SB
95
(File 1)

SENATE COMMITTEE REPORT
(FIRST COMMITTEE OF REFERRAL)

DATE: 2/1/91

FURTHER: Judiciary
Finance

Date of 5-Day Notice: 2/14/91
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: _____

Labor and Commerce Committee considered SB 95

Agreements between a labor organization and a public employer.

and recommended:

[✓] **replace with** _____ **CS** _____ [ ] same title [ ] new title

[ ] **attached amendment(s)**

[ ] _____ **letter of intent adopted**

[ ] **do pass**

[ ] **do not pass**

[ ] **no recommendation**

[✓] **individual recommendations**

[ ] **further referral to** _____

ATTACHES NEW FISCAL NOTE(S):

Department(s)/Date:	Department(s)/Date:
[✓] fiscal note(s) ADMIN	[ ] zero fiscal note(s)
[ ] appropriation-no fiscal note	[ ] Governor's bill w/fiscal note

SIGNING DO PASS:

J. Gleason

OTHER RECOMMENDATIONS:

Rick Halford NO Rec.
[illegible] -NO Rec

Lee Peace - NO Rec

Chair: Signature and Recommendation

SENATE LABOR & COMMERCE COMMITTEE
BILL FILE

BILL NUMBER: SB 95
BILL TITLE: AGREEMENTS BETWEEN A LABOR ORGANIZATION & A PUBLIC EMPLOYER
SPONSOR: RODEY RECEIVED: 2/1/91

WRITTEN REQUEST TO SCHEDULE: DATE 2/14 FROM RODEY
SECTIONAL ANALYSIS RECEIVED: DATE _____ FROM _____
FISCAL NOTE REQUESTED: DATE 2/14 FROM DOTPF
FISCAL NOTE RECEIVED: DATE _____ FROM _____
FISCAL NOTE ~~CS~~ REQUESTED: DATE 2/14 FROM COMMERCE
FISCAL NOTE CS RECEIVED: DATE _____ FROM _____
FISCAL NOTE ~~CS~~ REQUESTED: DATE 2/14 FROM DX/R
FISCAL NOTE CS RECEIVED: DATE _____ FROM _____
FISCAL NOTE ~~CS~~ REQUESTED: DATE 2/14 FROM ADMIN
FISCAL NOTE CS RECEIVED: DATE _____ FROM _____

FIVE DAY NOTICE GIVEN:
COMMITTEES OF REFERRAL: FIRST: L&C SECOND: _____ THIRD: _____

DATE	COMMITTEE ACTION
_____	_____
_____	_____
_____	_____
_____	_____

HEARING NOTIFICATION LIST

1. SPONSOR
2. AGENCY - DOTPF
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. CSSB 95 ( )

Revision Date: 4/10/91
Title: An Act authorizing the negotiation of project labor agreements.

Sponsor: Rodey
Requestor:

Department Affected: Administration
BRU: General Government
Component: Labor Relations

COMPONENT SERIAL NO. 0 0 5 8

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	185.0	194.3	204.0	214.2	226.3	237.6
TRAVEL	15.0	15.8	16.6	17.4	18.3	19.2
CONTRACTUAL	18.0	18.9	19.8	20.8	21.8	22.8
SUPPLIES	3.0	3.2	3.4	3.6	3.8	4.0
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	221.0	232.2	243.8	256.0	270.2	283.6
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	221.0	232.2	243.8	256.0	270.2	283.6
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	3.0	3.0	3.0	3.0	3.0	3.0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

This bill, as amended, would authorize the State to negotiate directly with unions regarding the wages, hours and terms and conditions of employment which private contractors would provide to employees engaged in public works construction and maintenance, and to administer those contract projects. Since line agencies are not staffed to negotiate labor agreements on behalf of the State, this collective bargaining negotiation and administration responsibility will be delegated to the Division of Labor Relations.

Prepared by: Bruce Cummings
Division: Labor Relations
Phone: 465-4403
Date: 4/10/91

Approved by Commissioner: Millett Keller
Agency: Administration
Date: 4/10/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. CSSB 95 (L&C)

ANALYSIS: (continued)

The Labor and Commerce Committee amended the proposed bill to include the responsibility for those projects over $7 million which are funded by State or local funds. The FY 92 proposed budget includes four to nine projects that would require State contract negotiations and administration on an ongoing basis. We estimate that our FY 92 workload would increase to the extent that three additional professional analysts would be necessary if this bill becomes law. It is anticipated that negotiations would be protracted in nature, occur concurrently and require continuous oversight for administrative purposes. Inflation is assumed at five percent (5%) per annum in succeeding fiscal years.

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. CSSB 95

Revision Date: 3/12/91
Title: An Act authorizing the negotiation of project labor agreements,
Sponsor: Rodey
Requestor:

Department Affected: Administration
BRU: General Government
Component: Labor Relations

COMPONENT SERIAL NO. 0 0 5 8

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	685.3	719.6	755.6	793.3	833.0	874.7
TRAVEL	39.5	41.5	43.6	45.7	48.0	50.4
CONTRACTUAL	49.2	51.7	54.2	57.0	59.8	62.8
SUPPLIES	6.2	6.5	6.8	7.2	7.5	7.9
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	780.2	819.3	860.2	903.2	948.3	995.8
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	780.2	819.3	860.2	903.2	948.3	995.8
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	10.0	10.0	10.0	10.0	10.0	10.0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: None.

ANALYSIS: (Attach a separate page if necessary.)

See attached.

Prepared by: Bruce Cummings Bruce Cummings Phone: 465-4403
Division: Labor Relations Date: 3/12/91

Approved by Commissioner: Millett Keller
Agency: Administration Date: 3/13/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. CSSB 95

ANALYSIS: (continued)

This bill would authorize the State to negotiate directly with unions regarding the wages, hours and terms and conditions of emp oyment which private contractors would provide to employees engaged in public works construction and maintenance, and to administer those contract projects. Since line agencies are not staffed to negotiate labor agreements on behalf of the State, this collective bargaining negotiation and administration responsibility will be delegated to the Division of Labor Relations.

It is impossible to predict from the bill itself just how many such project labor agreements the State may negotiate and administer, or whether such efforts would increase or decrease total project costs. The bill is promoted as an Alaskan hire bill; therefore, we assume that it will be utilized for that effort and that it will be otherwise cost-neutral in total project cost. There are over 275 projects listed in the proposed FY 92 budget; that number is likely to grow before passage. Many of these projects are neither construction nor maintenance projects, but the vast majority of them are. We presently negotiate and administer only 10-11 collective bargaining agreements. We conservatively estimate that our FY 92 workload would at least double if this bill becomes law. Inflation is assumed at five percent (5%) per annum in succeeding fiscal years.

BJC 3/12

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO : SB 95

Revision Date:
Title: "An Act relating to agreements between a labor organization..."
Sponsor: Senator Rodey
Requestor: Senate Labor & Commerce

Department Affected: Labor
BRU: Commissioner's Office
Component: Alaska Labor Relations Agency
COMPONENT SERIAL NO. 1200

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Jan Hart DeYoung
Phone : 264-2587
Division: Alaska Labor Relations Agency
Date : 2/19/91

Approved by Commissioner: Nancy Bear Usera
Agency: Department of Labor
Date: 2/19/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

FISCAL NOTE Ø
Department of LABOR

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. SB 95

Revision Date: 19-Feb-91
Department Affected: Natural Resources
Title: An Act relating to agreement between a labor organization & public employer
BRU: Management and Administration
Components: Administrative Services
Sponsor: Senator Rodey
Requestor: Senate Labor and Commerce
COMPONENT SERIAL NO. 424

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of Current year impact:

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Sharon Barton
Phone: 465-2406
Division: Management and Administration
Date: 19-Feb-91

Approved by Commissioner: Harold Heinze
Date: 19-Feb-91
Agency: Department of Natural Resources

Distribution (by preparer) : Legislative Finance, legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

REV 10/90

FISCAL NOTE Ø

Department of Nat. Resources

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NUMBER: SB 95

FISCAL NOTE

Revision Date: 2/1/01 Department Affected: DOT&PF
Title:"An Act relating to agreements between organization and a public employer" BRU: Statewide

Sponsor: Senator Rodey Component: Engineer. & Oper. Stnds.

Requestor: Component Serial Number: 547

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY92	FY93	FY94	FY95	FY96	FY97
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 FUNDS	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL FUNDING:	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

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary)
There should not be any major impact on the department unless we were required to do the negotiations and set up the Labor Agreements. There would be some administrative costs associated with that process, but such costs are nominal.

Prepared by: Jeffery C. Ottesen, Director Phone: 465-2951

Division: Engineering and Operations Standards Date: Feb. 19, 1991

Approved by Commissioner: Frank G. Turpin Phone: 465-3900

Agency: Department of Transportation and Public Facilities Date: Feb. 19, 1991

Distribution By Preparer: Legislative Finance, Legislative Sponsor, Requestor, OMB, Impacted Agency(ies).

REV 2/7/91

Alaska State Legislature

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SENATE LABOR AND COMMERCE COMMITTEE

TO: Nancy Quinto
Senate Secretary

FROM: Rod R. Mourant Legislative Aide
Senate Labor & Commerce Committee

DATE: April 9, 1991

RE: CSSB 95(L&C)

Per our conversation today, I am formally notifying you that I have requested a fiscal note on the subject bill. The bill was moved from committee on April 3rd. I requested a fiscal note from the agency on April 4th, April 5th and April 9th. I contacted the Governor's Office on the matter on April 8th and again today. I had previously spoken with you on April 5th and understood that a new fiscal note was required prior to advancing a bill.

From conversation today, I understand that you can advance the bill to its next committee of referral with a notation that a new fiscal note is forth coming. Please cause this to happen.

Thank you.

cc: Senator Pearce
Senator Rodey

bill file

Patrick M. Rodey
Senator

Alaska State Legislature

Senate

3111 C. St., Suite 510
Anchorage, Alaska 99503
(907) 561-7618

During Session:
P.O. Box V
Juneau, Alaska 99811
(907) 465-3793

April 9, 1991

To: Senator Rick Halford, Chair
Senate Judiciary Committee

From: Senator Pat Rodey, Vice-Chair
Senate Judiciary Committee

Pat

Subject: SB-95, Project Labor Agreements, and fiscal notes

I have enclosed three Fiscal Notes and one departmental position paper relative to SB-95 as introduced and subsequently reworked during the committee hearings by the Senate Labor and Commerce Committee before the measure was moved from Labor and Commerce on Wed, April 3, 1991.

I understand there is some confusion over the fiscal notes and the requirement under AS 24.08.035, requiring a fiscal note be attached to the bill *"containing an estimate of the amount of the appropriation increase or decrease which would result from enactment of the bill ..."* (copy attached) before moving a bill from the committee of first referral.

In this case SB-95, has fiscal notes of zero from three different departments and a Department of Administration position paper (3/13/91) addressing CSSB-95, as first proposed by the Labor & Commerce Committee.

The Department of Administration is apparently experiencing great difficulties in figuring a fiscal note. While other department's, (DOT&PF, Labor, and DNR) often involved in major construction projects, have submitted Fiscal Notes indicating they do not expect the "optional provisions" of SB-95 to have a fiscal impact on their respective departments, DOA apparently feels otherwise. However, DOA has been asked for a fiscal note since the bill was introduced, February 1, 1991. In addition, a committee hearing was first announced on February 14, 1991, and the hearing convened on February 20th, in compliance with the five day rule.

Departments are required to deliver fiscal notes to the committee requesting the note within five days. Requests for fiscal notes are nearly automatic when the five-day committee announcement is made. The Labor & Commerce Committee heard SB-95 for a second time, March 13th, **still without receiving a fiscal note from DOA.** On April 3, 1991, the Senate Labor and Commerce Committee took action moving CSSB-95 (L&C) from committee with individual member recommendations, again **still without receiving a fiscal note from DOA.** The original three fiscal notes from DOT&PF, Labor, and DNR were not altered by the changes made in the Labor & Commerce CS.

It should be noted that diligent staff efforts by Mr. Mourant of the Senate Labor & Commerce Committee to secure a Fiscal Note from DOA following committee action were attempted on April 4th, 5th, and again, April 9th. **Still no response.**

Why it has taken DOA so long to produce a Fiscal Note for SB-95, is unclear. This department has been engaged in negotiations with labor unions, trade organizations, and employee bargaining units since statehood! Surely they are familiar with the process. The adoption of SB-95, which would permit the option of project labor agreements in advance of going to bid on sizeable public construction projects should not prove difficult to those management personnel already well-experienced in labor negotiations.

Advancing SB-95 to the next committee of referral, complete with three fiscal notes, and a Department Position paper from DOA, would seem to be in the best interest of expediting legislation and certainly in line with the administration's goal of concluding legislative business before the 121 day session limit. A goal I heartily support.

Thanks for the opportunity to shed some light on this subject and for scheduling SB-95 this Thursday, April 11, before the Judiciary Committee.

cc: Senator Pearce, members Senate Judiciary Committee

Alaska State Legislature

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SENATE LABOR AND COMMERCE COMMITTEE

TO: Terry Cramer, Legislative Legal Counsel
Division of Legal Services

FROM: Rod Mourant, Committee Aide
Senate Labor & Commerce Committee

DATE: March 27, 1991

RE: Senate Bill 95

Working from the bill draft number 7-LS0319\J dated 3/21/91, please redraft with the following changes:

1) Add a new section that limits the application of Project Labor Agreements to projects that are entirely funded by state or local funds. This is intended to preclude projects that are either partially or entirely funded by federal funds from being included in PLA's.

2) Add a new section that limits the application of Project Labor Agreements to projects whose state and local funding totals in excess of seven million dollars ($7,000,000).

Terry, it is our intention to hear this new legislation on Wednesday, April 3.

Thank you.

bill file

Patrick M. Rodey
Senator

Alaska State Legislature

3111 C. St., Suite 510
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During Session:
P.O. Box V
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Senate

March 14, 1991

M E M O R A N D U M

To: **Senator Drue Pearce, Chair**
Senate Labor & Commerce Committee
and Senators:
Collins, Eliason, Halford, and Kerttula
Members, Senate Labor & Commerce Committee

From: Senator Pat Rodey Pat

Subject: **SB-95, Project Labor Agreements**

I am forwarding copies of letters from Alaska contractors who support passage of SB-95.

You will note they share the same enthusiasm for Project Labor Agreements because of several positive factors, including:

- ✔ **potential project cost savings**
- ✔ **Alaska residency preference in hiring**
- ✔ **reliable and skilled source of workers**
- ✔ **success with prior project labor agreements**
- ✔ **use PLAs successfully like private sector**

As we work to structure a sound, workable bill that will expand options for public agencies to consider when preparing public works projects remember that Alaska's working men and woman and many Alaskan contractors have successfully utilized project labor agreements.

It makes sense that public agencies should at least have the option to successfully employ a project labor agreement on a large scale project.

MAR 1 1991

LEGISLATOR'S COPY

If you have any modifications, please contact the assigned staff immediately.

LEGISLATIVE RESEARCH AGENCY
RESEARCH REQUEST FORM

91.188
Request #

Senator Drue Pearce
Requested for (Legislator)

Rod Mourant (4993)
Staff Phone Number

02/27/91 (GSH)
Date/Time Initials

Project-Specific Labor Agreements

ASSIGNMENT

Carol R. Vandor 02/27/91
Staff (3991) Date

SUBJECT DESCRIPTION

Research the use of project-specific labor agreements in Alaska. Where have they been used? On what projects? By whom?

PURPOSE:

Background Info/Pertinent Files?

ANTICIPATED COMPLETION DATE: March 15, 1991

Patrick M. Rodey
Senator

Alaska State Legislature

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During Session:
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Senate

February 20, 1991

Memorandum

To: Senator Drue Pearce, Chair
Members, Senate Labor & Commerce

From: Senator Pat Rodey Pat

Subj: SB-95, relating to agreements between a labor organization and a public employer - Project Labor Agreements (PLA).

The purpose of this legislation is to afford state agencies the same opportunity the private sector now enjoys to enter into project labor agreements.

While current law is silent with regard to state agency authority to enter into project labor agreements (PLAs) state agencies have successfully utilized these agreements in the past.

On the Bradley Lake hydro project, for example, an agreement was entered into between Enserch Corporation (primary contractors) and organized labor, which helped bring the project toward completion some $40 million under budget.

In another instance a direct project labor agreement was entered into between a labor union and the Alaska State Housing Authority for an asbestos abatement project.

Why should a state agency enter into a project labor agreement? The simple answer is for the same reason the private sector utilizes them - "cost savings."

As in the Trans-Alaska Pipeline project, Bradley Lake, and many North Slope Construction projects of significant magnitude, there can be cost savings realized by negotiating wages, working conditions, benefits, and other matters prior to the job going out to bid. These and other cost savings can be bid out and reflected in the cost of the project.

In addition to obvious potential cost savings any successful major project must be constructed following a stringent time-line. This time-line requires a "construction cadence" be followed in an uninterrupted manner. Any significant project needing a sizeable labor force must be able to count on a reliable, skilled work force to meet the construction cadence demands. The bottom line being - disruptions in labor supply can and will cost millions in lost manhours.

Underscoring the potential for cost savings and stable construction cadence, project labor agreements can bring about **"Alaska local hire,"** specifically provided for in federal labor law and supported by the U.S. Supreme Court. Local hire provisions found in all labor unions within Alaska allow local Alaska residents to be given preference for employment on Alaska projects. If this law had been in effect projects such as "Red Dog Mine" could have entered into PLAs which might have resulted in local village residents from the area having the first opportunity for employment on the project.

It is also important to note while project labor agreements are between state agencies or local governments and labor unions they do not preclude non-union residents from going to work on these projects. Equally important, anyone can and must be given access to employment on a PLA project through the union's hiring hall, whether a union or non-union applicant. An Alaskan can, if they desire, go through a union hall under a PLA but not be required to join the union as a member. Under federal law exclusive union membership is specifically prohibited. Union and non-union applicants for employment on state negotiated PLA are to be given equal consideration. If a non-union Alaskan walks through the hiring hall door first, he or she will be given priority for dispatch.

Passage of SB-95, will provide state agencies the opportunity to utilize project labor agreements that could well result in cost savings, success in meeting or exceeding construction deadlines, and help ensure that Alaskans are hired for Alaskan public works projects.

Rodey, SB-95, Statement of Purpose

Patrick M. Rodey
Senator

Alaska State Legislature

Senate

3111 C. St., Suite 510
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During Session:
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February 14, 1991

MEMORANDUM

To: **Senator Drue Pearce**
Chair, Labor and Commerce Committee

From: **Senator Pat Rodey**

Subj: Scheduling request for SB-95, An Act relating to agreements between a labor organization and a public employer.

I respectfully request SB-95, relating to project labor agreements, be considered for scheduling at the earliest possible date before the Senate Labor and Commerce Committee.

I have attached a detailed sectional analysis and line-by-line explanation of the legislation and its intent. Passage of SB-95 has the potential to help reduce the cost of public construction and maintenance projects (as it did in the Bradley Lake project) and it is likely to be a tool in our efforts to ensure Alaskans are employed on Alaskan public works projects.

Senate Bill (SB) 95

Draft version 7-LS0319/D, 2/28/91

An Act Permitting The State or Political Subdivisions Of The State To Enter Into Project Labor Agreements

LINE NO., PAGE 1

1 - 3	****
4 - 8	This section simply clarifies how and by which agency, administrative regulations pertaining to project labor agreements will be promulgated.
9 - 13	This section describes the purpose of the Bill as being twofold: (a) to structure job site labor relations on public construction projects in the interest of industrial harmony; and (b) to create a public contracting option for the State and political subdivisions that does not now exist. The Bill will allow the State and political subdivisions to negotiate

cost-savings through the vehicle of a project labor agreement, and thus to make more optimal use of public construction resources.

LINE NO., PAGE 1 (con't)

14 A PLA is a type of collective bargaining agreement. Only in the construction industry, however,

LINE NO., PAGE 2

1 - 4 may a Union and an employer or governmental entity enter into a collective bargaining agreement, regardless of whether the Union has achieved formal majority status. This section clarifies this fact and specifically applies this special "private construction industry" rule to the kind of public sector PLA's contemplated by this legislation.

4 - 10 This section specifies what kinds of provisions may be included in a PLA, beyond such traditional subjects as wages and benefits, etc. It specifically authorizes the State or political subdivision to require of prospective and successful bidders that they notify

certain "construction industry" labor organizations of job opportunities on publicly funded construction projects and that they accept applicants referred by such labor organizations. This idea is taken directly from § 8(f) of the National Labor Relations Act (NLRA).

LINE NO., PAGE 2 (con't)

12 - 16 These provisions enable the State or political subdivision to include language in a PLA establishing priorities in opportunities for employment referral based upon training, experience or length of service with the contractor, i.e., seniority; the industry, or in the particular geographical area. These referral priorities are a traditional part of a Union's operation of its hiring hall or job referral system. They are also expressly authorized by § 8(f) of the NLRA and have been approved by the National Labor Relations Board (NLRB) and the United States Supreme Court.

17 - 21 The language of this section comes directly from the construction industry exception to

the rule against "hot cargo" agreements contained in § 8(e) of the NLRA. It allows the State or political subdivision to require would be bidders to comply with the requirement that they subcontract or do business only with parties who agree to honor the terms of the PLA.

LINE NO., PAGE 2 (con't)

22 - 24 This section insures that the State or political subdivision retains a sufficient interest in and control over job site labor relations to qualify for the various construction industry exemptions provided for in this legislation.

25 - 28 This section provides that the standard good faith rules governing the collective bargaining process set forth under the Public Employment Relations Act shall apply to PLA's.

LINE NO., PAGE 3

29, p.2

7, p.3 Here the Bill provides that successfully negotiated PLA's shall be reduced to writing with a maximum term of three years's or for

the length of the project, which ever is longer. Disputes under the agreement shall be resolved through arbitration or by petition to the Alaska Labor Relation's Agency which is empowered to adopt appropriate administrative regulations.

8 - 10 This section clarifies that employees of contractors and subcontractors on public construction projects working under a PLA will not be public employees.

LINE NO., PAGE 3 (con't)

11 - 12 This section provides that the right to participate in an election addressing the question of Union representation is not barred by this legislation.

13 - 14 This section exempts the negotiation of a PLA from the provisions of the procurement code. Once the PLA is negotiated, however, competitive bidding would apply to all other aspects of the project. The PLA would have merely established some of the pre-conditions for submitting a successful bid. Moreover, collective bargaining agreements are already

exempt from the procurement code since they are contracts for "services". This section, however, would remove any doubt.

15 - 16 This section exempts PLA's from the State's anti-trust prohibitions. State law already exempts those arrangements -- such as the negotiation of a PLA, that would be exempt under Federal law. State action itself is also generally exempt from anti-trust scrutiny. Nonetheless, this section would remove any doubt.

LINE NO., PAGE 3 (con't)

17 - 21 These sections add appropriate language to the procurement code and the State's anti-trust statutes to reflect the exemptions provided for above.

SB 95 BY HELMÉ

An Act Relating To Agreements Between
A Labor Organization And A Public Employer

LINE NO., PAGE 1

(1) *****

(2) *****

(3) The reference made at line 3 is to the Alaska Public Employment Relations Act AS 23.40.070 et. seq. The part of the statute specifically contained at AS 23.40.110 deals with unfair labor practices or acts that neither (a) a public employer nor (c) a labor organization may legally commit. Subsection (b) currently provides for one exemption from the section's prohibition against employer unfair labor practices as follows: (b) Nothing in this chapter prohibits a public employer from making an agreement with an organization to require as a condition of employment (1) membership in the organization ... following the beginning of employment..."

(4-7) Lines 4-7 add a fourth part or subsection (d) to AS 23.40.110 which will operate to enable the State to enter into typical construction industry or

LINE NO., PAGE 1

prehire agreements with a labor organization covering construction industry employees.

(8, 9) Subsection (d)(1) at lines 8-9, authorizes such agreements regardless of whether the union has been elected to act as their bargaining representative by a majority of the employer's employees. Ordinarily, collective bargaining occurs only after a union has first been elected by a majority vote of the employees affected. However, recognizing the enormous workforce instability in the construction industry, several decades ago Congress approved special rules for bargaining between unions and construction industry employers. For example, in the construction industry a project will often be designed and let before any employees have been hired. For this reason, subsection (d)(1) enables a public employer, like its private counterparts, to enter into an agreement with a union covering a construction project before the job has been awarded or any employees are hired.

The language proposed at (d)(1) is a common feature of Federal Labor Law. The language, in fact, is derived is nearly identical form from the

National Labor Relations Act at § 8(f) as follows:

> It shall not be an unfair labor practice ... for an employee ... to make an agreement covering employers engaged (or who, upon their employment, will be engaged in the building and construction industry with a labor organization of which building and construction employees are members ... because (1) the majority status of such labor organization has not been established under Section 9 of the Act prior to the making of such agreements ... [1]

(10-12) The language at subsection (d)(2) is also taken from §8(f) of the NLRA and is intended only to empower the public employer to give such a labor organization the opportunity to refer its out-of-work registrants [2] to the public employer for work opportunities. Simply stated, it authorizes the public employer to utilize a union's hiring hall or referral procedures to secure applicants for employment. The language as it appears at (d)(2) is taken directly from the NLRA

after the above quote from §8(f)(1) as follows:

---

[1] Section 9 of the NLRA deals with elections as does our reference to AS 23.40.100 at line 9.

[2] Anyone, member and non-member alike, by law may register with a union to secure employment; hence, the term "registrant" as opposed to "member."

LINE NO., PAGE 1

* * *

> (3) Such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment ...

(13-14)
1 (p.2) Section (d)(3) is again taken directly from the NLRA at §8(f) as follows:

* * *

> (4) Such agreement specifies the minimum training or experience qualifications for employment based upon length of service with such employer, in the industry or in the particular geographical area ... (emphasis supplied.)

This language merely authorizes the public employer to utilize a union's hiring hall. By law, such hiring halls may legally provide for distinctions between otherwise equally qualified applicants based upon one applicant's residence in a specified geographical area, i.e., the State of Alaska. Such geographical preferences are a traditional part of a union's hiring hall and have been recognized not

only by congress but approved in Bricklayers Union, 49 LRRM 1223 (1961) by the NLRB and in IBT v. NLRB, 365 U.S. 667 (1961) by the United States Supreme Court.

(2-6) Section 1(d)(1)-(3) of this bill addressed certain actions of the government in its capacity as a direct employer of construction industry employees. The language at subsection (e) addresses the public employer's relationship with its contractors and subcontractors as opposed to its employees. It specifically authorizes in public contracts the kind of "subcontracting agreements" that can and have been utilized in the private sector for decades.

Like the previous sections, this language also comes directly from §8(e) of the NLRA. Section 8(e) generally prohibits an employer and union from refusing to handle the goods of or do business with any other employer. Such prohibited agreements are commonly referred to as "Hot Cargo." Like the "proviso" to §8(e) of the NLRA, our section (e), expressly exempts such contracting agreements from any statutory or other legal prohibition. The "construction industry proviso" or exception to

the NLRA's prohibition against "Hot Cargo" agreements provides as follows:

* * *

> (PROVIDED), That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work ...: Provided further, that for the purposes of this subsection (e) ... The terms any employer ... shall not include persons in the relation of a ... manufacturer ... working on the goods or premises ... or performing parts of an integrated process of production in the apparel and clothing industry ...

(6-8) Certain legal challenges to agreements such as those provided for in SB 95 have been filed. Where such challenges have been preliminarily successful, as in the Boston Harbor case recently decided by the 1st Circuit Court of Appeals, the error most commonly cited by the Courts involved the public employer's failure to retain control over the "means, manner and standards of performance" of employees working on projects covered by such agreements. We have thus shored-up this potential problem by insuring the requisite involvement by

the State with the language that appears at lines 6-8.

(9-11) The NRLA like SB 95 excludes certain activities including manufacturing from its coverage. SB 95, however, goes on to provide additional exemptions for more typical Alaskan industries like fishing, agriculture, logging, timber and shipping. All these exemptions do, however, is to narrow the application of SB 95 to the construction industry only. SB 95 will apply only to construction projects built by the State directly as an employer of construction industry employees, or to projects built for the State by contractors and subcontractors utilizing State funds appropriated for such construction.

(12-14) The language at subsection (f) again parallels the NLRA. It merely provides that execution of the kind of "pre-hire" or project labor agreements contemplated by SB 95 is not intended to prevent any group of employees from exercising their right to vote on the question of union representation. Such elections are currently provided for under AS 23.40.100; hence, the reference at lines 13 and 14. Likewise under the NLRA, pre-hire or project agree

ments authorized under Sections 8(e) and 8(f), do not bar elections as provided for under §9 of the NLRA, as follows:

> Provided further, that ... shall not be a bar to a petition filed pursuant to Section 9(c) or 9(e) ...

(15-16) The language of the NLRA on this point is nearly identical to that provided for by SB 95. Subsection (g) provides that the agreements authorized by SB 95 are not prohibited by AS 45.50.562 - 45.50.596 dealing with prohibitions against Monopolies and Restraints of Trade. In a certain sense, it merely clarifies AS 45.50.572(a) which already exempts the activities of labor organizations from coverage as follows:

> AS 45.50.562 - 45.50.596 do not forbid the existence or operation of labor ... organizations ... from lawfully carrying out the legitimate objectives of them ...

AS 45.50.572(b) already exempts actions or arrangements authorized

> ... under the laws of the United States which exempt these actions or arrangements from application of the anti-trust laws ...

To the extent such contracts as provided for under SB 95 might be "required" by a state regulatory

agency, they are again already exempt from the State's anti-trust prohibitions under AS 45.50.572(g);

> AS 45.50.562 - 45.50.596 do not forbid activities expressed required by a regulatory agency of the state ... if the regulatory agency has given due consideration to the possible anti-competitive effects ...

(17-18) Like the above reference, subsection (h) exempts the agreements provided for under SB 95 from the application of AS 36.30 et. seq., also referred to as the State Procurement Code. Competitive bidding requirements would thus not necessarily apply to pre-hire or project labor agreements. That is not to say that job awards would go to the other than the low bidder. It merely means that in considering which of several bids would be both low and qualified, the State would be able to legally preference those contractors who had executed agreements to secure their employees from appropriate geographical or "area preference based" union hiring halls.

(19-20) Section 2 of SB 95 adds new language to AS 23.30.850(b) which now lists those contracts specifically exempt from coverage under the Procurement Code. The new language adds a 23rd exemption for

LINE NO., PAGE 2

"agreements entered into" under SB 95.

(21-24) Finally, Section 3 of SB 95 adds similar language to the current list of anti-trust exemptions provided for at AS 45.50.571 to include the agreements contemplated by SB 95.

a:\szymanski.mem

COPY

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM April 13, 1990

SUBJECT: Project labor agreements (SB 529)

TO: Senator Pat Rodey

FROM: Teresa B. Cramer
Legislative Counsel

You have requested additional comments on the contracting and hiring procedures proposed for public construction projects.

Your office has provided me with a copy of a memorandum from Carolyn E. Jones, Assistant Attorney General, in which Ms. Jones suggests that the state procurement code currently bars a state agency from requiring bidders to hire its labor force from a single source. She also suggests that the arrangement is vulnerable to constitutional attack. I would agree with both of these conclusions.

It would be possible to amend the procurement code so that specifications for public construction contracts could include a project labor agreement. SB 529 addresses the state's power as an employer to enter into a prehire agreement on its own behalf. It does not address the state's ability to enter into public construction contracts that require private contractors to secure their workers from a particular union. To do so, an amendment to AS 36.30.060, to permit agencies to include prehire agreements in the specifications for bids for public construction contracts, would be advisable.

