It is my opinion that the state equal protection provision is the appropriate provision to consider in this case, since this is a question of differing treatment within the statute, not the extent to which resident preference may be required by the state. However, since art. 1, sec. 23 of the state constitution states that resident preference is to be allowed to the extent allowed by federal law, a court may apply the more lenient federal equal protection clause. In that case, although I believe that the present statutory treatment of entities is not completely rationally related to achieving the statute's goal, it would be more difficult to find the provision unconstitutional because the rational basis test under that provision is nearly a presumption of constitutionality.

Senator Dick Eliason
Page 2
February 15, 1989

With regard to the issue of subcontracting, I do not view this as a significant problem since a prohibition against subcontracting could be inserted in the contract between the state agency and the contractor.

If I may be of further assistance, please advise.

TB:kb
wkk2/006

FISCAL NOTE

REQUEST: _____

Revision Date: _____ Agency Affected: Department of Administration
Title: * _____ BRU: General Services and Supply

Sponsor: Faiks Components: Purchasing
Requestor: Labor and Commerce

* An act relating to the definition of "Alaska Bidder"

for purposes of the Alaska Bidder Preference

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
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
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REVENUE	0	0	0	0	0	0
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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)

This bill would have an impact to partnerships' qualifications for the Alaska Bidders Preference. For a partnership to qualify under this bill for the Alaska Bidders Preference, only one of the partners must be a resident rather than the present requirement for all partners to be a resident. The Division of General Services and Supply does not anticipate significant impacts when applying the Alaska Bidders Preference if this bill is enacted.

Prepared By: Robert J. Link, Director *RL* Phone: 465-2250
Division: General Services and Supply Date: _____

Approved by Commissioner: John M. Andrews Date: 3/28/89
Agency: Department of Administration *JMA*

Distribution (by preparer):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Dept. of Administration
 Title: 'An Act relating to the definition of ARU: General Services & Supply
'Alaska Bidder' for purposes of the AK bidder pref.
 Sponsor: Faiks Components: Purchasing
 Requestor: Labor & Commerce

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
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
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REVENUE	0	0	0	0	0	0
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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 attachment.

Prepared by: Robert J. Link, Director *Robert Link* Phone: 465-2250
 Division: General Services & Supply Date: 1/24/89

Approved by Commissioner: John M. Andrews *John M. Andrews* Date: 1/24/89
 Agency: Department of Administration

Distribution (by preparer):

Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

**DEPARTMENT OF ADMINISTRATION
POSITION PAPER**

DIVISION: General Services and Supply

BILL NUMBER: SB 59

BILL TITLE: An Act relating to the definition of Alaska bidder for purposes of the Alaska bidder preference in the awarding of State contracts.

If this Bill becomes law, it would change the group of bidders who qualify for an Alaska bidder preference. It would do this two ways.

By deleting "or qualified to do business" those firms that are incorporated in other jurisdictions but qualified by DCED would no longer qualify for the Alaska bidder preference. This would reduce the number of firms that qualify for the bidder preference.

By adding "at least 50 percent of the" would allow partnerships with partners who are not residents of the State to qualify for the bidder preference. This would increase the number of firms that qualify for the preference.

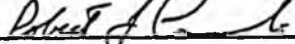
Some inequity would remain in that partnerships such as accounting firms and architectural and engineering firms that have offices within the State staffed by residents would not qualify for the preference while offices of corporations located in State would qualify.

The effects of passage of this bill on competitive sealed bid or competitive sealed proposal process would be minimal.

The department's position on this bill is neutral. It is appropriate that the legislature determine who qualifies for State preferences.

APPROVED:

Director: Robert J. Link

Signature: 

Date: 2/3/89

Commissioner: John M. Andrews

Signature: 

Date: 2/3/89

For further information call Dean Gottehrer at 465-2200

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 58

IMPACTS

This bill would have impacts to partnerships and corporation qualifications for the Alaska Bidders Preference.

1. Corporations bidding on supplies, services, and professional services would not qualify for the Alaska Bidders Preference unless they were incorporated under the laws of the State. Some corporate vendors qualify to do business with the State but, are not incorporated under the laws of the State. These vendors currently receive the Alaska Bidders Preference and would no longer qualify under this bill.
2. For a partnership to qualify under this bill for the Alaska Bidders Preference, only 50% of the partners must be residents rather than the present requirement for all partners to be a resident.
3. The Division of General Services and Supply does not anticipate significant impacts when applying the Alaska Bidders Preference if this bill is enacted.

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERRAL

Date of 5-DAY NOTICE 3/1/89
IN ACCORDANCE WITH UNIFORM RULE 23

FURTHER

**FISCAL NOTE(S) MUST BE ATTACHED
IN ACCORDANCE WITH AS 24.08.035

DATE TURNED INTO OFFICE 3/23/89

1/9/89

Mr. President:

L&C

Committee considered SB 58

definition of 'Alaska bidder' for purposes of the Alaska bidder preference in the awarding of state contracts

and recommended:

- replace with cs SB 58 (L+C) same title
- attached amendment(s) and new title
- _____ letter of intent adopted

do pass

do not pass

no recommendation

individual recommendations

further referral to _____

FISCAL NOTE(S) attached zero
 appropriation no FN attached

fiscal impact
 Gov. FN introduced w/ bill

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

[Handwritten signatures]

[Handwritten signature]
Chairman signature and recommendation

Committee backup attached

Original sponsors: Faiks and Coghill

As compared to 2/24/89 draft

1 IN THE SENATE

2 CS FOR SENATE BILL NO. 58 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the definition of 'Alaska bidder'
7 for purposes of the Alaska bidder preference in the
8 awarding of state contracts."

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

10 * Section 1. AS 36.30.170(b) is amended to read:

11 (b) The procurement officer shall award a contract based on
12 solicited bids to the lowest responsive and responsible bidder after
13 an Alaska bidder preference of five percent and an Alaska products
14 preference as described in AS 36.30.322 - 36.30.338 have been applied.

15 In this subsection, "Alaska bidder" means a person who

16 (1) holds a current Alaska business license;

17 (2) submits a bid for goods, services, or construction
18 under the name as appearing on the person's current Alaska business
19 license;

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

23 (4) is incorporated [OR QUALIFIED TO DO BUSINESS] under the
24 laws of the state or is incorporated under other laws and qualified to
25 do business under the laws of the state, is a sole proprietorship [,]
26 and the proprietor is a resident of the state, or is a partnership [,]
27 and at least one of the [ALL] partners is a resident [ARE RESIDENTS]
28 of the state; ^{was originally "50% of the"} and

29 (5) if a joint venture, is composed entirely of venturers

1 [VENTURES] that qualify under (1) - (4) of this subsection.
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Original sponsors: Faiks and Coghill

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4 SIXTEENTH LEGISLATURE - FIRST SESSION

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

23 (4) is incorporated [OR QUALIFIED TO DO BUSINESS] under the
24 laws of the state or is incorporated under other laws and qualified to
25 do business under the laws of the state, is a sole proprietorship [,]
26 and the proprietor is a resident of the state, or is a partnership [,]
27 and at least 50 percent of the [ALL] partners are residents of the
28 state; and

29 (5) if a joint venture, is composed entirely of venturers

1 [VENTURES] that qualify under (1) - (4) of this subsection.

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

8 (d) The procurement officer shall award an insurance-related
9 contract based on solicited bids to the lowest responsive and respon-
10 sible bidder after an Alaska bidder preference of five percent. In
11 this subsection, "Alaska bidder" means a person who meets the criteria
12 set out in (b)(1) - (5) of this section and who is an Alaska domestic
13 insurer.

