

SB

129

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



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MEMORANDUM

TO: The Honorable Randy Phillips
Chairman, Legislative Budget
and Audit Committee

FROM: Randy S. Welker *Randy*
Legislative Auditor

DATE: February 4, 1993

RE: Recommendations for Amending Procurement Statutes

This memorandum is in response to your concerns regarding continued abuse of established contracting and procurement procedures. Our recent audit on the contract for services related to opening the Arctic National Wildlife Refuge is the most recent of several reports we have issued on abuses and circumvention of contracting procedures. From this background and perspective, we offer the following suggestions about possible amendments to the procurement statutes that would improve the fairness of the procurement process and curb the continuing abuses.

Make the Chief Procurement Officer (CPO) more independent

A central aspect to the State's procurement procedures is the position of the CPO. The primary impetus for the creation of this oversight position was the consensus of Senator Faiks' special committee on state contracting that some independent authority was necessary to make government contracting more fair and open. The minutes of that committee's deliberations indicate that the CPO was intended to act as an independent reviewer and approval authority over government contracting. The concept had been adopted from a model governmental procurement code that served in large measure as a guide to the committee's discussions and review.

In establishing the position of CPO, AS 36.30.010 most significantly provides that removal prior to expiration of a four year term, can be only for cause. Typically directors of state agencies can be removed at the discretion of the administration. Accordingly, the "removal for cause" provision indicates that the legislature wanted the CPO to have more autonomy and authority than a typical agency director. These provisions reflect Senator Faiks'

committee's concern that some measure of independent review be introduced into the state's procurement process.

Since its inception the position of CPO has not functioned as originally intended. The Cowper administration simply gave the Director of General Services and Supply the additional title of CPO. For the most part procurement practices continued as usual. In order to reinforce the independence aspect of the CPO position, the legislature should consider prohibiting the CPO from serving in any other capacity.

The CPO has extensive authority and responsibilities, the most significant being the mandated responsibility to "*procure or supervise the procurement of all supplies, services and professional services by an agency.*" We advise that the statutes be amended to make the intended independence and oversight function of the CPO more definite and clear. One way would be to lengthen the term of office to six years rather than four. This would clearly indicate that the CPO had a status beyond a single gubernatorial term. Consideration could also be given to making the CPO subject to confirmation by the legislature. The legislature may also feel it necessary to specify the salary or pay range for the position in order to further insulate the CPO from undue influence or pressure from executive branch agencies.

Require CPOs to certify procurement documentation

The procurement statutes repeatedly attempt to fix responsibility for procurement determinations with the CPO. For example, AS 36.30.300 states that a sole source contract can only be awarded after the CPO has determined "*in writing that there is only one source for the procurement exists*" and that "*this written determination must include findings of fact that are supported by clear convincing evidence.*" Further the statute prohibits the CPO from delegating his responsibilities to make such determinations. Such specificity indicates that the legislature wanted the CPO to independently exercise oversight and approval over procurement decisions.

In various audits of specific procurement and contracts we found that the CPO did indeed delegate his responsibility to make independent determinations. Typically, CPOs have been approving requests for alternative procurement (that is, procurement other than competitive sealed bidding) with the caveat that their "*approval is based solely on the attached information provided by [state agency].*" Particularly in procurement that involved the Office of the Governor, past CPOs have acquiesced to the certifications of staff in that office as to the necessity or lack of alternatives when approving sole source solicitations.

In view of this, we recommend that AS 36.30 be amended to specifically require the CPO to independently make, and certify that they made, the necessary determinations for approving non-competitive procurement. More specifically, AS 36.30 could be amended to put in place requirements similar to those that fiscal officers must follow when certifying state expenditures. AS 37.10.030 states that fiscal officers are responsible for "*the existence and correctness of the facts recited in the certificate or stated on the voucher or its supporting papers and for the legality of the proposed payment under the appropriation or fund involved.*"

Accordingly, if similar requirements were inserted in AS 36.30 the CPO could be responsible for accuracy and correctness of the information used for his approvals of limited solicitations. Failure to independently review, evaluate, and verify circumstances surrounding various procurement when certifying alternative procurement requests could subject the CPO to the sanctions of AS 11.56.210, unsworn falsification. The statute makes it a class A misdemeanor to for a person submit a false written or recorded statement which he knows not to be true. Attaching such sanctions to the CPO approvals should further serve to make the CPO more vigilant, which in turn would enhance the position's independence, when approving the use of alternative procurement procedures.