The specifications for state contracts constitute state action and provide a basis for challenging the legislation. A bidder who did not use union labor or preferred to secure union labor through a local not included in the specifications could challenge the inclusion of the requirement in the bid specifications as a denial of equal protection. The state could point to the policy favoring collective bargaining for support of the bid specification requirement, but could not

SB 529

justify, on the basis of resident hire, its choice of a union that included a resident hire policy over one that did not. In Robison v. Francis, 713 P.2d 259 (Alaska 1986), the court held that excluding nonresidents from public construction jobs so that more jobs would be available to state residents was not a permissible justification for discrimination under the privileges and immunities clause. Ms. Antel suggested that Image Carrier Corp. v. Beame, 567 F.2d 1197 (1977), offered some hope on the constitutional issues raised by the proposed contracting provisions. The case arose from a New York City resolution requiring that certain city forms be printed by union shops. Nonunion printing shops challenged the requirement as a denial of equal protection. The court held that the requirement imposed economic regulation only. The state policy in favor of collective bargaining provided a rational basis for the resolution. The dissent argued that the city, as trustee of the people, must conserve public funds and therefore found the union shop only policy as unreasonable and unrelated to qualifications for the job to be performed.

A challenge to the project labor agreements that are the basis for SB 529 would almost certainly include Privileges and Immunities and right to travel issues as well as equal protection claims. The Alaska courts have found the state's justifications for resident hire and local hire statutory requirements unpersuasive in recent years. It seems likely that if the court reaches the constitutional issues, the resident hire requirements would fall. However, a contractor's standing to raise the constitutional claims of a nonresident construction worker could be challenged and, as Ms. Antel points out, a nonresident's standing to assert claims against the state is also attenuated by the removal of the residence discrimination to the union.

If I may be of further assistance, please advise.

TBC:lmb
L10/066

March 14, 1991

Drue -

These are the cases Helene Brooks was referring to in last nights hearing. I thought we already had copies but a review of my files proved me wrong. Rodey's office had never distributed.

I have given copy to each committee member.

Rod

Put in bill file

Alaska State Legislature

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SENATE LABOR AND COMMERCE COMMITTEE

TO: Members
Senate Labor & Commerce Committee

FROM: Rod R. Mourant, Legislative Aide
Senate Labor & Commerce Committee

RE: Senate 95

Date: March 14, 1991

Enclosed are copies of the court rulings and legal opinions that Helene Brooks referred to during her testimony on SB 95 in the March 13th committee hearing.

either part of the *Toomer* test.[50] First, the state failed to present a substantial justification for its discrimination. Alaska had not shown that nonresidents were a "peculiar source" of the state's high unemployment. In fact, many Alaska residents were jobless because they were not qualified for available employment.[51] Second, the state had failed to prove that the act was sufficiently narrow in scope.[52] The act, which granted an across-the-board preference for all jobs and all residents, regardless of training or employment status, was grossly overinclusive.[53]

The Court also refuted the state's claim of immunity from the strictures of the privileges and immunities clause based on the natural resources exception.[54] The Court noted that a state's proprietary connection to the discrimination may warrant consideration, but held that Alaska's attenuated proprietary interest in the contracts regulated by Alaska Hire could not justify the resulting discrimination.[55] According to the Court, the Act "[was] an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the state's residents."[56]

The Court next applied privileges and immunities analysis to a local hire law in *United Building & Construction Trades Council v. Mayor of Camden*.[57] *Camden* involved a municipal law that required forty percent of all employees of contractors and subcontractors on city projects to be Camden residents.[58] The proposed justification presented by the city was that the law was enacted to alleviate economic blight and to halt the resulting exodus of Camden's residents.[59]

Although the case applies a privileges and immunities analysis to a municipal law,[60] the Court's opinion is applicable to state laws in

50. *Id.* at 526-27 (footnote omitted).

51. *Id.*

52. *Id.* at 527-28.

53. *Id.*

54. *Id.* at 528.

55. *Id.* at 529.

56. *Id.* The Court noted that the only limit on the scope of Alaska Hire was that the activity to which the statute was applied take place within Alaska. *Id.* at 531.

57. 465 U.S. 208 (1984).

58. The Camden ordinance, adopted as part of a statewide affirmative action program, required that contractors on public works projects attempt to employ Camden residents and always have Camden residents comprising at least 40% of workers. *Id.* at 211.

59. *Id.* at 222.

60. *Id.* at 216-18. The Court held that the Camden ordinance was not exempt from privileges and immunities clause review at the challenge of out-of-state residents merely because some in-state residents were similarly affected by the ordinance. *Id.* at 217-18.

several respects. The Court held the right to employment with private contractors on public works projects to be fundamental.[61] The Court also outlined the appropriate framework for evaluating the constitutionality of the statute, the *Toomer* test refined in *Hicklin* ("the *Toomer-Hicklin* test").[62] However, due to a sparsity of evidence, the Court declined to apply the test.[63] Instead, the Court remanded the case for evaluation under the articulated standards.[64]

Camden shows that the Court is retreating from the hard line it took against local hire laws in *Hicklin*. The Court made several notable points that could work in favor of a state attempting to defend a local hire law. First, the Court held that any analysis under the privileges and immunities clause must "be conducted with due regard for the principle that states should have considerable leeway in analyzing local evils and in prescribing appropriate cures."[65] Second, noting Camden's proprietary interest in the jobs at issue, the Court stated that granting leeway was especially important when a government practiced discrimination as a condition of its own spending.[66] The Court distinguished its rejection of the proprietary interest asserted in *Hicklin*,[67] which it had held to be too attenuated to justify Alaska's discrimination. The Camden ordinance, by contrast, did not have the "ripple effect" that proved fatal to the Alaska law.[68] "It [the Camden ordinance] is limited in scope to employees working directly on city public works projects," the Court noted.[69] As the preceding discussion shows, the *Camden* Court apparently recognized the importance of the mitigating factors it had rejected under the *Hicklin* facts. Unfortunately, due to the lack of evidence before the Court, it could not apply these factors to the local hire law in controversy.[70]

61. *Id.* at 219.

62. *See supra* notes 50-53 and accompanying text.

63. *Camden*, 465 U.S. at 223. No trial had been held in the case. The Supreme Court of New Jersey had certified the case for direct appeal after brief administrative proceedings pertaining to the state treasurer's approval of the law. *Id.*

64. *Id.*

65. *Id.* at 222-23 (quoting Toomer v. Witsell, 334 U.S. 385, 396 (1948)).

66. *Id.* at 223.

67. *See supra* notes 59-60 and accompanying text.

68. United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 223 (1984).

69. *Id.*

70. One group of commentators interprets the *Camden* ruling as clearly favorable to states attempting to uphold local hire laws. *See* 1 R. ROTUNDA, J. NOWAK, & J. YOUNG, *supra* note 23, § 12-7, at 658. The authors state that *Camden*'s reference to other cases upholding restrictions on public employment against equal protection and commerce clause claims indicates that the Court is unlikely to invalidate city or state residency requirements for public employment under the privileges and immunities clause. *Id.*

III. State Court Interpretations of Local Hire Laws

A. *State v. Antonich*: Wyoming Preference Act Upheld

Wyoming is the only state in which a highest state court has held a local hire law constitutional in the wake of *Camden*. The case that tested the Wyoming law, *State v. Antonich*,[71] stemmed from the criminal prosecution of construction company superintendent Roger Antonich.[72] The state charged Antonich with violating the Wyoming Preference Act,[73] which gives a complete preference to qualified Wyoming residents for employment on public works projects and provides misdemeanor penalties for supervisors who flout the law.[74] The prosecutor alleged that Antonich fired a Wyoming worker from a public construction project in order to hire nonresident workers.[75] The county court dismissed the charge on the ground that the statute violated the privileges and immunities clause. The Wyoming Supreme Court reversed and found that the statute satisfied the *Toomer-Hicklin* test.[76]

As a threshold matter, the state conceded that the Wyoming Preference Act burdened a fundamental right, the right of a nonresident to work on a public construction project,[77] and therefore fell within the purview of the privileges and immunities clause. The evil that the Act was intended to combat was ". . . a resident remaining unemployed while a nonresident takes a job on a Wyoming public works project."[78] The court found that "without question" reduction in unemployment is a valid state goal.[79] Conceding that other states' local hire laws have usually not survived privileges and immunities scrutiny, the court explained several factors distinguishing the Wyoming statute

71. 694 P.2d 60 (Wyo. 1985).

72. *Id.* at 61.

73. Wyo. Stat. §§ 16-6-201 to -206 (1977). The Act provides:

> Every person who is charged with the duty of construction, reconstructing, improving, enlarging, altering or repairing any public works project or improvement for the state or any political subdivision . . . shall employ only Wyoming laborers on the project or improvement. Every contract let by any person shall contain a provision requiring that Wyoming labor be used except other laborers may be used when Wyoming laborers are not available for the employment from within the state or are not qualified to perform the work involved.

Id. § 16-6-203 (1977).

74. *Id.* § 16-6-206 (1977).

75. *Antonich*, 694 P.2d at 61.

76. *Id.* at 64.

77. *Id.* at 62.

78. *Id.* (citation omitted).

79. *Id.*

and contrasted the Wyoming law with the Alaska Hire statute stricken in *Hicklin*.[80]

The court described several features that narrow the scope of the Wyoming Preference Act. First, the Act does not attempt to eliminate general unemployment. Instead, it applies only to nonresident applicants for public works construction jobs.[81] Second, the statute limits demands on employers, merely requiring an employer to deny nonresidents employment when the state can provide qualified residents to meet its needs.[82] Finally, the statute applies only to projects in which the state has a proprietary interest.[83] The court concluded that the Act was constitutional because it narrowly addressed the goal of reducing unemployment and because the degree of discrimination "bears a close relation to the state's valid reasons for discriminatory treatment."[84]

Gaps exist in the *Antonich* court's reasoning. The *Toomer-Hicklin* test requires (1) that nonresidents constitute a peculiar source of the evil at which the statute is aimed, and (2) that the discrimination be no greater than necessary. The *Antonich* court's opinion, however, lacks analysis of either of these issues.

Nonresidents may in fact cause unemployment in Wyoming. In 1985, the state ranked fourth highest in percentage of unemployment benefits paid interstate.[85] This factor may indicate a high percentage of nonresidents working in Wyoming.[86] The combination of these factors indicates that Wyoming has an unemployment problem that may be caused by nonresidents. The court should have considered such factors in its opinion rather than assuming that a causal relationship existed between nonresident laborers and unemployment.[87]

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80. *Id.* at 64. The court stated:

> The Wyoming statute at issue in the present case requires merely that governmental funds, allocated to public works projects, be used to hire qualified, available residents in preference to nonresidents. The statute does not effect the sort of wide-ranging discriminatory treatment fatal to Alaska Hire in *Hicklin v. Orbeck.*

Id. at 63.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 64.

85. LABOR REPORT, *supra* note 3, at 19.

86. *See supra* note 5.

87. State v. Antonich, 694 P.2d 60, 64 (Wyo. 1985) (Thomas, C.J., concurring). Chief Justice Thomas stated:

> I have a concern about the adequacy of the record to support the nexus between the evil of "a qualified Wyoming worker's remaining unemployed

The concurrence in *Antonich* points out a second flaw in the majority's analysis. Although the majority finds that the statute's narrowing features allowed it to pass the second prong of the *Toomer-Hicklin* test, the concurrence disagreed with this holding.[88] The concurrence notes that the preference granted by the statute is not limited to those who are unemployed. Any Wyoming resident who is qualified and available for work receives a preference.[89] A statute granting employed residents a preference to the detriment of nonresidents is overbroad for its stated purposes of reducing unemployment.

In sum, *Antonich* demonstrates that a local hire statute can pass judicial scrutiny. However, the court apparently applied the *Toomer-Hicklin* test perfunctorily. Although it is possible that the Wyoming statute could have passed constitutional muster, the *Antonich* opinion does not prove that the statute *should* have survived.

B. Cases Striking Local Hire Laws

State and federal courts outside Alaska have held local hire laws unconstitutional as violative of the privileges and immunities clause. Perhaps the most restrictive interpretation of the constitutionality of a local hire law derives from a 1984 advisory opinion of the Supreme Judicial Court of Massachusetts to the Massachusetts Senate.[90] The Massachusetts court analyzed a proposed bill that would require private contractors on state-funded projects in areas with high unemployment to employ Massachusetts residents in at least eighty percent of all jobs covered by the contract.[91]

In its analysis of the bill, the Supreme Judicial Court of Massachusetts observed initially that the bill would burden a fundamental right.[92] The court then found that the bill failed both prongs of the *Toomer-Hicklin* test. Noting that it had no records with which to work, the court assumed arguendo that nonresidents were a peculiar

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while a nonresident goes to work on a government-funded construction project" and the statute in question. I agree that that is a possibility, but the record does not demonstrate it.

Id.

88. *Id.*

89. *Id.* Unfortunately, the concurring opinion provides merely an unworkable alternative. The concurrence relies upon the state's proprietary interest in the projects to find that the statute does not violate the privileges and immunities clause. The concurrence seems to stipulate that because the state is participating in the marketplace its actions are immune from privileges and immunities clause scrutiny. *Id.* at 65. The United States Supreme Court, however, has rejected that argument. *See supra* note 24.

90. Opinion of the Justices to the Senate, 393 Mass. 1201, 469 N.E.2d 821 (1984).

91. *Id.* at 1201-02, 469 N.E.2d at 822.

92. *Id.* at 1203, 469 N.E.2d at 823.

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January 14, 1988

Mr. Ray Metcalfe
Metcalf Investments Inc.
PO Box 4-2766
Anchorage AK 99509

Re: An Act limiting the period of employment in remote locations.

Dear Ray:

I have reviewed your proposed statute limiting the period of time that a person may work in remote locations. This proposed legislation avoids a major legal problem in past resident hire legislation. It has long been held that the states have the legislative power to regulate hours, wages and conditions of employment. See, e.g., West Coast Hotel v. Parrish, 300 U.S. 379 (1937). Past efforts of the state to impose residency requirements have been challenged successfully under the Privileges and Immunities Clause of Article IV of the U.S. Constitution. Hicklin v. Orbeck, 437 U.S. 518 (1978); Robison v. Francis, 713 P.2d 259 (Alaska 1986). However, a successful privileges and immunities challenge would be very difficult if the legislation does not explicitly discriminate between residents of Alaska and non-residents, especially where the proposed legislation has as its primary purpose the regulation of safety and the conditions of working in remote locations. This proposed legislation would have the incidental impact of making it more convenient to live in Alaska. However, it would be very difficult to attack in court, especially if it can be shown that persons who work for long periods of time in remote locations, such as the North Slope, are less efficient, observant, or have more accidents. The purpose of avoiding the long separation of families may also be a neutral, non-discriminatory purpose that would support such a statute. As long as there is some evidence to support this proposition, the legislature or the people through initiative would have a great deal of discretion in regulating hours and working conditions.

Your proposed legislation would be much less vulnerable to the challenges which have been successful in the Hicklin and Francis cases.

Yours truly,

Ron Zobel

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 4

To Max Gilford	From Helene Brooks
Co.	Co.
Dept.	Phone #
Fax # 465-4428	Fax # 276-1963

Max:
This may address T. Atamer's concerns at least partially.
Helene

For an Act entitled: An Act limiting the period of employment in remote locations.

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

*Section 1. AS18.60. is amended by adding a new section to read:

Sec. 18.60.061. **DECLARATION OF HAZARD.** Employment remote locations for excessive periods of time imposes a substantial burden upon, and a hindrance to the people the state in terms of lost production, lost wages, medical expenses, increased insurance costs, disibility compensation payments, and physical and mental health problems, and social problems including drug and alcohol abuse, family discord and domestic violence.

*Section 2. AS18.60 is amended by adding a new section to read:
Sec. 18.60.062. **LIMITATION ON PERIOD OF EMPLOYMENT IN REMOTE LOCATIONS.** (a) A person may not work at a remote location for more than seven days in fourteen days, excluding time going to or from the job location.

(b) It is the purpose of this section to limit the days of work in a fourteen day period to seven days of work at remote location(s) regardless of the type of duties or number of employers.

(c) In casse of emergency, where life or property is in imminent danger, the period of work may be extended during the continuance of the emergency.

(d). Workers in remote locations shall be transported to non-remote locations, or their domicile in another remote location, during the seven day period that they are not working.

(e). This section does not apply to:

(1) Persons who are domiciled at the remote location, and maintain a dwelling unit at the remote location that is not directly related to their employment at the remote location, and who do not occupy employee housing accomodations during the period of work. For the purpose of this subsection employee housing accomodations are accomodations that are not in the ordinary course of business regularly provided on a commercial basis to the general public. Employee housing accomodations shall not be brought within this exception simply by offering lodging to the general public.

(2) Persons who are employed for a period or periods of not more than four work-weeks in the aggregate in any calandar year in an industry found by the Commissioner to be of a seasonal nature.

*Section 3. AS18.60.105 is amended by adding a new subsection to read:

(c) In AS18.60.061 and AS18.60.062 "remote location" means a location in which the domiciliarys of that location are qualified to harvest fish and game on a subsistence basis under state or federal law or regulation.

United States Government

NATIONAL LABOR RELATIONS BOARD

Region 19 - Resident Office

222 West 7th Ave - No. 21

Anchorage, AK 99513-0076

(907)
271-5015

February 26, 1991

Alaska Utility Construction, Inc.
101 E. Swanson
Wasilla, Alaska 99687

Re: I.B.E.W. Local 1547
Homer Electric Association
Case No. 19-CE-92

Gentlemen:

The above-captioned case charging violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that further proceedings are not warranted at this time. I am, therefore, refusing to issue Complaint in this matter. A written summary report of the basis for my conclusions is attached.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, 1717 Pennsylvania Avenue N.W., Washington, D.C. 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C. by the close of business on March 12, 1991. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washinton, D.C. and a copy of any such request should be submitted to me.

Re: Local 1547 I.B.E.W./Homer Electric Association
Case No. 19-CE-92
and
Local 1547 I.B.E.W./Chugach Electric Association
Case No. 19-CE-93

SUMMARY REPORT

Both charges alleges that I.B.E.W. Local 1547 and each of the above Employers have violated Secion 8(e) of the Act by entering into collective bargaining agreements or Letters of Understanding which provide that certain work may only be contracted or subcontracted to firms which are signatory to agreements with I.B.E.W. Local 1547.

The investigation established that I.B.E.W. Local 1547 and Homer Electric Association have in effect a Letter of Understanding which provides that only contractors signatory to agreements with I.B.E.W. Local 1547 may perform work normally performed by HEA bargaining unit employees on construction projects. I.B.E.W. Local 1547 and Chugach Electric Association have contractual provisions within separate agreements covering outside employees and generation plant employees which provide that work involving new construction performed at job sites may only be contracted or subcontracted to firms in agreement with I.B.E.W. Local 1547.

The investigation established that the agreements between I.B.E.W. Local 1547 and both Homer Electric and Chugach Electric are secondary in effect and thus within the ambit of Section 8(e) of the Act. However, the investigation also established that the agreements with HEA and CEA are permissible within the construction industry proviso of Section 8(e). In this regard, it was clear that the work covered by the agreements with both HEA and CEA is limited to construction work normally performed by HEA or CEA employees represented by I.B.E.W. Local 1547, that HEA and CEA are functioning as construction contractors with regard to that work, and that the agreements prohibit any economic pressure or threats thereof in the event of disputes. Rather, expedited arbitration is the sole permissible means of dispute resolution.

It was concluded, therefore, that the agreements between I.B.E.W. Local 1547 and both HEA and CEA are not violative of Section 8(e) of the Act. Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616, 633 (1975), Woelke & Romero Framing Co., 456 U. S. 645 (1982), A. L. Adams Construction v. Georgia Power Company, 733 F2d 853 (11th Cir, 1984).

Accordingly further proceedings are not warranted.

If you file an appeal, please complete the Form NLRB-4767, Notice of Appeal, enclosed with this letter and send one copy of the form to each of the other parties whose names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with me within the time stated above.

Sincerely,

John D. Nelson
Regional Director

By: _____
Robert H. Wettleson
Resident Officer

Enclosures

Certified Mail No P 545 870 960
Return Receipt Requested

cc: General Counsel, Attn: Office of Appeals, National Labor Relations Board, 1717 Pennsylvania Avenue N.W., Washington, D.C. 20570

National Labor Relations Board, 2948 Federal Building, 915 Second Avenue, Seattle, Washington 98174

National Labor Relations Board, 222 W. 7th Avenue, #21, Anchorage, Alaska 99513

✓ I.B.E.W. Local 1547, Attn: Helene Antel, General Counsel 2702 Denali Street, Anchorage, Alaska 99503

Richard R. Huffman, Attorney, KEMPPEL, HUFFMAN, & GINDER, 255 E. Fireweed Lane, Suite 200, Anchorage, Alaska 99503

Homer Electric Association, 3977 Lake Street, Homer, Alaska 99603

GENE
KULAWIK
276-6281 W
277-7892 H
NEXT TIME SB95

STEVE BURRELL
AIC MINERS
FAX 278-7597
SB 95

DON RAPP
345-2266
SB 95

MARK HICKEY
RL

BOB WARD
A & C

ANN WILLIAMS
MUNI ANCH

SB 95
JIM OTTENHOFFER
OIL FIELD SVCS.
344-1577

FB 15

OS -

Transparency

<u>Plus</u>

(1) Assume that it only applies to property using the <u>total</u> <u>state</u> + local function f — not <u>[illegible]</u>

(2) [illegible] ~~[illegible]~~ — only [illegible] appr[illegible] [illegible]

[illegible] →

Elason said he would offer amend. which would sunset the ~~bill~~ authority to deploy in 2 years —

[illegible] make sure his staff was drafted but didn't tell anyone about it.

I want to move it on 4/3.

March 28, 1991

Drue:

RE: SB 95

Thought I would mention that Shiela Peterson in Eliason's office is having sunset drafted. She also mentioned that she thought Dick said the project size limit was going to be greater than $10,000,000 rather than $7,000,000.

Also, spoke with Terry Cramer about "state and local funds" vs stae or local funds. She consulted the revisor of statutes who indicate "and" covers "and/or".

Rod

PAT THOUGHT 10 TOO HIGH
WE COULD LIVE WITH 7.5

JHELAND

JMIKE

March 19, 1991

Drue -

Re: SB95

Carol Vandort from Leg Research called. She was having trouble with our research task of finding examples of project specific labor agreements.

She spoke with Dick Fox, Executive Director, Mass. Water Resource Authority. They managed the Boston Harbor cleanup. When they released their RFP it did include union hire and working condition specification. The bid went to Kaiser, a GC type project mgmt firm. The catch on that project is that the Mass Water Resource Authority is not a public employer under Mass state law.

Carl Uhlien, an attorney with Morgan, Lewis & Bockius in DC is considered the national expert on the exemptions that exist in the Nation Labor Relations Act. He drafted the language that covered the pipeline construction. If you would like, I could call him. (202-467-7075)

Rod

As I understand, neither is the power authority in Kentucky they referred to according to Halford

SB 95 OUTSTANDING ITEMS

1) AEA fiscal note, position paper & testimony.

2) AIDEA fiscal note.

3) Definition of "maintenance" - Helene Brooks/Mike Szymanski.

4) Definition of employee/employer relationship - Cummings/Strasbaugh.

5) University position & fiscal note.

6) Railroad position & fiscal note.

3/13 Hearing

February 27, 1991

Drue -

Re: SB 95

I spoke with Terry Cramer of Leg Legal about the exclusion provisions on pg 2, sec 2. Terry was the bill drafter.

She believes it provides for the agreement to exclude a firm or product from the project for any reason. She, for instance, could see all non-union employers being excluded through agreement from a project.

That doesn't mean to say that such a clause would be constitutional under equal protection provisions, but rather, that it could occur. It could be subsequently challenged in court.

Rod

Have language drafted that only does what Helene intended.

ACTUAL REASON IS ONLY TO ALLOW PROJECT SPECIFIC LABOR AGREEMENTS TO BE HONORED

SB 95

Senate Bill 529, an act relating to exemptions to the prohibition against unfair labor practices, was introduced by the Senate Labor & Commerce Committee by request last year.

Senate Bill 95, an act relating to agreements between a labor organization and a public employer, embraces many of the provisions of last year's SB 529 but deletes provisions calling for mandatory union membership as a condition for continued employment.

SB 95 provides the vehicle for project specific labor agreements for publicly funded projects.

SB 95 Points of Interest

1. Section 1. (e) Allows for unions to negotiate with the public employer to exclude certain employers, contractors, subcontractors or persons from handling, using, selling, transporting or providing services.

2. The exclusion possibility in Section 1 (e) only applies to construction projects.

3. Section 1. (h) exempts project specific labor agreements from the state procurement code.

4. Section 2. exempts the entire project specific labor agreement process from the state procurement code.

5. Section 3. exempts project specific labor agreements from statutes governing monopolies, restraint of trade and unfair labor practice provisions.

6. The administration is unclear about who and under what circumstances such labor agreements would be negotiated.

7. The administration is unclear as to whether provisions in Section 1. allows non-state employees to become state employees under such an agreement or become eligible for state retirement and health benefits.

8. SINCE JUDGEMENT OF QUALIFICATION AND REFERRAL WILL BE CONDUCTED BY THE HIRING HALL, WHAT GUARANTEE IS THERE THAT STANDARDS WILL BE APPLIED TO MEMBERS AND NON-MEMBERS EQUALLY

SB 95 Points of Interest

1. Section 1. (e) Allows for unions to negotiate certain exclusion of suppliers or manufacturers from the specific project.

? what does this mean?

2. The exclusion possibility in Section 1(e) does not apply to projects of fishing, maritime, agricultural, logging, timber industry, and apparel & clothing industries.

3. Section 1. (h) exempts project specific labor agreements from the state procurement code.

4. Section 2. exempts the entire project specific labor agreement process from the state procurement code.

5. Section 3. exempts project specific labor agreements from statutes governing monopolies, restraint of trade and unfair labor practices.

Put in my bill file.

UNION CAN NEGOTIATE FOR EMPLOYER TO CEASE OR REFRAIN FROM HANDLING, USING, SELLING, TRANSPORTING OR DOING BUSINESS WITH ANOTHER EMPLOYER, CONTRACTOR, SUBCONTRACTOR OR PERSON.

ie., IF THE UNION DOESN'T LIKE YOU, FOR WHATEVER REASON, THEY CAN NEGOTIATE TO EXCLUDE YOU FROM THE PROJECT.

TELECOPY COVER SHEET

SENATOR DRUE PEARCE'S OFFICE

VOICE **(907) 465-4993** *FAX* **(907) 463-5352**

To: LABOR RELATIONS *Fax:* 465-2269

Attn: BRUCE CUMMINGS *Phone:* _____

Transmitted by: ROD MOUGANT *Date:* 4/3/91

Re: SB 95

Comments: HERE IS CS THAT WILL BE HEARD TODAY. THINK THERE MIGHT BE AN OTHER AMENDMENT. SHOULD MOVE OUT TODAY

ROD

Number of Pages: 4 *Including Cover Sheet.*

TELECOPY COVER SHEET

SENATOR DRUE PEARCE'S OFFICE

VOICE **(907) 465-4993** *FAX* **(907) 463-5352**

To: RAY LATCHEM *Fax:* 522-5224

Attn: _____ *Phone:* _____

Transmitted by: ROD MOURANT *Date:* 3/22/91

Re: SB 95

Comments: HERE IS VERSION CURRENTLY UNDER CONSIDERATION. MY UNDERSTANDING IS THAT SENATOR RODEY WILL BE PRESENTING A NEW VERSION. I DON'T KNOW WHAT CHANGES WILL BE MADE BUT WILL SEND YOU A COPY WHEN AVAILABLE

Rod

Number of Pages: 4 *Including Cover Sheet.*

TELECOPY COVER SHEET

SENATOR DRUE PEARCE'S OFFICE

VOICE **(907) 465-4993** *FAX* **(907) 463-5352**

To: AMA *Fax:* 278-1997

Attn: STEVE BURRELL *Phone:*

Transmitted by: ROD MOURANT *Date:* 3/22/91

Re: SB 95

Comments: PER YOUR REQUEST, HERE IS COPY OF SB 95. I WILL ADD YOUR NAME TO THE LIST OF PEOPLE TO NOTIFY WHEN THE BILL IS NEXT SCHEDULED TO BE HEARD.

Rod

Number of Pages: 4 *Including Cover Sheet.*

TELECOPY COVER SHEET

SENATOR DRUE PEARCE'S OFFICE

Office Phone (907) 465-4993 FAX (907) 463-5352

TO: HELENE BROOKS Fax: 276-1963

Phone: _____

ATTN: _____

TRANSMITTED BY: ROD MOURANT

DATE: 3/8/91

RE: SB 95

COMMENTS: THIS IS PROPOSED "EXCLUSION" AMENDMENT. DOES IT DO WHAT WE DISCUSSED?

NUMBER OF PAGES: 2 (INCLUDING cover sheet)

TELECOPY COVER SHEET

SENATOR DRUE PEARCE'S OFFICE

Office Phone (907) 465-4993 FAX (907) 463-5352

TO: LEG LEGAL SOCS Fax: 465-2029

Phone: 465-3867

ATTN: TERRY CRAMER

TRANSMITTED BY: ROD MOURANT

DATE: 3/8/91

RE: SB 55 AMENDMENT

COMMENTS: PLEASE ADVISE LEGAL INTERPRETATION DIFFERENCES IN VERSIONS

NUMBER OF PAGES: 2 (INCLUDING cover sheet)

TELECOPY COVER SHEET

SENATOR DRUE PEARCE'S OFFICE

Office Phone (907) 465-4993 FAX (907) 463-5352

TO: LABOR RELATIONS Fax: 2269

Phone: 4404

ATTN: BRUCE CUMMINGS

TRANSMITTED BY: ROD MOURANT

DATE: 3/5/91

RE: SB 95

COMMENTS: THOUGHT YOU MIGHT WANT TO SEE THIS PROPOSED CS BEFORE TOMORROW'S MEETING.

NUMBER OF PAGES: 4 (**INCLUDING** cover sheet)

7-LS0319\M.1
Cramer
04/03/91

AMENDMENT

OFFERED IN THE SENATE BY SENATOR ELIASON

TO: CSSB 95(L&C) 7-LS0319\M dated 3/27/91

Page 1, line 2, following "agreements":

Insert "; and providing for an effective date"

Page 1, after line 8:

Insert a new bill section to read:

"* **Sec. 2.** AS 23.05.380 is repealed and reenacted to read:

Sec. 23.05.380. REGULATIONS. The agency shall adopt regulations under the Administrative Procedure Act (AS 44.62) to carry out labor relations functions under AS 23.05.360 - 23.05.390, AS 23.40.070 - 23.40.260, and AS 42.40.730 - 42.40.890. "

Renumber the following bill sections accordingly.

Page 3, after line 24:

Insert new bill sections to read:

"* **Sec. 6.** AS 36.30.850(b)(23), AS 36.90 150, and AS 45.50.572(j) are repealed January 1, 1995.

* **Sec. 7.** Section 2 of this Act takes effect January 1, 1995."