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

4 (4) is incorporated or qualified to do business under the
5 laws of the state, or is a sole proprietorship[,] and the proprietor
6 is a resident of the state, or is a partnership[,] and one or more of
7 the general [ALL] partners is a resident [ARE RESIDENTS] of the state;

8 (5) if a joint venture, is composed entirely of ventures
9 that qualify under (1) -- (4) of this subsection.

10 * Sec. 6. AS 36.30.210(a) is amended to read:

11 (a) A request for competitive sealed proposals must contain the
12 date, time, and place for delivering proposals, a specific description
13 of the supplies, construction, services, or professional services to
14 be provided under the contract, and the terms under which the sup-
15 plies, construction, services, or professional services are to be
16 provided. The request shall require the offeror [TO SUBMIT EVIDENCE
17 OF THE OFFEROR'S VALID ALASKA BUSINESS LICENSE AND], no later than
18 five working days after identifying which proposal is most advanta-
19 geous to the state, to list subcontractors the offeror proposes to use
20 in the performance of the contract. The list shall include the name
21 and location of the place of business for each subcontractor, the work
22 to be subcontracted to each subcontractor, and evidence of the subcon-
23 tractor's valid Alaska business license. An offeror for a construc-
24 tion contract shall also submit evidence of the offeror's registration
25 under AS 08.18 and evidence of registration for each listed subcon-
26 tractor.

27 * Sec. 7. AS 36.30.210 is amended by adding a new subsection to
28 read:

29 (e) The offeror must have a valid Alaska business license at the

February 24, 1989

MEMORANDUM

TO: Senator Dick Eliason, Chairman
Senate Labor and Commerce Committee

FROM: Senator Jan Faiks, Chairman
Senate Judiciary Committee

SUBJECT: SB 58 "An Act relating to the definition of
'Alaska bidder' for purposes of the Alaska
bidder preference in the awarding of state
contracts."

SB 58 has been referred to the Senate Labor and Commerce Committee for consideration. This bill amends the definition of 'Alaska bidder' for purposes of the Alaska bidder preference in the awarding of state contracts under AS 36.30, the State Procurement Code.

As 36.30.170 provides that the state must award contracts based upon solicited bids to the lowest responsible and responsive bidder, after an Alaska bidder preference of five percent has been applied. An Alaska bidder is defined as 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 th 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.

SB 58 was introduced at the recommendation of Duncan Fowler, the Ombudsman. In a letter to me dated October 8, 1988, Mr. Fowler discussed the apparent unfairness of AS 36.30.170, which provides that a corporation qualified to do business in Alaska is entitled to an Alaska bidder preference, regardless of where the business is incorporated and whether the stockholders are Alaskans. On the other hand, a partnership is entitled to an Alaska bidder preference only if all the partners are residents of Alaska.

Mr. Fowler stated that this was inequitable, in that it gives corporations an unfair advantage which partnerships are denied. He said that it seems to penalize long time Alaska partnerships when a single member retains partnership status but moves out of state, which does not lessen the partnership's Alaskan commitment as a whole. It penalizes the partnership in which one partner "bails out" on the another without the Alaska partner's permission, leaving the survivor without Alaska bidders' preference status while he extricates himself from the partnership.

To correct these inequities, Mr. Fowler recommended a redefinition of "Alaska bidder" to include partnerships in which 50 percent or more of the partners are full time residents of Alaska.

As originally drafted by legal services, SB 58 did two things: first, on page 1, line 25, it made the change to AS 36.30.179(b) that was recommended by Mr. Fowler.

Second, on page 1, line 23, it deleted the phrase "or qualified to do business" from the list of factors that qualified a business for a bidder preference. This phrase was intended to apply only to foreign corporations that obtained a certificate of authority to do business in Alaska from the Department of Commerce and Economic Development. Its purpose was to hold that foreign corporations that were legally authorized to do business in Alaska were eligible to qualify for a bidder preference.

The drafter deleted "or qualified to do business" because she viewed the inclusion of this phrase as a drafting error in the original statute that could be interpreted as allowing any non-corporation that possessed an Alaska business license,

such as partnerships and sole proprietorships, to qualify for an Alaska bidder preference, even if all the partners or the proprietor of the partnership or sole proprietorship were not Alaskans. In fact, there have been some non-Alaskan partnerships that have claimed rights under this interpretation.

Unfortunately, the change made by the drafter has the unintended side effect of making any corporation not incorporated in Alaska ineligible for a bidder preference, regardless of the amount of business or number of offices it has here.

For this reason, I am recommending that the committee consider adopting the attached CS. This CS takes care of the drafter's concerns regarding the applicability of the phrase "or qualified to do business," without having the unintended side effect of preventing all foreign corporations from qualifying for a bidder preference. In effect, the CS makes this particular line of the Procurement Code mean what most people always thought it meant, and what the drafters intended.

Alaska State Legislature

Chairman
(907) 465-4523



Jan Faiks
Post Office Box V
Juneau, Alaska 99811

Senate Judiciary Committee

February 27, 1989

MEMORANDUM

TO: Senator Dick Eliason, Chairman
Senate Labor and Commerce Committee

FROM: Senator Jan Faiks, Chairman
Senate Judiciary Committee

SUBJECT: SB 58 "An Act relating to the definition of 'Alaska bidder' for purposes of the Alaska bidder preference in the awarding of state contracts."

SB 58 has been referred to the Senate Labor and Commerce Committee for consideration. This bill amends the definition of 'Alaska bidder' for purposes of the Alaska bidder preference in the awarding of state contracts under AS 36.30, the State Procurement Code.

As 36.30.170 provides that the state must award contracts based upon solicited bids to the lowest responsible and responsive bidder, after an Alaska bidder preference of five percent has been applied. An Alaska bidder is defined as 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 pro-

Members
Mike Szymanski, Vice-Chairman • Rick Halford • Drue Pearce • Pat Rodey

Out of Session

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prietor 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.

SB 58 was introduced at the recommendation of the Ombudsman, Mr. Duncan Fowler. In a letter dated October 8, 1988, Mr. Fowler discussed the apparent unfairness of AS 36.30.170, which provides that a corporation qualified to do business in Alaska is entitled to an Alaska bidder preference, regardless of where the business is incorporated and whether the stockholders are Alaskans. On the other hand, a partnership is entitled to an Alaska bidder preference only if all the partners are residents of Alaska.

Mr. Fowler stated that this was inequitable, in that it gives corporations an unfair advantage which partnerships are denied. He said that it seems to penalize long time Alaska partnerships when a single member retains partnership status but moves out of state, which does not lessen the partnership's Alaskan commitment as a whole. It penalizes the partnership in which one partner "bails out" on the other without the Alaska partner's permission, leaving the survivor without Alaska bidder preference status while he extricates himself from the partnership.

To correct these inequities, Mr. Fowler recommended a redefinition of "Alaska bidder" to include partnerships in which 50 percent or more of the partners are full time residents of Alaska.

As originally drafted by Legal Services, SB 58 did two things: first, on page 1, line 25, it made the change to AS 36.30.170(b) that was recommended by Mr. Fowler. This change provides a good deal more equity in the bidder preference than is currently the case.

Second, on page 1, line 23, SB 58 deleted the phrase "or qualified to do business" from the list of factors that qualified a business for a bidder preference. This phrase was intended to apply only to foreign corporations that obtained a certificate of authority to do business in Alaska from the Department of Commerce and Economic Development. Its purpose was to hold that foreign corporations that were legally authorized to do business in Alaska were eligible to qualify for a bidder preference.