It should be recognized that there are limits to how much the effectiveness of a CPO can be improved by statutory amendment. No matter how much the autonomy and independence of the position is enhanced, the attitude and inclination of the individual appointed to the position is still the most critical element to making the concept of a CPO a workable part of promoting more open and fair government procurement.

Six suggestions for statutory amendments

In summary, we offer the following six suggestions regarding how the State's procurement statutes could be amended to provide more open and fair procurement:

- ◆ Increase the term of the CPO to six years. (AS 36.30.010 (a))
- ◆ Prohibit the CPO from holding any other state position. (AS 36.30.010 (b))
- ◆ Require legislative confirmation of the CPO. (AS 36.30.010 (a))
- ◆ Fix CPO salary in Statute to preclude retaliation. (AS 36.30.010 (a))
- ◆ Replace "commissioner" with CPO in Limited Competition Procurement section of the Procurement Code (Note: No change recommended to commissioner of Transportation reference). (AS 36.30.305 (a))
- ◆ Add statutory requirement that the CPO must "certify" as to the existence and correctness of the facts and the legality of the proposed alternative procurement under the State's procurement code. Further, subject the certification to sanctions under AS 11.56.210. This should apply to all procurement made under Article 4. Other Procurement Methods for which the CPO has approval responsibilities. This includes sole source (AS 36.30.300), limited competition (AS 36.30.305), and emergency procurement (AS 36.30.310).

XPRT CONSULTANTS

9701 Brien Street
Anchorage, Alaska 99516
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2 April 1993

APR 5 1993

Chairman Leman and Members of the Committee

Senate State Affairs Committee

Alaska State Senate

SUBJECT: SB 129 - Chief Procurement Officer - Recommendations and Comments

The concept of creating a means to assure better statutory compliance is a good idea and a lofty goal, but probably won't be achieved through additional limitations on the authority of the Chief Procurement Officer (CPO).

SB 129 as proposed does have several aspects which will enhance the role and position of the CPO and which will be beneficial to the overall procurement function. However, the bill needs more work before passage to avert potential misinterpretation.

Comments and suggestions as a result of in-depth review of SB 129 are attached for your review and consideration. Also attached is brief resume of the undersigned consultant, to attest expert qualifications in the field of public procurement.

XPRT Consultants is an independent non-partisan firm established in 1982 for consultation, expert services, and representation in procurement and contracting matters.

In your deliberations, please give weight to the attached recommendations and suggestions regarding SB 129.

If I can be of any further assistance, please call (907) 346-3416.

Sincerely,



PEGGY R. THOMAS, C.P.M.

Chief Executive Officer

Attachment

cc: Senate Finance Committee

SB 129 - CHIEF PROCUREMENT OFFICER AUTHORITY - COMMENTS AND SUGGESTIONS

1
2 Although certain past procurement transactions may have
3 demonstrated problems regarding statutory approval, there could
4 really be some confusion created if subject bill is enacted as
5 proposed. Based on in-depth review, and for consistency with the
6 existing law, the following changes should be incorporated in SB
7 129 (SB0129a).

8
9 Abuse of authority by ANY procurement officer, including the CPO,
10 should be handled by appropriate discipline and/cr enforcement of
11 existing law.

12
13 - Sec. 2.

14
15 AS PROPOSED:

16
17 "AS 36.30.010 is amended by adding new subsections to read:

18 (c) The chief procurement officer may not delegate the duties
19 of the chief procurement officer established under this chapter."