7-LS0319\D.2
Cramer
03/18/91

AMENDMENT

OFFERED IN THE SENATE BY SENATOR RODEY

TO: CSSB 95 ( ) DATED 2/28/91

Page 2, line 4, after "29 U.S.C. 159.":

Insert "However, they may not enter into a project labor agreement to cover work currently or traditionally performed by employees of the state or political subdivision or work covered under a current collective bargaining agreement between the state or political subdivision and a labor organization representing employees of the state or political subdivision unless both the state or political subdivision and the labor organization representing the employees consents to coverage of that work in the project labor agreement."

VALRSCO

CONCRD

7-LS0319\D.1
Cramer
03/11/91

AMENDMENT

OFFERED IN THE SENATE BY SENATOR PEARCE

TO: CSSB 95( )

Page 2, lines 17 - 21:

Delete all material.

Insert a new paragraph to read:

"(3) require the state or a political subdivision of the state to require a contractor, subcontractor, or other person involved in the project to only do business, including the handling, using, selling, and transporting of goods, and the employment of construction industry employees, with other contractors, subcontractors, or persons who qualify under and are in compliance with the terms of the agreement."

M E M O

DATE: March 8, 1991

TO: Rod Mourant
Legislative Assistant
Senator Drue Pearce's Office

FROM: Helene M. Antel, General Counsel
International Brotherhood of Electrical Worker's

SUBJECT: SB 95

"CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION"

****

You're right; but, the version that was sent to you was not properly edited. Please see the attached corrected copy. Is this any better?

HMA/rrw

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 2

To Rod Mourant	From Helene Brooks
Co.	Co.
Dept.	Phone #
Fax # 463-5352	Fax # 276-1463

a:\mourant2.mem

AMENDMENT

OFFERED IN THE SENATE BY SENATOR PEARCE
TO: CSSB 95 ( ) dated 2/28/91

Page 2, lines 17 - 21:

Delete all material.

Insert a new paragraph to read:

(3) require a contractor, subcontractor or other person to do business, including the handling, using, selling, and transporting of goods, or the employment of construction industry employees, only with contractors, subcontractors or other persons who comply with the terms of the agreement.

a:SB95.amd

AMENDMENT TO SB 95
Rod Mourant, Legislative Assistant
to Senator Drue Pearce

M E M O

DATE: March 8, 1991

TO: Rod Mourant
Legislative Assistant
Senator Drue Pearce's Office

FROM: Helene M. Antel, General Counsel
International Brotherhood of Electrical Worker's

SUBJECT: SB 95

"CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION"

****

I believe our intent is the same but I would feel more comfortable with the attached language. In fact, your suggestion makes a significant improvement in the bill.

HMA/rrw

e:\mourant.mem

Fax: 463-5352

AMENDMENT

OFFERED IN THE SENATE BY SENATOR PEARCE
TO: CSSB 95 ( ) dated 2/28/91

Page 2, lines 17 - 21:

Delete all material.

Insert a new paragraph to read:

(3) require a contractor, subcontractor or other person to do business, including the handling, using, selling, and transporting of goods, or the employment of construction industry employees, persons who qualify under only with other contractors, subcontractor or are in compliance with the terms of the agreement.

a:SB95.amd

AMENDMENT TO SB 95
Rod Mourant, Legislative Assistant
to Senator Drue Pearce

DRAFT

7-LS0319\D.1
Cramer
03/07/91

AMENDMENT

OFFERED IN THE SENATE BY SENATOR PEARCE

TO: CSSB 95( ) dated 2/28/91

Page 2, lines 17 - 21:

Delete all material.

Insert a new paragraph to read:

"(3) require a (contractor, subcontractor or other) ~~person covered by the agreement~~ to ~~limit the persons with whom the person or a contractor or subcontractor of the person~~ does business, including the handling, using, selling, and transporting of goods, ~~to persons~~ (only with other contractors, subcontractor or ^ and the employment of construction industry employees) who qualify under the terms of the agreement." (and are in compliance with)

AMENDMENT

OFFERRED IN THE SENATE

BY SENATOR PEARCE

TO: CSSB 95( ) dated 2/28/91

Page 2, lines 17-21:

Delete all material.

Insert a new paragraph to read:

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AMENDMENT

OFFERED IN THE SENATE

BY SENATOR PEARCE

TO: CSSB 95( ) dated 2/28/91

Bill version -

Page 2, lines 17-21 read:
"(3) require the state or a political subdivision of the state and one or more labor organizations representing employees in the building, maintenance, and construction industry to enter into an agreement concerning labor relations on a public construction project, to cease or refrain, or agree to cease or refrain, from handling, using, selling, transporting, or doing business with a contractor, subcontractor, or other person."

Terry Cramer version -

Page 2, lines 17-21:
Delete all material.

Insert a new paragraph to read:
"(3) require a person covered by the agreement to limit the persons with whom the person or a contractor or subcontractor of the person does business, including the handling, using, selling, and transporting of goods to persons who qualify under the terms of the agreement."

Helene Brooks version -

Page 2, lines 17-21:
Delete all material.

Insert a new paragraph to read:
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Helene Brooks version -

Page 2, lines 17-21:
Delete all material.

Insert a new paragraph to read:
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7-LS0319\M
Cramer
3/27/91

CS FOR SENATE BILL NO. 95 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS RODEY, Menard

A BILL

FOR AN ACT ENTITLED

"An Act permitting the state or political subdivisions of the state to enter into project labor agreements."

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

* **Section 1.** AS 23.05.380 is amended to read:

Sec. 23.05.380. REGULATIONS. The agency shall adopt regulations under the Administrative Procedure Act (AS 44.62) to carry out labor relations functions under AS 23.05.360 - 23.05.390, AS 23.40.070 - 23.40.260, AS 36.90.150, and AS 42.40.730 - 42.40.890.

* **Sec. 2.** AS 36.90 is amended by adding a new section to read:

Sec. 36.90.150. PROJECT LABOR AGREEMENTS. (a) The purpose of this section is to enable the state or a political subdivision of the state to structure labor relations at the job site of a public construction project in the interests of industrial harmony and to permit public agencies to make optimal use of their construction resources.

(b) If the public construction project meets the requirements of (c) of this section, the

New Text Underlined [DELETED TEXT BRACKETED]

state or a political subdivision of the state and a representative of one or more labor organizations representing employees in the building, maintenance, and construction industry may enter into a project labor agreement concerning labor relations on a public construction project whether or not the representative is a majority status labor organization under 29 U.S.C. 159. However, they may not enter into a project labor agreement to cover work currently or traditionally performed by employees of the state or political subdivision or work covered under a current collective bargaining agreement between the state or political subdivision and a labor organization representing employees of the state or political subdivision unless both the state or political subdivision and the labor organization representing the employees consents to coverage of that work in the project labor agreement. In addition to addressing wages, hours, and other terms and conditions of employment, the agreement may, with respect to labor relations on the project,

(1) require the state or political subdivision to require a contractor, subcontractor, or other person on the project to

(A) notify labor organizations representing building, maintenance, and construction industry employees of project employment opportunities; or

(B) accept referrals of qualified applicants from the labor organizations for project employment;

(2) provide for priority in opportunities for employment referrals based on minimum training or experience qualifications or based on length of service

(A) with the contractor, subcontractor, or other person;

(B) in the industry; or

(C) in the particular geographical area;

(3) require the state or a political subdivision of the state and one or more labor organizations representing employees in the building, maintenance, and construction industry to enter into an agreement concerning labor relations on a public construction project, to cease or refrain, or agree to cease or refrain, from handling, using, selling, transporting, or doing business with a contractor, subcontractor, or other person.

(c) This section applies to a public construction project only if

(1) the project is entirely funded by state and local funds; and

(2) the total cost of the project exceeds $7,000,000.

(d) The state or political subdivision shall retain substantial control of job site labor

relations including the means, manner, and standards of performance of all employees engaged in work or employed on projects covered by an agreement entered into under this section.

(e) If a settlement is reached at the completion of negotiations under this section, the state or political subdivision shall reduce the settlement to writing in the form of an agreement. The agreement may include a term for which it will remain in effect, not to exceed three years. However, if the specific project is expected to last longer than three years, the term may exceed three years but may not exceed the length of the project. The agreement must include a grievance procedure with binding arbitration as its final step.

(f) The labor relations agency shall adopt regulations under the Administrative Procedure Act (AS 44.62) to implement this section.

(g) Notwithstanding a project labor agreement entered into under this section, employees of the contractors and subcontractors on a public construction project are not considered employees of the state or political subdivision of the state.

(h) An agreement entered into under (b) of this section does not constitute an election under 29 U.S.C. 159.

(i) The provisions of AS 36.30 do not apply to agreements entered into under this section.

(j) An agreement entered into under this section is not prohibited under AS 45.50.562 - 45.50.596.

* **Sec. 3.** AS 36.30.850(b) is amended by adding a new paragraph to read:

(23) agreements entered into under AS 36.90.150.

* **Sec. 4.** AS 45.50.572 is amended by adding a new subsection to read:

(j) AS 45.50.562 - 45.50.596 do not prohibit agreements entered into under AS 36.90.150 between a public employer and a labor organization or representative of labor organizations.

7-LS0319\J
Cramer
3/21/91

NEW CS

CS FOR SENATE BILL NO. 95 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY

LANGUAGE added to this CS 3-21-91

Offered:
Referred:

Sponsor(s): SENATORS RODEY, Menard

A BILL

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* Sec. 2. AS 36.90 is amended by adding a new section to read:

Sec. 36.90.150. PROJECT LABOR AGREEMENTS. (a) The purpose of this section is to enable the state or a political subdivision of the state to structure labor relations at the job site of a public construction project in the interests of industrial harmony and to permit public agencies to make optimal use of their construction resources.

(b) The state or a political subdivision of the state and a representative of one or more

New Text Underlined [DELETED TEXT BRACKETED]

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(2) provide for priority in opportunities for employment referrals based on minimum training or experience qualifications or based on length of service

(A) with the contractor, subcontractor, or other person;

(B) in the industry; or

(C) in the particular geographical area;

(3) require the state or a political subdivision of the state and one or more labor organizations representing employees in the building, maintenance, and construction industry to enter into an agreement concerning labor relations on a public construction project, to cease or refrain, or agree to cease or refrain, from handling, using, selling, transporting, or doing business with a contractor, subcontractor, or other persor..

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(d) If a settlement is reached at the completion of negotiations under this section, the

state or political subdivision shall reduce the settlement to writing in the form of an agreement. The agreement may include a term for which it will remain in effect, not to exceed three years. However, if the specific project is expected to last longer than three years, the term may exceed three years but may not exceed the length of the project. The agreement must include a grievance procedure with binding arbitration as its final step.

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7-LS0319\G
Cramer
3/14/91

CS FOR SENATE BILL NO. 95 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

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Referred:

Sponsor(s): SENATORS RODEY, Menard

A BILL

FOR AN ACT ENTITLED

"An Act permitting the state or political subdivisions of the state to enter into project labor agreements."

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

* Section 1. AS 23.05.380 is amended to read:

Sec. 23.05.380. REGULATIONS. The agency shall adopt regulations under the Administrative Procedure Act (AS 44.62) to carry out labor relations functions under AS 23.05.360 - 23.05.390, AS 23.40.070 - 23.40.260, AS 36.90.150, and AS 42.40.730 - 42.40.890.

* Sec. 2. AS 36.90 is amended by adding a new section to read:

Sec. 36.90.150. PROJECT LABOR AGREEMENTS. (a) The purpose of this section is to enable the state or a political subdivision of the state to structure labor relations at the job site of a public construction project in the interests of industrial harmony and to permit public agencies to make optimal use of their construction resources.

(b) The state or a political subdivision of the state and a representative of one or more

labor organizations representing employees in the building, maintenance, and construction industry may enter into a project labor agreement concerning labor relations on a public construction project whether or not the representative is a majority status labor organization under 29 U.S.C. 159. In addition to addressing wages, hours, and other terms and conditions of employment, the agreement may, with respect to labor relations on the project,

(1) require the state or political subdivision to require a contractor, subcontractor, or other person on the project to

(A) notify labor organizations representing building, maintenance, and construction industry employees of project employment opportunities; or

(B) accept referrals of qualified applicants from the labor organizations for project employment;

(2) provide for priority in opportunities for employment referrals based on minimum training or experience qualifications or based on length of service

(A) with the contractor, subcontractor, or other person;

(B) in the industry; or

(C) in the particular geographical area;

(3) require the state or a political subdivision of the state and one or more labor organizations representing employees in the building, maintenance, and construction industry to enter into an agreement concerning labor relations on a public construction project, to cease or refrain, or agree to cease or refrain, from handling, using, selling, transporting, or doing business with a contractor, subcontractor, or other person.

(c) The state or political subdivision shall retain substantial control of job site labor relations including the means, manner, and standards of performance of all employees engaged in work or employed on projects covered by an agreement entered into under this section.

(d) In negotiating and implementing an agreement under this section, the state or political subdivision of the state and the labor organization or representative of labor organizations shall comply with the requirements for negotiating and implementing collective bargaining agreements set out in AS 23.40.070, 23.40.110 - 23.40.160, 23.40.180, 23.40.190, and 23.40.250.

(e) If a settlement is reached at the completion of negotiations under this section, the state or political subdivision shall reduce the settlement to writing in the form of an agreement. The agreement may include a term for which it will remain in effect, not to exceed three years.

However, if the specific project is expected to last longer than three years, the term may exceed three years but may not exceed the length of the project. The agreement must include a grievance procedure with binding arbitration as its final step. Either party to the agreement has a right of action to enforce the agreement by petition to the Alaska labor relations agency established in AS 23.05.360.

(f) The labor relations agency shall adopt regulations under the Administrative Procedure Act (AS 44.62) to implement this section.

(g) Notwithstanding a project labor agreement entered into under this section, employees of the contractors and subcontractors on a public construction project are not considered employees of the state or political subdivision of the state.

(h) An agreement entered into under (a) of this section does not constitute an election under 29 U.S.C. 159.

(i) The provisions of AS 36.30 do not apply to agreements entered into under this section.

(j) An agreement entered into under this section is not prohibited under AS 45.50.562 - 45.50.596.

*** Sec. 3.** AS 36.30.850(b) is amended by adding a new paragraph to read:

(23) agreements entered into under AS 36.90.150.

*** Sec. 4.** AS 45.50.572 is amended by adding a new subsection to read:

(j) AS 45.50.562 - 45.50.596 do not prohibit agreements entered into under AS 36.90.150 between a public employer and a labor organization or representative of labor organizations.

7-LS0319\D
Cramer
2/28/91

CS ADOPTED by L+C

CS FOR SENATE BILL NO. 95 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

LANGUAGE REMOVED IN NEW CS 3/21/91

BY

Offered:
Referred:

Sponsor(s): SENATORS RODEY, Menard

A BILL

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DRAFT CS-95

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APR 2 6 1991

WALTER J. HICKEL
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

April 24, 1991

Senator Drue Pearce
Capitol Building
Room 510

Dear Senator Pearce:

I want to thank you for the letter and copies of the public comment on Senate Bill 95.

With best regards.

Sincerely,

Walter J. Hickel

Walter J. Hickel
Governor

1991 LEGISLATION
POSITION PAPER
DEPARTMENT OF ADMINISTRATION

Division Labor Relations **Bill Number** CSSB 95

Bill Title An Act permitting public entities to enter into project labor agreements.

Position Statement: Explain briefly what bill does, its impacts and Department's position, i.e., a) support, b) do not support, c) neutral or d) oppose.

CCSB 95 modifies the original bill by proposing that most of the text be added to Title 36 (Public Works), rather than in AS 23.40, Public Employment Relations Act (PERA). The CS is clear in its title, intent and wording. Nevertheless, it is substantively the same bill as the original version; we are opposed to it.

CSSB 95 is loosely modeled after portions of the National Labor Relations Act (NLRA) which permits the negotiation of so-called "project labor agreements" between private construction contractors and unions which traditionally represent employees in the building and construction trades. However, CCSB 95 proposes a radical departure from existing law by authorizing public entities which contract out construction or maintenance to negotiate directly with unions the wages, hours and terms of employment which will govern the employees subsequently utilized by the private contractor(s) who is awarded the construction contract. The private contractor has no role in these collective bargaining negotiations. Further, the bill proposes that the public entity must retain control of the job site labor relations, including the means, manner and standards or performance of the private contractor's "employees" working on the project. To our knowledge, no other state has enacted law authorizing the negotiation of project labor agreements directly with the government, rather than the traditional primary employer (contractor) who actually does the work.

FALSE

Even if constitutional, this type of government intrusion into and control of private sector labor relations is bad public policy. Exercise of government authority under these provisions would effectively strip private employers of their ability to freely engage in good faith bargaining with unions as provided in federal law. It raises the distinct possibility that small contractors and nonunion contractors will be severely disadvantaged in competing for public works contracts. since the project labor agreement negotiated without their participation may require a union hiring hall.

APPROVED:

Director Bruce Cummings **Division** Labor Relations

Signature [signature] **Date** 3/13/91

Commissioner Millett Keller

Signature [signature] **Date** 3/12/91

(For more information, call Barbara Pritchett 465-2200) Rev. 01/28/91

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Position Statement Continued:

The bill requires that any such agreement contain a grievance procedure culminating in binding arbitration. This is not required in federal law; it is subject to the free give-and-take of negotiations. The bill requires that disputes arising from the negotiation or implementation/administration of such contract be adjudicated under PERA, rather than under the NLRA.

The substantial control over employees which the public entity can or must exercise under this proposal--combined with its cross-references to Alaskan public employee labor law--raises the possibility that public entities negotiating such a project labor agreement would be found under federal tax and/or employment laws to be joint or primary employers of the project workers, notwithstanding the award of a separate construction or maintenance agreement with a "contractor."

Proponents have advocated this bill as promoting Alaska hire on public works contracts. However, it is unclear how union referrals under this bill would contribute to Alaska hire any more than is already permissible under existing NLRA provisions for project labor agreements.

Proponents also suggest that project labor agreements would be more economical under this bill than under the NLRA, although again it is unclear how. It is also unclear whether public entities may abandon attempts to negotiate such an agreement, once the process is initiated; cross-references to PERA for adjudication of disputes suggest that any attempts to withdraw because of economic unfeasability would be procedurally burdensome and time-consuming, if not impossible.

Although utilization of bill provisions is ostensibly permissive, the reality is that organized labor may exercise irresistible pressure on public entities to, at a minimum, "experiment" with application of the new law. Since public employers are not experienced or well-trained in the negotiation and execution of construction labor agreements (nor maintenance agreements, in many cases), there is a strong possibility that such agreements would be less cost-effective than those negotiated with private employers. The State has experienced this result in the negotiation of the initial maintenance agreement (1974) with its Labor, Trades and Crafts bargaining unit.

This bill also raises the specter of jurisdictional disputes between public employee unions and their private sector counterparts. At the State level, jurisdiction on maintenance and small-scale construction work is presumed by organizations representing State employees. This bill may enable the negotiation of labor agreements for this work with unions who are not now the majority status representative of these employees. How this can be reconciled with other provisions of PERA regarding representation rights is not explained in the bill itself; presumably, this issue would be ultimately resolved by legal disputes over jurisdiction.

Bill No: Senate Bill No. 95 **Date:** February 19, 1991

Title: "An Act relating to agreements between a labor organization and a public employer." **Contact:** Eileen Plate 465-2700

Senate Bill No. 95 would amend the Public Employment Relations Act to insulate certain conduct from an unfair labor practice charge under AS 23.40.110. A public employee labor organization would not be able to charge a public employer with an unfair labor practice for entering into an agreement with construction trade unions to impose restrictions on construction or maintenance contractors working for the public employer. SB No. 95 would allow terms in such an agreement that required the employer to notify labor unions of opportunities for employment, allowed unions to refer applicants for employment, imposed minimum training or experience requirements for employment, or required hiring preferences based on length of service with an employer, in an industry, or in a geographical area.

PERA covers collective bargaining only between public employees and public employers. The effect of SB 95 on PERA would be very narrow--insulating a public employer from an unfair labor practice charge by one of its bargaining unit representatives.

The purpose of PERA as described in AS 23.40.070 is to provide for collective bargaining between public employees and public employers "to promote harmonious and cooperative relations between the government and its employees and to protect the public by insuring effective and orderly operations of government." SB 95 does not appear to either advance or obstruct this objective.

SB No. 95 would not have a fiscal impact on the Alaska Labor Relations Agency.

APPROVED:

Nancy Bear Usera, Commissioner
Department of Labor

POSITION PAPER/Department of Labor

MAR 1 4 1991

Department of Transportation and Public Facilities

POSITION PAPER

BILL NO: CSSB 95 APPROVED:

TITLE: Unfair Labor Practice Exemptions DATE: March 13, 1991

CSSB 95 modifies the original bill in organization but not intent. While the department originally took a neutral position toward this bill, we have discussed the implications of it with other departments who are more knowledgeable of labor law and conclude that we cannot support it.

The Position Paper by the Department of Administration essentially describes the reasons why this bill does not make good public policy. The idea of government negotiating labor agreements without competition which conspire to exclude many citizens and firms from the opportunity to work on public works projects is controversial at best. As the bill's language is permissive and not compulsory, it is doubtful we would seek to enter into such agreements.

Our reluctance to enter into project related labor agreements is based on an assessment of advantages and disadvantages. The cited advantages of lower wage costs, hours of work and the like are fictional given that most of these elements are fixed in law. Perhaps we could gain a no-strike clause, but we have not experienced any significant project delays due to labor disputes under current arrangements. At risk, is the likelihood of legal challenges from both employees and contractors who are denied access to the public works program. Such challenges seem likely and would be expensive in both legal costs and potential claims and damages.

Because we would not seek to enter into such agreements, we do not forecast any fiscal implications.

For Further Information contact Katy McHugh at 465-3900.

Department of Transportation and Public Facilities

POSITION PAPER

BILL NO: Senate Bill No. 95 APPROVED:

TITLE: " An Act relating to agreements between a labor organization and a public employer."

DATE: 2/20/1991

The Department does not oppose nor support the bill. The legislation should, however, improve the liklihood of Alaska hire on certain construction projects.

Alaska State Legislature

WHILE IN JUNEAU
P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-3844

3111 C STREET, SUITE 150
ANCHORAGE, ALASKA 99504
(907) 561-2018

SENATE LABOR AND COMMERCE
COMMITTEE

March 19, 1991

Kathleen Strasbaugh, Assistant Attorney General
General Civil Section
Department of Law
P.O. Box K
Juneau, AK 99811

Dear Ms. Strasbaugh:

The Senate Labor & Commerce Committee has been taking testimony on Senate Bill 95, An Act permitting the state or political subdivisions of the state to enter into project labor agreements. During a recent hearing, Commissioner Millet Keller of the Department of Administration entered into the record a copy of a memorandum that you wrote to Bruce Cummings and Randy Simmons on March 13, 1991.

Further clarification of that memorandum would be appreciated. A point brought out in conversation regarding the legislation was that all employees are covered by either the Public Employees Relations Act or the National Labor Relations Act.

In the first case, the employees would be classified as public employees and entitled to all terms, conditions and benefits there in. In the second instance it was noted that according to a 1st Circuit Court of Appeals ruling a public entity i.e.; state or municipality, could not negotiate or set the terms and conditions of a labor agreement between a private employer and a labor organization.

Would you please advise me if my understanding correct and could you please amplify.

Thank you for your timely attention to this matter. This legislation will be brought before the committee for an additional hearing in the near future.

Sincerely,

Rod Mourant
Legislative Aide

Attachments

MEMORANDUM

State of Alaska

Department of Law

TO: D. Randy Simmons, Deputy Commissioner
Department of Transportation and
Public Facilities

and

Bruce Cummings, Director
Division of Labor Relations
Department of Administration

DATE: March 13, 1991

FILE NO:

TEL NO: 465-3600

SUBJECT: SB 95

FROM: Kathleen Strasbaugh
Assistant Attorney General

Please find attached copies of opinions prepared by our office and legislative legal counsel regarding last year's version on the above legislation. We believe that this year's versions pose some of the same problems.

Last year, Sen. Rodey introduced legislation proposed by the IBEW which it (the IBEW) hoped would result in the use of project labor agreements in the public sector. We believe they had two arrangements in mind: [1] the project owner enters agreements with labor unions that their hiring halls will be used on construction projects and then requires its contractors to use the halls in accordance with the agreement, and [2] the owner requires its bidders to use union labor. IBEW suggested that it could insure local hire if such agreements were implemented.

The legislative device used last year, and again this year in SB 95 (also introduced by Sen. Rodey), is an amendment to PERA which protects public employers from unfair labor practice charges if they enter into prehire agreements with the construction trade unions for certain kinds of public works projects. The opinions written last year centered around the union's local hire theory, and the possibility that such arrangements might be anticompetitive, both under antitrust laws and the state's procurement code. The opinions suggest that excluding nonunion workers or contractors might constitute discrimination against particular economic groups in violation of the state's equal protection guarantee, as interpreted by the Alaska Supreme Court in State v. Enserch Alaska Construction, Inc., 787 P.2d 624 (Alaska 1989).

Neither last year's bill nor this year's actually permit or mandate project labor agreements; they merely permit prehire agreements where the public employer actually employs the workforce on a project. Neither covers the situation where a project is put out to bid. Thus it is unlikely to result in project labor agreements, though some public entities may use it if they use force accounts for construction. We understand that a draft committee substitute is circulating which purports to cover the situation where the public entity is the project owner rather than the employer which would result in such agreements.

This year's bill exempts agreements described in the new section it adds to PERA from the provisions of AS 36.30 and antitrust statutes. It is not clear that project labor agreements as contemplated by their sponsors could not nonetheless be considered anticompetitive, since the approved agreements concern the public entity only when they act as employers, not as owners contracting out. The draft committee substitute is an effort to govern the public entity as a project owner rather than as an employer, but because it directs that the project's labor relations be conducted under PERA, and that the public entity retain substantial control over the projects employees, it would appear that the proposed substitute does not really change the relationships involved.

The provision of proposed AS 23.40.110(d) allowing preference for a particular geographical area may not be an unfair labor practice if the bill is enacted, but the bill will not protect public employers from Enserch liability. A new subsection, proposed AS 23.40.110(e), has been added which protects public employers from unfair labor practice charges for boycotting. However, it is unlikely that courts would look favorably on such activities by government entities. The state's protective labor legislation (little Davis-Bacon, OSHA, workers' comp, etc.) covers the basic health and safety of the state's workers. Thus the primary public purpose advanced in support of such agreements is the purchase of labor peace, i.e., if the public employer signs up, the union promises not disrupt its project. In litigation in Massachusetts, such an agreement have been challenged on the theory that the best price is in the public interest, and if such an agreement results in the rejection of lower bids, it is inimical to the public interest.1/ And of course when a government dispenses its favors in a discriminatory fashion, it is subject to Enserch type equal protection challenge.

As to the boycott or "hot cargo" portion of the bill, if a government can't debar contractors without granting them a hearing, how can it undertake a boycott without some sort of due process?

1/ Such an agreement by the state of Massachusetts as owner was struck down as violative of the National Labor Relations Act, which was found to preempt the state's efforts to control the labor relations between the contractors and their employees. Associated General Contractors v. Massachusetts Water Resources Authority, ___F.2d ____, 59 U.S.L.W. 2266 (October 24, 1990). The committee substitute attempts to avoid this issue by leaving the labor relations in the control of the public entity. However, this control may result in an employment relationship.

It might be wise to eliminate at least the boycott and geographic preference sections of the bill. To the extent that laws are supposed to instruct, the inclusion of the material might lead a government entity (many of the entities covered by PERA are small municipalities and utilities) to conclude that the geographic preference and boycotting are permissible, when they might in fact result in constitutional litigation.

Please let me know if I can provide any further assistance.

KS:lmk

ALASKA INDUSTRIAL DEVELOPMENT
AND EXPORT AUTHORITY

480 WEST TUDOR • ANCHORAGE, ALASKA 99503-6690 • (907) 561-8050 • FAX (907) 561-8998

DATE: 2-20-91

TIME: _____

PLEASE DELIVER THE FOLLOWING PAGES TO:
Katie McHugh

TRANSMITTING FROM: 907-561-8998

RICOH FAX 1000L

THIS TRANSMITTAL IS FROM: Riley Arnold

NUMBER OF PAGES (INCLUDING COVER PAGE): 25

IF YOU EXPERIENCE ANY PROBLEMS IN RECEIVING, PLEASE TELEPHONE THE OFFICE NUMBER (907-561-8050) AND ASK FOR Cy.

SPECIAL INSTRUCTIONS OR COMMENTS

for your information

Please cc: Honey Savage
Thanks

ALASKA INDUSTRIAL DEVELOPMENT
AND EXPORT AUTHORITY

480 WEST TUDOR • ANCHORAGE, ALASKA 99503-6690 • (907) 561-8050 • FAX (907) 561-8998

MEMORANDUM

TO: Cynthia Larson
Department of Commerce
and Economic Development

FROM: Bertram L. Wagnon
Executive Director

DATE: February 20, 1991

SUBJECT: Requested Staff Analysis of
Senate Bill No. 95

I apologize for the lateness of the Authority's response and assure you that our performance and responsiveness will improve.

Senate Bill No. 95 is the predecessor of last year's Senate Bill No. 529. I am attaching for your information various items of correspondence that go to the heart of the policy and legal issues associated with this piece of proposed legislation.

In my opinion, the Authority's staff does not possess the expertise required to perform a traditional fiscal note analysis of Senate Bill 95. Certainly we could provide our opinion on the likely impacts associated with our development projects, but feel this needs to be offered in the full context of all public work projects.

You should be aware that the Authority receives its authority to engage in public works procurement under delegation from the Department of Transportation and Public Facilities (AS 36.30.015). This is true of nearly all other state agencies engaged in public works activities. This being the case I would recommend that DOT&PF assume the lead role for the administration in responding, analyzing, and interpreting impacts associated with this legislation.

The Authority intends to contact DOT&PF and request their assistance in analyzing the impacts of the proposed legislation on the Authority's development program as authorized by AS 44.88. How private sector developers and the contracting community re to state agencies providing negotiated project labor agreements, as pa of the bidding document, can only be speculative without their direct testimony.

2702 DENALI STREET
ANCHORAGE, ALASKA 99503-2779

TELEPHONE (907) 272-6571
DISPATCH (907) 276-1547
FAX (907) 276-1963

BUSINESS MANAGER - FINANCIAL SECRETARY
PRESIDENT

April 10, 1990

Jan Hart DeYoung, Esq.
State of Alaska
ATTORNEY GENERAL'S OFFICE
Anti-Trust Division
1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501

Re: Anti-Trust Complaint Against
North Slope Oil Companies

Dear Ms. DeYoung:

Although I am writing this letter in my capacity as General Counsel for the International Brotherhood of Electrical Workers, Local 1547 ("IBEW"), the matters we seek to bring to your attention involve a major public policy issue for the State of Alaska. If the conduct complained of herein is not enjoined, the State will have permitted the oil companies to obtain total control over the North Slope Labor Market in clear violation of AS 45.50.564. It will have also condoned the efforts of that monopoly to artificially depress the market rate for labor. The State's labor organizations have also been denied the opportunity to negotiate in a market composed of more than one employer or to secure a competitive market value for the services of their members.

For these reasons, please consider this an official complaint filed pursuant to AS 45.50.590 and a request that the Attorney General commence an investigation into the allegations contained herein.