The drafter deleted "or qualified to do business" from current law because she viewed the inclusion of this phrase as a drafting error in the original statute that could be interpreted as allowing any non-corporation that possessed an Alaska business license, such as partnerships and sole proprietorships, to

qualify for an Alaska bidder preference, even if all the partners of the partnership or the proprietor of the sole proprietorship were not Alaskans. In fact, there have been some non-Alaskan partnerships that have claimed preference rights under this interpretation.

Unfortunately, this change has the unintended side effect of making any corporation not incorporated in Alaska ineligible for a bidder preference, regardless of the amount of business or number of offices it has here.

For this reason, I recommend that the committee consider adopting the attached CS. This CS takes care of the drafter's concerns regarding the applicability of the phrase "or qualified to do business," without having the unintended side effect of preventing all foreign corporations from qualifying for a bidder preference. In effect, the CS makes this particular line of the Procurement Code mean what most people always thought it meant, and what the original drafters intended.

The Procurement Code is a new area of state law, taking effect only last year. As such, we are still at the stage of discovering which sections work as intended and which sections are in need of modification. The committee substitute for SB 58 makes two simple yet necessary modifications to the code, one of which makes it more equitable, while the other makes it do what the drafters intended. I urge the committee to give favorable consideration to this legislation.



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(907) 563-5500

March 3, 1989

The Honorable Richard Eliason
Chairman
Labor and Commerce Committee
Alaska State Senate
P.O. Box V
Juneau, Alaska 99811

Subject: Senate Bill 58

Dear Senator Eliason:

As a forty-three year resident of the state, sixteen years as an Anchorage real estate broker, and as agent for Calais Properties, Ltd., owners of the Calais Office Center in Anchorage (the third largest private office complex in the state), I strongly support a revision to the language regarding partnership residency set forth in AS36.30.170(b).

I would in the first instance support a revision providing for "any partnership" doing business in the state of Alaska which meets the requirements of subsections (1)-3). In the alternative, I would support a revision providing for "at least one (1) partner, including a corporation, be a resident of the state".

The primary rationale for this change is that partnerships containing one or more partner residing out of state are at an unfair competitive disadvantage to any corporate entity, notwithstanding the amount of investment, length of local business operation and taxes paid. This disadvantage is readily apparent in the area of office space procurement.

My client, Calais Properties, Ltd., is a limited partnership (quite common in real estate development) whose General Partner is Wright Runstad & Company, a corporation. Its Limited Partners include The Calais Company, Inc. of Anchorage which has a sixteen and one-half (16.5%) interest in the partnership. The shareholders of Calais Company, Inc. are, to the best of my knowledge, all old time Alaskans.

The Honorable Richard Eliason
March 3, 1989
Page 2

As a result of the existing definition of partnership in the new procurement statute, my client may have lost at least two bid competitions during the past nine (9) months, i.e., the Anchorage offices of the Ombudsman and the Permanent Fund Dividend. In the latter instance, the New York Life Insurance Company, due to its corporate organization qualified as an Alaskan bidder, while my clients who have been active in the state since 1973, invested in excess of 15 million dollars in new capital, paid millions in taxes and created untold jobs, is not qualified under the existing law. This is unfair - "the play field is not level".

I have two additional concerns 1) that a corporation be considered a resident partner (although this may be legally redundant) and, 2) that the effective date of the technical correction be immediate given the near term expectation of some large sized State of Alaska bid solicitations.

Thank you for your consideration of this matter.

Respectfully submitted by,

JACK WHITE COMPANY

H. Norman Rokeberg (KR)

H. Norman Rokeberg
Associate Broker

HNR:krb

cc: Senator Jan Haik
Bob Link
Barbara Dingfield



DAMES & MOORE

A PROFESSIONAL LIMITED PARTNERSHIP

5761 SILVERADO WAY, SUITE P, ANCHORAGE, ALASKA 99518-1657 (907) 562-3366

January 27, 1989

Senator Dick Eliason
Capitol, Room 417
P.O. Box V
Juneau, Alaska 99811

Dear Senator Eliason:

At the suggestion of Senator Faiks I wish to request an amendment to Senate Bill No. 58 regarding Alaska bidder preference.

My name is Jim Hemming and I have been an Alaska resident for 28 years. For the past 11 years, I have managed the Anchorage office of Dames & Moore, Consulting Engineers. Dames & Moore has been in business in Alaska for 18 years. We are committed to Alaska and have worked hard to keep our office in Anchorage open through the economic downturn while other companies have closed their offices and moved out.

Now, however, our ability to do business in Alaska is being threatened. When the regulations for AS 36.30.170 (B) (Alaska Bidders Preference) were finalized this year, we were told that we no longer qualified as an Alaskan business because Dames & Moore is a limited partnership rather than a corporation. We would be penalized at least 15 points on any state contract that we bid on in the future.

The statute states that for a partnership to be qualified as an Alaskan business, all of the partners must be residents of Alaska. The same is not true for corporations. A corporation could qualify after being in the state for 6 months even if none of the managers, board of directors or major stockholders are Alaskan residents. The intent of the legislation, I believe, was to prevent large outside companies rather than partnerships from setting up joint ventures with small companies in Alaska as a "front" with most of the work being done outside the state. This, however, is not what the law says.

The longterm picture is that Dames & Moore may no longer be able to compete on state projects. As you can see from the attached list, state projects have been a significant part of our business in the past. We have used Alaskan residents on virtually all of our projects in the state. I may have to lay off Alaskan residents if State of Alaska projects are no longer open to my company.



Senator Dick Eliason
January 27, 1989
Page 2

The remedy to our problem is relatively simple. If line 25 and 26 of the proposed bill were amended to delete [at least 50 percent] and add at least one our problem would be solved and we could continue to keep Alaskans employed. I have enclosed a legal opinion from our attorneys for your information.

Please let me know what you can do.

Sincerely,

DAMES & MOORE

James E. Hemming, Partner (Ltd.)
Manager, Alaska Operations

JEH/029lms

Attachments

cc: Governor Steve Cowper, w/o attach
Senator Jan Faiks, w/o attach.

KENNETH R. ATKINSON
JOHN M. CONWAY
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November 10, 1988

Dames & Moore
5761 Silverado Way, Suite P
Anchorage, Alaska 99518-1657

Mr. James E. Hemming

Re: Alaska Preference Statutes

Dear Mr. Hemming:

You have asked us to determine what statutes or regulations may preclude Dames & Moore, a limited partnership, from qualifying as an Alaskan bidder. That statute is AS 36.30.170(b)(4) which provides that a partnership may not qualify as an Alaskan bidder unless "all partners are residents of the state". As a result of being denied an Alaskan bidders preference, Dames & Moore would not qualify for either the 5% preference found in AS 36.30.170(b) or the newly imposed 10% evaluation preference found in 2 AAC 12.260(e). The latter regulation incorporates the definition of "Alaskan bidder" found in AS 36.30.170(b).

You have asked us to evaluate the constitutionality of the foregoing definition of "Alaskan bidder" in light of Dames & Moore's long term presence in the state. It is my understanding that Dames & Moore is a limited partnership comprised of Dames & Moore Inc., the general partner, and approximately 70 individual limited partners located around the world. Dames & Moore has maintained an office in Alaska for eighteen (18) years and is qualified to do business in the state. Dames & Moore has had an office in Anchorage continuously since 1970, and maintained a second office in Homer from 1976 to 1987. Dames & Moore currently has eight Alaska employees, although it has employed up to 52 Alaskans in better economic times. The manager of Alaska operations for Dames & Moore is Mr. James E. Hemming. Mr. Hemming is a limited partner in the Dames & Moore limited partnership and has lived in Alaska since 1961.

In our view, a strong argument can be made that the denial of an Alaskan bidders preference to a partnership in the position of Dames & Moore is unconstitutional. First, the goal of the statute, to favor Alaska residents, appears constitutionally impermissible. Second, assuming a permissible goal, the means chosen appear unreasonable as applied to partnerships.