20 (d) While a person performs the duties of the chief
21 procurement officer under this chapter, the person may not be
22 employed in or appointed to another position with the state.

23 (e) The annual salary of the chief procurement officer is
24 range 26, step C, of the salary schedule established in AS
25 39.27.011."

26
27 **RECOMMENDATION: Regarding Sec. 2. (c)**

28
29 Suggest deletion of that portion of Sec. 2., which adds new
30 subsection (c) to AS 36.30.010, and which prohibits CPO delegation
31 of AS 36.30 established duties.

32
33 **RATIONALE:**

34
35 AS 36.30.010 sets forth (and in fact prescribes) "duties" of the
36 chief procurement officer (CPO). This proposed amendment, would
37 preclude the CPO's delegating authority to "procure or supervise
38 the procurement of" supplies, services, etc. In other words, all
39 procurement would have to be done by or under the supervision of
40 the CPO.

41
42 As worded, the proposed new AS 36.30.010 (c) will forbid any
43 delegation by the CPO of procurement authority to others. AS
44 36.30.010 (in subsection (b)) among other duties enumerated,
45 already states:

46
47 "Except as otherwise specifically provided in this chapter, the
48 chief procurement officer shall (1) procure or supervise the
49 procurement of all supplies, services, and professional services
50 needed . . ."

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1 It should be noted that if the wording in the presently proposed
2 amendment (Sec. 2., adding (c) to AS 36.30.010) is retained, it
3 will impose several undesirable supervisory and organizational
4 relationship changes.

5
6 Also, as drafted, Sec. 2 apparently conflicts with the concept of
7 delegation of authority by the "commissioner" to agencies set forth
8 in AS 36.30.015 (a) and (b). If the CPO is required by AS
9 36.30.010 (c) to either do or to supervise all procurement, AND if
10 the CPO is forbidden to delegate the duty of "procurement" or
11 "supervision of procurement" to others, then all State procurement
12 would have to be done by the CPO or under CPO supervision. This
13 means that no other agency may do State procurement, and conflicts
14 with the statutory provision for delegation by "commissioner" to
15 agencies expressed in AS 36.30.015(a). Thus, in essence, the
16 proposed amendment precludes ANY decentralization of the
17 procurement function.

18
19 The State Procurement Code already forbids the CPO to delegate in
20 excess of the small purchases limitation (presently \$25,000) for
21 the following:

- 22
23 - sole source approval (AS 36.30.300(a)) and
24 - limited competition approval (AS 36.30.305(a)).

25
26 For consistency, if intent is to prohibit delegation for other
27 specific sections of AS 36.30, the limitations should be inserted
28 at the point in the chapter where the limit is imposed, as it is in
29 AS 36.30.300 and 305. On the other hand, although not as
30 consistent, and perhaps harder to read and apply, to further limit
31 CPO's power of redelegation, a more specific statement of the
32 limitations should be given in the proposed amendment, i.e.,

33
34 "(c) The chief procurement officer may not delegate the duties of
35 the chief procurement officer established under AS 36.30.010 xx,
36 xx, xx, or AS 36.30.xxx, xxx, xxx."

37
38 (Insert at the "xx" or "xxx" the specific subparagraphs of the
39 section(s) for which it is intended to forbid delegation.)

40
41 AS 36.30.560 -- 625, identify the procurement officer of the
42 contracting agency as the person who issues appealable decisions in
43 bid protests and/or contract disputes. If delegation by the CPO is
44 not permitted, these references would also need to be further
45 clarified or changed.

46
47 The CPO should never serve in a dual capacity as both defendant and
48 deciding official in cases of bid protest or contract controversy
49 at the appellate level. The CPO must be allowed to delegate
50 procurement authority to the agency level or to other procurement

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1 officers who actually perform the procurement process. The
2 University of Alaska Board of Regents through adopted procurement
3 regulations and the President has designated the CPO as the
4 appellate level for purposes of deciding bid protests and contract
5 controversies. If the Code is amended to preclude the CPO's
6 delegation of procurement authority, the University will of
7 necessity have to reorganize its procurement function to eliminate
8 creation of a conflict of interest.