STATEMENT OF FACTS

The instant problem has its roots in several informal luncheon discussions in 1988 between Bill Wade, the newly-appointed CEO of Arco Alaska ("Arco") and Gary Brooks, Business Manager of the IBEW. As a result of those discussions, Mr. Wade agreed to explore the possibility of improved relations between Arco and organized labor. Since such a project could have easily involved more people than would be practical, the discussions were narrowed to the five business managers of the Petroleum Crafts Council, i.e.

the Plumbers, Pipefitters & Steamfitters ("Fitters"); Laborers International Union of North America ("Laborers"); International Union of Operating Engineers ("Operators"), General Teamsters ("Teamsters"); the IBEW and several oil company representatives of Arco.

The parties met occasionally over the course of several months but formal negotiations never commenced. Curiously, Arco alleged fear of an anti-trust lawsuit if any single oil company agreed to negotiate directly with any one labor organization individually or directly with a group of labor organizations. Rather, it was strongly implied through these talks that the oil companies would deal with labor only through a contractor association serving as the middle man in negotiations, for all of the oil companies.

Just prior to the vote repealing Economic Limit Factor ("ELF") during the past legislative session, real negotiations began for the first time. The motivation, however, was political. George Nelson, former President of British Petroleum Exploration ("BP"), offered a basic 70 percent wage package for 50 percent of the oil companies' work on the North Slope in exchange for a commitment by labor to lobby the legislation against the repeal. The availability of work on the North Slope was made expressly conditional upon labor's success in blocking this legislation. By the first vote, the offer went from 70 percent of the basic wage and 50 percent of the work to 73/50 percent, then to 73/60 percent, and then to 75/60 plus a $20 million pipeline job. For several of the crafts that was sufficient; however, IBEW held out on the basis that it was unwilling to engage in political blackmail to secure work for its members. The money and offer was also too far below IBEW's scale.

The ELF was ultimately repealed. Once that occurred, no agreement was reached and no further talks took place for several months. The oil companies were no longer willing to negotiate; labor had not delivered the promised votes. Then in approximately March of 1989 following the Valdez/Exxon oil spill, George Nelson apparently decided it was time the oil companies and labor finalized some kind of agreement. The oil companies then retained Attorney Thomas P. Owens, Jr., Esq. to create a North Slope Contractors Association (the "Association) to deal exclusively with labor. Mr. Owens was then to meet with representatives of organized labor on behalf of the oil companies through the Association. Several representatives of labor did meet with Mr. Owens. However, the pipeline crafts -- the Laborers, the

Operators, the Teamsters and Fitters -- had already consented to the 70 percent wage rate for all pipeline work that the Association had scheduled. The Association thereafter refused to deal with any labor group individually or to discuss anything other than one standardized set of terms and conditions.

Once an agreement with the pipeline crafts was signed, there was absolutely no possibility for any real negotiations between the association and the remaining building trades crafts -- even assuming there had been before. In essence, the Association had successfully fixed the going labor rate and the building trades crafts were told "this is it, take it or leave it." Several of the crafts were unwilling, but at a loss for what else to do, signed a similar agreement. The IBEW, however, again did not and to date is adamantly opposed to being forced to accept terms unilaterally dictated by the oil companies through the Association. Mr. Brooks has steadfastly refused to permit the Association to dictate to the IBEW how much its electricians can ask for their services regardless of what other unions might have found agreeable. IBEW has never consented to deal as if all of organized labor was one bargaining unit. Neither is it willing to let the oil companies dictate standard terms. The result, however, has been the threat of economic sanctions and enormous political pressure exerted by the oil companies through the Association to get IBEW to capitulate and thus secure a total monopoly.

SUMMARY

The Association gave IBEW very little, if any, latitude to change or deviate from the terms it had forced upon the other unions. The major purchasers of North Slope labor have essentially established a dominant buyer's association that because of the extent of its control over the market has been able to declare that henceforth labor will be "sold" for only one single depressed rate. The Association and through it, the oil companies have applied enormous and increasingly threatening pressure on the IBEW to capitulate. The reason is that without IBEW's participation, the monopoly is not yet fully completed. On the other hand, the Association has not deviated from its position that the IBEW can do no better for its members than the Association has permitted other unions. In fact, because the IBEW has refused to sign an agreement similarly reducing its wage rate to the 70% level, the Association has solicited the other unions to do IBEW's work. Economic coercion and political pressure is thus still being utilized to control the North Slope construction market.

The nature of the problem is further described in the attached letter from Gary Brooks to Wesley Nason dated March 12, 1990. Additional information can be obtained from the following:

James M. Beasley, Vice President, Houston Contracting Company - Alaska, Ltd. (561-3419)

Gary Brooks, Business Manager, International Brotherhood of Electrical Workers, Local 1547 (272-6571)

Marc Frey, Business Manager, Laborers Local 341 (272-4571)

Matt Greskie, Business Manager, Ironworkers Local 751 (258-4766)

Wesley P. Nason, President, North Slope Contractors Association; and Vice President and Area Manager of H.C. Price Construction Compnay (345-4657)

George N. Nelson, Former President, British Petroleum Exploration (278-1611)

Thomas P. Owens, Jr., Attorney for North Slope Contractors Association (276-3963)

Phil Thingstad, Business Manager, Carpenters Local 1281 (276-3533)

Bill Wade, President, CEO-Arco Alaska, Inc. (265-6499)

If you have any additional questions, please feel free to contact me. We hope the State will consider these potential anti-trust violations as seriously as we do. The oil companies have successfully obtained a monopoly over the employment market and wage rates on the North Slope. They have used that monopoly to mandate a wage roll-back across the entire State and, thus, have artfully compressed the prevailing or Davis-Bacon rate for the work at issue. Such a wage reduction was made possible not by hard bargaining. Rather, it was the decision of the oil companies to act in concert with each other in offering only one flat rate for labor regardless of its nature or the labor organization involved

that created this monopoly. It is also the product of an illegal combination in pursuit of political gains outside the scope of traditional collective bargaining. Anti-trust exemptions apply only when traditional bargaining occurs at the behest of a labor organization. When an employer group initiates bargaining for a purely political purpose and then coerces labor to agree to mandated uniform terms, the anti-trust exemptions are clearly no longer applicable.

Certainly, given these facts, the State should consider this a matter of such significant public interest to warrant at least an investigation; we think it is and we look forward to your involvement and your help. When a situation develops such as it has here, there are clearly anti-trust implications. When a buyer's association is formed which is then able to foreclose any price competition among non-member sellers, an anti-trust violation has certainly been alleged. This is precisely what the oil companies have done here.

Very truly yours,

IBEW LOCAL UNION 1547

Helena M. Antel
General Counsel

HMA/crd
cc: Cary Brooks, IBEW Business Manager
Senator Tim Kelly
Senator Rick Halford
Senator John B. Coghill
Senator [illegible] Rodey
Roger Sams, IBEW Assistant Business Manager - Anchorage
Tom Casken, IBEW Assistant Business Manager - Juneau
John Gulch, IBEW Assistant Business Manager - Fairbanks
Vera Plumb, IBEW Assistant Business Manager - Ketchikan

§ 17.3 Agenda Item 2: Employ More Sophisticated Top-Down Organizing Techniques

The NLRA allows employers in construction to sign a union agreement without the benefit of a certification election. So-called "prehire agreements" are allowed under § 8(f) of the NLRA due to the cyclical and sporadic nature of employment in this field. As a result, organized labor can directly approach construction management to sign a union agreement in what is known as "top-down" organizing.

In the 1980s organized labor markedly decreased its reliance on top-down organizing efforts. This decrease was largely the result of increasing reluctance by construction contractors to be saddled with either union wages or union work rules which impact their competitiveness. In addition, employers were either aware of, or themselves had participated in, disputes arising out of the trust fund obligations which accompanied the collective bargaining agreements.

Another obstacle to top-down organizing was the NLRB's *Deklewa* decision.[12] This decision, which changed the rules governing prehire agreements, offered long-time union employers an opportunity to repudiate their collective bargaining agreements and start over. Thus, while top-down organizing was still the favored organizing tool for unions because of the cyclical nature of employment in construction, it was not meeting with the type of success it had enjoyed 20 years ago.

However, in the 1990s organized labor has become more sophisticated in its "sales pitch" to both contractors and owners and may successfully stem the decline in success of top-down organizing. Again, it is the labor force shortage which offers the key element for these renewed efforts. After the recession which marked the 1980s, construction in many parts of the country has enjoyed a resurgence. With this resurgence has come the need for trained employees. Open shop contractors are facing a critical shortage of trained employees.

Organized labor has exacerbated this problem by recruiting qualified employees from the nonunion ranks to obtain employment with union contractors. Nonunion employers have seen wholesale defections of long term employees to their union competitors based upon union promises of high wages and fringe benefits. As a result, many nonunion contractors will be forced to enter into collective bargaining agreements voluntarily in order to obtain access to the union hiring hall.

Nonunion employers will also face top-down organizing efforts based upon so-called "corporate campaign" strategies. This strategy, which was successfully utilized in the famous 1986 campaign at the Saturn plant in Tennessee, involves a broad appeal to the public, state legislators, and pressure groups to assist the union in its efforts to obtain a collective bargaining agreement with the

[12] 782 N.L.R.B. No. 194 (1987).

reluctant owner. Rather than responding with the traditional dual gate system, the employer will have a harder time responding to adverse publicity, consumer boycotts, targeting of financial institutions that do business with the employer, and political lobbying. These campaigns will increase as the unions repair their tattered public image.

"Job targeting" will be another controversial form of top-down organizing which will place competitive pressure upon the nonunion contractor. In order to set up a job targeting program, the union must set aside funds or ask its members to participate in a voluntary assessment to create such funds. The union employer, when competing against a nonunion contractor, can then petition the union to have access to these funds. If successful, the union employer will be allowed to bid the project at the nonunion wage rate and the employees will be paid the difference between the union wage rate and the nonunion wage rate from the reserve fund. In some cases, the funds go directly from the union to the employees. In others, funds are funnelled through the employer.

The legality of the job targeting program will be subject to attack on several grounds because of the source and nature of the funding. One such challenge may come from the Internal Revenue Service (IRS) which may treat the monies as "wages" for which the requisite tax deduction must be made. Apparently, several of the union job targeting programs are sloppy in explaining employer requirements under the Internal Revenue Code (IRC) and have been subject to attack. A second basis for IRS challenge is that such funding programs may deprive the union of its tax exempt status under § 501(c)(5) of the IRC.

Union job targeting programs may also be challenged before the federal Department of Labor's Wage and Hour Division. According to the challengers, the differential funds constitute wages under the Fair Labor Standards Act and therefore must enter into overtime computations. In addition, such contributions may constitute deductions under the federal Copeland Anti-Kickback Act.[13] As such, these deductions must conform to several statutory requirements including individual employee approval of these assessments.

Finally, the job targeting program may be subject to attack under the federal Davis-Bacon Act. Those who challenge the union program may allege that direct payments by the union to employees cannot be credited toward satisfying the "prevailing wage" obligation under the Act. Time will tell whether job targeting programs will be a lawful union tool in the 1990s.

Finally, organized labor's traditional tool for top-down organizing—picketing—will continue. In the recent case of *Laborers Local Union No. 1185 (NVE Constructors)*,[14] the NLRB held that a union could picket for the object of inducing an employer to sign a prehire agreement under § 8(f) of the NLRA. Employers had argued that prehire agreements were exempt from recognitional picketing since, by law, the § 8(f) agreements must be entered into voluntarily.

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[13] 18 U.S.C. § 874.

[14] 296 N.L.R.B. No. 165 (1989).

The NLRB disagreed and held that there was no statutory exemption for prehire construction contracts and that the union could picket for a reasonable period of time in order to obtain such a contract. Had the NLRB ruled otherwise, organized labor would have been dealt a grievous blow to their already weakened top-down organizing strategies.

§ 17.4 Agenda Item 3: Engage in More Aggressive Bottom-Up Organizing

As a result of the decrease in open shop receptivity to the top-down organizing strategy, unions will be forced to beef up their bottom-up organizing campaigns. The unique characteristics of the construction employee and the construction industry make successful bottom-up organizing difficult. Construction projects are short-lived, the complement of employees varies on a daily basis, the management-to-work crew ratio is typically high, and the construction employee tends to be relatively independent and therefore not subject to peer pressure. In addition, because of the blurred distinction between management and rank-and-file prevalent among open shop contractors, organizing efforts can typically be spotted at an early stage.

Even if the organizing campaign has been successfully carried through to the petition stage with a resulting election, the construction employer can utilize the NLRB process to obtain more time prior to the election, to limit or expand the scope of the bargaining unit in the employer's favor, and to effectively prepare a campaign which will address employee concerns. Despite these obstacles and long odds, construction unions have no choice. They must either organize or disappear. Based upon the following phenomena which will increase into the 1990s, the unions are doing their best to adapt to an increasingly hostile environment in the construction industry. Again, the key element to successful bottom up organizing in the 1990s will be the labor force shortage.

First, unions will engage in widespread "salting" of nonunion projects. "Salting" refers to the phenomenon of planting union supporters among the ranks of nonunion contractors. Contrary to the traditional practice of convincing an existing nonunion employee to spearhead a union campaign, organized labor is taking advantage of the nonunion contractor's desperate need for trained employees. The application process offers the union ready access to the nonunion contractor's work situs and its employees. Realizing this, unions have trained their apprentices in organizing techniques so that they may spearhead bottom-up organizing efforts once they obtain employment in the nonunion construction industry.

In addition, business agents are obtaining application forms from unsuspecting nonunion employers and distributing these forms to out-of-work union construction workers. These applicants are able to survive the relaxed scrutiny of nonunion employers desperate for applicants and commence a successful organizing campaign. Even if these applicants are revealed as union adherents in the

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

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April 20, 1990
HAND DELIVERED

Senator Patrick M. Rodey
Room 113-C, Capitol
Juneau, Alaska 99811

Re: SB 529 - project labor agreements

Dear Senator Rodey:

You have asked us to review a proposal by the International Brotherhood of Electrical Workers (IBEW) whereby the Alaska Energy Authority (AEA) would enter into project labor agreements which, it suggests, will permit the state to accomplish local hire objectives otherwise prohibited by the United States and Alaska constitutions. State v. Enserch Alaska Construction, Inc., No. 3539 (Alaska Supreme Court, December 13, 1989); Robison v. Francis, 713 P.2d 259 (Alaska 1986)

We have reviewed two memoranda by IBEW's counsel, the March 20, 1990 memorandum by legislative legal services attorney Teresa Cramer (No. 6-2330), and our own opinion of January 19, 1990. 1990 Inf. Op. Att'y Gen. (January 19; 661-90-0255). Each of IBEW's memoranda contains a different version of the proposal, but as nearly as we can make out, it suggests that AEA enter into agreements with building and construction trades unions to work on AEA projects and then require project general contractors to use the labor for which the state has contracted. It proposes legislation which would amend the Public Employment Relations Act (PERA) to permit public employers to enter prehire agreements to assure that such an arrangement would not be treated as an unfair labor practice under AS 23.40.110. SB 529 has been introduced to make this amendment to PERA.

IBEW suggests that internal union rules requiring persons who wish to be sent out from union hiring halls to be residents of the state or area where the construction is located will be immune from state court scrutiny because the unions in question would be governed exclusively by the National Labor Relations Act (NLRA) which preempts state action. It argues that the concern expressed in our January 19, 1990 opinion that requiring contractors to hire a particular labor force may constitute an anticompetitive practice under the Alaska procurement code is unfounded, as labor unions governed by the NLRA are generally exempt from prosecution under federal antitrust laws.

PERA and NLRA are mutually exclusive in their coverage; a single collective bargaining agreement between an employer and a unit of its employees cannot be both public sector and private sector. Thus, IBEW's proposal must be read as a choice by AEA between two alternatives: (1) hiring state employees and (2) requiring contractors to hire union labor. NLRA does not apply to public employers. Sec. 2 (2), NLRA, 29 U.S.C. sec. 152. Necessarily, any collective bargaining agreement between a state agency and a union would be outside NLRA, and any employees hired under such an agreement would be state employees. Temporary project employees are not entitled to participate in PERS or group health insurance, but hiring project employees does require the state to incur unemployment, workers' compensation, and other costs (including SBS, if AEA is a participating agency), and we imagine that such employees' bargaining representatives would seek at least health insurance in bargaining for their members. 1/ The state may be able to require contractors to use such employees in AEA's construction projects. However, it may be that AS 44.83.189, which provides that AEA's new projects are to be treated as public works of the state, can be read to make AS 35.15.010, disapproving construction by the state's own work force in most circumstances relevant here, applicable to AEA projects. 2/

We conclude, as did assistant legislative attorney Teresa Cramer, that an agreement between the state and labor unions would be subject to constitutional attack to the extent it required Alaska hire on AEA projects. In addition, we believe that our previous advice, that requiring contractors to use union labor may be unduly restrictive of competition under the procurement code, and vulnerable to constitutional attack under Enserch, is correct. In addition, after reviewing the authority cited by IBEW, we conclude that in fact such a requirement may pose antitrust problems, problems we did not consider in our earlier opinion. It appears to us that SB 529 is somewhat beside the point as far as local hire is concerned.

The time allowed us for a response to your inquiry is too brief to cover the legal questions raised by this issue in any detail, but we do explain our conclusions at some greater length below.

1/ But See 2 AAC 10.220(b)(2), which suggests that persons not eligible for retirement benefits are not employees under PERA.

2/ As AS 35.15.010 refers to construction by the department of transportation and public facilities, it could also be argued that it would not apply to AEA.

1. Collective bargaining agreements between the state and the building trades unions which require resident hire will be vulnerable to constitutional challenge.

Legislative legal counsel's analysis of the legal problems presented by imposing a residency requirement is correct: a local hire requirement in an agreement to which the state is a party is subject to constitutional challenge under the federal privileges and immunities clause. Cramer memorandum at 2, citing Robison. Such a scheme may also offend the equal protection clause of the Alaska Constitution. Enserch, slip op. at 25.

IBEW suggests in its March 22, 1990, letter to you that the jurisdiction of the Alaska Labor Relations Agency over unfair labor practices would preclude the jurisdiction of the court in a constitutional challenge to the collective bargaining agreement. Id. at 3. This is clearly incorrect; there is no doubt that the courts of this state have the jurisdiction to hear and decide cases where the constitutionality of the state's conduct is challenged. AS 22.05.010. The fact that an administrative tribunal has primary jurisdiction in a dispute does not preclude either the court's general jurisdiction, or appellate review; indeed the ALRA's decisions are reviewable under AS 44.62.560 and AS 22.05.010(c). See AS 23.40.130.

IBEW suggests in the same paragraph in which it addresses the above issue that the NLRA preempts any consideration by the Alaska courts of discrimination by unions covered by federal labor legislation. This assertion would be correct if the collective bargaining agreement were between the contractor and its workers, rather than the state and the building trades unions, and if the state did not require local hire in its contract with the successful bidder. However, it is our understanding that whether there is an agreement between the state and labor unions, or a contract between the state and its contractors requiring them to hire union labor, the idea of the proposal is that resident hire would be a condition of the contract. There would seem to be little difference between requiring the contractor to hire residents and requiring the union hiring hall to accept only resident applicants under either the federal or state constitutions. Cf. Enserch; Robison. The NLRA cannot protect the state from an Enserch or Robison challenge if such conditions are imposed by a state contract. 3/ If a union hiring hall happens to

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3/ The authority cited by IBEW for the proposition that unions may discriminate in favor of local residents does not involve state

(continued...)

impose a resident requirement, it may be that local hire will occur in the manner suggested by the IBEW. However, it must happen without the compulsion or involvement of the state to be protected by the NLRA.

2. Requiring contractors to hire only union labor may constitute an anticompetitive practice.

If the intent of the IBEW's proposal is that AEA require its contractors to hire union labor on its projects, and if the contractors are not restricted to local hire, a different question is presented. As we observed in our January 1990 opinion, the procurement code, AS 36.30, applies to AEA projects. The code prohibits unduly restrictive specifications and anticompetitive practices. AS 36.30.060(c); AS 36.30.920; AS 36.30.930. See also 2 AAC 12.090; 2 AAC 12.790. Requiring contractors to hire labor from a particular source would seem to offend these provisions, and may, as we noted, be subject to an Enserch challenge as well.

The procurement code exempts collective bargaining agreements from its provisions. See AS 36.30.990(15), excepting collective bargaining agreements from the definition of "services". However, that exemption is addressed to the state's entry into collective bargaining agreements, not to the specifications which may be imposed upon its contractors. 4/

3/ (...continued)
action. IBEW has also cited in support of its position the collective bargaining agreement between Public Employees Local 71 and the state, which calls for preferential hiring for residents. Federal courts have upheld residency (of no particular duration) and continued residency requirements for municipal police and fire employees. See, e.g. McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976) (per curiam). Some state courts have upheld such requirements as well. See, e.g. Detroit Police Officers Ass'n v. City of Detroit, 190 N.W. 2d 97 (Mich. 1971); Ector v. City of Torrance, 514 P.2d 433 (Cal. 1973). However, the question of whether public employment is subject to the federal privileges and immunities clause has been referred to as unsettled. Internat'l Organization of Masters, Mates, and Pilots, 831 F.2d 842, 846 (9th Cir. 1989). We leave to another day the question of the validity of the Local 71 contract provision in light of Robison and Enserch. See also, State v. Wylie, 515 P.2d 142 (Alaska 1973).

4/ IBEW suggests at page 10 of its January 30, 1990 internal memorandum that because AEA is involved in the construction of utility services, the allowance by the procurement code of sole
(continued...)

If the union's proposal (see March 22, 1990, letter at 6) can be construed as an agreement between building trades unions and AEA that AEA will require union labor on its projects, it may also have antitrust consequences. United Mine Workers of America v. Pennington, 381 U.S. 657 (1965), is cited in IBEW's January 30, 1990 memorandum in support of an argument that unions are broadly exempt from the requirements of antitrust statutes. In Pennington the United States Supreme Court noted that a union is not entitled to exemption from antitrust laws if it enters an agreement with a group of employers to impose terms and conditions of employment on bargaining units not covered by its collective bargaining agreement, even where the agreement concerns bargainable subjects such as wages. Id. at 665-6. Relying on similar reasoning, the court held in a later case that an agreement between a union and a contractor was not exempt under antitrust laws where it excluded all nonunion subcontractors from a portion of the market. Connell Co. v. Plumbers and Steamfitters, 421 U.S. 616, 623 (1975). Such an agreement would not be a collective bargaining agreement with an employer, or an agreement among employees for mutual aid and protection under AS 45.50.572. Thus such an agreement would not appear to be exempt from antitrust scrutiny.

This is not to suggest that we are certain an antitrust violation exists; the law of labor exemptions to antitrust legislation continues to evolve, rendering any meaningful advice on the subject difficult at best. C.A. Hills, Antitrust Advisor, sec. 13.13 at 832-3 (3d ed. 1985). However, we are bound to point out that restrictions such as those proposed by IBEW are not always protected by the labor exemption in the private sector, and may not be protected here. Connell presents ready analogy for interpreting state antitrust and procurement code provisions concerning anticompetitive practices and restrictive specifications.

The fact that subcontracting is a mandatory subject of bargaining in the private sector has no bearing here, where there is no state bargaining unit whose work is to be contracted out. See IBEW March 22, 1990 letter at 6.

3. SB 529 will have no impact on local hire; it is not clear that it is necessary for any other purpose.

4/ (...continued)
source contracts for the procurement of utility services applies. 2 AAC 12.410(d)(4). This regulation is clearly intended to apply to obtaining electricity, telephone, and other utility services usually delivered by monopolies, not to the construction of utility facilities.

SB 529 would exempt prehire agreements with the building trades (agreements between unions and employers entered into before a workforce is hired) from the unfair labor practices prohibited by AS 23.40.110. Such agreements are permitted under the NLRA for the construction industry.

A public employer may voluntarily recognize a labor organization as the exclusive representative of a unit of its employees. AS 23.40.100(d). The ALRA may approve such an arrangement if it is able to verify the majority status of the labor organization. 2 AAC 10.130. SB 529 would not alter this requirement, as it merely prevents the imposition of sanctions on an employer for entering into an agreement before such a determination is made. The legislation would not protect the state from constitutional litigation if a resident hire requirement were challenged. It would likely be little used, given AS 35.15.010.

SB 529 would not convert recruiting, selection, and hiring into a mandatory subject of bargaining. See IBEW January 30, 1990 memorandum at 24. While it is true that the NLRA has instructive value, and that the ALRA will give great weight to relevant National Labor Relations Board (NLRB) decisions when determining unfair labor practice cases (2 AAC 10.250(c)), it does not follow that in all matters it is an appropriate interpretive guide for PERA. In particular, hiring, recruiting, selection, and classification of employees are critical components of Alaska's constitutionally mandated merit system, and are among the "general policies describing the function and purpose of a public employer," not recognized by the NLRA, and excepted from those wages, hours, and working conditions required to be collectively bargained under PERA. AS 23.40.250(8). See also Order and Decision No. 110 (Alaska Labor Relations Agency, August 26, 1987). 5/

You may wish to consult with the department of administration's division of labor relations as to any policy implications of the bill. There seem to be no legal issues other than those mentioned above.

5/ The state's contracts with Local 71 do allow for the use of their hiring hall, in recognition that the positions Local 71's members hold have not lent themselves to traditional merit system recruiting and selection devices. However, the use of the hiring hall remains a permissive subject.

Summary and additional comments

In summary, we cannot assure you that AEA (or any other state agency) can enter into an agreement, either with collective bargaining representatives or with contractors, limiting labor on its projects to residents, without being subject to an Enserch or Robison challenge. If resident hire requirements are omitted from such agreements, AEA can (a) enter into collective bargaining agreements and thereby acquire its own work force, although its use of such a force for construction of public works may be restricted by AS 35.15.010 or (b) enter into agreements with labor unions that it will require its contractors to hire union labor, although this may constitute a violation either of the procurement code or antitrust legislation.

Another option not fully addressed in IBEW's proposals (although it may be what they had in mind when they wrote their March 22, 1990 letter to you) is a project labor agreement in which the owner of a project agrees with a union or group of unions as to the terms and conditions of employment which will govern the relationship between labor and the contractors on a project, including the requirement that all hiring be done through the unions' hiring hall(s). Such an arrangement was approved by the Massachusetts Commissioner of Labor for the Boston Harbor clean-up project on the theory that a no strike/ no jurisdictional dispute agreement by the union for the 10 year duration of the project was in the public interest. 35 Construction Labor Rept. 1264 (February 28, 1990). We are not familiar with the Massachusetts procurement code, but we would observe that under Alaska's procurement code (which is interpreted by regulations in the department of administration, not department of labor rulings), such an agreement is not a collective bargaining agreement, and thus AEA would have to put the project labor agreement itself out to bid. In addition, resident hire could not, under Robison and Enserch, be a condition of such a labor agreement. We must also point out that the Boston Harbor agreement has been challenged in federal district court on the grounds that it is anticompetitive, a violation of antitrust laws, of various provisions of the NLRA, the Employee Retirement Income Security Act (ERISA), and of the equal protection and due process guarantees of the United States Constitution. 36 Construction Labor Rept. 3 (March 7, 1990). The challengers also dispute the ruling that the agreement is in the public interest, claiming that it will increase the cost of the project. Id.

Please advise us if we can be of any further assistance in this matter.

Sincerely yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By:
Kathleen Strasbaugh
Assistant Attorney General

KS:me

MEMORANDUM

State of Alaska
Department of Law

TO: Robert E. LeResche
Executive Director
Alaska Energy Authority

DATE March 15, 1990

FILE NO #661-90-0255

TEL NO 276-3550

SUBJECT Project labor agreements

FROM: DOUGLAS B. BAILY
ATTORNEY GENERAL

By: Carolyn E. Jones
Assistant Attorney General

In our memorandum of advice dated January 19, 1990, we advised you that the state procurement act probably prohibited the Alaska Energy Authority (AEA) from entering into a project labor agreement with a union. We further noted that such an agreement would be vulnerable to constitutional attack.

We have since reviewed a memorandum prepared by legal counsel for the International Brotherhood of Electrical Workers (IBEW) which was apparently drafted in response to our memorandum of January 19th. Nothing in the IBEW memorandum has persuaded us to revise our opinions in the memorandum of January 19th.

As we understand the concept of a project labor agreement, it is an agreement where a prime contractor agrees to use only organized labor on the construction of a particular project. In this case, the AEA would sign a project labor agreement with, for example, IBEW. Then AEA would require every contractor on a particular project to procure its labor force from IBEW. The difficulty which AEA has in executing and implementing such an agreement is twofold.

The state procurement act and its enabling regulations specifically prohibit the use of specifications or contract terms and conditions that limit competition or require procurement from a sole source unless no other description or requirements will suffice. AS 36.30.060(c); 2 AAC 12.090. The AEA would have to demonstrate that requiring prospective contractors to use organized labor was the only available means to assure the construction.

In discussing the state procurement act, the IBEW memorandum, however, confused the concept of project labor agreements with contracts for construction. While there is abundant case law endorsing the use of collective bargaining agreements between labor and an employer, that case law does not solve our problem under the state

procurement act. In the latter circumstances, we are dealing with the state as owner -- not as employer. 1/ Obviously, the concerns we mention here could be solved if the legislature amended the procurement law.

Our second concern poses an even bigger problem. In our view, an arrangement that would limit potential bidders to a particular labor agreement is quite vulnerable to a constitutional attack. In State v. Enserch Alaska Construction, Inc., No. 3539 (Alaska Supreme Court, December 18, 1989), the Alaska Supreme Court struck down the Regional Preference Law because it attempted to favor one economic group over another.

The IBEW memo suggests that a project labor agreement between the state and a union whose administrative rules prefer state residents would avoid the constitutional problems of the past. While the memo cites federal case law that has endorsed the use of resident hire through project labor agreements, those cases dealt with private contractors -- not with the state or a political subdivision as contractor. The memo does not help us deal with the problems under Alaska constitutional law. In fact, given the Enserch decision, we question whether any set of facts would satisfy the equal protection problem with project labor agreements. 2/

CEJ/jds

1/ We note that AS 36.30.995(15) specifically excludes collective bargaining agreements and employment contracts from the definition of "services." We read that exemption to apply to the state in its role of employer, i.e., the state procurement act would not apply vis a vis the state as employer and e.g., the Alaska State Employees Association.

2/ Quite apart from the legal issues discussed here, the decision to limit potential bidders to a particular labor arrangement is a policy issue that is better suited for legislative action than individual agency agreements.

MEMORANDUM

State of Alaska
Department of Law

TO: Robert E. LeResche
Executive Director
Alaska Energy Authority

DATE: January 19, 1990
FILE NO.: 661-90-0255
TEL NO.: 276-3550
SUBJECT: Project labor agreements

FROM: DOUGLAS B. BAILY
ATTORNEY GENERAL
By: Carolyn E. Jones
Carolyn E. Jones
Assistant Attorney General

You have asked two questions: whether the Alaska Energy Authority (AEA) may negotiate and execute a project labor agreement with one or more unions, and whether the authority may then require, as a contract condition, that the successful bidder on a construction procurement operate within the terms of the project labor agreement. While the authority may execute contracts for construction of power projects, it probably cannot execute a project labor agreement that prefers the hire of employees who are members of a labor union.

The authority has the power to contract for the construction of a power project and "to enter into contracts or agreements with respect to the exercise of any of its powers...." AS 44.83.080(10), 44.83.080(14). Presumably, the authority may enter into a project labor agreement with one or more unions unless a general prohibition exists for all state agencies.

I have examined federal and state labor law. Title 29 of the United States Code Annotated and Title 23 of the Alaska Statutes are silent on this question. The state procurement act, however, is not.