Article I, section 1, of the Alaska Constitution provides, in part, that " all persons are equal and entitled to equal rights, opportunities and protection under the law." A similar equal protection provision is contained in the United States Constitution. The Fourteenth Amendment to the United States Constitution also prohibits the states from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States." The opportunity for equal employment, including employment in the construction industry, is a fundamental right. Robinson v. Francis, 713 P.2d 259, 265 (Alaska 1986).

In Lynden Transport, Inc. v. State, 532 P.2d 700 (Alaska 1975), the Alaska Supreme Court struck down a statute which created certain preferences for Alaskan owned motor carriers. The court stated:

Handicapping nonresidents admitted to do business in the state, however, has never in itself been considered a valid reason for a classification A discrimination between residents and nonresidents based solely on the object of assisting one class over the other economically cannot be upheld under either the privileges and immunities or equal protection clauses.

(emphasis added; id. at 709-710). See also Robinson v. Frances, 713 P.2d 259 (Alaska 1986). Thus a strong argument can be made that present preference scheme is prohibited by both the state and federal constitutions.

Second, assuming that the goal of favoring Alaska residents is constitutionally permissible, the means chosen appear unreasonable thus rendering the statute unconstitutional on this alternative ground. As stated in Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976), a classification must "be reasonable, not arbitrary, and must rest upon some difference having a fair and

Dames & Moore
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substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." The present statute arguably fails this test as it unreasonably and arbitrarily penalizes businesses which operate in the form of a partnership.

The means chosen here do not ensure that Alaska businesses receive a preference and in fact can actually frustrate Alaska businesses. For example, an Alaskan based engineering firm with the majority of its partners in Alaska and one partner in a Seattle branch office would be considered a nonresident as all its partners do not reside in the state. AS 36.30.170(b)(4). A foreign corporation, however, can qualify as an Alaskan resident simply by applying to do business in the state and by staffing an office here with one employee for six months. AS 36.30.170(b)(4). Thus a Texas corporation with thousands of employees in Texas and one file clerk stationed in Anchorage for six months would be entitled to an Alaskan bidders preference whereas the foregoing Alaskan engineering firm, which may have been located here for twenty years, would not. Where an Alaskan business operates in the form of a partnership and has one or more partners located outside the state, the preference statute may actually operate as a preference for out-of-state corporations.

The means chosen by the legislature are further unreasonable as they do not prohibit an "Alaskan bidder" from subcontracting the work to a nonresident firm. Thus a partnership which has operated a large office in Anchorage for nearly two decades, like Dames & Moore, can be deemed a nonresident while a single six-month Alaskan resident, who intends to subcontract all or most of the work to an outside firm, will receive an "Alaskan bidder's" preference. As the means chosen by the legislature do not bear "a fair and substantial relationship" to the legislative goal of favoring Alaska residents, a strong argument can be made that the statute is unconstitutional as applied to partnerships.

There are two possible avenues for remedying Dames & Moore's exclusion from the Alaskan bidders preference: (1) a lawsuit and (2) legislative amendment to the definition of an Alaskan bidder contained in A.S 36.30.170(b)(4). A lawsuit may well prove successful. Depending on the effort put into defense of the statute by the state, however, such a lawsuit could potentially require a substantial expenditure of time and money. For this reason, I would recommend an initial attempt to obtain an amendment to the statute.

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The legislature may be amenable to amendment given the dissatisfaction expressed to you by state contracting officers with the present definition of an "Alaskan bidder". In addition, such an amendment would discourage a broad based legal challenge to the concept of Alaskan bidders preferences. The final argument is that an amendment would remove the disability presently imposed on Alaskan partnerships and further the purpose of the statute.

In terms of specific language, I would suggest that you seek to amend AS 36.30.170(b)(4) to read:

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 one or more of the partners is a resident of the state.

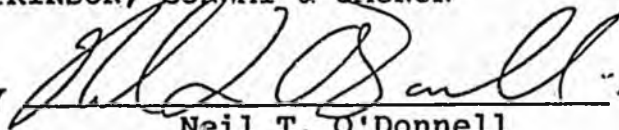
This language will result in partnerships being treated on a equal basis with corporations and proprietorships. If you wish to pursue a judicial resolution of this issue, please contact me so that we can further discuss the merits of the specific legal challenges and the means by which to pursue the same.

Please advise if I may be of further assistance.

Very truly yours,

ATKINSON, CONWAY & GAGNON-

By



Neil T. O'Donnell

NTO:jmm

List of Projects Conducted for the
State of Alaska
by
Dames & Moore Professional Limited Partnership*
Anchorage, Alaska
1970-1989

*Each of the projects on the attached list utilized Alaska residents.

- 1970 Alaska Department of Transportation and Public Facilities (ADOT&PF) Geologic and geophysical studies, proposed Ketchikan airport, Gravina Island, Alaska.
- 1970 ADOT&PF - Soils engineering studies, offshore rock fill area, Ketchikan, Gravina Island, Alaska.
- 1970 ADOT&PF - Soils investigation, proposed state capitol building, Juneau, Alaska.
- 1970 ADOT&PF - Soils investigation, tidelands ADDN, proposed maintenance building, Juneau, Alaska.
- 1971 ADOT&PF - Geologic and oceanographic studies, proposed airport runway extension, Sitka, Alaska.
- 1971 ADOT&PF - Inspection of rock excavation, proposed state office building, Juneau, Alaska.
- 1971 ADOT&PF - Review of pile driving and socket inspection, state office building, Juneau, Alaska.
- 1971 ADOT&PF - Design consultation, proposed runway extension, Sitka, Alaska.
- 1971 ADOT&PF - Consultation for dredged fill, small boat harbor, Whittier, Alaska.
- 1972 ADOT&PF - Geophysical and soils investigation, airport ferry terminal, Gravina Island, Alaska.
- 1972 ADOT&PF - Subsurface investigation and ocean engineering, mobilization and demobilization, ferry terminals, southeast Alaska.
- 1973 ADOT&PF - Subsurface investigation and ocean engineering, ferry terminals, Hoonah, Alaska.
- 1973 ADOT&PF - Subsurface investigation and ocean engineering, ferry terminal, Kake, Alaska.
- 1973 ADOT&PF - Consultation, proposed dock facility, Cold Bay, Alaska.
- 1973 ADOT&PF - Consultation quarry development, airport runway extension, Sitka, Alaska.
- 1973 ADOT&PF - Wind monitoring system installation, Anchorage International Airport, Anchorage, Alaska.
- 1974 ADOT&PF - Microclimate evaluation, parking garage, Fairbanks, Alaska.
- 1974 ADOT&PF - Environmental impact report, airport runway, Anchorage, Alaska.
- 1974 ADOT&PF - Preliminary foundation investigation, school buildings, Tanana-Fort Yukon, Alaska.