9
10 The University CPO cannot legitimately be involved in actually
11 doing procurement transactions because the CPO is required to make
12 appellate decisions in protests and disputes which are brought
13 against the University and which are initially made and must be
14 defended by the responsible procurement officer, i.e., someone
15 other than the CPO. For the CPO to sit in judgement on appeals of
16 his/her own decisions would be a grave conflict of interest. Thus,
17 it is essential that the CPO may delegate procurement authority to
18 others for conformity with the protest and conflict resolution
19 procedures established in University regulations implementing AS
20 36.30.

21
22 If the CPO is constrained from delegating procurement authority to
23 others, it will require new organization structures in both the
24 State's purchasing department(s) and the University's.

25
26 The executive department's autonomy to determine structure within
27 its administrative functions would be undermined if it cannot
28 exercise its own choice as to procurement organization structure.
29 There should be no statutory requirement to have either a
30 centralized or decentralized procurement office per se, leaving
31 maximum discretion to the department(s) for delegation outside the
32 central environment. All delegations by the CPO to others should
33 be worded in such a way as to exclude what is forbidden by statute
34 to be delegated, thereby assuring legal conformity.

35
36 An appointed CPO has statutory procurement authority per AS
37 36.30.010.

38
39 Certain "commissioners" have statutory procurement authority per AS
40 36.30.015(a). For the University of Alaska, which has no
41 commissioner, special definition of terms is provided by statute in
42 AS 36.30.005(c). The President of the University equates to
43 "commissioner" and has delegated the entire statutory authority of
44 AS 36.30 to the University CPO.

45
46 The State has a commissioner who functions separately from the CPO,
47 a CPO, and in addition, a Director of General Services and Supply
48 (GS&S). The GS&S is a centralized state procurement office where
49 the actual procurement is done for items and services (except
50 construction) which exceed various agencies' delegated authority.

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1 Some procurement authority has also been delegated to agencies.

2
3 The diversity of organization and structure within the discretion
4 of the department(s) would not be permitted if AS 36.30.010(c) is
5 amended as proposed to prohibit delegation by the CPO of the CPO's
6 statutory duties.

7
8 Abuse of authority by ANY procurement officer, including the CPO,
9 should be handled by appropriate discipline and/or enforcement of
10 existing law.

11
12 **RECOMMENDATION: Regarding Sec. 2. (d)**

13
14 Suggest that Sec. 2. (d) should be deleted, and the language
15 suggested below be substituted in lieu thereof.

16
17 "(d) The chief procurement officer shall not be assigned additional
18 duties inconsistent with or outside the functions ascribed to the
19 position by this chapter."

20
21 **RATIONALE:**

22
23 This proposed amendment of AS 36.30.010 to add a new subsection (d)
24 as drafted will make it impossible for an incumbent CPO to apply
25 for and/or be hired for any other position with the State, creating
26 a chilling effect on any potential for career progression during
27 the term of appointment. The CPO should not be excluded from
28 consideration for other positions. If the intent is to be certain
29 that other duties are not added to detract from the full attention
30 required for performance of CPO functions, or limit the free
31 exercise of independent judgement, then that is what the amendment
32 should say. The language recommended above could accomplish the
33 latter.

34
35 **- Sec. 4.**

36
37 **AS PROPOSED:**

38
39 "AS 36.30.310 is amended to read:
40 Sec. 36.30.310. EMERGENCY PROCUREMENTS . . . A written
41 determination by the chief procurement officer of the basis for the
42 emergency and for the selection of the particular contractor shall
43 be included in the contract file . . ."

44
45 **RECOMMENDATION: Regarding Sec. 4**

46
47 Suggest the proposed amendment of AS 36.30.310 to require written
48 determination by the chief procurement officer for exercise of
49 emergency procurement authority be deleted in its entirety.