The procurement of construction of state facilities -- including projects by the authority -- is governed by AS 36.30. The commissioner of the department of administration is responsible for adopting regulations governing the preparation, revision, and content of specifications for construction required by an agency. AS 36.30.060(a). The specifications required by the agency "must promote overall economy for the purposes intended and encourage competition in satisfying the state's needs, and may not be unduly restrictive." AS 36.30.060(c). Not only is competition encouraged in state procurements but anticompetitive practices are strictly forbidden and may subject an offeror or bidder to prosecution of a class C felony. AS 36.30.920; AS 36.30.930(2).

The commissioner has implemented AS 36.30, in part, by adopting regulations that

> (1) prohibit the use of specifications that have "the effect of exclusively requiring a proprietary ... construction item, or procurement from a sole source, unless no other manner of description will suffice," 2 AAC 12.090;
>
> (2) prohibit the use of contract terms and conditions that "have the effect of unnecessarily limiting competition or exclusively requiring a proprietary ... construction item or procurement from a sole source unless no other requirements will suffice," 2 AAC 12.790.

A requirement that the successful bidder on a procurement contract hire its labor force from a single source would appear to come within the statutory and regulatory prohibitions contained in AS 36.30.060, AS 36.30.930(2), 2 AAC 12.090, and 2 AAC 12.790. A specification or contract term of this nature would only be permissible upon a showing that no other manner of description and no other requirement would suffice. 2 AAC 12.090, 2 AAC 12.790. Making this showing could prove to be a very heavy -- if not impossible -- burden for the authority.

An arrangement that would limit potential bidders to a particular labor agreement is also vulnerable to a constitutional attack. In the recent case of State v. Enserch Alaska Construction, Inc., No. 3539 (Alaska Supreme Court, December 18, 1989) the Alaska Supreme Court struck down on equal protection grounds the Regional Preference Law, a statute requiring local hire for publicly funded projects constructed in economically distressed areas. Many features of the proposed arrangement resemble those of the Enserch case.

AEA would give a preference to (or impose an absolute requirement on) contractors on its projects who employed union labor. Presumably, the rationale for such a preference is that unionized labor is better paid and protected than nonunion labor, and that this is a social and economic benefit to the state which outweighs the emphasis placed in public contracting on getting the best price.

The court in Enserch rejected a similar goal under the Regional Preference Law. The state had argued that, by conferring an economic benefit on the residents of a particular region, unemployment would be reduced and the social harms resulting from chronic unemployment could be remedied. Enserch, slip op. at 29. While such goals were important, they could not be achieved by the

disparate treatment of unemployed workers in another region. Id., at 30. 1/

Arguably, since all prospective contractors would be required to hire union labor, they would not be treated differently at least as to competition amongst themselves. However, if a contractor has no existing relationship with the trade unions or union subcontractors, they may be disadvantaged.

Construction workers not currently members of unions would be required to obtain membership in order to be employed on a project when the bid is ultimately awarded. Assuming that employment must be obtained through a hiring hall, and that some sort of seniority system were in force for referrals, nonunion workers would at a minimum be delayed in obtaining work, if not foreclosed altogether. This result is acceptable in the private sector. However, it may not be acceptable where occasioned by government action.

Having determined that the right to engage in an economic endeavor is an important right, the Alaska Supreme Court takes a dim view of government action which favors one economic group over another. Enserch, slip op. at 27 and 30. In Enserch, the court concluded that favoring one group of similarly situated workers over another was not a legitimate goal.

CONCLUSION

The Alaska Energy Authority has the power to enter into project labor agreements as long as they do not conflict with the language and intent of laws generally applicable to state agencies. A project labor agreement that required a project contractor to hire employees directly from one source -- that is, a labor union -- would probably discourage competition and be overly restrictive. Such a contract term would be permissible under the state procurement act only if the authority could demonstrate that it had no other alternative. Even if the agreement survived a challenge under the state procurement act, it would still be constitutionally vulnerable where it preferred one group of laborers over another.

CEJ/jds

1/ Even if we assume ~~that~~ the goal of protecting labor by ensuring better wages, this goal is already being served by existing prevailing wage legislation such as the Little Davis-Bacon Act, AS 36.05.

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Re: ABC et al. vs. City of Seward and IBEW Local 1547
United States District Court No. A91-001 Civil
Our File 15200-004

Gentlemen:

We enclose herewith a copy of the complaint filed with the District Court in this matter on Wednesday, January 2, 1991. Helene Antel, attorney for the IBEW Local 1547 accepted service on behalf of the IBEW. The City of Seward was served by certified mail on January 3, 1991. We do not anticipate any challenge regarding service or jurisdiction.

Also enclosed is a Joint Motion for Expedited Status Conference. The Motion sets forth dates for the briefing schedule in this matter, as agreed between the parties. According to the schedule, our opening motion and memorandum are due Wednesday, January 23; the opposition memoranda are due Wednesday, February 18; and our reply memorandum is due February 25. Oral argument will be scheduled by the court for some date thereafter.

We will forward a draft of our opening memorandum to you on or about Wednesday, January 15. We welcome any comments you may have

at that time. Should you have any questions regarding this matter, please do not hesitate to contact us.

Very truly yours,

DELANEY, WILES, HAYES,
REITMAN & BRUBAKER, INC.

Marc D. Bond

Marc D. Bond

cc: Maurice Baskin
William F. Reeves

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ASSOCIATED BUILDERS AND CONTRACTORS, INC., a Maryland corporation, ASSOCIATED GENERAL CONTRACTORS OF ALASKA, an Alaska nonprofit corporation, IRBY CONSTRUCTION COMPANY, a Mississippi corporation, IRBY/ ALASKA UTILITIES CONSTRUCTION COMPANY, an Alaska corporation, Plaintiffs, vs. CITY OF SEWARD, an Alaska home rule municipality, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1547 (IBEW), a labor union, Defendants.	Case No. A90-001 Civil

JOINT MOTION FOR EXPEDITED STATUS CONFERENCE

Plaintiffs and defendants in this matter hereby move for an expedited status conference to establish a briefing schedule and a time for oral argument on a Motion for Preliminary Injunction and Summary Judgment, to be filed by plaintiffs in this matter.

This matter involves a project to construct a high voltage

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electric transmission line near the City of Seward, now scheduled to be let for bid in the spring of this year, and constructed during the summer of 1991. All parties concur in the necessity of early construction of the transmission line to insure a steady, adequate power supply for the City of Seward service area.

It appears there are no genuine issues of material fact which would preclude resolution of this matter on a dispositive motion. Counsel for the City of Seward is in the process of drafting a stipulation of facts which will provide the basis for argument on the legal issues raised by the complaint.

The City of Seward needs to erect this line during the 1991 construction season. None of the parties desires to endanger the completion of the project during 1991, but all desire an expeditious resolution of their legal rights in this matter.

Accordingly, counsel for all parties have conferred, and suggest the following briefing and oral argument schedule: (1) Motion for Preliminary Injunction and Summary Judgment (and supporting Memorandum) filed and served January 23, 1991; (2) Oppositions filed and served February 18, 1991; (3) Reply filed and served February 25, 1991; and (4) Oral argument to be scheduled as soon thereafter as the court deems appropriate.

The parties respectfully request a status conference to

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discuss these matters with the court, and to establish a time for oral argument.

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REITMAN & BRUBAKER, INC.
Attorneys for Plaintiffs

Date: 1-3-90

Marc D. Bond

PERKINS COIE
Attorneys for City of Seward

Date: 3 JAN 1991

Gordon J. Tans

HELENE M. ANTEL
Attorney for IBEW, Local 1547

Date: Jan. 1, 1991

Helene M. Antel

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ASSOCIATED BUILDERS AND CONTRACTORS, INC., a Maryland corporation, ASSOCIATED GENERAL CONTRACTORS OF ALASKA, an Alaska nonprofit corporation, IRBY CONSTRUCTION COMPANY, a Mississippi corporation, IRBY/ ALASKA UTILITIES CONSTRUCTION COMPANY, an Alaska corporation,

Plaintiffs,

vs.

CITY OF SEWARD, an Alaska home rule municipality, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1547 (IBEW), a labor union,

Defendants.

Case No. ~~A90-~~ A91-001 Civil

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND FOR MONEY DAMAGES

This complaint concerns the letting for bid and construction of an electrical transmission line project near the City of Seward. The complaint seeks a judgment declaring illegal a certain bid pre-qualification requirement, a preliminary and

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permanent injunction against enforcement of the requirement, an award of compensatory and treble damages, and the recovery of costs, interest, and attorney fees.

I. JURISDICTION

This is an action dealing with the rights of the parties under federal labor, employee benefits, antitrust and civil rights laws, as well as certain laws of the State of Alaska. The district court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 [federal question], 28 U.S.C. § 1337(a) [commerce and antitrust regulation], 28 U.S.C. § 1343(a)(3) [civil rights], 29 U.S.C. § 1132 [ERISA], 28 U.S.C. § 2201(a) [declaratory judgment], Civil Rule 57 [declaratory judgment], and the doctrine of pendent jurisdiction.

II. VENUE

The unlawful conduct and actions which are the subject of this complaint have been, are being, and (without relief from this court) will be committed within the District of Alaska, and will affect the interstate trade and commerce being conducted within and through the District of Alaska. All of the defendants reside, do business, or may be found in the District of Alaska.

III. GENERAL NATURE OF CONTROVERSY

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3.1 This action seeks relief from an unlawful pre-qualification bid specification imposed by the City of Seward on a $9.5 million project for the construction of an electric transmission line from Lawing to Fort Raymond in the Seward's utility service district (the Project).

3.2 The City of Seward has required that, as a condition of qualifying to bid on the project, all contractors be signatories to a labor agreement with the International Brotherhood of Electrical Workers, Local 1547 (IBEW) "that will assure that work traditionally performed by employees represented by the IBEW will be performed by such workers."

3.3 The IBEW signatory requirement is unreasonable, unlawful and anti-competitive. It constitutes unlawful municipal regulation of private collective bargaining in violation of the National Labor Relations Act. It unreasonably restricts competition in violation of federal and state antitrust laws. It deprives the plaintiffs of equal protection and due process of law under the United States and Alaska Constitutions. It violates the provisions of the City of Seward Code concerning public contracts.

3.4 Seventy percent of all construction work in this country is performed on a non-union basis. Only 21% of all employees in the construction industry are union members. The

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effect of the "union contract" requirement in the pre-qualification process is to force the plaintiffs to become parties to a union labor agreement not negotiated or executed by their free will. This unlawful restriction will cause irreparable harm to the plaintiffs by depriving them of the opportunity to participate in a multi-million dollar construction project. The restriction is also in conflict with the public interest, in that it will deprive the City of Seward and its ratepayers of full and open competition in the bid process.

3.5 Accordingly, the plaintiffs seek a declaration that the restrictive bidding qualification is unlawful and unenforceable. The plaintiffs also seek a preliminary injunction against the enforcement of the restriction during the pendency of this litigation, and a permanent injunction. The plaintiffs seek money damages for violations of their rights, and an award of costs, interest and attorney fees.

IV. PARTIES

4.1 Plaintiff Associated Builders and Contractors, Inc. (ABC), is a national trade association of over 18,000 merit shop construction contractors, that is, those contractors that use both union and non-union labor. Since its founding in 1950, it has been

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the objective of ABC, its local chapters and their member companies to provide high quality, low cost, and timely construction work, which benefits businesses, consumers, and taxpayers. ABC is filing this action on behalf of its individual members who have been and will continue to be damaged by the loss of business opportunity resulting from the enforcement of the IBEW signatory requirement.

4.2 Plaintiff Associated General Contractors of Alaska (AGC) is an Alaska non-profit corporation whose members include merit shop construction contractors. AGC was founded in 1954, and its objectives include the provisions of high quality, low cost, and timely construction work. AGC is filing this action on behalf of its individual members who have been and will continue to be damaged by the loss of business opportunity resulting from the enforcement of the IBEW signatory requirement.

4.3 Plaintiff Irby Construction Company (Irby) is a Mississippi corporation. Irby is one of the largest contractors engaged in the erection of electrical transmission lines in the United States, having constructed high tension and other electrical lines in all states and several foreign countries. Irby is qualified to do business in the State of Alaska, and has filed its last biennial report due, and paid all necessary corporate and franchise fees.

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4.4 Plaintiff Irby/Alaska Utilities Construction JV (Irby/AUC) is a joint venture composed of Irby Construction Company, and Alaska Utilities Construction Company. AUC is an Alaska corporation with many years of experience in constructing electric transmission lines for virtually every major utility in the State of Alaska. AUC is in good standing, and has filed its last biennial report due, and paid all necessary corporate and franchise fees.

4.5 Defendant City of Seward (Seward) is a home rule municipality incorporated under the laws of the State of Alaska.

4.6 Defendant International Brotherhood of Electrical Workers, Local Union 1547 (IBEW) is a labor union organized under the National Labor Relations Act.

V. FACTUAL BASIS OF THE COMPLAINT

5.1 During the 1990 legislative session, the Alaska Legislature approved a grant appropriation of $9.5 million to the City of Seward for the construction of an electric transmission line from Lawing to Fort Raymond. 208 SLA 1990, §144. Exhibit A.

5.2 On July 23, 1990, the State of Alaska and City of Seward enter into a "Standard Agreement Form for Municipal Grants" (Grant) for $9,500,000 for the construction of electrical line and attendant structures. Exhibit B. The Grant is known as Department

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of Administration Grant No. 7/91-956, and was accepted by Seward in City of Seward Resolution No. 90-086.

5.3 In October of 1990, the City of Seward caused to be published a "Request for Contractors to Pre-Qualify to Bid on Construction of the Seward 115KV Transmission Line Lawing to Fort Raymond" (Request). Exhibit C. The Request required the submission of a pre-qualification form to Seward by October 29, 1990. The Request includes the following language:

> The City of Seward is a signatory to a collective bargaining agreement with the International Brotherhood of Electrical Workers (IBEW), Local Union 1547. In order to preserve work traditionally performed by employees represented by the IBEW and to avoid destruction of wages, hours and conditions of employment achieved through the collective bargaining process, the City has agreed that, to the extent permitted by law, it will not contract, or allow the subcontract, for the construction of the 115 KV main electrical transmission intertie line between Lawing and Fort Raymond Subdivisions within the City of

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Seward for work traditionally performed by the IBEW except to a party with an appropriate current labor agreement with the IBEW.

The Request for Pre-Qualification shall be submitted on the contractor's letterhead in a format to address each of the following subjects. . . .

6. A statement attesting that the contractor is a party to an appropriate current labor agreement with the IBEW that will assure that work traditionally performed by employees represented by the International Brotherhood of Electrical Workers, local union 1547 ("IBEW") will be performed by such workers.

(The requirement stated in ¶6 is hereafter referred to as the IBEW signatory requirement.)

5.4 On October 1990, Irby submitted a request to be pre-qualified to bid on construction of the line.

5.5 On October 1990, Irby/AUC submitted a request to be pre-qualified to bid on construction of the line.

5.6 On November 16, 1990, Everett P. Diener, Manager of

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Engineering & Utilities for Seward, wrote letters to Charles Irby of Irby, and Aaron Downing of Irby/AUC. The letters requested additional information concerning the companies' Alaska experience and the identity of the key employees would be on the job. The letter also noted Irby's and Irby/AUC's objection to Item #6, said they would likely recommend to the City Council that Irby and Irby/AUC be found not qualified, and invited Irby and Irby/AUC to change its response to Item #6. Exhibit D.

5.7 On November 26, 1990, Aaron Downing responded, submitting additional information on Irby/AUC's Alaska experience, and designating the key employees. The letter also elaborated on the objection to Item #6. Exhibit E. On the same date, John Nye of Irby responded, submitting additional information on Irby's Alaska experience, and designating the Irby key employees. The letter declined to amend the objection to Item #6. Exhibit F.

5.8 On November 30, 1990, Mr. Diener sent a letter to Charles Irby stating: "We find you qualified to perform except for Item #6 which states that you must be a party to a current labor agreement with the IBEW. Consequently, I have no alternative but to omit your company from the list of contractors I will submit to the City Council as qualified bidders on this project. Therefore, if the City Council approves the recommendation a bid will not be

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accepted from Irby Construction Company." Exhibit G.

5.9 On December 3, 1990, Mr. Diener responded to the November 26 submission from Irby/AUC. By letter, Mr. Diener stated: "We find you qualified to perform except for Item #6 which states that you must be a party to a current labor agreement with the IBEW. Consequently, I have no alternative but to omit your company from the list of contractors I will submit to the City Council as qualified bidders on this project. Therefore, if the City Council approves the recommendation a bid will not be accepted from Irby/Alaska Utility Construction JV." Exhibit H.

5.10 On November 30, 1990, Mr. Diener sent a memorandum to the Seward Mayor and City Council, finding Irby and Irby/AUC to be not qualified for failure to comply with the requirement of a current labor agreement with IBEW. Exhibit I.

5.11 On December 10, 1990, the Seward City Council met and approved the list of bidders, omitting Irby and Irby/AUC on the basis of Item #6. Resolution No. 90-152, Exhibit J.

5.12 The City of Seward intends to proceed with the bidding process in order to commence construction of the project as soon as weather permits in the spring of 1991.

5.13 Unless the IBEW signatory requirement is enjoined and declared illegal, the plaintiffs will suffer irreparable injury by

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their inability to participate in the project.

FEDERAL CLAIMS

COUNT ONE: THE NATIONAL LABOR RELATIONS ACT

6.1 Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157, provides that employees have the right to join "labor organizations to bargain collectively through representatives of their own choosing," and "shall also have the right to refrain from any or all of such activities..."

6.2 Sections 8 and 9 of the NLRA, 29 U.S.C. §§ 158 and 159, provide that employers are required only to negotiate in good faith with unions who represent a majority of their employees. These sections also prohibit both employers and unions from interfering with employees in the exercise of their rights under Section 7 of the NLRA, 29 U.S.C. § 157.

6.3 The City of Seward is a public agency created pursuant to the laws of the State of Alaska. The City has impermissibly promoted the interests of the IBEW by forcing all would-be Project bidders to recognize and deal with the IBEW, regardless of whether the bidders' employees have chosen to join or bargain through the IBEW, and regardless of whether the bidders can come to mutually agreeable terms with the IBEW. This action is in

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violation of the NLRA, which preempts state regulation of labor-management relations.

6.4 By forcing would-be bidders to not only negotiate with the IBEW, but to enter into an agreement with the IBEW as a condition of bidding on the Project, the City of Seward leaves little bargaining strength for would-be bidders. The IBEW, knowing that the would-be bidder must come to terms, is obviously unlikely to negotiate less favorable terms with such a bidder than other agreements IBEW has with other bidders. Thus, the IBEW signatory requirement indirectly dictates the terms of the agreement between the IBEW and all would-be bidders, in violation of the NLRA.

6.5 Plaintiffs' employees have chosen not to belong to or be represented by any labor organization, let alone the IBEW in particular. By imposing the IBEW signatory requirement upon would-be bidders, the City has deprived the employees of rights protected by the NLRA, including the right to refrain from union membership, the right to negotiate individual terms and conditions of employment, and, in the event the employees seek union representation, the right to join and be represented by the union of their choice.

6.6 The IBEW signatory requirement constitutes impermissible state regulation of private labor relations under the

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NLRA. The requirement affects the substantive aspects of the free collective bargaining process to an extent forbidden by the NLRA. The requirement undermines the policies upon which the comprehensive labor relations law embodied in the NLRA are based.

6.7 Plaintiffs are entitled to a preliminary and permanent injunction against the enforcement of the IBEW signatory requirement, and a declaration that the requirement is illegal.

COUNT TWO: THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

7.1 The City of Seward requires would-be bidders to enter into a labor agreement with the IBEW. The IBEW typically demands, as part of all of labor contracts, that the employer contribute to a variety of specified employee benefit plans.

7.2 In order to bid on the Project, any contractor would therefore be required to agree to contribute to IBEW employee benefit plans, which will undoubtedly be different from those which the various plaintiff-employers now have in place for their employees.

7.3 The IBEW signatory requirement thus regulates and dictates the terms of the employee benefit plans of all would-be bidder on the Project.

7.4 The Employee Retirement Income Security Act ("ERISA")

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preempts "any and all state laws insofar as they may now or nereafter relate to any employee benefit plan." 29 U.S.C. § 114(a).

7.5 The IBEW signatory requirement relates to employee benefit plans and is being imposed under color of state law. It therefore violates ERISA.

7.6 Plaintiffs are entitled to a preliminary and permanent injunction against the enforcement of the IBEW signatory requirement, and a declaration that the requirement is illegal.

COUNT THREE: THE SHERMAN ANTITRUST ACT

8.1 The Project requires that materials and labor travel in interstate commerce.

8.2 Through the artifice of pre-qualification requirements, the City of Seward and the IBEW have entered into a conspiracy to restrain free competition and interstate commerce by imposing the IBEW signatory requirement on all prospective bidders. The conspiracy reflected in the IBEW signatory requirement effectively excludes from the bidding process all contractors whose employees do not wish to be represented by the IBEW.

8.3 Defendants executed the Agreement as part of a general scheme to reduce competition and eliminate non-union contractors from the construction of electrical transmission lines

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in the State of Alaska.

8.4 Defendants at all times relevant to the allegations set forth herein were acting as the agents and/or co-conspirators of each other, with a common anti-competitive purpose or design.

8.5 The City of Seward also acquiesced to threats, intimidation and coercion employed by the IBEW to secure the IBEW signatory requirement.

8.6 Defendants' unlawful conduct has prevented non-union contractors from bidding on the Project, and thus substantially reduces competition and substantially raises the likely price of the Project. Defendants' activities and conduct have had and continue to have a substantial impact on interstate commerce in violation of 15 U.S.C. § 1.

8.7 Defendants' unlawful conduct has injured plaintiffs in their businesses, property, and person in that they have suffered and will continue to suffer substantial injury to the goodwill of their businesses, lost business opportunities, and the loss of profits and employment.

8.8 Neither the City of Seward nor the IBEW enjoy absolute or qualified immunity with respect to their participation in the anti-competitive activities described in the complaint. The IBEW signatory requirement does not comport with the sovereign

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policies of the State of Alaska. There is no requirement in the legislature's appropriation that bidders on the Project be bound by a labor agreement with the IBEW. Similarly, there is no requirement in the Grant that bidders on the Project be bound by a labor agreement with the IBEW.

8.9 Plaintiffs are entitled to a preliminary and permanent injunction against the enforcement of the IBEW signatory requirement, and a declaration that the requirement is illegal. Plaintiffs are also entitled to treble damages for injury suffered because of the illegal activities.

COUNT FOUR: EQUAL PROTECTION OF THE LAW

9.1 The Fourteenth Amendment to the United States Constitution declares that "no state shall ... deny to any person within its jurisdiction the equal protection of the laws."

9.2 Acting under color of state law, defendants engaged in conduct with the knowledge that such conduct would have the effect of denying plaintiffs' equal protection rights under the Fourteenth Amendment.

9.3 The IBEW signatory requirement has the effect of precluding the award of the Project to non-union contractors (in fact, any contractor, union or otherwise, without a contract with

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the IBEW) as a class. No hearings on the IBEW signatory requirement were held, nor were any findings supported by substantial evidence made, which might provide a rational basis for this distinction.

9.4 The bidding requirements could have been more narrowly drafted to achieve any legitimate objectives without unlawfully requiring any bidders to agree to representation by the IBEW.

9.5 The arbitrary and capricious distinction made by the defendants is a violation of the equal protection rights of the plaintiffs. As a result of that distinction, plaintiffs have sustained and continue to sustain damages which are difficult to calculate, and for which a declaratory judgment and injunction are appropriate remedies.

COUNT FIVE: DUE PROCESS OF LAW

10.1 The Fourteenth Amendment to the United States Constitution declares that "no state shall ... deny to any person of life, liberty, or property, without due process of law ...."

10.2 Acting under color of state law, defendants engaged in conduct with the knowledge that such conduct would have the effect of denying plaintiffs' due process rights under the Fourteenth Amendment.

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10.3 Irby and the Irby/AUC are ready, willing and able to bid on and to perform the Project. Both have been found qualified to bid with the sole exception that neither has a labor agreement with the IBEW. Because of the unreasonable IBEW signatory requirement, plaintiffs have been deprived of an opportunity to obtain work on the Project. The requirement deprives plaintiffs of a property interest in contract awards without due process of law.

10.4 The arbitrary and capricious distinction made by the defendants is a violation of the due process rights of the plaintiffs. As a result of that distinction, plaintiffs have sustained and continue to sustain damages which are difficult to calculate, and for which a declaratory judgment and injunction are appropriate remedies.

COUNT SIX: 42 U.S.C. § 1983 CIVIL RIGHTS

11.1 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to

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the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

11.2 Acting under color of state law and municipal ordinance, defendants engaged in conduct with the knowledge that such conduct would have the effect of denying plaintiffs' rights under the United States Constitution, and the laws of the United States, including the NLRA, ERISA, the Sherman Act and other laws.

11.3 As a result of the violations of plaintiffs' rights, plaintiffs have sustained and continue to sustain damages which are difficult to calculate, and for which a declaratory judgment and injunction are appropriate remedies.

11.4 Pursuant to 42 U.S.C. § 1988, plaintiffs are entitled to an award of reasonable attorney fees as part of the costs of this action.

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STATE CLAIMS

COUNT SEVEN: EQUAL PROTECTION OF THE LAW

12.1 Alaska Constitution, Art. I, § 1 provides that "all persons are equal and entitled to equal protection under the law..."

12.2 Acting under color of state law, defendants engaged in conduct with the knowledge that such conduct would have the effect of denying plaintiffs' equal protection rights under the Alaska Constitution.

12.3 The IBEW signatory requirement has the effect of precluding the award of the Project to non-union contractors (in fact, any contractor, union or otherwise, without a contract with the IBEW) as a class.

12.4 The IBEW signatory requirement does not have a fair and substantial relation to a legitimate government interest.

12.5 The unfair distinction made by the defendants is a violation of the equal protection rights of the plaintiffs. As a result of that distinction, plaintiffs have sustained and continue to sustain damages which are difficult to calculate, and for which a declaratory judgment and injunction are appropriate remedies.

COUNT EIGHT: DUE PROCESS OF LAW

13.1 Alaska Constitution, Art. I, § 7 provides in

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

13.2 Acting under color of state law, defendants engaged in conduct with the knowledge that such conduct would have the effect of denying plaintiffs' due process rights under the Alaska Constitution.

13.3 Irby and the Irby/AUC are ready, willing and able to bid on and to perform the Project. Both have been found qualified to bid with the sole exception that neither has a labor agreement with the IBEW. Because of the unreasonable IBEW signatory requirement, plaintiffs have been deprived of an opportunity to obtain work on the Project. The requirement deprives plaintiffs of a property interest in contract awards without due process of law.

13.4 The arbitrary and capricious distinction made by the defendants violates the due process rights of the plaintiffs. As a result of that distinction, plaintiffs have sustained and continue to sustain damages which are difficult to calculate, and for which a declaratory judgment and injunction are appropriate remedies.

COUNT NINE: ALASKA ANTITRUST LAWS

14.1 AS 45.50.562 and .572 prohibit restraint of trade and the monopolization of any part of trade or commerce.

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14.2 Through the artifice of the bidding specifications, the City of Seward and the IBEW have entered into a conspiracy to restrain free competition and interstate commerce by imposing the IBEW signatory requirement on all prospective bidders. The conspiracy reflected in the IBEW signatory requirement effectively excludes from the bidding process all contractors whose employees do not wish to be represented by a labor union, or who prefer to deal only with a union designated by a majority of their employees.

14.3 Defendants wilfully executed the Agreement as part of a general scheme to reduce competition and eliminate non-union contractors from the construction of electrical transmission lines in the State of Alaska.

14.4 Defendants at all times relevant to the allegations set forth herein were acting as the agents and/or co-conspirators of each other, with a common anti-competitive purpose or design.

14.5 The City of Seward also acquiesced to threats, intimidation and coercion employed by the IBEW to secure the IBEW signatory requirement.

14.6 Defendants' unlawful conduct has prevented non-union contractors from bidding on the Project, and thus substantially reduces competition and substantially raises the likely price of the Project.

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14.7 Defendants' unlawful conduct has injured plaintiffs in their businesses, property, and person in that they have suffered and will continue to suffer substantial injury to the goodwill of their businesses, lost business opportunities, and the loss of profits and employment.

14.8 Neither the City of Seward nor the IBEW enjoy absolute or qualified immunity with respect to their participation in the anti-competitive activities described in the complaint. The IBEW signatory requirement does not comport with the sovereign policies of the State of Alaska. There is no requirement in the legislature's grant that bidders on the Project be bound by a labor agreement with the IBEW. Similarly, there is no requirement in the Standard Agreement Form for Municipal Grants executed by the City and the Alaska Department of Administration that bidders on the Project be bound by a labor agreement with the IBEW.

14.9 Plaintiffs are entitled to a preliminary and permanent injunction against the enforcement of the IBEW signatory requirement, and a declaration that the requirement is illegal. Plaintiffs are also entitled to treble damages for injury suffered because of the illegal activities.

MUNICIPAL CLAIMS

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COUNT TEN: CITY OF SEWARD PROCUREMENT CODE

15.1 The City of Seward Code provides: "When a procurement involves the expenditure of state or federal grant, assistance or contract funds, the procurement shall be conducted in accordance with any applicable mandatory state or federal law and regulation." Code § 6.01.020. The Code also provides that procurement contracts "shall be let by the city council to the lowest qualified responsive and responsible bidder." Code § 6.10.230.

15.2 Nothing in the Code authorizes Seward to require as a qualification for bidding on a project that the bidder have a current labor agreement with any labor union.

15.3 The IBEW signatory requirement violates federal and state laws, and the City of Seward Code, by mandating a current labor agreement with the IBEW, and thereby imposing additional costs on plaintiffs.

15.4 Plaintiffs are entitled to a preliminary and permanent injunction against the enforcement of the IBEW signatory requirement, and a declaration that the requirement is illegal.

REQUESTED RELIEF

WHEREFORE, having stated their complaint, plaintiffs pray for the following relief:

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1. Declaratory Judgment: A judgment declaring the IBEW signatory requirement: (a) is null and void as preempted by the NLRA and ERISA to the extent it requires plaintiffs to recognize and deal with a non-majority representative union and to be bound to enter an agreement with the IBEW; (b) works a denial of plaintiffs' rights to equal protection and due process in contravention of the Constitutions of the United States and the State of Alaska, and 42 U.S.C. § 1983; and (c) is unenforceable against the plaintiffs.

2. Injunction: A preliminary and permanent injunction against the defendants and their agents, employees, successors, attorneys, and all those acting in concert or in participation with them, prohibiting enforcement against plaintiffs of those portions of the bid qualifications, including in particular the IBEW signatory requirement, which would require plaintiffs to recognize or deal with any union or to adhere to any collectively bargained terms or conditions of employment.

3. Money damages: Judgment in favor of plaintiffs and against defendants for damages, including treble the amount of actual damages found to have been sustained by plaintiffs as a result of defendants' unlawful conduct under 15 U.S.C. § 1 and AS 45.50.576.

4. Costs and Fees: Judgment in favor of plaintiffs and

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against defendants for costs, interests and attorney fees in bringing and prosecuting this action pursuant to 42 U.S.C. § 1988, AS 45.50.576(a), and any other applicable Alaska law.