- 1974 ADOT&PF - Characterization of wastewater effluent, International Airport, Fairbanks, Alaska.
- 1974 ADOT&PF - Site selection, ferry terminal, Anchorage, Alaska.
- 1974 ADOT&PF - Foundation investigation, vocational education building, Fort Yukon, Alaska.
- 1974-75 ADOT&PF - Meteorological analysis, International Airport, Anchorage, Alaska.
- 1974-78 Alaska Department of Fish & Game (ADF&G) - Baseline marine ecology studies, marine plant communities, Kachemak Bay, Alaska.
- 1975 ADOT&PF - Underwater inspection, airport runway extension, Sitka, Alaska.
- 1975 ADOT&PF - Consultation, testing, wastewater treatment facilities, Deadhorse, Alaska.
- 1975 ADOT&PF - Foundation investigation, vocational education building, Tanana, Alaska.
- 1975 ADOT&PF - Site selection, state capitol, Alaska.
- 1975 ADOT&PF - Inspection and recommendations, water & wastewater treatment facilities, Nulato, Alaska.
- 1975 ADOT&PF - Environmental report, airport runway, Anchorage, Alaska.
- 1975-78 ADF&G - Baseline marine ecology studies, Kachemak Bay, Alaska.
- 1975-78 ADF&G - Management data study, kelp herring egg fishery, Prince William Sound, Alaska.
- 1975-78 ADF&G - Benthic crab survey, marine environment, Kachemak Bay, Alaska.
- 1976 ADOT&PF - Laboratory services, sewage treatment plant, Fairbanks, Alaska.
- 1976 ADOT&PF - Foundation investigation, village schools, northern Alaska.
- 1976-77 ADF&G - Geophysical and benthic investigation, Lower Cook Inlet, Alaska.
- 1976-78 ADOT&PF - Laboratory testing, Fairbanks International Airport, Fairbanks, Alaska.
- 1977 ADF&G - Site investigation, fish hatchery, Prince William Sound, Alaska.
- 1977 ADOT&PF - Consultation, bush schools, Alaska.
- 1977-78 ADF&G - Site evaluation, fish hatchery with geothermal heat source, Bell Island, Alaska.

- 1978 ADOT&PF - Geotechnical Investigation, proposed state office building, Juneau, Alaska.
- 1978-79 ADF&G - Water quality analyses, coastal waters, Ketchikan, Alaska.
- 1978-79 ADOT&PF - Meteorology & air quality investigations, proposed state capital site, Willow, Alaska.
- 1979 ADOT&PF - Soils and hydrology, Fish hatchery, Prince William Sound Main Bay, Alaska.
- 1979 ADOT&PF - Expert weather testimony, Anchorage International Airport, Anchorage, Alaska.
- 1979-80 ADOT&PF - Foundation investigation, fish hatchery, Snettisham, Alaska.
- 1980 ADOT&PF - Consultation preliminary planning, proposed bridge, Naknek, Alaska.
- 1980-81 ADOT&PF - Feasibility study, runway extension, Dutch Harbor, Alaska.
- 1980-81 ADOT&PF - Soils logging, Fish dock, Dutch Harbor, Alaska.
- 1980-81 ADOT&PF - Bathymetric survey, dock and facilities, Dutch Harbor, Alaska.
- 1980-81 Alaska Power Authority (APA) - Environmental assessment, hydroelectric plant, Dillingham, Alaska.
- 1980-81 APA - Environmental Assessment, hydroelectric power plant, Haines, Alaska.
- 1980-81 APA - Potential coal supply for village fuel in Northwest Alaska.
- 1981 ADOT&PF - Economic consultation
- 1981 ADOT&PF - Consultation, foundation bedrock, Main Bay salmon hatchery, Prince William Sound, Alaska.
- 1981-82 APA - Hydro power plan feasibility analysis, Bristol Bay region, Alaska.
- 1981-82 ADOT&PF - Engineering feasibility, economics & development plan, Chernofsky Harbor port facility, Unalaska Island, Alaska.
- 1981-82 ADOT&PF - Harbor feasibility study, St. Paul, St. George Island, Alaska.
- 1981-82 State of Alaska, Department of Policy & Development planning - Economic consultation.
- 1981-82 ADOT&PF - Geotechnical services, St. Paul Harbor, Alaska.
- 1981-83 ADOT&PF - Environmental Assessment, Wasilla bypass, Wasilla, Alaska.

1981-83 ADOT&PF - Socio-economics, New Parks Highway, Alaska.

1981-83 ADOT&PF - Geotechnical services, St. George Harbor, Alaska.

1981-83 ADOT&PF - Noise impact analysis, New Parks Highway, Alaska.

1981-83 ADOT&PF - Air quality impact assessment, New Parks Highway, Alaska.

1982 State of Alaska, Office of the Governor - Develop/analyze Alaska fisheries research alternatives.

1982 State of Alaska, Petroleum Revenue Division - Petroleum forecast.

1982 ADOT&PF - Transportation study, St. George Island, Alaska.

1982 ADOT&PF - Transportation study, St Paul Island, Alaska.

1982 ADOT&PF - Biological & field investigation, boat harbor , Pribilof Islands, Alaska.

1982 ADOT&PF - Geotechnical offshore and onshore boat harbor, Pribilof Islands, Alaska.

1982 Alaska Power Authority (APA) - Assess feasibility of coal & gas energy for Bethel, Alaska.

1982-83 ADOT&PF - Environmental analyses & report preparation, St. George Harbor design, St. George Island, Alaska.

1982-83 Alaska Power Authority (APA) - Geothermal well, Unalaska, Alaska.

1982-83 APA - Hydro power plan feasibility analysis, Newhalen River, Alaska.

1982-84 ADOT&PF - Environmental studies, Knik Arm Crossing, Anchorage, Alaska.

1983 ADOT&PF - Consultation compliance seafood quality assurance program, Juneau, Alaska.

1983 ADOT&PF - Determine demand for marine services, Pribilof Islands, Alaska.

1983 State of Alaska, Department of Community Regional Affairs - Biological & Commercial Consulting, Bristol Bay, Alaska.

1983 ADOT&PF - Draft EIS revision, Limited access highway, Wasilla, Alaska.

1983 APA - Hydro power plan feasibility analysis, Iliamna, Alaska.

1984 ADOT&PF - Highway air quality assessment, Anchorage, Alaska.

1984 State of Alaska, Department of Natural Resources (DNR) - Geotechnical services, coal mining, Anchorage, Alaska.

- 1984-85 ADOT&PF - Marine seismic survey/geology, Turnagain Arm, Alaska.
- 1984-85 DNR - Dam safety inspections, Vortag Lake & Isatkoak Dams, Barrow & Kotzebue, Alaska.
- 1984-85 DNR - Cost guidelines for reclamation of coal mines. Anchorage, Alaska.
- 1984-85 APA - Susitna alternative economic studies, Susitna Hydroelectric Project, Susitna, Alaska.
- 1984-85 APA - Environmental permitting, exploratory geothermal well, Unalaska, Alaska.
- 1984-85 APA - Sockeye salmon smolt survey, hydro power feasibility analysis, Iliamna, Alaska.
- 1984-85 State of Alaska, Court System - Seismic & earthquake engineering analysis, courthouse addition, Anchorage, Alaska.
- 1985 DNR - Dam safety inspection, Slate Creek, Kodiak, Alaska.
- 1985 APA - Wildlife users survey, Susitna hydroelectric project, Susitna, Alaska.
- 1985-86 State of Alaska, Department of Environmental Conservation (DEC) - Steam use inventory.
- 1986 ADOT&PF - Monitor gravel extraction, Elmendorf AFB, Alaska.
- 1986 State of Alaska, Department of Community and Regional Affairs (DCRA) - Bristol Bay underutilized fisheries potential.
- 1986 DEC - Fishery, mining and recreational use survey of Tolovana River.
- 1986 APA - Consulting services, hydroelectric project, Bradley Lake, Alaska.
- 1986-87 APA - Engineering & economic feasibility study, geothermal power plant, Aleutian Islands, Unalaska, Alaska.
- 1987 DEC - Crown Point tank car incident, environmental assessment.
- 1988-89 APA - Railbelt Intertie, environmental assessment.
- 1985 - present APA - Bradley Lake hydro salmon monitoring project.