5. Other Relief: Such other relief as the court may deem equitable and just under the circumstances.

DATED at Anchorage, Alaska this 28th day of December, 1990.

DELANEY, WILES, HAYES,
REITMAN & BRUBAKER, INC.
Attorneys for Plaintiffs

Stephen M. Ellis

Stephen M. Ellis

Marc D. Bond

Marc D. Bond

DELANEY, WILES,
HAYES, REITMAN
& BRUBAKER, INC.
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Editor's notes.--Sections 139--142 of this chapter will not be set out in the Alaska Statutes. Keep this pamphlet for future references to these sections. Copies of this chapter are also available from the Legislative Affairs Agency or any Legislative Information Office.

Chapter 208

AN ACT

Making, amending, and repealing capital and operating appropriations; and providing for an effective date.

~~* Section 1. The unexpended and unobligated balance of the appropriation made in sec. 10, ch. 172, SLA 1988, page 15, line 9 (Petersburg-Solid Waste Incineration - $800,000) is repealed and reappropriated to the Department of Administration for payment as a grant under AS 37.05.315 to the City of Petersburg for solid waste disposal.~~

~~* Sec. 2. The unexpended and unobligated balance of the appropriation made in sec. 227, ch. 117, SLA 1989, page 86, line 6 (Petersburg-Wastewater Treatment/Solid Waste Projects - $500,000) is repealed and reappropriated to the Department of Administration for payment as a grant under AS 37.05.315 to the City of Petersburg for solid waste disposal.~~

* Sec. 3. Section 158, ch. 3, FSSLA 1987, page 53, line 6 is amended to read:

	APPROPRIATION ITEMS	GENERAL FUND
Wrangell Solid Waste Projects [INCINERATOR] (EC 1)	306,000	306,000

* Sec. 4. Section 286, ch. 50, SLA 1980, page 64, line 16 is amended to read:

	APPROPRIATION	GENERAL FUND

EXHIBIT A

* Sec. 144. The sum of $9,500,000 is appropriated from the Railbelt energy fund (AS 37.05.520) in the general fund to the Department of Administration for payment as a grant under AS 37.05.315 to the City of Seward for the design and construction of the Seward transmission line from Lawing to Fort Raymond substation.

* Sec. 145. The sum of $9,000,000 is appropriated from the Railbelt energy fund (AS 37.05.520) in the general fund to the Alaska Railroad Corporation for the purchase of locomotives, rolling stock, and associated equipment costs.

* Sec. 146. Contingent upon the execution of a long-term, no-cost lease between the Alaska Railroad Corporation and the Municipality of Anchorage that designates the Alaska Railroad Corporation's Government Hill bluff land as open space or for public use, the sum of $2,500,000 is appropriated from the Railbelt energy fund (AS 37.05.520) in the general fund to the Department of Administration for payment as a grant under AS 37.05.315 to the Municipality of Anchorage for road and bridge improvements for the Anchorage Ship Creek Original Townsite Redevelopment Project, including extension of Warehouse Avenue, realignment of C Street, and construction of a Ship Creek pedestrian bridge.

* Sec. 147. (a) The sum of $1,600,000 is appropriated from the Railbelt energy fund (AS 37.05.520) in the general fund to the Department of Community and Regional Affairs for weatherization and energy conservation and for the energy efficient residential housing incentive program under sec. 9 of SCS CSSSHB 358 (Fin) am S (efd fld), enacted by the Sixteenth Alaska State Legislature.

(b) The sum of $600,000 is appropriated from the Railbelt energy fund (AS 37.05.520) in the general fund to the Department of Community and Regional Affairs to match federal receipts for the weatherization and energy conservation program.

STANDARD AGREEMENT FORM FOR MUNICIPAL GRANTS

This agreement is executed between the State of Alaska, Department of Administration (Hereinafter called the "State"), and the City of Seward (Hereinafter called the "Grantee");

WITNESSETH that:

Whereas, the Grantee is willing to undertake the performance of this grant under the terms of this agreement;

Whereas, the Grantee has the authority under the State law or local charter to provide the services for which funds were appropriated;

Whereas, the State has the authority to enter into this agreement by AS 37.05.315;

Whereas, unexpended funding for this grant lapses on the five year anniversary date of July 10, 1990 if the project is not substantially underway or upon completion of the project if work is completed prior to the five year anniversary date or if substantial, ongoing work stops after the five year date is reached;

Whereas, the grant number is; 7/91-956

Whereas, the grant amount is; $9,500,000

Whereas, the grant purpose is; Design and construction of the Seward transmission line from Lawing to Fort Raymond substation

Whereas, the Grantee intends to use these funds as explained below;

The project consists of replacing approximately 24 miles of 69 KV line with a new 115 KV and 3 miles of new 69 KV transmission line; rebuilding Seward Substation to accommodate 115 KV; relocating existing transformers from Lawing and Spring Creek Substations to Seward Substation; relocating existing transformers from Seward Substation to Spring Creek Substation; rebuilding Spring Creek Substation as required to accept the transformers; replacing existing and constructing new distribution lines and services and other work necessary for a complete operational electrical transmission and distribution system serving customers within the Seward Electric Utility Service Area.

JUL 23 1990

OFFICE OF THE
CITY CLERK

RECEIVED
JUL 26 1990
Dept. of Administration
Administrative Services

EXHIBIT B

NOW THEREFORE, the parties hereto agree as follows:

ARTICLE I. GRANT CONDITIONS.

The Grantee:

(1) will spend the grant only for the purposes specified above.

(2) will allow, on request, an audit by the State of the uses made of the grant.

(3) assures that, to the extent consistent with the purpose of the appropriation, the facilities and services provided with the grant will be available for use of the general public.

(4) will return to the State all grant funds received for construction of a public facility, if the State, upon reviewing the documentation provided and other evidence, determines that substantial, ongoing work on the project has not begun within five years of the date it was appropriated.

(5) will, for all grants for construction of a public facility, operate and maintain the facility for its practical life and that it will not look to the State to operate or maintain the facility or pay for its operation and maintenance. This does not apply to a grant for money for repair or improvement of an existing facility operated or maintained by the State at the time the grant is accepted if the repair or improvement for which the grant is made will not substantially increase the operation or maintenance costs to the State.

(6) will submit a monthly municipal grant financial report until the project is completed. A final municipal grant financial report is due within 90 days of project completion.

(7) will retain for a period of three years after project completion all contracts, invoices, materials, payrolls, personnel records, conditions of employment, and other data relating to matters covered by the grant.

(8) will return all unexpended grant monies to the State within 90 days of project completion.

(9) will not allow any of the grant monies to be used for the purpose of lobbying activities before the Alaska Legislature.

(10) will comply with the minimum wage and employment provisions of Alaska's public construction contract law as set out in AS 36.05.010 (copies of which are available through the Department of Labor).

ARTICLE II. TERMS OF PAYMENT

Twenty percent of the grant shall be paid to the grantee, as an advance, within 10 days of the effective date of this agreement. The remainder of the grant will be paid after the entire advance is expended. The payments will be based on grantee expenditures that exceed the advance amount. These expenditures must be reported to the Department of Administration on a municipal grant financial report. Expenditures are herein defined as actual cash outlays or current payables.

The State will reimburse from financial reports signed by the Mayor or persons designated in writing by the Mayor to certify.

NOTE: Signing of this agreement does in no way excuse the recipient of the municipal grant of any other law, Alaska State Statute or City code regulations. Recipient must in all cases consult and adhere to all local, State, or Federal laws that pertain to public funds.

The grantee recognizes that 02. AAC 45.010 establishes specific audit requirements for grant agreements executed after August 1, 1985. If the grantee does not have a copy of 02. AAC 45.010, one should be obtained from the Department of Administration.

The Grant Administrator, by written notice, may terminate this agreement, in whole or in part, when it is in the best interest of the State. The State is liable only for payment in accordance with the payment provisions of the agreement as amended for services rendered before the effective date of termination.

The amount of the grant is full consideration of the grantee's performance.

ARTICLE III. ADDITIONAL CONTRACT PROVISIONS.

The effective date of this grant is the date the agreement is signed by the State.

IN WITNESS WHEREOF, the parties have executed this agreement.

Approved by ~~Ordinance~~/Resolution # 90-086 dated 07/23/90.

Grantee will attach a copy of Ordinance/Resolution.

Grantee

By: Michael Gatti

Deputy City Manager
(Official Title)

Date: 7/24/90

State of Alaska

By: Frank Baxter
Frank Baxter
Commissioner of Administration

(Official Title)

Date: 7-27-90

DISTRIBUTION:

Grantee [ ] State [X]

For State Use Only

Budgeted funds are available for the period and purpose of this expenditure.

Kim Brooks — Certifying Officer

8.14.90 — Date

REQUEST FOR CONTRACTORS TO PRE-QUALIFY TO BID ON CONSTRUCTION OF THE SEWARD 115KV TRANSMISSION LINE LAWING TO FORT RAYMOND

The City of Seward desires to receive requests for pre-qualification from electrical construction contractors deserving to bid on construction of approximately 24 miles of 115KV transmission line and associated work extending from Lawing Substation, Mile 24 Seward Highway, to the Seward substation in Seward. Bids will be accepted only from contractors who have been pre-qualified.

In order to be considered for qualification to bid this project, the contractor must be licensed to perform work in the state of Alaska and maintain an office in Alaska where business and contract matters may be conducted. Also, the contractor and their subcontractors must be a party to an appropriate current labor agreement with the IBEW that will assure that work traditionally performed by employees represented by the International Brotherhood of Electrical Workers, local union 1547 (IBEW) is performed by such employees.

A pre-submittal conference will be held at the Seward City Council Chambers, Fifth & Adams Streets, Seward, at 1:30 p.m. on Wednesday, October 17, 1990. Interested contractors are encouraged to attend the conference.

A copy of the pre-qualification form and related documents may be obtained at the office of the City Engineer, PO Box 167, Seward, Alaska 99664.

The requests for pre-qualification must be submitted to the city clerk no later than 5:00 p.m. on Monday, October 29, 1990. Proposals submitted after that date and time shall be returned unopened to the sender and will not be considered.

The selection of qualified bidders will be at the sole discretion of the city of Seward, and the city reserves the right to reject any and all requests for pre-qualification. This solicitation does not commit the City of Seward to award any contract for construction of the line or preclude the City from subsequent advertisement for contractors to pre-qualify or to advertise for bids without requiring pre-qualification. This solicitation does not commit the city of Seward to pay any cost incurred in the preparation of the request for pre-qualification or to award any contract.

LINDA S. MURPHY, CMC/AAE
CITY CLERK

Notice to Publisher - SEWARD PHOENIX LOG - Publish 10/11/90
ANCHORAGE DAILY NEWS - Publish 10/13 & 14/90
FAIRBANKS NEWS MINER - Publish 10/13 & 14/90
PENINSULA CLARION - Publish 10/13 & 14/90

EXHIBIT C

Request for pre-qualification for
construction of the 115KV transmission line
Page 2

POSTED: 10/08/90

City Hall bulletin board
U. S. Post Office
Harbormaster's Building

MAILED OR DELIVERED: 10/08/90

Seward Phoenix Log
Anchorage Daily News
Fairbanks News Miner
Peninsula Clarion

REQUEST FOR CONTRACTOR TO PRE-QUALIFY TO BID ON CONSTRUCTION OF SEWARD'S LAWING TO FORT RAYMOND TRANSMISSION LINE

The City of Seward desires to receive "Requests for Pre-qualification" from electrical construction contractors desiring to bid on all or a part of construction of approximately 24 miles of 115 KV Transmission Line and associated works extending from Lawing Substation, Mile 24 Seward Highway, to the Seward Substation in Seward. Bids will be accepted only from contractors who have been pre-qualified. Request for Pre-Qualification must be submitted to the Seward City Clerk not later than 5:00 p.m. on the 29th of October, 1990.

The project is being funded from a 9.5 million dollar grant from the State of Alaska to the City of Seward. Due to the timing of the Grant and the urgent need for upgrades to the system within budgeted funds, it is expected that the work will be bid in several phases with bids being requested for the first construction contract in the Spring of 1991. The City anticipates providing major material components, including poles, insulators and conductors. The contracts requiring pre-qualifications include the following work, however, the scope of work included in each contract may vary significantly from the phases described below, or a phase may be broken into several contracts.

PHASE I - Construction of a 115 KV electrical transmission line from approximately mile 19 Seward Highway to Seward Substation. This work would include construction of a wood pole 115 KV line, 25 KV underbuilt distribution line, removal or rehabilitation of existing 69 KV line, connection of services and associated work. Clearing of the rights of way may not be included in the work and if bid as a separate contract will not require pre-qualification.

PHASE II - Construction of a 115 KV electrical transmission line from the Lawing Substation, Mile 24 Seward Highway to Mile 19 Seward Highway. This would include construction of a wood pole 115 KV transmission line, 25 KV underbuilt distribution line, rehabilitation or removal of existing 69 KV transmission line, connection of services and associated work. Clearing of the rights of way may not be included in the work and if bid separately will not require pre-qualification.

PHASE III - Construction of the balance of work necessary to upgrade the power from 69 KV to 115 KV. This would include relocating several large transformers, rebuilding substations to handle higher voltages and all other work necessary to complete the project to serve Seward from the new 115 KV transmission line.

The work is currently being designed by Dryden and LaRue Engineers, Inc. of Anchorage. The schedule for bidding will depend upon design time, material delivery dates and other factors which may not be under control of the City.

In order to be considered for qualification to bid this project a contractor must be licensed to perform the required work in the State of Alaska and maintain an office in Alaska where business and contract matters may be conducted. The City of Seward is a signatory to a collective bargaining agreement with the International Brotherhood of Electrical Workers (IBEW), Local Union 1547. In order to preserve work traditionally performed by employees represented by the IBEW and to avoid destruction of wages, hours and conditions of employment achieved through the collective bargaining process, the City has agreed that, to the extent permitted by law, it will not contract, or allow the subcontract, for the construcuon of the 115 KV main electrical transmission intertie line between Lawing and Fort Raymond Subdivisions within the City of Seward for work traditionally performed by the IBEW except to a party with an appropriate current labor agreement with the IBEW.

The Request for Pre-qualification shall be submitted on the contractor's letterhead in a format to address each of the following subjects. In order to simplify review, each subject shall be included in a similarly lettered paragraph or tab. Additional information may be submitted in additional paragraphs or tabs.

1. Name, address of firm and individual or primary owners of the firm.

2. Name, address and telephone number of person(s) who will be directly responsible for the contract work.

3. Summary of firm's experience in constructing similar projects in Alaska, including the names of key persons involved with projects.

4. Names, addresses and telephone numbers of individuals, firms and agencies who may be contacted as references.

5. A copy of the firm's most recent financial statement and a statement from a bonding company attesting to the firm's capability to obtain performance and payment bond in excess of 5 million dollars or if less the limits of the firm's bonding capability.

6. A statement attesting that the contractor is a party to an appropriate current labor agreement with the IBEW that will assure that work traditionally performed by employees represented by the International Brotherhood of Electrical Workers, local union 1547 ("IBEW") will be performed by such workers.

7. A statement attesting to whether or not you ever failed to complete a contract due to insufficient resources. Explain.

8. Address the equipment you anticipate using on this work.

   Describe in detail the major items of equipment you have available for this work.

   Do you propose to purchase any major items of equipment for use on this project? If yes, describe type, quantity, and approximate cost.

   Do you propose to rent any equipment for this work? If yes, describe type and quantity.

9. Do you expect to subcontract any of the work contained in this project? If yes, describe.

10. Other information you may desire to present.

The "Request for Pre-qualification" will be evaluated based upon information included therein, provided by references or other reliable sources including the local union 1547 ("IBEW") and past performances on similar City projects. The City may request additional information or conduct interviews if deemed necessary. Each firm will be notified whether or not it is recommended as qualified to bid prior to the time a listing of firms is submitted to the City Council for approval of the bidder's list. BIDS WILL BE ACCEPTED ONLY FROM THOSE CONTRACTORS LISTED ON THE BIDDERS LIST APPROVED BY THE CITY COUNCIL. Pre-qualification to bid shall not excuse bidders from compliance with all subsequent bid and contract requirements.

Prospective proposers should familiarize themselves with the City of Seward Purchasing and Contract Procedures and especially Section 6.10.345 of the Seward City Code. Proposers are responsible for compliance with the Seward City Code. A contractor found not qualified by the City Council may appeal the Council's decision by delivering a "Notice of Appeal" to the City Clerk within ten (10) calendar days following notice of the Council's decision. In order for the Notice of appeal to be accepted for reconsideration by the City Council it shall show that the initial "Request for Pre-qualification" was submitted by the specified date and time required herein. The notice shall also include specific exceptions to the Council's decision and specific factual information to show that the contractor is qualified to perform the work. General assertion that the Council's decision is contrary to law or to fact are not sufficient to warrant reconsideration.

The decision of the Council shall be rendered within 45 days of the "Notice of Appeal", except if the time limits are extended by mutual consent. The decision of the Council shall be final and conclusive unless the contractor commences action through the court within 30 days from receipt of the Council's decision.

The "Request for Pre-qualification" must be submitted to the City Clerk not later than 5:00 p.m. on the 29th of October 1990. Proposals submitted after that date and time shall be returned unopened to the sender and will not be considered. A pre-submittal conference will be held at the Seward City Council Chamber corner of Fifth & Adams starting at 1:30 p.m. on October 17, 1990. Interested contractors are encouraged to attend the conference.

For additional information contact Everett P. Diener, City of Seward's Manager of Engineering and Utilities at 224-3331.

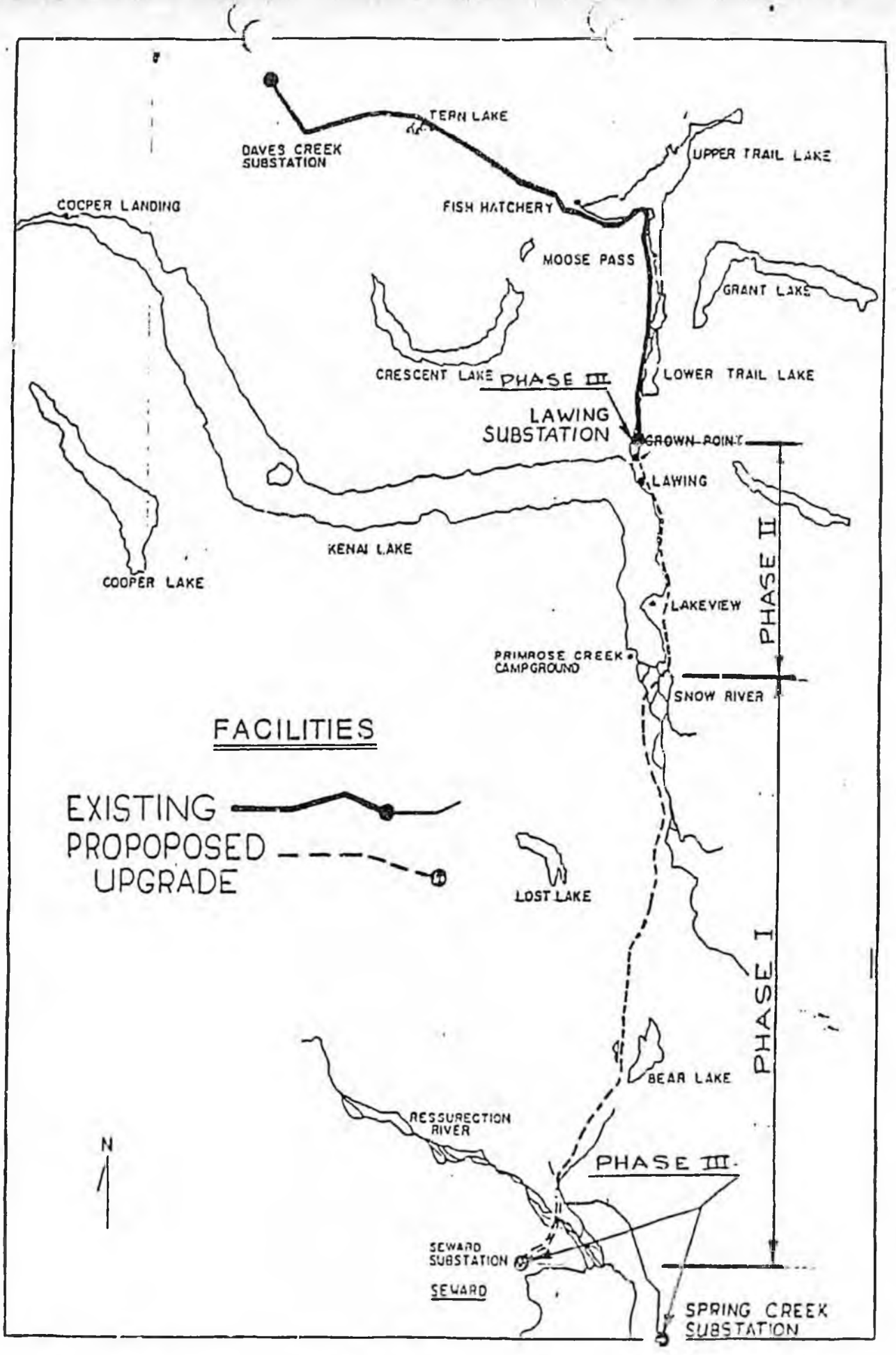
The selection of the qualified proposers will be at the sole discretion of the City of Seward, and the City reserves the right to reject any and all Requests for Pre-Qualification or not to award any contracts if deemed in the best interest of the City. This solicitation does not commit the City of Seward to award any contract for construction of the line or preclude the City from subsequent advertisement for contractors to pre-qualify for this work. This solicitation does not commit the City of Seward to pay any cost incurred in the preparation of the Request for Pre-Qualification or to award any contract.

Enclosures:

1. Map of proposed line.

2. Extracts from City Code

   6.10.135
   6.10.215
   6.10.345


TERN LAKE
DAVES CREEK SUBSTATION
UPPER TRAIL LAKE
COOPER LANDING
FISH HATCHERY
MOOSE PASS
GRANT LAKE
CRESCENT LAKE
PHASE III
LOWER TRAIL LAKE
LAWING SUBSTATION
GROWN POINT
LAWING
KENAI LAKE
COOPER LAKE
LAKEVIEW
PHASE II
PRIMROSE CREEK CAMPGROUND
SNOW RIVER
FACILITIES
EXISTING
PROPOPOSED
UPGRADE
LOST LAKE
PHASE I
BEAR LAKE
RESSURECTION RIVER
N
PHASE III
SEWARD SUBSTATION
SEWARD
SPRING CREEK SUBSTATION

Encl 2

CITY CODE
CHAPTER 6

6.10.135 AWARD ONLY TO RESPONSIBLE BIDDER/PROPOSER. A contract awarded under this chapter shall be made only to a responsible bidder/proposer. The city manager may report to the city council and recommend rejection of a bid or a proposal on the basis of the following criteria:

1. the skill and experience demonstrated by the bidder/proposer in performing contracts of a similar nature;
2. the bidder's/proposer's record for honesty and integrity;
3. the bidder's/proposer's capacity to perform in terms of facilities, personnel and financing;
4. the previous and existing compliance by the bidder/proposer with laws and ordinances relating to the contract;
5. the number and scope of conditions attached to the bid/proposal;
6. the bidder's/proposer's past performance under city contracts. If the bidder/proposer has failed in any material way to perform its obligations under any contract with the city, the bidder/proposer may be deemed a non-responsible bidder/proposer.

(Ord. 615, 1989)

.....

6.10.140 NOT RESPONSIBLE BIDDER/PROPOSER FINDING. A report that the low bidder/proposer is not responsible shall delay the award of the contract until after completion of the procedures outlined below.

1. If the city manager or his designee reports to the city council that the lowest bidder is not responsible, notice shall immediately be sent to the next two lowest bidders or the next two most preferred proposers and the report shall be placed on the agenda of the next scheduled council meeting, provided, that the next council meeting allows two weeks' written notice to the lowest bidder and the next two lowest bidders or most preferred and next two most preferred proposers.
2. At the council meeting, the lowest bidder or most preferred proposer and the city manager or his designee shall have the opportunity to be heard regarding the adverse report.

.....

6.10.215 COMPETITIVE SEALED BIDS - PUBLIC NOTICE. The city clerk shall call for bids by advertising at least once in a newspaper of general circulation in the city not less than two weeks prior to the date set for receiving bids. (Ord. 615, 1989)

.....

6.10.345 PRE-QUALIFICATION OF BIDDERS/PROPOSERS. Pre-qualification of bidders or proposers under Chapter 6.10 is permitted if the city manager determines that pre-qualification is in the public interest. Justification for pre-qualification may include but shall not be limited to the need to restrict bidding to firms having special knowledge and experience in the work required, or a need to expedite contracting procedures. A request for letters of intent shall be advertised in the manner prescribed in Section 6.10.215. The published request shall describe the task(s) to be performed, the minimum qualifications of firms to be selected, and procedures for evaluating those firms. Evaluation criteria may include, but shall not be limited to, the same factors as listed at 6.10.135 for determining a responsible bidder. Firms will be either approved or rejected, with no rating designated to compare firms within either the approved or rejected category. At least three firms must be included in the approved category. The city council shall approve the pre-qualification list by resolution. Requests for bids or proposals will be solicited from only those firms on the approved list and only those pre-qualified firms shall be allowed to submit bids pursuant to this section. (Ord. 615, 1989)

CITY OF SEWARD

P.O. BOX 167
SEWARD, ALASKA 99664

- Main Office (907) 224-3331
- Police (907) 224-3338
- Harbor (907) 224-3130
- Fire (907) 224-3445
- Telecopier (907) 224-3248

November 16, 1990
90-11-208-01

Charles L. Irby, President
Irby Construction Company
P.O. Box 1819
Jackson, MS 39215

Dear Mr. Irby:

Thank you for submitting a request to be pre-qualified to bid on construction of the Seward 115 KV Transmission Line.

We are reviewing your submittal and it appears you have not clearly described your Alaskan experience or listed the firm's key personnel involved with those projects as requested in Item #3. We would appreciate you providing additional data to meet this requirement.

We also note your objection to the statement required by Item #6 concerning being a party to an appropriate labor agreement with the IBEW. Based on your response we may recommend to City Council that Irby Construction Company be found not qualified to bid. Should you desire to amend your response please do it at this time.

I would appreciate you providing additional information or clarification to enable us to thoroughly evaluate your experience. Your prompt response will be appreciated since we hope to make final determination of qualified contractors prior to the 30th of November for submittal to the City Council on December the 10th. If you have any questions feel free to call me.

Sincerely,

Everett P. Diener

Everett P. Diener
Manager of Engineering & Utilities

cc: Calvert
Arvidson
Schaefermeyer
208 File

EXHIBIT D

NOV 20 '90 08:48 CITY OF SEWARD, ALASKA

CITY OF SEWARD

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November 16, 1990
90-11-208-01

Aaron H. Downing
President AUC
Irby/Alaska Utility Construction JV
101 East Swanson Avenue
Wasilla, Alaska 99687

Dear Mr. Downing:

Thank you for submitting a request to be pre-qualified to bid on construction of the Seward 115 KV Transmission Line.

We are reviewing your submittal and it appears you have not clearly described your Alaskan experience or listed the firm's key personnel involved with those projects as requested in Item #3. We would appreciate you providing additional data to meet this requirement.

We also note your objection to the statement required by Item #6 concerning being a party to an appropriate labor agreement with the IBEW. Based on your response we may recommend to City Council that Irby/Alaska Utility Construction JV be found not qualified to bid. Should you desire to amend your response please do it at this time.

I would appreciate you providing additional information or clarification to enable us to thoroughly evaluate your experience. Your prompt response will be appreciated since we hope to make final determination of qualified contractors prior to the 30th of November for submittal to the City Council on December the 10th. If you have any questions feel free to call me.

Sincerely,

Everett P. Diener

Everett P. Diener
Manager of Engineering & Utilities

cc: Calvert
Arvidson
Schaefermeyer
208 File

IRBY CONSTRUCTION COMPANY/
ALASKA UTILITY CONSTRUCTION, INC.
JOINT VENTURE
101 East Swanson Avenue
Wasilla, Alaska 99687-8704
(907) 376-3859

November 26, 1990

Everett P. Diener
Manager of Engineering and Utilities
City of Seward
P. O. Box 167
Seward, Alaska 99664

Reference: Your letter of November 16, 1990 - Seward Transmission Line Upgrade

Dear Mr. Diener:

In response to your request for additional data please be advised as follows: Should we be the successful bidder for your transmission line upgrade, our project manager will be Aaron Downing. Mr. Downing, as his resume' shows, has extensive Alaska experience encompassing nearly 40 years in the Alaska electrical construction and utility industry.

Our submitted list of projects shows the Alaska projects completed by our Joint Venture as well as the individual venturers. In addition the principals have further experience such as a 25 miles section of 115kv in Portage Pass, 65 miles of 69kv at Homer Electric, 17 miles of 69kv at Fairbanks, 8 miles of 115kv at Palmer, as well as many other projects. The experience of our organizations and their principals encompasses every major utility in the State of Alaska with the exception of the Cities of Seward and Nome.

As to item number 6, we stand by our prior response. We feel this requirement is unlawful and that we, by making such an attestation, could be found guilty of Anti-Trust violations and hence liable for treble damages. Our preliminary calculations, based upon our cost estimates, shows the total damages could run as high as 12 million dollars

EXHIBIT E

plus attorney fees. Our firm is not willing to become a party to an unlawful agreement as yours appears, and we certainly abhor the risk of a $12,000,000 lawsuit should we acquiesce to the union proviso.

Our experience shows we have not found it necessary to have an exclusive agreement with IBEW Local 1547 in order to acquire sufficient qualified Alaska resident workmen for Alaska projects.

You should be aware the IBEW Local 1547 has less than five hundred qualified outside construction workmen who are bona-fide residents of Alaska. Based upon this information, past experience, and with knowledge of upcoming projects, we believe the union will have to import personnel from outside to meet the state employment needs. We recognize that your pre-qualification does not address local hire and that workmen need not be Alaska residents, but our joint venture operates with the tenant of local hire. We have found it to the benefit of the owner and ourselves to hire the bulk of our construction personnel from the local area in which we are working. Local workman pay your local taxes and utility bills. Workman outside of your service area do not. The City of Seward should look at how many Seward and vicinity residents belong to IBEW and are available for hire against how many Seward and vicinity residents who are not IBEW members, but are available for hire. We are sure that many more Seward people will find employment on the transmission line if the requirement that they also be members of IBEW Local 1547 is removed.

We also find it morally troubling that State of Alaska money which belongs to all Alaskan residents should be narrowly channelled to the sole benefit of less than five hundred people, thereby cutting out the remainder. How can one justify nine and 1/2 million dollars to the benefit of 0.08% of the states population and forsake the others? One must also consider the political consequences of an exclusive IBEW Union hire agreement with the almost certain backlash from other political forces and other unions the next time the City of Seward lobbies for state funds. While the IBEW does have political influence it does not begin to compare with the clout of the remainder of the construction industry which you have evidently chosen to ignore.

We, therefore, are loathe to attest to your requirement that our workmen, and those of our subcontractors, be members of IBEW. We do not relish the prospect of a legal suit in the range of $12,000,000. Nor do we think it morally right that state money should be reserved solely for the benefit of a tiny few at the expense of the vast majority.

We trust this letter provides sufficient data for you approval of our pre-qualification to bid your project.

Very truly yours,

Aaron H. Downing
President AUC
A Joint Venture Partner

AHD:prs
file:sewprebl.01

IRBY CONSTRUCTION CO.

November 26, 1990

City of Seward
P. O. Box 167
Seward, Alaska 99664

Attn: Mr. Everett P. Diener
Manager of Engineering and Utilities

Dear Mr. Diener:

Thank you for your letter (90-11-208-01) of November 16, 1990 requesting additional information to pre-qualify for the construction of the Seward 115 kV Transmission Line

We are in the process of construction or have completed the following Transmission Lines in the State of Alaska.

1. Fritz Creek-Soldotna 115 kV Wood H-Frame - 28.5 miles - Under Construction - Owner, Homer Electric Association.

2. Thompson Pass Avalanche Repair - 14 Strs. - Completed 1989. Joint Venture with Alaska Utility Construction, Inc. Owner, Alaska Energy Authority.

3. Alaska Intertie - 98 Miles - 345 kV Steel Pole Strs - Completed 1984 - Owner - Alaska Power Authority.

Irby Construction Company would have the following personnel available to place on the Seward 115 kV Transmission Line.

1. Pat McBride* - Superintendent - Alaska experience - Assistant Superintendent on the Alaska 345 kV Intertie, Superintendent on the Fritz Creek-Soldotna 115 kV Line.

2. Steve Roberts* - Lineman on the Alaska Intertie, Assistant Superintendent on the Fritz Creek-Soldotna 115 kV Line.

3. Pete Porter - Assistant Superintendent On the Alaska 345 kV Intertie - Superintendent on the Thompson Pass Avalanche Repair.

EXHIBIT F

4. Mike Barnes* - Lineman on the Alaska Intertie - Wire Stringing Foreman on the Fritz Creek-Soldotna 115 kV Transmission Line.

5. Doug Booth - Material Specialist on the Fritz Creek-Soldotna 115 kV Transmission Line.

* Holds Current Alaska Lineman's Certificate.

We note you statement concerning our objection to being a party to an appropriate labor agreement with the IBEW (Item No. 6). We do not desire to amend our response of October 24, 1990.

If we can be of further help or if you have additional questions, please feel free to contact us at 601/969-1811.

Sincerely,

IRBY CONSTRUCTION COMPANY

John R. Nye

John R. Nye
Assistant General Superintendent

JRN/mk

CITY OF SEWARD

P.O. BOX 167
SEWARD, ALASKA 99664

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November 30, 1990
90-11-208-02

DRAFT

Charles Irby, President
Irby Construction Company
P.O. Box 1819
Jackson, MS 99215

Dear Mr. Irby:

Thank you for your response to our letter requesting clarification of some items on your request to be pre-qualified to bid on construction of the Seward 115 KV Transmission Line.

We find you qualified to perform except for Item # 6 which states that you must be a party to a current labor agreement with the IBEW. Consequently, I have no alternative but to omit your company from the list of contractors I will submit to the City Council as qualified bidders on this project. Therefore, if the City Council approves the recommendation a bid will not be accepted from Irby Construction Company.

For your information this recommendation will appear on the City Council agenda for the meeting on December 10, 1990, and you are invited to appear in person or submit written comments to the City Clerk, Linda Murphy. If you intend to appear you should notify Linda Murphy at 224-3331 (fax 224-3248).

Further, you may appeal the City Council's decision by delivering a "Notice of Appeal" to the City Clerk within ten (10) calendar days following notice of the Council's decision. In order for the Notice of Appeal to be accepted for reconsideration by the City Council it shall show that the initial "Request For Pre-Qualification" was submitted by the specified date and time. The Notice shall also include specific exceptions to the Council's decision and specific factual information to show that you are qualified to perform the work. A general assertion that the Council's decision is contrary to law or to fact are not sufficient to warrant reconsideration.

EXHIBIT G

We sincerely appreciate your response to our original pre-qualification proposal and subsequent amplification on that response.

Sincerely,

Everett P. Diener
Manager of Engineering & Utilities

cc: Calvert
Arvidson
Schaefermeyer
208 File

CITY OF SEWARD

P.O. BOX 167
SEWARD, ALASKA 99664

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December 3, 1990
90-11-208-02

Aaron H. Downing, President AUC
Irby/Alaska Utility Construction JV
101 East Swanson Avenue
Wasilla, Alaska 99687

Dear Mr. Downing:

Thank you for your response to our letter requesting clarification of some items on your request to be pre-qualified to bid on construction of the Seward 115 KV Transmission Line.

We find you qualified to perform except for Item # 6 which states that you must be a party to a current labor agreement with the IBEW. Consequently, I have no alternative but to omit your company from the list of contractors I will submit to the City Council as qualified bidders on this project. Therefore, if the City Council approves the recommendation a bid will not be accepted from Irby/Alaska Utility Construction JV.

For your information this recommendation will appear on the City Council agenda for the meeting on December 10, 1990, and you are invited to appear in person or submit written comments to the City Clerk, Linda Murphy. If you intend to appear you should notify Linda Murphy at 224-3331 (fax 224-3248).

Further, you may appeal the City Council's decision by delivering a "Notice of Appeal" to the City Clerk within ten (10) calendar days following notice of the Council's decision. In order for the Notice of Appeal to be accepted for reconsideration by the City Council it shall show that the initial "Request For Pre-Qualification" was submitted by the specified date and time. The Notice shall also include specific exceptions to the Council's decision and specific factual information to show that you are qualified to perform the work. A general assertion that the Council's decision is contrary to law or to fact are not sufficient to warrant reconsideration.

EXHIBIT H

We sincerely appreciate your response to our original pre-qualification proposal and subsequent amplification on that response.

Sincerely,

Everett P. Diener by Dac

Everett P. Diener
Manager of Engineering & Utilities

cc: Calvert
Arvidson
Schaefermeyer
208 File

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November 30, 1990
90-11-208-01

MEMORANDUM:

TO: HONORABLE MAYOR AND MEMBERS OF CITY COUNCIL

THRU: DARRYL SCHAEFERMEYER, CITY MANAGER

FROM: E. PAUL DIENER, MGR. ENGINEERING & UTILITIES E. Paul Diener by Ed

SUBJECT: PRE-QUALIFICATION OF 115 KV TRANSMISSION LINE CONSTRUCTION CONTRACTORS

A request for contractors to pre-qualify to bid on construction of the Seward 115 KV Transmission Line was properly advertized and five firms responded. In order to be considered for qualification to bid this project, the contractor in addition to being experienced and having the resources to do the work he must be licensed to perform work in the State of Alaska and maintain an office in Alaska where business and contract matters may be conducted. Also, the contractor and their subcontractors must be a party to an appropriate current labor agreement with the IBEW that will assure that work traditionally performed by employees represented by the International Brotherhood of Electrical Workers, local union 1547 is performed by such employees.

The responding firms were: Newbery Alaska, Inc., Norcon, Inc., Irby/Alaska Utility Construction JV, Irby Construction Company and City Electric, Inc. The submittals were reviewed and all of the firms were requested to provided additional information or clarification on their submittals.

Newbery Alaska, Inc., Norcon, Inc. and City Electric, Inc. were found to be qualified to bid on the project. Irby/Alaska Utility Construction JV and Irby Construction Company submittals did not meet the requirement of a current labor agreement with the International Brotherhood of Electrical Workers, local union 1547. Copies of the Irby and Irby/AUC JV proposals are attached for your reference. The other proposals are available from the City Clerk.

RECOMMENDATION:

That the City Council find Newbery Alaska, Inc., Norcon, Inc. and City Electric, Inc. to be qualified to bid on the 115 KV Transmission Line project.

EXHIBIT 1

Sponsored by: Schaefermeyer

CITY OF SEWARD, ALASKA
RESOLUTION NO. 90-152

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SEWARD, ALASKA, APPROVING PREQUALIFIED BIDDERS FOR CONSTRUCTION OF THE SEWARD INTERTIE PROJECT

WHEREAS, by legislative appropriation, the state of Alaska has granted to the city of Seward funds for the construction of much needed improvements to the Seward electrical transmission system; and

WHEREAS, the city has made every effort to expedite the design, acquisition of materials, and construction of the project including the award of design and engineering contracts concurrent with other necessary work for the construction; and

WHEREAS, by doing so, the city has endeavored to make it possible for construction to commence as early as next spring on the project; and

WHEREAS, one of the efforts to expedite construction of the project is the prequalification of bidders for construction of portions of the project; and

WHEREAS, the city has complied with the provisions of the Seward Code with respect to the prequalification process; and

WHEREAS, certain bidders have submitted all required information and met the requirements of the prequalification and have been recommended by the city engineer in consultation with the city's independent engineering firm to be found by the City Council as prequalified bidders;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SEWARD, ALASKA, that:

Section 1. The following named corporations have been found to be prequalified as bidders for construction of the Seward 115 KV transmission line:

Newbery Alaska, Inc.
Norcon, Inc.
City Electric, Inc.

Section 2. The following named firms are found NOT to be qualified because they failed to meet the requirement of a current labor agreement with the International Brotherhood of Electrical Workers Local Union 1547:

EXHIBIT J

CITY OF SEWARD, ALASKA
RESOLUTION NO. 90-152

Irby/Alaska Utility Construction JV
Irby Construction Company

Section 3. Any firm found not qualified may appeal this decision by delivering a "Notice of Appeal" to the City Clerk within ten (10) calendar days following notice of this Resolution and by complying with the appeal procedures set forth in the REQUEST FOR CONTRACTOR TO PREQUALIFY TO BID ON CONSTRUCTION OF SEWARD'S LAWING TO FORT RAYMOND TRANSMISSION LINE.

Section 4. This resolution shall take effect immediately upon its adoption.

PASSED AND APPROVED by the City Council of the city of Seward, Alaska, this 10th day of December, 1990.

THE CITY OF SEWARD, ALASKA

William C. Noll, Mayor

AYES:
NOES:
ABSENT:
ABSTAIN:

ATTEST:

Linda S. Murphy, CMC/AAE
City Clerk

(City Seal)

APPROVED AS TO FORM:

Perkins Coie, Attorneys for the city of Seward, Alaska

Fred B. Arvidson
City Attorney

Stephen M. Ellis
Marc D. Bond
Delaney, Wiles, Hayes,
Reitman & Brubaker, Inc.
1007 West 3rd Avenue, Suite 400
Anchorage, Alaska 99501
907-279-3581

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ASSOCIATED BUILDERS AND CONTRACTORS, INC., a Maryland corporation, ASSOCIATED GENERAL CONTRACTORS OF ALASKA, an Alaska nonprofit corporation, IRBY CONSTRUCTION COMPANY, a Mississippi corporation, IRBY/ ALASKA UTILITIES CONSTRUCTION COMPANY, an Alaska corporation, Plaintiffs, vs. CITY OF SEWARD, an Alaska home rule municipality, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1547 (IBEW), a labor union, Defendants.	Case No. A90-001 Civil

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT,
OR, IN THE ALTERNATIVE FOR A PRELIMINARY INJUNCTION

Pursuant to Federal Rules of Civil Procedure 56, 57 and 65, plaintiffs move for summary judgment, or, in the alternative, for a preliminary injunction prohibiting the enforcement of a City of Seward ordinance requiring individual plaintiff companies to be signatories to a collective bargaining agreement with the International Brotherhood of Electrical Workers, Local 1547, in

order to bid on a project to construct an electric transmission line near the City of Seward. This motion is supported by the memorandum submitted herewith, and by the Stipulation filed by the parties in this matter.

DATED at Anchorage, Alaska this 28th day of January, 1991.

DELANEY, WILES, HAYES,
REITMAN & BRUBAKER, INC.
Attorneys for Plaintiffs

By: Stephen M. Ellis
Stephen M. Ellis

By: Stephen M. Ellis
for Marc D. Bond

DELANEY, WILES,
HAYES, REITMAN
BRUBAKER, INC.
SUITE 400
607 WEST 3RD AVENUE
ANCHORAGE, ALASKA
(907) 279-3581

Stephen M. Ellis
Marc D. Bond
Delaney, Wiles, Hayes,
Reitman & Brubaker, Inc.
1007 West 3rd Avenue, Suite 400
Anchorage, Alaska 99501
907-279-3581

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ASSOCIATED BUILDERS AND CONTRACTORS, INC., a Maryland corporation, ASSOCIATED GENERAL CONTRACTORS OF ALASKA, an Alaska nonprofit corporation, IRBY CONSTRUCTION COMPANY, a Mississippi corporation, IRBY/ ALASKA UTILITIES CONSTRUCTION COMPANY, an Alaska corporation, Plaintiffs, vs. CITY OF SEWARD, an Alaska home rule municipality, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1547 (IBEW), a labor union, Defendants.	Case No. A91-001 Civil

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE FOR A PRELIMINARY INJUNCTION

This action concerns a requirement that all prospective bidders for a contract to erect a high tension electric transmission line near the City of Seward (the City) must first enter into a collective bargaining agreement with the International Brotherhood

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of Electrical Workers, Local 1547. The plaintiffs seek a judgment declaring the requirement to be unlawful, a permanent injunction forbidding its enforcement, and an award of attorney's fees and costs.

This motion seeks summary judgment in favor of the plaintiffs on several of the claims raised in the complaint. In the alternative, the motion seeks a preliminary injunction forbidding enforcement of the requirement pending resolution of this matter.

I. FACTS

The parties have stipulated to all of the relevant facts in this matter. See Stipulation of Facts dated January 25, 1991. The following recitation of pertinent facts, all of which are set forth in the stipulation, forms the basis for this motion.

The City operates the Seward Electric Utility System, which provides commercial and residential electrical service within its allocated service territory. The City has needed expanded electrical transmission capabilities for the last several years. In particular, the City requires the construction of a 115 Kv transmission line from Lawing[1] to Fort Raymond and attendant facilities (the Project).

During the 1990 legislative session, the Alaska

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1 Lawing is located 21 miles north of the City.

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Legislature approved a grant appropriation of $9.5 million to the City for the Project. 208 SLA 1990, § 144. The City accepted this grant by Resolution 90-086. Exhibit A to the Stipulation.

On July 23, 1990, the State of Alaska and the City entered into a "Standard Agreement Form for Municipal Grants" (Grant) for $9,500,000 for the construction of the electrical line and attendant structures. Exhibit B to the Stipulation.[2]

On October 8, 1990, the City issued a "Request for Contractors to Pre-Qualify[3] to Bid on Construction of the Seward 115KV Transmission Line - Lawing to Fort Raymond." Exhibit D to the Stipulation. The Request included the following language (hereinafter referred to as the "IBEW signatory requirement"):

> The City of Seward is a signatory to a collective bargaining agreement with the International Brotherhood of Electrical Workers (IBEW), Local Union 1547. In order to preserve

---

[2] The grant agreement notes: "Signing of this agreement does in now way excuse the recipient of the municipal grant of any other law, Alaska Statute or City code regulations. Recipient must in all cases consult and adhere to all local, State, or Federal laws pertaining to public funds." Exhibit B to the Stipulation at 3.

[3] "Pre-qualification" is a process which allows the owner of a construction project to determine each bidder's competency and responsibility to satisfactorily complete the project before the bidder submits a bid.

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work traditionally performed by employees represented by the IBEW and to avoid the destruction of wages, hours, and conditions of employment achieved through the collective bargaining process, the City has agreed that, to the extent permitted by law, it will not contract, or allow the subcontract, for the construction of the 115 KV main electrical transmission intertie line between Lawing and Fort Raymond Subdivisions within the City of Seward for work traditionally performed by the IBEW except to a party with an appropriate current labor agreement with the IBEW.

The Request for Pre-Qualification shall be submitted on the contractor's letterhead in a format to address each of the following subjects.

. . .

6. A statement attesting that the contractor is a party to an appropriate current labor agreement with the IBEW that will assure that work traditionally performed by

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employees represented by the International Brotherhood of Electrical Workers, local union 1547 ("IBEW") will be performed by such workers.

In October of 1990, both Irby Construction Company ("Irby") and Irby/Alaska Utilities Construction JV ("Irby/AUC") submitted separate requests to be pre-qualified to bid on the Project. Exhibits E and F to the Stipulation. Both companies expressed concerns regarding the IBEW signatory requirement. On November 16, 1990, Everett Diener, Manager of Engineering and Utilities for the City of Seward, wrote letter to Charles Irby of Irby, and Aaron Downing of Irby/AUC. The letters requested additional information concerning the companies' Alaska experience and the identity of the key employees each would have on the Project. The letters also noted Irby's and Irby/AUC's objection to Item #6, said that Mr. Diener would likely recommend to the City Council that Irby and Irby/AUC be found not qualified, and invited Irby and Irby/AUC to change its response to Item #6. Exhibits G and H to the Stipulation.

By letter dated November 26, 1990, Aaron Downing submitted additional information on Irby/AUC's Alaska experience, and designated the key employees. The letter also elaborated on the

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objection to Item #6. Exhibit J to the Stipulation. On the same date, John Nye of Irby responded, submitting additional information on Irby's Alaska experience, and designating the Irby key employees. Mr. Nye declined to amend the objection to Item #6. Exhibit I to the Stipulation.

On November 30, 1990, Mr. Diener sent a letter to Charles Irby stating:

> We find you qualified to perform except for Item #6 which states that you must be a party to a current labor agreement with the IBEW. Consequently, I have no alternative but to omit your company from the list of contractors I will submit to the City Council as qualified bidders on this project. Therefore, if the City Council approves the recommendation a bid will not be accepted from Irby Construction Company.

Exhibit M to the Stipulation.

The City's December 3, 1990, response to Irby/AUC was substantially the same. Exhibit N to the Stipulation.

On November 30, 1990, Mr. Diener sent a memorandum to the Seward Mayor and City Council, finding Irby and Irby/AUC to be not

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qualified for failure to comply with the requirement of a current labor agreement with IBEW. Exhibit K to the Stipulation.

On December 10, 1990, the Seward City Council adopted Resolution 90-152, which approved the list of bidders, omitting Irby and Irby/AUC on the basis of Item #6. Exhibit L to the Stipulation.

The City intends to proceed with the bidding process in order to commence construction of the Project in 1991. Pursuant to its collective bargaining agreement with the IBEW, and the resolutions adopted by the City Council, the City will not accept bids from Irby or Irby/AUC. Irby and Irby/AUC are in all respects fully qualified, in terms of skill, knowledge and experience, to construct the Project, having been so found by the City of Seward's designated representative. See Exhibits M and N to the Stipulation. The sole basis for this discrimination is the lawful refusal of Irby and Irby/AUC to enter into a collective bargaining agreement with the IBEW, where the IBEW has not been certified by the National Labor Relations Board as the legal representative of Irby's or Irby/AUC's employees.

II. PROCEDURAL POSTURE

A. THIS COURT HAS JURISDICTION OF THIS MATTER

The Complaint alleges jurisdiction based on 28 U.S.C. § 1337(a) [commerce and antitrust regulation], 28 U.S.C. § 1343(a)(3)

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[civil rights], 29 U.S.C. § 1132 [ERISA], 28 U.S.C. § 2201(a) [declaratory judgment], Civil Rule 57 [declaratory judgment], and the doctrine of pendent jurisdiction. This memorandum relies upon all of the foregoing provisions, with the exception of 29 U.S.C. § 1132 [ERISA].[4] It is obvious jurisdiction lies with this Court as to all issues raised herein with the possible exception of the argument in Section III(B) below, in which we show that the City's imposition of the IBEW signatory requirement is unlawful because it is pre-empted by the National Labor Relations Act. However, pertinent authority readily establishes the court's jurisdiction as to that issue as well.

In Golden State Transit Corp. v. City of Los Angeles (Golden State II), ___ U.S. ___ 110 S.Ct. 444, 450, 107 L.Ed.2d 420 (1989) the Court explained that in situations such as involved here, the National Labor Relations Board has neither authority nor jurisdiction:

> Although the National Labor Relations Board has exclusive jurisdiction to prevent and remedy unfair labor practices by employers and unions, it has no authority to address conduct

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[4] ERISA issues are not addressed herein because of the existence of an apparent material issue of fact.

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protected by the NLRA against governmental interference.[5] There is thus no comprehensive enforcement scheme for preventing state interference with federally protected labor rights that would foreclose the § 1983 remedy. Nor can there be any substantial question that our holding in Golden State I that the city's conduct was pre-empted was within the competence of the judiciary to enforce. Rather, the city argues that it cannot be held liable under § 1983 because its conduct did not violate any rights secured by the NLRA. On the basis of our previous cases, we reject this argument. We agree with petitioner that it is the intended beneficiary of a statutory scheme that prevents governmental interference with the collective-bargaining process and that the NLRA gives it rights enforceable against governmental interference in an action under § 1983.

The Court's footnote 5 is illuminating. It provides:

> The Court of Appeals was thus

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> mistaken in ruling that because the NLRB has exclusive jurisdiction to redress violations of the NLRA by labor and mangement, the federal courts do not have jurisdiction to address claims of governmental interference with interests protected by the Act. Our cases have repeatedly stressed the distinctions between the two types of claims, see Brown v. Hotel Employees, 468 U.S. 491, 503, 104 S.Ct. 3179, 3186, 82 L.Ed.2d 373 (1984); Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 145, n. 6, 96 S.Ct. 2548, 2555, n. 6, 49 L.Ed.2d 396 (1976); Railroad Trainmen v. Terminal Co., 394 U.S. 369, 382, n. 17, 89 S.Ct. 1109, 1117, n. 17, 22 L.Ed.2d 344 (1969).

110 S.Ct. at 450, n. 5.

Accordingly, this court does have jurisdiction to address

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the claim that the City has improperly interfered with interests protected by the NLRA.

B. SUMMARY JUDGMENT

Summary judgment is appropriate where there is no genuine dispute as to the material facts, and the movant is entitled to judgment based on the undisputed facts as a matter of law. Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir. 1985); Fed.R.Civ.P. 56(c). Material facts are those which may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A genuine dispute exists where there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. Id.

In this case, the parties have stipulated to the material facts, leaving no genuine dispute to be resolved by a jury. The case is thus ripe for decision by the court on this motion.

C. PRELIMINARY INJUNCTION

It appears the court will be able to resolve this matter on the motion for summary judgment. If so, the plaintiffs request as part of their relief that the court permanently enjoin enforcement of the IBEW signatory requirement. However, the court discerns genuine issues of material fact, or requires additional time to resolve the matter, the plaintiffs request the

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court issue a preliminary injunction forbidding enforcement of the IBEW signatory requirement.

In evaluating a motion for a preliminary injunction, the court must examine four elements. The definitive elucidation of these elements, and their relative importance, is set forth in State of Alaska v. Native Village of Venetie, 856 F.2d 1384, 1388-89 (9th Cir. 1988):

> Traditionally, there are four factors to be considered before a court decides to grant or deny preliminary injunctive relief:
>
> 1) The likelihood of the plaintiff's success on the merits;
>
> 2) the threat of irreparable harm to the plaintiff if the injunction is not imposed;
>
> 3) the relative balance of this harm to the plaintiff and the harm to the defendant if the injunction is imposed; and
>
> 4) the public interest.

See Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980); 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2948 at 430-

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31 (1973).

In Warm Springs Dam Task Force v. Gribble, 565 F.2d 549, 551 (9th Cir. 1977), this court treated factors two and three above as a single factor (citing Alpine Lakes Protection Society v. Schlapfer, 518 F.2d 1089, 1090 (9th Cir. 1975)), and further noted that factor four is but one more interest to be balanced along with the interests of the parties. Id. Thus, there essentially are only two factors to be considered: The likelihood of the plaintiff's success on the merits; and, the relative balance of potential hardships to the plaintiff, defendant, and public.

These two factors have been employed in a test framed in the alternative. Basically, plaintiffs are entitled to preliminary injunctive relief if:

1) They demonstrate

- a probable success on the merits, and

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- a possibility of irreparable injury;

2) or if they demonstrate a fair chance of success on the merits (i.e. serious questions are raised), and

- the balance of hardships tips sharply in their favor.

See Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983); Miss Universe, Inc. v. Flesher, 605 F.2d 1130, 1134 (9th Cir. 1979); William Inglis & Sons Baking Company v. ITT Continental Baking Company, Inc., 526 F.2d 86, 88 (9th Cir. 1975).

It is settled that the alternatives in the above test are not to be treated as two separate tests, but rather, as "extremes of a single continuum." Benda v. Grand Lodge of International Association of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978), cert. dismissed, 441 U.S. 937, 99 S.Ct.

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2065, 60 L.Ed.2d 667 (1979). The proper approach is best summarized as follows:

> The critical element in determining the test to be applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly. Aguirre v. Chula Vista Sanitary Service, 542 F.2d 779 (9th Cir. 1976).

Id.; see also Inglis, 526 F.2d at 88.

Thus, in order to obtain an injunction, the plaintiffs must demonstrate some persuasive combination of likely success on the merits and likely threat of irreparable injury. In addition, the court should examine whether an injunction is in the public interest.

In the instant case, plaintiffs can demonstrate both likely success on the merits and substantial irreparable harm. In addition, the public interest compels the issuance of an injunction in this matter.

If the injunctive relief is not granted, plaintiffs will be precluded from even bidding on the $14 million Project. In view

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of the uncertainties of the bidding process, it is very difficult to estimate the losses which will be suffered by Irby and Irby/AUC, the two plaintiffs fully qualified to bid on the Project, except for the IBEW signatory requirement.

As is further alleged in the Complaint and demonstrated in this Memorandum, the IBEW signatory requirement works a denial of plaintiffs' constitutional and statutory rights. The constitutional deprivation, without more, constitutes irreparable injury. See, e.g., Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976) (Opinion of Brennan, J.) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). See also Golden State Transit Corp. v. City of Los Angeles (Golden State I), 475 U.S. 608, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986) (enjoining local government action preempted by NLRA); General Electric Co. v. New York State Dept. of Labor, 891 F.2d 25 (2d Cir. 1989) (authorizing injunction against state law preempted by ERISA); Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee, 685 F.Supp. 718 (N.D. Cal. 1988), aff'd 891 F.2d 719 (9th Cir. 1989) (injunction granted on both NLRA and ERISA grounds).

III. THE IBEW SIGNATORY REQUIREMENT VIOLATES FEDERAL, STATE AND LOCAL CONSTITUTIONAL AND STATUTORY PROVISIONS.

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Federal, state and local laws protect the plaintiffs from edicts such as the IBEW signatory requirement. In particular, 42 U.S.C. § 1983 specifically authorizes a civil action for deprivation of rights secured by the United States Constitution and federal laws.

The IBEW signatory requirement violates the equal protection and due process rights of the plaintiffs. The requirement also violates the National Labor Relations Act (NLRA), the Employee Retirement Income Security Act (ERISA), and the Sherman Antitrust Act. In addition to federal laws, the requirement violates the Code of the City of Seward.

This court is empowered to declare the rights of the parties under the Declaratory Judgment Act, and to enter an injunction forbidding enforcement of the IBEW signatory requirement. The court should also enter judgment awarding attorney fees and costs to the plaintiffs as authorized in 42 U.S.C. § 1985.

A. THE PLAINTIFFS HAVE ASSERTED A VALID CLAIM UNDER 42 U.S.C. § 1983.

Congress has provided a remedy for persons whose federal rights have been violated. 42 U.S.C. § 1983 provides:

> **Section 1983. Civil action for deprivation of rights.**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or

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usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Analysis of a claim under § 1983 requires a two step inquiry. Golden State Transit Co. v. City of Los Angeles (Golden State II), --- U.S. ---, 110 S.Ct. 444, 448, 107 L.Ed.2d 420 (1989); Livadas v. Aubry, 749 F.Supp. 1526, ---- (N.D.Cal. 1990). "First, the plaintiff must assert the violation of a federal right," not merely the violation of federal law. Golden State II, 110 S.Ct. at 448. This requires an analysis of several factors: (1) Does the provision in question create obligations binding on the governmental unit, or does it merely express a congressional preference for

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certain kinds of treatment? Golden State II, 110 S.Ct. at 448; Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 19, 101 S.Ct. 1531, 1541, 67 L.Ed.2d 694 (1981). (2) Is the interest asserted sufficiently certain that it is within the competence of the judiciary to enforce? Golden State II, 110 S.Ct. at 448; Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 431-432, 107 S.Ct. 766, 775-776, 93 L.Ed.2d 781 (1987). (3) Is the plaintiff an intended beneficiary of the federal law? Golden State II, 110 S.Ct. at 448; Wright, 479 U.S., at 430, 107 S.Ct., at 774.

The United States Supreme Court has held that NLRA creates "rights" in labor and management that are protected against government interference. Golden State II, 110 S.Ct. at 449-52, and see discussion in section B, below. Furthermore, the Court has also held that where the National Labor Relations Board does not have jurisdiction over a matter, a party protected by the NLRA may seek redress in a § 1983 action in federal court. Id. Finally, an employer is a party intended to be protected by the NLRA. Id.

The second inquiry under a § 1983 analysis, once the plaintiff establishes a prima facie claim under the statute, is whether the defendant can show Congress specifically foreclosed a remedy under § 1983 by providing a comprehensive enforcement mechanism for protection of the federal right. Golden State II, 110

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S.Ct. at 448; Smith v. Robinson, 468 U.S. 992, 1005 n.9, 104 S.Ct. 3457, 3464 n.9, 82 L.Ed.2d 746 (1984). There is no such mechanism under the facts of this case.

Moreover, the plaintiffs' rights are also protected under the equal protection and due process clauses of the United States Constitution, and the Sherman Antitrust Act. Cf. Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee, 685 F.Supp. 718 (N.D. Cal. 1988), aff'd, 891 F.2d 719 (9th Cir. 1989).

Thus, all of the factors are readily satisfied in this case. The plaintiffs are entitled to damages for the violation of their rights, and to an award of attorney fees and costs pursuant to 42 U.S.C. § 1985.

B. THE NATIONAL LABOR RELATIONS ACT PROHIBITS THE IBEW SIGNATORY REQUIREMENT IN LETTING PUBLIC PROJECTS TO BID.

The IBEW signatory requirement seeks to impose a labor agreement on employers who wish to bid on the Project even if the union is not the certified bargaining representative of the employer's employees. The City, as a state entity, is forbidden from so doing by the National Labor Relations Act (NLRA).

The National Labor Relations Act occupies the field of interstate commerce in labor, except where matters of purely local

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concern allow for local governance. Guss v. Utah Labor Relations Board, 353 U.S. 1, 3, 77 S.Ct. 598, 599, 1 L.Ed.2d 601 (1957). The areas of local concern are limited, and do not include the authority to mandate a collective bargaining agreement between a private employer and a labor union.

Congress has seen fit to leave to the economic markets the issue of whether an employer comes to terms with a labor union. Golden State I, 475 U.S. at 616, 106 S.Ct. at 1399-1400. The IBEW signatory requirement imposes upon every bidder-employer the obligation not only to bargain with the IBEW, but to come to an agreement. That edict is pre-empted by the NLRA.

The NLRA only requires an employer to bargain with the properly selected representative of its employees. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5). Indeed, it is an unfair labor practice for an employer to coerce employees in the exercise of their rights to organize and select a union, or not to organize, as they see fit. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1).

The proper representative of the employees is that designated or selected by the majority of the employees in a bargaining unit. NLRA § 9(a), 29 U.S.C. § 159(a). In this instance, no bargaining representative has been designated or selected, yet the City of Seward is forcing would-be bidders to deal

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exclusively with the IBEW Local 1547.

Even if would-be bidders could be forced to bargain in good faith with the IBEW, they can not be forced to come to an agreement or to accept a specific pre-designated agreement. NLRA requires only that the parties bargain in good faith, not that they come to an agreement.[5] NLRA § 8(d), 29 U.S.C. § 158(a)(5) and (d). Golden State I, 475 U.S., at 616, 106 S.Ct., at 1399.