State of Alaska
Ombudsman

Duncan C. Fowler

October 20, 1988

Senator Jan Faiks
6060 Yukon Drive
Anchorage, Alaska 99516

Dear Senator *Jan* Faiks:

There have been lots of changes, high volume complaints and some great issues at the Ombudsman's office since my last legislative newsletter in May.

- The Fairbanks Ombudsman's office opened for business on July 18, 1988 at the Courthouse Square, 250 Cushman St., 452-4001.
- The Anchorage and Juneau offices relocated this summer: in Anchorage to the Post Office Mall, Room 305, with telephone service at 277-8848 and in Juneau to the Court Plaza, 240 Main St., Room 700, with the same phone number, 465-4970.
- Business has been brisk the first quarter of FY89. So far, this may be the busiest year for our office since 1985.
 - 1364 complaints have been filed.
 - 1281 cases closed of which 28 were fully investigated.
 - 540 requests for information or referral services.
 - 245 complaints are pending action by my staff.
- The City of Wrangell entered a contract for us to provide Ombudsman services effective July 1, 1988.
- I also entered into a one-time contract with the City of Fairbanks for investigation of an allegation of harassment by a city policeman.
- I have been working with the City of Ketchikan regarding its request for information about contracting for ombudsman services under AS 24.55.320 beginning in 1989.

Reply to:

- P.O. Box 102636
Anchorage, AK 99510-2636
(907) 563-3673
(800) 478-2624
- P.O. Box W0
Juneau, AK 99811-3000
(907) 465-4970
(800) 478-4970
- P.O. Box 74358
Fairbanks, AK 99707
(907) 452-4001
(800) 478-3257

The recent requests by local communities for ombudsman services has not only surprised me but has proved interesting. These requests have been initiated by conservative taxpayers in those communities. Those citizens are wanting assurance their government is operating efficiently, effectively and being responsive to the needs of the citizens. This local role was envisioned by the drafters of The Alaska Ombudsman Act. They included a provision requiring communities choosing such services to pay their fair share of the costs of our operation.

RURAL ISSUES

Alaska citizens who live outside Juneau, Anchorage and Fairbanks continue to have free access to the Ombudsman through one of the three toll free telephone numbers (Southcentral residents call 800-478-2624, our Anchorage office; Interior residents call 800-478-3257, our Fairbanks office; and Southeastern residents call 800-478-4970, our Juneau office).

Among the diverse issues brought to my attention in the past few months are (1) allegation of inefficient administration of alcohol programs and staffing in Dillingham; (2) an arbitrary termination of a Kenny Lake School employee by an REAA superintendent, (3) a poorly located DEC hearing about spraying herbicides along a railroad right of way, and (4) a fish molestation charge by a game warden against a man on a Sunday outing.

In A88-0253, a Dillingham resident complained that the Commissioner of Health and Social Services and her staff had not adequately monitored an alcohol treatment program in his town. He complained about the credentials of the program staff and stated that one of them was using and selling illegal drugs. Assistant Ombudsman Ruth DeCamp's investigation coincided with an on-site program review by the State Office of Alcohol and Drug Addiction (SOADA), which revealed that the department had maintained a close overview of the program and there was no substance to the allegations. However, I recommended and the agency agreed to immediately conduct a confidential investigation into the drug abuse charges, despite the anonymous nature of that complaint. The agency's review into the "hearsay" allegations, by an independent investigator, exonerated the staff member.

My Anchorage office received a number of complaints about the Copper River School District. Although the Ombudsman theoretically has jurisdiction over Rural Education Attendance Areas (REAA's), in fact most complaints are either technically premature because they have not been heard by the school board, or they are out of our statutorily defined jurisdiction because they have been heard and decided by elected officials (the school board). There are few decisions made by superintendents or others without review of the school boards.

In A88-0454, a janitor at the Kenny Lake School attempted to complain, as a parent, about the principal and two teachers at a school board meeting. He stated he was threatened with a law suit and told to complain through the superintendent. The next day he did so and was placed on suspension and then fired, after working for the district for 12 years. He appealed to the same school board who referred him to the superintendent.

Although this matter is outside my jurisdiction, it appears that several fairness issues deserve to be addressed. One involves the janitor's termination and lack of real appeal rights. Another involves citizen complaints that the superintendent is using state money to fight an investigation against him by the Professional Teaching Practices Commission (PTPC). Complainants stated that the school board had assured the superintendent his salary and position even if the PTPC ultimately decertified him. It appears that there may be room for some legislative checks and balances in the REAA system.

In J88-0236, a Seward man, and later the city clerk, believed the people of Seward were promised a public hearing in Seward regarding the spraying of herbicides along the railroad right of way. Ombudsman investigator Odette Foster talked with the Department of Environmental Conservation (DEC) director of Environmental Health, who did not remember making such a promise. Instead, he selected Moose Pass for a hearing, having encouraged members of that community to send in petitions requesting the hearing. He insisted he had been misunderstood but agreed to hold an additional hearing in Seward. Assistant Ombudsman Foster facilitated the meetings between DEC and the Seward community.

Ms. Foster received her first fish molestation complaint in July. The complainant had taken his family on a Sunday outing, having just received a subsistence permit. Not knowing the rules of the game, he got tired of waiting for the fish net to do its work and jumped in the creek and swam after the fish. That failing, he started throwing rocks at the fish. All this was observed by a game warden hiding out in the bushes, who cited the man for fish molestation. This matter was closed as a matter before the courts but the gentleman was referred to a copy of the fish and game rules so that he could avoid this sort of difficulty in the future.

WRANGELL

Our contract with Wrangell began on July 1, 1988 and we have received 16 complaints from that community since then. Assistant Ombudsman Kim Elton visited the community to provide information and gather impressions from folks in Wrangell on September 29 and 30. The contract is for a yearly cost of \$12,000 plus travel expenses. Because of the distance involved, we are dependent on Wrangell officials to deal openly

and honestly with our office over the telephone and I have been given assurances that will to happen.

J88-0499 was a short investigation which explored the appropriateness of the City of Wrangell denying a connection to city electricity because of the location of the citizen's meter box, which was eleven feet above ground. The Ombudsman confirmed that the city was correct in denying hook up because of the inaccessibility of the box. The agency based its decision on a reference manual not included in city ordinance. My office recommended and the city agreed to two recommendations: (1) that the city write and adopt clear written standards for what is required to pass an electrical inspection (to specifically include references to manuals and other written standards); (2) that the city reimburse the complainant for half of his out of pocket expenses for moving the box to an attainable height.

DELAYS

The bane of government, the dreaded delay, continues to strike. For dozens of Fairbanks public assistance applicants, a delay of 10 minutes in meeting an agency appointment was the cause of grievous inconvenience. For others, a delay of two years was the norm for citizens awaiting a decision by the Commissioner of Natural Resources.

In July and August the Anchorage Ombudsman's office reviewed a complaint (A87-1344) that the Northern Regional Office of Public Assistance was arbitrary in requiring clients who were ten minutes or more late to reschedule appointments. Some clients were required to wait for several weeks for new appointments, although they claimed to have arrived on time for appointments. They claimed the paperwork they were asked to fill out took so much time that the time slot for their meetings with caseworkers passed and they were told they would have to be rescheduled, usually days and sometimes weeks later.

Assistant Ombudsman Robyn Williams learned different public assistance offices throughout the state have different ways of handling clients who do not arrive on time for scheduled appointments. My finding was that the Fairbanks office has a valid reason for employing a late policy, which is applied consistently and with advance notice to clients. However, I recommended that the division provide prior notice of late policies to clients throughout the state; that it allow clients as much flexibility as possible; that clients should have several options for rescheduling a cancelled appointment; that priority should be given clients whose applications are about to expire; and that the division have more uniformity statewide in its tardiness policy. The division agreed to all of these and has drafted an administrative procedure on rescheduling late clients.