The United States Constitution, Art. VI, cl. 2, provides that the laws of the United States "shall be the supreme law of the land."[6] Under the Supremacy clause, state and local laws, together with policies which conflict with the NLRA, are unenforceable and the proper subject of a declaratory judgment and injunctive relief.

"The [United States Supreme] Court has articulated two distinct NLRA pre-emption principles." Metropolitan Ins. Co. v.

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[5] The IBEW signatory requirement is thus wholly inconsistent with the NLRA. Further, the IBEW has an obvious and enormous advantage in any such negotiations, since the prospective bidder is compelled to reach an agreement with the IBEW in order to bid on the Project.

[6] United States Constitution, Art. VI, cl. 2, provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

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Massachusetts, 471 U.S. 724, 748, 105 S.Ct. 2380, 2394, 85 L.Ed.2d 728 (1985); Golden State Transit Co. v. City of Los Angeles (Golden State I), 475 U.S. 608, 613, 106 S.Ct. 1395, 1398, 89 L.Ed.2d 616 (1986); Associated Builders and Contractors of Mass. v. Mass. Water Resources Authority, --- F.2d ---, 135 L.R.R.M. (BNA) 22713, 59 U.S.L.W. 2266, 1990-2 Trade Cases ¶ 69,229, 1990 WestLaw 163312, at p.6 (1st Cir. 1990), opinion vacated and rehearing en banc granted.

First, the so-called Garmon pre-emption rule "prohibits States from regulating 'activity that the NLRA protects, prohibits, or arguably protects or prohibits.'" Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282, 286, 106 S.Ct. 1057, 1061, 89 L.Ed.2d 223 (1986), citing San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959).

Second, the so-called Machinists rule "precludes state and municipal regulation 'concerning conduct that Congress intended to be unregulated.'" Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S., at 749, 105 S.Ct., at 2394, citing Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976).

While the Garmon rule may have application here, it is the Machinists rule with which we are primarily concerned. Although the labor-management relationship is structured by the NLRA, certain

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areas intentionally have been left "to be controlled by the free play of economic forces." Machinists, 427 U.S., at 140, 96 S.Ct., at 2553, quoting N.L.R.B. v. Nash-Finch Co., 404 U.S. 138, 144, 92 S.Ct. 373, 377, 30 L.Ed.2d 328 (1971).

The United States Supreme Court takes a dim view of government efforts to regulate the rights of employers and employees as to the organization and recognition of labor unions, and negotiation of contracts. In Machinists, an employer and a union were engaged in collective bargaining over an expired contract. The members of the union engaged in a concerted refusal to work overtime and the employer filed a charge with the National Labor Relations Board claiming that such action was an unfair labor practice. The Board found the concerted activity was not an unfair labor practice. The employer had simultaneously filed an unfair labor practice complaint with the Wisconsin Employment Relations Commission. The Commission agreed with the employer, and filed a cease and desist order against the union. The Court found such conduct was merely one of the economic weapons available to unions under the NLRA, and held the state law and Commission order to be pre-empted by the NLRA.

> Our decisions since Briggs-Stratton have made it abundantly clear that state attempts to

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> influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB ... The availability or not of economic weapons that federal law leaves the parties free to use cannot "depend upon the forum in which the [opponent] presses its claims." (Citation omitted.)

Machinists, 427 U.S., at 153, 96 S.Ct., at 2559.

The preemption set forth in Machinists was reinforced in Wisconsin Dept. of Industry, Labor and Human Relations v. Gould Inc., 475 U.S. 282, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986). In Gould, the employer contested a state law which barred state agencies from purchasing "any product known to be manufactured or sold by any persons or firm" named on a list kept by the Department of Industry of persons or firms found by the NLRB to have violated the NLRA in three separate cases within a 5-year period. 475 U.S., at 283-84, 106 S.Ct., at 1059-60.

Wisconsin attempted to defend the policy by arguing that it was not using its regulatory or police powers, but rather merely its spending powers. As a "market participant," Wisconsin argued that it was freed of the restrictions ordinarily placed on states by

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the Commerce Clause. 475 U.S., at 289, 106 S.Ct., at 1062. The Court noted that while the position of market participant did free Wisconsin from certain Commerce Clause prohibitions, the blacklist policy was "tantamount to regulation," and forbidden by the NLRA:

> Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties. (Citations omitted.) The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. (Citations omitted.) The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and

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have a different role to play.

475 U.S., at 290, 106 S.Ct., at 1063.

Golden State also provides an example of improper government interference preempted by the NLRA. The case involved the City of Los Angeles, which had issued an operating franchise to a taxi cab company. The company applied for renewal of the franchise. While the application was pending, the company's employees went out on strike. The City Council declined to renew the franchise, but statements by the Council President indicated that the Council would vote to renew the franchise if the company settled its labor dispute before the franchise expired. The dispute was not settled, and the franchise expired. Golden State I, 475 U.S. at 609-11, 106 S.Ct. at 1396-97. The Court held that such actions interfered with the bargaining process, and were preempted by the NLRA. In Golden State II, the Court held the employer was entitled to bring an action against the City based on 42 U.S.C. § 1983.

This same principle was recently enforced in Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee, 685 F.Supp. 718 (N.D. Cal. 1988), aff'd, 891 F.2d 719 (9th Cir. 1989). California had adopted a statute requiring employers to abide by certain terms of union apprenticeship

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programs. The district court held the NLRA pre-empted the requirement:

> By requiring Hydrostorage to become a party to certain provisions of the Boilermakers' collective bargaining agreement, the [state] is intruding into the area of collective bargaining from which Congress under the NLRA has excluded it. As the Court explained in Golden State [I]: the NLRA requires an employer and a union to bargain in good faith. But it does not require them to reach an agreement.

685 F.Supp. at 616.

In Charlesgate Nursing Center v. Rhode Island, 723 F.Supp. 859 (D.R.I. 1989), the court held the NLRA pre-empted a statute which made it unlawful for employers to utilize the services of third parties in recruiting or hiring strike replacements. Again, the court found that the state unlawfully prohibited activity which Congress intended as a legitimate economic weapon for employers' use in collective bargaining.

The City's requirement that bidders be IBEW signatories violates the NLRA by dictating not only (1) that bidders must deal exclusively with the IBEW (even if their employees do not so

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choose), but (2) also dictating that bidders must come to terms with the IBEW. This is not a matter of "peripheral concern" in the employer-employee relationship. Rather it is the core concern of the NLRA. See Golden State I, 475 U.S. at 618 n.8, 106 S.Ct. at 1400 n.8.

The pre-emptive effect of the Machinists rule applies equally to state and local governments, and it does not matter whether the government acts through general law, court order or bidding specifications. Golden State I, 475 U.S. at 614 n.5, 106 S.Ct. at 1398 n.5; Associated Builders and Contractors of Mass. v. Mass. Water Resources Authority, --- F.2d ---, 135 L.R.R.M. (BNA) 22713, 59 U.S.L.W. 2266, 1990-2 Trade Cases ¶ 69,229, 1990 WestLaw 163312, at p.6 n.15 (1st Cir. 1990), opinion vacated and rehearing en banc granted.

In addition, it does not matter whether the government acts as a market participant or a market regulator. Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282, 287-88, 106 S.Ct. 1057, 1061, 89 L.Ed.2d 223 (1986); Golden State I, 475 U.S., at 618, 106 S.Ct., at 1400; Associated Builders and Contractors of Mass. v. Mass. Water Resources Authority, supra.

Finally, and significantly, the alleged importance of the government's claimed purpose is irrelevant. Rather, the court

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focuses on the effect of the government policy on the operation of federal legislation. Perez v. Campbell, 402 U.S. 637, 652, 91 S.Ct. 1704, 1712, 29 L.Ed.2d 233 (1971); Associated Builders and Contractors of Mass. v. Mass. Water Resources Authority, supra.

The City and IBEW may argue they are exempted from pre-emption by the so-called "hot cargo provisions"[7] of NLRA § 8(e) and 8(f), 29 U.S.C. § 158(e) and (f). These sections merely permit private employers in the construction industry to enter into "hot cargo" agreements, and to voluntarily sign union agreements prior to actually hiring employees or prior to the union obtaining majority status. NLRB v. Ironworkers Local 103, 434 U.S. 335, 98 S.Ct. 651, 54 L.Ed.2d 586 (1977)[8]. This is no authority for state or local

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[7] A "hot cargo provision" has been described by the Ninth Circuit as follows:

> A "hot cargo provision," so named because of the prevalence at one time of such provisions in Teamsters Union contracts, is an agreement between a union and an employer by which the employer promises not to use the materials or, as in this case, the services of nonunion employers.

Pacific Northwest Chapter of Associated Builders & Contractors, Inc. v. N.L.R.B., 609 F.2d 1341, 1343 n.1 (9th Cir. 1979), on rehearing, 654 F.2d 1301 (9th Cir. 1981), affirmed in part, vacated in part, Woelke & Romero Framing, Inc. v. N.L.R.B., 456 U.S. 645, 102 S.Ct. 2071, 72 L.Ed.2d 398 (1982).

[8] The Court observed that any such agreements must be the product of voluntary and mutual negotiations:

> Congress was careful to make its intention clear that pre-

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governments to restrict the collective bargaining rights of private employers. Government agencies are expressly excluded from coverage under the NLRA. 29 U.S.C. § 152(2).

Thus, the City's imposition of the IBEW signatory requirement is pre-empted by the NLRA. As an agent of the state government, the City may not, through the guise of a collective bargaining agreement, impose an obligation on employers which violates their rights under the NLRA.

C. THE IBEW SIGNATORY REQUIREMENT VIOLATES THE SHERMAN ANTITRUST ACT AND THE LANDRUM GRIFFIN AMENDMENTS TO THE NLRA.

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal..." 15 U.S.C. § 1. The Sherman Act precludes conspiracies between labor organizations and non-labor organizations designed to reduce competition. See Connell Const. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975); Allen Bradley Co. v. Local Union No. 3, Int'l Brotherhood of Elec. Workers, 325 U.S. 797, 65 S.Ct.

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hire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle.

434 U.S. at 348 n.10, 98 S.Ct. at 659 n.10.

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1533, 89 L.Ed. 1939, rehearing denied, 326 U.S. 803, 66 S.Ct. 11, 90 L.Ed. 489 (1945); Allied Int'l, Inc. v. International Longshoremen's Ass'n, 640 F.2d 1368 (1st Cir. 1981), aff'd, 456 U.S. 212, 102 S.Ct. 1656, 72 L.Ed.2d 21 (1982); Imperial Constr. Management Corp. v. Laborers Int'l Union of N. America Local 96, 133 L.R.R.M. (BNA) 2452 (N.D. Ill. Jan. 17, 1990); C&W Constr. Co. v. Brotherhood of Carpenters and Joiners of America, Local 745, 687 F. Supp 1453 (D. Haw. 1988).

In the case at bar, plaintiffs allege that, through the imposition of the IBEW signatory requirement by the Seward-IBEW collective bargaining agreement and city ordinance, defendants have conspired to reduce competition in the construction industry by precluding non-union contractors from even bidding on the Project. Defendants' actions are not protected by either the statutory or non-statutory exemptions to Section 1 of the Sherman Act, and their conduct is therefore unlawful and should be enjoined.

1. The Statutory Exemption Does Not Apply.

The statutory exemption to the Sherman Act is set forth in the Clayton Act, 15 U.S.C § 17, 29 U.S.C. § 52, and the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105 and 113. This exemption does not apply where a union acts in combination with non-labor groups. Allen Bradley Co. v. Local Union No. 3, Int'l Brotherhood

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of Elec. Workers, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945). In that decision, certain unions were found to have unlawfully participated with a combination of businessmen to "prevent all competition from others." Similarly, in United Mineworkers of America v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), the Court noted:

> Likewise, if as is alleged in this case, the union became a party to a collusive bidding arrangement designed to drive Phillips and others from the TVA spot market, we think any claim to exemption from antitrust liability would be frivolous at best.

An example of the application of this rule is found in Larry V. Muko, Inc. v. Southwestern Penn. Bldg. and Const. Trades Council, 609 F.2d 1368 (3d Cir. 1979), cert. denied, 459 U.S. 916, 103 S.Ct. 229, 74 L.Ed.2d 182 (1982). In that case a restaurant chain entered into an agreement with labor organizations that the chain would not award construction contracts to any non-union contractor. The court held such an agreement was not entitled to statutory exemption from federal antitrust laws. 609 F.2d at 1373. See also, Smitty Baker Coal Co., Inc. v. United Mine Workers of America, 620 F.2d 416 (4th Cir. 1980), cert. denied, 449 U.S. 870,

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101 S.Ct. 207, 66 L.Ed.2d 89 (1980).

Nor does the IBEW signatory requirement foster the goals established by the statutory exemption from the Sherman Act. The purpose of the exemption is to permit labor unions to acquire and use to their advantage a monopoly in labor of a particular kind in relation to the employer with which it has a collective bargaining agreement. Neither the union nor the municipal employer may seek to use this advantage to deprive other, non-union employers (or union employees with collective bargaining agreements with unions other than the IBEW) of the right to bid on, and to win, public contracts for the construction of public facilities.

Through the IBEW signatory requirement, included in the collective bargaining agreement between the City of Seward and the IBEW, and enforced by city ordinance, the defendants have conspired to impose their agreement on other employers and, in so doing, to reduce competition from non-IBEW employers, employees, and unions. The Agreement represents nothing more than a gross attempt to preclude all but IBEW contractors from participating in the Project. Thus the statutory exemption cannot apply.

2. The IBEW Signatory Requirement is not Protected by the Non-Statutory Exemption.

The Supreme Court has created a non-statutory exemption to the antitrust laws for conduct not directed at "commercial

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competition." Apex Hosiery Co. v. Leader, 310 U.S. 469, 495-96, 60 S.Ct. 982, 993-94, 84 L.Ed. 1311, 128 A.L.R. 1044 (1943). In this case, however, the IBEW signatory requirement is aimed directly at commercial competition, and seeks to exclude from even bidding on the Project those companies who choose, or whose employees choose, not to deal with the IBEW.

3. The City of Seward and the IBEW do not Enjoy Immunity Under the Parker v. Brown Doctrine

The Supreme Court has established non-statutory immunity from federal antitrust laws for certain activities undertaken or regulated by the states. Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943); Patrick v. Burget, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988). In Patrick, the Court reiterated the requirements for such immunity:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy." Second, the anti-competitive conduct "must be 'actively supervised' by the state itself. Only if an anti-competitive act of a private party meets both of these requirements, is it fairly attributable to the State.

486 U.S. at 99, 108 S.Ct. at 1663.

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"When the State itself has not directed or authorized an anti-competitive practice, the state's subdivisions in exercising their delegated power must obey the antitrust laws." Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 416, 98 S.Ct. 1123, 1138, 55 L.Ed.2d 364 (1978) (Opinion of Brennan, J.). "The requirement of clear articulation and affirmative expression is not satisfied when the State's position is one of mere neutrality respecting the municipal actions challenged as anti-competitive." Community Communications Co. v. City of Boulder, 455 U.S. 40, 55, 102 S.Ct. 835, 843, 70 L.Ed.2d 810 (1982).

Municipalities are fully subject to federal antitrust laws. "Municipalities, on the other hand, are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. [Citing Lafayette.] Rather, to obtain exemption [under Parker v. Brown], municipalities must demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.' Id." Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38-39, 105 S.Ct. 1713, 1716, 85 L.Ed.2d 25 (1985).

There is no suggestion that the State of Alaska has sanctioned, let alone mandated, a requirement that all bidders on

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the Project must have a collective bargaining agreement with the IBEW. Indeed, the City of Seward procurement code itself requires contracts to be let to the "lowest qualified responsive and responsible bidder." City of Seward Code § 6.10.230. Nothing in the code authorizes the City to impose a qualification wholly unrelated to job performance -- i.e., being signatory to a contract with a specific IBEW union -- on all prospective bidders.

Accordingly, no exemption from federal antitrust statutes exists. The IBEW signatory requirement violates those statutes and should be enjoined.

D. THE IBEW SIGNATORY REQUIREMENT VIOLATES PLAINTIFFS' EQUAL PROTECTION AND DUE PROCESS RIGHTS.

The Fourteenth Amendment to the United States Constitution provides as follows:

> No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens 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.

The Fourteenth Amendment is applicable to any entity

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acting under color of state law ("state action") and a civil action for deprivation of Fourteenth Amendment rights is available pursuant to 42 U.S.C. § 1983. See Section @, supra.

The Alaska Constitution, Art. I, Sec. 1 provides in part "that all persons are equal and entitled to equal rights, opportunities, and protection under the law..." Art. I, Sec. 7 provides in part: "No person shall be deprived of life, liberty, or property, without due process of law."

1. The IBEW Signatory Requirement Violates the Plaintiffs' Equal Protection Rights under the United States and Alaska Constitutions.

These constitutional provisions have uniformly been held as prohibiting state-sponsored discrimination against particular groups of persons (such as merit shop contractors) and as creating a cause of action to redress such discrimination. Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), reh. denied, 448 U.S. 917, 101 S.Ct. 39, 65 L.Ed.2d 1180 (1980) (guarantee of equal protection is a right to be free from invidious discrimination in statutory or other governmental classifications). See also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), where the Supreme Court affirmed a judgment striking down Richmond's minority business enterprise plan, as violative of the equal protection clause of the Fourteenth

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Amendment. The plan required non-minority contractors, who were awarded city construction contracts, to subcontract at least 30% of each contract to minority business enterprises.

Art. I, Sec. 1 of the Alaska Constitution is a prohibition against laws which, in their application, make unjust distinctions between persons. Leege v. Martin, 379 P.2d 447, 451 (Alaska 1963). The Alaska Constitution provides greater protection to individual rights than does the United States Constitution. State v. Enserch Alaska Const., Inc., 787 P.2d 624, 631 (Alaska 1989). The Alaska Supreme Court has outlined the analysis required under the Alaska equal protection clause as follows:

> [W]e first determine the importance of the individual interest impaired by the challenged enactment. We then examine the importance of the state interest underlying the enactment. Depending upon the importance of the individual interest, the equal protection clause requires that the state's interest fall somewhere on a continuum from mere legitimacy to a compelling interest. Finally, we examine the nexus between the state interest and the state's means of furthering that interest. Again

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depending upon the importance of the individual interest, the equal protection clause requires that the nexus fall somewhere on a continuum from substantial relationship to least restrictive means. The equal protection clause thus requires that all enactments be substantially related to a legitimate state interest. Some enactments are held to higher standards, and may even need to be the least restrictive means of achieving a compelling state interest.

787 P.2d at 631-32 (footnotes and citations omitted).

Both federal and Alaska courts have held that economic classifications may violate equal protection rights. For example, in Master Printers Ass'n v. Board of Trustees of Junior College, 356 F. Supp. 1355 (N.D. Ill. 1973), plaintiff, a trade association representing 400 non-union printing firms, brought an action to declare unconstitutional defendant's practice of soliciting bids for printing educational materials from only union firms. The district court noted "the long line of cases holding the precise conduct [i.e., union-only restriction] alleged here is unconstitutional and against public policy. 356 F.Supp. at 1357. The district court

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invoked Anthony P. Miller, Inc. v. Wilmington Housing Auth., 165 F.Supp. 275 (D. Del. 1958), in which another district court found "'by the clear weight of authority, a municipal corporation cannot discriminate in favor of organized labor ... .'" Master Printers, 356 F.Supp. at 1357, quoting Miller, 165 F.Supp. at 279 (citations omitted).

The district court in Master Printers denied defendant's motion to dismiss and in so doing offered a comment that could have been made with respect to the present controversy:

> We note here that the issue is not purely a labor one, i.e., whether a state or municipal corporation can support organized labor exclusively but rather the general question of whether as a matter of public policy the lowest bidder ought to be granted the contract in order to conserve public funds irrespective of the union or non-union implications or whether discrimination results from restriction to unions alone.

356 F.Supp. at 1357 (emphasis in original).

In a more recent case, Three Rivers Cablevision, Inc. v. City of Pittsburgh, 502 F.Supp. 1118 (W.D. Pa. 1980), plaintiff

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Three Rivers challenged the city's award of a cable television contract to one of several bidders on equal protection and due process grounds. The district court held that plaintiff's equal protection claim was clearly cognizable because plaintiff alleged that the ostensibly neutral state bidding statute was not applied with an even hand. 502 F.Supp. at 1033. In supporting this conclusion, the district court quoted Yick Wo v. Hopkins, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 1073, 30 L.Ed. 220 (1886), a seminal decision in equal protection jurisprudence:

> Though [a] law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

502 F.Supp. at 1133.

In State v. Enserch Alaska Construction, Inc., 787 P.2d 624 (Alaska 1989), the court held that a state law providing preference to residents of economically distressed zones for certain

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employment on public works projects was unconstitutional under the equal protection clause. In Gilman v. Martin, 662 P.2d 120 (Alaska 1983), the court held that a municipal ordinance granting preferences to municipal residents in the acquisition of municipal land under a land sale lottery violated the equal protection rights of non-residents.

The right to engage in economic endeavor is an important right for state equal protection purposes, which requires close scrutiny of laws impinging on that right. Enserch, 787 P.2d at 632-33. "Close scrutiny of enactments impairing the important right to engage in economic endeavor requires that the state's interest underlying the enactment be not only legitimate, but important, and that the nexus between the enactment and the important interest it serves be close." 787 P.2d at 633.

The laudatory goal of the City of Seward procurement code is to insure that the lowest qualified and responsible bidder obtains each contract to supply services or products to the City. City of Seward Code § 6.10.230. It seems more than a little far-fetched that the drafters of the Code envisioned the day when to be "qualified" a bidder had to have a collective bargaining agreement with a particular union. Rather, this is an irrational preference, mandated by City of Seward ordinances, which violates the equal

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protection rights of the plaintiffs. It is an artifice with "the underlying objective of assisting one class [IBEW contractors and IBEW members] over another [non-union contractors, non-union employees and contractors with non-IBEW unions]." 787 P.2d at 634.

There is no rational basis for the IBEW signatory requirement. There is no evidence, indeed, there has been no finding at all by the City Council, that IBEW-signatories are the only contractors who can complete this job. Even had there been any such evidence, the City cannot demonstrate that the IBEW signatory requirement was carefully tailored and narrowly drafted to solve any demonstrated problems. The requirement violates the plaintiffs' equal protection rights and should be enjoined.

2. The IBEW Signatory Requirement Violates the Plaintiffs' Due Process Rights under the United States and Alaska Constitutions.

The Fourteenth Amendment provides that in order to assert a claim for denial of due process, one must allege and prove that he was deprived unjustly of a protected liberty or property interest. As articulated in Board of Regents v. Roth, 408 U.S. 564, 572, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972), property interests do not emanate from the Constitution, but are established on rules or understandings based on federal or state laws, including statutes, which may create legitimate claims of entitlement to the benefits

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which they confer. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). A deprivation of such a protected property interest without due process is an actionable wrong.

A due process claim requires a two-step analysis. The plaintiff must prove: (1) that it had a definite liberty or property interest; and (2) that such interest was abridged, under color of state law, without appropriate process. Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

In Three Rivers, the plaintiff contended that the protected property interest denied by defendant was the right to have a cable television contract awarded in accordance with the requirements of a municipal ordinance governing the process. The process plaintiff claimed to be due was adherence to the city's own procurement requirements. In supporting plaintiff's contention that its constitutional right to due process was violated, the district court noted:

> That a true property interest existed in the award of the contract cannot, as defendants urge, be summarily rejected by noting that, unlike the usual due process case, plaintiffs are not being deprived of some benefit which

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> they presently enjoy, rather than one which they desire to acquire in the future. Both the Supreme Court and the Third Circuit have recognized that a due process interest in benefits sought to be obtained may arise out of the very provisions regulating their disbursement.

502 F.Supp. at 1129, citing Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), and Winsett v. McGinnes, 617 F.2d 996 (3rd Cir. 1980), cert. denied, 449 U.S. 1093 (1981). See also Metric Constructors, Inc. v. Gwinett County, 729 F.Supp. 101 (N.D. Ga. 1990) (recognizing property interest in disappointed bidder of public contract). Similarly, Alaska courts have recognized that disappointed bidders on public contracts may have a potential "property interest" which could support a due process claim. See Alyeska Ski Corporation v. Holdsworth, 426 P.2d 1006 (Alaska 1967).

In the present case, plaintiffs' interest in the award of the Project contract is sufficient to invoke due process. Plaintiffs are being denied a property interest in the award of project construction contracts to the "lowest qualified responsive and responsible bidder." City of Seward Code § 6.10.230. Skill,

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ability and integrity, rather than union affiliation, dictate a bidder's "responsibility."

Plaintiffs have been and are ready, willing, and able to bid on the Project, and are fully qualified to perform the contract. However, by incorporating the IBEW signatory requirement into the "qualifications" process, the City has precluded the plaintiffs from even bidding on the Project. In this manner, the City has denied plaintiffs the process to which they are due, and an injunction should issue.

E. THE IBEW SIGNATORY REQUIREMENT IS NOT AUTHORIZED BY THE CITY OF SEWARD CODE.

The City of Seward has provided for the procurement from third parties of goods and services required by the City. The procurement code is found in Title 6, "Purchasing, Contracts, and Professional Services." The purpose of Title 6 is set forth in § 6.01.010.[9] In general, the Code requires the use of competitive

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[9] City of Seward Code § 6.01.010 provides:

> 6.01.010 Purpose. The purpose of this title is to:
> A. maximize the purchasing value of public funds in the procurement of goods and services for the city;
> B. provide an efficient system for the purchase of goods and services without creating unreasonable administrative burdens and restrictions;
> C. provide flexibility in the methods of purchasing goods and services in order to meet the goals and objectives of the city as determined by the city council;
> D. provide for the fair and equitable treatment of all

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bidding to obtain goods and services valued in excess of $10,000. Code § 6.10.110.

The Code mandates the award of any contract to a "responsible bidder/proposer." Code § 6.10.135 allows a city manager to recommend to the city council rejection of a bid on the basis of select criteria.[10] None of these criteria include the absence of a collective bargaining agreement of any kind, let alone

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persons involved in the provision of goods and services to the city; and

E. prevent collusion and anti-competitive practices by the providers of goods and services.

[10] This section provides:

6.10.135 Award only to responsible bidder proposer. A contract awarded under this chapter shall be made only to a responsible bidder/proposer. The city manager may report to the city council and recommend rejection of a bid or a proposal on the basis of the following criteria:

1. the skill and experience demonstrated by the bidder/proposer in performing contracts of a similar nature;

2. the bidder's/proposer/s record for honesty and integrity;

3. the bidder's/proposer's capacity to perform in terms of facilities, personnel and financing;

4. the previous and existing compliance by the bidder/proposer with laws and ordinances relating to the contract;

5. the number and scope of conditions attached to the bid/proposal;

6. the bidder's/proposer's part performance under city contracts. If the bidder/proposer has failed in any material way to perform its obligations under any contract with the city, the bidder/proposer may be deemed a non-responsible bidder/proposer.

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an agreement with a particular union.

In addition, the Code specifically states that contracts "shall be let by the city council to the lowest qualified responsive and responsible bidder .... ." Code § 6.10.230.[11] Nothing in this section authorizes the City Council to set any qualifications for bidders other than those which relate to the ability of the bidder to fully perform the contract in a timely manner.

The imposition of the IBEW signatory requirement is therefore unauthorized by the Code, and in violation of it. The court should enjoin enforcement of the requirement.

CONCLUSION

The City of Seward requires the construction of a high voltage electrical transmission line to insure good quality and reliable service to its electric customers. The State of Alaska and the City have each appropriated public funds to permit the construction of this line. The public interest is clearly found in the expeditious and expert construction of this Project at the lowest cost consistent with the bid's specifications.

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[11] This section of the Code incorporates a local bidder preference most likely unconstitutional as violative of the equal protection provisions of the Alaska and United States Constitutions. See, e.g., State v. Enserch Constr., Inc., 787 P.2d 624 (Alaska 1989) (state law directing employment of local residents in economically depressed zones held unconstitutional).

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Unfortunately, the City and the IBEW, whether through coercion or cooperation, have elected to impose a requirement wholly unrelated to the goal: Any prospective bidder, whether ultimately successful or unsuccessful, must negotiate and contract with the IBEW in order to line up at the starting gate.

This requirement violates the NLRA, because it constitutes municipal government intervention in the labor market in an area which Congress has seen fit to leave to market forces. The requirement violates ERISA, because it impermissibly relates to employee benefit plans regulated by ERISA. The requirement violates equal protection and due process rights, because it unfairly, and without any factual basis, discriminates against merit shop companies. The requirement violates federal antitrust laws. The requirement is without authority in the City of Seward procurement code.

These constitutional provisions and laws seek to preserve this goal: That governments such as the City of Seward be prohibited from injecting themselves into commerce and labor matters preserved to the free market by Congress. The City has no legitimate interest in forbidding non-union contractors or contractors with agreements with non-IBEW unions from bidding on the Project, and the law rightly enjoins such a proscription.

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DELIVER TO: LIOCDAR

ORIGINAL
SENT: 02/20/91 TIME: 15:44
FROM: LIOCMIL
SUBJECT: 91-02-090;PL;SB95;2/20
PRINT DATE: 02/20/91 TIME: 15:44

SUBJECT LINE TO READ: TC NO.; PL FS;SHORT SUBJECT;DATE

T/C NO: 91-02-090
DATE: 2/20
SPONSOR: S LABOR AND COMMERCE
SUBJECT: SB 95 UNFAIR LABOR
MODERATOR: JUDY
SITE: ANCHORAGE

PARTICIPANT LIST

TO TESTIFY

NAMES/REPRESENTING	ADDRESS	PHONE	BILL NO.
1. RICHARD CATTANACH			
2. JIM LANE/AGC			
3. STEPHEN WALSH/AGC			
4.			
5.			
6.			

TO OBSERVE

NAME/ REPRESENTING	ADDRESS	PHONE	BILL NO.
1.			
2.			
3.			
4.			
5.			

BACK UP NUMBER 561-1199
EMAIL ADDRESS LIOCMIL

UNABLE:
OBSERVED:
TOTAL:

START TIME: END TIME:

DELIVER TO: LTOCACB

ORIGINAL

SENT: 03/13/91 TIME: 16:15
FROM: LTOCFBX
SUBJECT: CS FOR SB 95
PRINT DATE: 03/13/91 TIME: 16:15

TO ADAM.
FROM FRAN/FBX:

COULD WE PLEASE HAVE A COPY OF THE CS FOR SB95 FAXED TO THE OFFICE FOR OUR PARTICIPANTS? FAX # 456-3346. THANKS

TINA IN KODIAK

DELIVER TO: LIOCACB

ORIGINAL
SENT: 03/13/91 TIME: 15:51
FROM: LIOCMIL
SUBJECT: 91-03-039;BL;SB 26,64,95;3-13
PRINT DATE: 03/13/91 TIME: 15:51

T/C NO 91-03-039
DATE: 03-13091
SPONSOR: S LABOR & COMMERCE
SUBJECT: SB 26,SB 64,SB 95
MODERATOR: JUDY

BRIDGE LIST

1. JNU
2. ANC
3. FBX
4. KOD
5. SOL
6.

I can explain the

time constraints

if you'd rather not call on him.

It'z do.
Ask him for phone #
we'll call in morning.

Bruce Gabriel SB 95

PH # 262 - 4700