Assistant Ombudsman Dave Plaskett investigated an allegation that the Department of Natural Resources (DNR) delayed a citizen's appeal to the commissioner for two years (A87-1284/A87-1344). Investigation revealed a large agency backlog of appeals to the commissioner; unresolved problems with developing a system for timely answering appeals to the commissioner; problems with the commissioner's staff responding to political and administrative pressures by answering appeals out of chronological sequence; and insufficient staff assigned to appeals work.

I recommended: (1) that the agency set out an appeals process, including a deadline for commissioner's response, in regulation; (2) that the number of staff needed to process backlogged and ongoing appeals be enhanced; (3) that staff be trained to use the available computer system for obtaining information needed in reviewing appeals; (4) and that staff discontinue working appeals out of order. An appeals process should be fair to all appellants.

The department committed itself to examining the appeals process and to streamlining it. The Commissioner stated that appeals backlogs would be cleaned up and new procedures implemented to prevent further backlog. She also committed to examining staff training needs and have the appeal procedure promulgated into state regulations.

I am pleased to report a recent letter from the Commissioner indicates the backlog has been entirely eliminated. Future appeals will be handled in a timely manner. This represented a significant commitment of time and effort on the part of Commissioner Brady, Deputy Commissioner Boston-Gorsuch and their staff in response to an ombudsman investigation.

BOTCHED

My Anchorage office received the most botched state complaint of the year, when a woman notified us that her husband was ordered by the Child Support Enforcement Division to provide medical support for his three children, two of whom were adults and one of whom died in 1985. CSED confirmed the administrative error and promised to write a letter of apology to the complainant, who replied, "It's about time!" (A88-0590)

KIDS' ISSUES

The mother of a girl who was called as a grand jury witness in a sexual abuse case protested the girl's interviews by the District Attorney outside the mother's presence (A88-0825). Assistant Ombudsman Gwen Byington investigated and found that Assistant DA Marsha Bissell interviewed the witness alone, attempting to establish rapport with her and to prepare her for her appearance before the grand jury. No abuse of

discretionary authority was found in the procedures used. In fact, Ms. Bissell's contact with the girl was sensitively performed and conducted in accordance with the guidelines of the 1987 Interagency Child Sexual Abuse Agreement.

A88-0482, -0483 and -0514 brought to my attention a problem which affected a number of long term handicapped children. The mother of a severely handicapped child learned that the Division of Medical Assistance would no longer pay for diapers for incontinent children. Her supplier had received a notice of discontinuation of coverage and the mother was informed that previous coverage had been an error and that federal guidelines prohibited diaper coverage. This mother, herself handicapped, had no means of paying for diaper supplies if she kept her daughter at home. Ironically, the child's medical needs would be covered in full if the mother chose to place her in a residential care facility.

The mother, acting for herself and other parents of handicapped children, contacted Advocacy Services of Alaska, several elected officials and researched Medicaid coverage in six other states, where diapers are provided by Medicaid. She could not get a satisfactory explanation for the noncoverage from Alaska's Division of Medical Assistance.

Assistant Ombudsman Steve Atkinson requested from the Division a copy of the federal Medicaid regulations which prohibited payment for diapers for the incontinent. He also requested a copy of the Division's poll of insurance companies and other states' Medicaid programs, on which the division based its denial of coverage.

The persistence of the mother and the Ombudsman's office had a positive outcome. The division received verbal permission from the federal regional office to provide restricted coverage for diapers for such handicapped children. There was some delay in return of coverage, due to problems with the federally mandated computer payment system. Sometimes finding the right solution takes remarkable tenacity and patience.

The grandmother of a hearing-impaired child filed a complaint that the Educational Support Office of the Department of Education was violating federal law by inadequately supervising the education of children enrolled at the Alaska State School for the Deaf (ASSD) (A88-0814). When Assistant Ombudsman Atkinson investigated the matter, he discovered that the staff failed to get approval from the boy's mother of their initial plan before his placement at ASSD. There appeared to be a conflict between the personal parenting style and expectations of the boy's family and the recommendations of the staff at ASSD concerning his educational needs. However, there was no indication that P.L. 94-142, which requires Individualized Education Programs for all special needs

students before placement, was being routinely overlooked by staff. ASSD staff and the child's family were able to continue working together for the education of the hearing impaired child.

PIONEERS

In A88-0739, Older Alaskans Ombudsman William O'Connor contacted our office on behalf of the family of a Palmer Pioneer Home resident who was involuntarily being transferred out of that facility. The resident was suffering from Alzheimers and had other mental health problems. Recent modification of his medication had caused dramatic behavior changes and the staff considered him dangerous and beyond their control. The family needed time to locate a more appropriate facility, but the transfer was scheduled at the end of June.

By the time the complaint came to Assistant Ombudsman Robyn Williams, she discovered the parties involved were working out a plan for a more orderly transfer. The resident's doctor was developing a medication regime which better controlled his behavior and met his medical needs. The family was arranging placement in Michigan and was getting financial affairs in order for Medicare coverage.

It appears that the intervention of the Ombudsman's office helped moderate high emotions and critical needs so that all parties could work out a just and reasonable solution.

PHONES

The state is providing an increasingly better level of telephone service to its citizens, if the results of recent Ombudsman activity are indicative of this general area of communication.

In J88-0422, a job applicant was unhappy because the Anchorage job service called him collect in Wasilla to tell him about a job opportunity. As you know, many job applicants are without income and having a difficult financial time. As a result of ombudsman involvement, Job Service has now changed the collect-call policy and calls out of region applicants at state expense. The agency also accepts collect calls.

A88-0270 and A88-0274 dealt with telephone overloads at Postsecondary Education Commission (PSEC). The Commission had no 800 lines, did not accept collect calls, had no recorded messages and some staff accepted and returned calls during restricted hours. As a result of the agency's awareness of the problem and our recommendations, PSEC will be modifying its telephone system to provide better access to its callers by late October. The new system will allow automated call answering, recorded messages based on touch tone input from the caller. If more information is needed, the call will

automatically be routed to "human" or it will allow the caller to leave a message for a staff member.

GENDER

Assistant Ombudsman Penelope Horter received a complaint from a woman who was attempting to gain title to land under a patent and objected to the requirement by the Department of Natural Resources, Division of Land and Water Management that she specify her sex and marital status on the transfer form. She'd been informed by the division that if she did not specify "single woman" or "married woman" as directed on the questionnaire that she might not receive title to her property.

This particular form had not been updated in 1984 when other forms were changed to reflect gender neutral language of "single person" and "married person." The division quickly agreed to accommodate the complainant and to change the form at the next printing.

However, the division, following legal requirements, will continue to require marital status for a land patent.

Even archaic legal language is subject, somewhat, to influence from our changing times.

In J88-0223, the Commissioner of Labor set legal precedent for unemployment law in Alaska when he decided that leaving a job to establish a household with a spouse is a fundamental right. This change was in large part due to the persistence of a complainant in appealing denial of her benefits. She was denied unemployment insurance benefits because leaving work to join her spouse was not considered "good cause" by the labor appeal tribunal. She quit her job in Juneau to join her husband in Freshwater Bay. She actively sought and found work but continued to appeal the adverse unemployment insurance decision, with encouragement from the ombudsman's office.

The Commissioner's precedent-setting decision will favorably affect benefits for spouses who join each other in the future. This is a good example of what a citizen can accomplish by pursuing a just solution to a personal predicament. It also is an example of how the ombudsman educates and helps citizens use agency appeal procedures.

PAYROLL AND PERSONNEL

We reviewed several problems in this area which involved timing. In June, Anchorage Assistant Ombudsman Steve Atkinson completed an investigation that the Department of Corrections had contacted a job applicant's current employer against the complainant's specific instructions. The current employer (private sector) demoted the employee when they learned he was actively seeking other employment. Investigation revealed that

Corrections was not considering the applicant as a finalist but simply notified current employers as a standard procedure. In this case, the application reviewer did not note the complainant's request not to contact the current employer unless he was a finalist. I found that the state has an obligation to thoroughly review information submitted in applications to avoid unnecessarily harming applicants. The department agreed to add language to its background investigation packet (application material), asking applicants to check a box on the personal history form if they do not want their current employer contacted.

Another state employer, the Anchorage International Airport (Department of Transportation and Public Facilities), directed an employee to terminate his outside employment. The employee felt his outside employment caused no conflict with his state employment. The designated supervisor, who normally would have heard an appeal, was out of town. Because of the immediacy of the threatened termination, the Commissioner instead heard this case and determined that the outside employment did not violate provisions of the Executive Ethics Act. The employee was allowed to retain both jobs.

DITCHES TO BE DUG

In one case the State said a ditch couldn't be dug; in another, it required digging in an unsafe area, claimed two citizens from different parts of Alaska.

In J88-0359, a Juneau property owner believed it was unreasonable to be denied a permit from the Habitat Protection division of Fish and Game for digging a trench across a small stream. He claimed the creek was on his property and the division had no right to tell him what to do there. Assistant Ombudsman Dave Plaskett's review indicated that the Department of Fish and Game has authority under AS 16.05.870 to require the Commissioner's approval and a fish habitat permit to excavate in a stream bed, no matter who owns the land. Additionally, the Attorney General advised the property owner he did not have the right to pollute a water column and affect fish spawning.

On the Kenai Peninsula a man was awarded a timber sale bid in the Cooper Creek Sale by the Division of Forestry. The logger found the division nonresponsive when he asked for guidance about logging in an area with two unmarked electrical cables running along the ground. Assistant Ombudsman Gwen Byington helped facilitate a meeting between the division and the complainant so that logging would be conducted outside a newly established corridor, to protect the electrical cables and the logger.

ENFORCEMENT

A small claims court plaintiff found a major glitch in her case against a military man who failed to pay his rent (A88-0922). She found that she was required to provide legal counsel for any military defendant. She told Assistant Ombudsman Robyn Williams this was totally unreasonable. Additionally, the complainant alleged that she received no specific notice of this requirement when she initially filed her claim.

Ms. Williams talked with court personnel and learned that legal representation was required by the Federal Soldiers and Sailors Relief Act. Apparently this act was passed to protect service personnel from being sued without notice or representation while they are "in service for their country."

Ms. Williams suggested that the Forms Committee for the Court System consider developing a way to notify the public about this requirement for military defendants. However, the investigation was discontinued due to lack of jurisdiction over this federal legislation.

A complaint of police brutality during an enforcement procedure (A88-0600) was brought by a complainant who sought treatment for a migraine headache at a Palmer hospital, who later refused treatment when a blood-alcohol test was required, and who was forcibly removed by the Palmer police and the Alaska State Troopers following a request for help from the hospital.

The complainant alleged that the Troopers used excessive force making an arrest for disorderly conduct, brutalizing him in the process. The investigation by Assistant Ombudsman Ruth DeCamp revealed that the police followed correct procedure in the arrest and made some effort to respond to the complainant's needs during incarceration. Hospital and police staff described his strong resistance and refusal to accept their reasons for denying him medical treatment and for involving the police. This resistance seems to have aggravated the incident. Valley Hospital, a private agency, the Palmer Police, a local government agency, the Alaska State Troopers, and the staff at Mat-Su Pretrial Facility were all cooperative in the investigation.

The complainant, who did not feel vindicated by the Ombudsman's investigation, continues his search for justice.

ART SCHOLARSHIP

My Juneau office received a complaint alleging that the University of Alaska's student activities office in Juneau had inefficiently managed an art scholarship fund (J87-0762). The fund accumulated money through nine student art shows from 1982

through 1988. The students kept 90 percent of the receipts as commission; the remaining 10 percent went to the fund to be used for scholarships. Investigation by Assistant Ombudsman Odette Foster revealed that no scholarships had been awarded, that the scholarship's purpose and guidelines were never written, and record keeping of the funds contained numerous errors.

As a result of investigation, University staff reconstructed the books and identified \$526.92 which should be applied to scholarships. The University of Alaska Southeast agreed with my recommendation to award one or more scholarships with this fund and to reconsider whether this type of small scholarship is practical. It is now focusing its fund raising efforts on larger scholarships.

ALASKA BIDDERS' PREFERENCE

AS 36.30, the State Procurement Code, took effect January 1, 1988. The Ombudsman's Office is subject to that code and we have amended our procurement practices to conform, including the promulgation of regulations.

Following the new procedures, the Ombudsman's office issued an invitation to bid in May for competitive sealed bidding when seeking lease space in Anchorage. Bids were opened on June 2 and an intent to award a contract was issued to the apparent low bidder on June 28. I received a protest from two competing bidders on June 30 and on July 13.

In addition to other matters, both bidders specifically protested an apparent unfairness inherent in AS 36.30.170, which defines "Alaska bidder." Both protesting bidders believed they should have received any Alaska bidders' preference because they met all reasonable definitions of "Alaska bidder." Upon review, it was evident that neither met the criteria of AS 36.30.170(b)(4) which states an Alaska bidder "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." [Emphasis added.]

Specifically, both protesters were members of partnerships in which all partners were not Alaska residents. In the one instance, there are a number of partners, most of whom are long time Alaska residents; at least one now lives out of the state. In the other instance, a partnership is in the process of dissolving, since one partner left the state and the partnership, leaving the other partner to lease business space, pay all debtors, and actively dissolve the partnership. The remaining partner is a long time Alaska resident who meets the statutes' other definitions. This latter protestor would have been low responsive bidder had he received the 5 percent bidders' preference. Following the mandate of the statute, I

could not define him as an Alaska bidder for purposes of the preference, and I awarded the contract to the next bidder, who in fact did qualify for the Alaska bidders' preference.

There are several inequities in the statute. One is that an incorporated entity is not required to have its members residents of Alaska to be entitled to the Alaska bidders' preference. This seems to grant corporations an unfair advantage which partnerships are denied. It seems to penalize long time Alaska partnerships when a single member retains partnership status but moves out of state, which does not lessen the partnership's Alaskan commitment as a whole. It certainly penalizes the partnership in which one partner "bails out" on another without the Alaska partner's permission, leaving the survivor without Alaska bidders' preference status while he extricates himself from the partnership.

The State Procurement Code is to be reviewed by the legislature in late 1989. The Commissioner of Administration and the Commissioner of Transportation and Public Facilities are required to report to you concerning procurement by state agencies during fiscal year 1988, which is now complete. That report is due you on December 1, 1989 and is to include recommendations for changes in AS 36.30. Please accept as my recommendation for change a redefinition of Alaska bidder to include partnerships in which 50 percent or more of the partners are full time residents of Alaska.

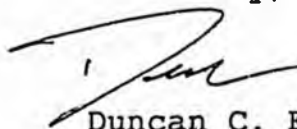
If you would like more information about this recommendation, or if you desire a report in another format, please feel free to contact me at any time.

* * *

I have included copies of new brochures and posters. They are aimed at increasing citizen awareness not only of this office but also giving them "how to" tips on solving their own problems with government. Call any of my offices if you would like additional copies for your offices or constituents.

Please let me know if you have questions or comments about this report, or if you wish more detailed information about these case summaries or other work of the office.

Sincerely,



Duncan C. Fowler
Ombudsman