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1 RATIONALE:

2
3 Delay occasioned by referral to the CPO for approval will make it
4 impossible for procurement officers to respond appropriately in
5 emergency situations. Timely response to procurement requirements
6 in an emergency is essential in order to mitigate damage and/or
7 loss. When urgency of circumstances demands it, procurement must
8 be accomplished without delay. If routine procedure requires
9 waiting for approval by the CPO before procurement action can be
10 taken to satisfy emergency needs, then it cannot meet expected and
11 appropriate immediate response criteria. The procurement officer
12 with requisite authority who is nearest to the need is the one who
13 has the most knowledge of the urgency, and who is in the best
14 position to exercise independent judgement required to make the
15 written determination regarding a prospective emergency
16 procurement. Restriction for only the CPO to make written
17 determinations for emergency procurement will cripple the State's
18 ability to provide adequate procurement support in response to
19 emergency situations.

20
21 Abuse of authority by ANY procurement officer, including the CPO,
22 should be handled by appropriate discipline and/or enforcement of
23 existing law.

24
25 - Sec. 5.

26
27 AS PROPOSED:

28
29 "AS 36.30 is amended by adding a new section to read:

30 Sec. 36.30.315. DETERMINATIONS BY CHIEF PROCUREMENT OFFICER;
31 CRIMINAL PENALTY. (a) In a determination made by the chief
32 procurement officer under AS 36.30.300 - 36.30.310, the chief
33 procurement officer shall independently examine the material facts
34 of the contract and independently determine whether the contract is
35 eligible for the procurement procedure selected for the contract.

36 (b) If the chief procurement officer knowingly makes a
37 false statement in a determination made by the chief procurement
38 officer under AS 36.30.300 - 36.30.310, the chief procurement
39 officer is guilty of a class A misdemeanor."
40

41 RECOMMENDATION: Regarding Sec. 5. (a)

42
43 Suggest paragraph (a) the proposed addition of new section, (AS
44 36.30.315) be deleted, and language suggested below be substituted
45 in lieu thereof. Also, this amendment should be at AS 36.30.935
46 instead of at AS 36.30.315.
47

48 "Sec. 36.30.935. PROHIBITION AGAINST SUBSTITUTION OF JUDGEMENT IN
49 PROCUREMENT MATTERS. Procurement decisions which form the basis of
50 procurement actions taken within statutory or delegated procurement

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1 authority are not voidable after the fact, except for reason of
2 illegality. Decisions taken pursuant to law and regulation by a
3 procurement officer are of necessity the product of the independent
4 judgement of such officials. Exertion of undue influence to change
5 decisions or to adversely affect the competitive and statutory
6 process of public procurement is a violation of this chapter."
7

8 RATIONALE:
9

10 If the intent is to require the independent judgement of the CPO in
11 making determinations under AS 36.30, the concept should be
12 applicable to ALL determinations required by and transactions
13 executed by ANY procurement officer under the authority of AS
14 36.30. The ABA Model from which the statute was spawned carried
15 the intent for exercise of independent judgement by the responsible
16 procurement officer, i.e., the final word and responsibility for a
17 procurement transaction is vested in the procurement officer who
18 executes a procurement document within the limits of his/her
19 delegated authority.
20

21 There is another side to this concept which should also be
22 considered. Of course, if the law states that the independent
23 judgement of the CPO is to be exercised, that precludes anyone's
24 substituting their judgement for that of the CPO either before or
25 after the fact. In effect this will strengthen the authority of
26 the CPO and is a good idea. However, it should be noted that if
27 the intent is to make the CPO more responsible for the decisions
28 and approvals rendered in procurement matters, then ENFORCEMENT of
29 the present law is what is needed, i.e., if ANY procurement
30 officer, including the CPO knowingly violates AS 36.30, action
31 should be taken to prosecute pursuant to the law. The present law
32 adequately covers this, but the proposed amendment actually reduces
33 the penalty instead of imposing a heavier charge for knowing
34 violation of AS 36.30 in a procurement matter. If intent is to
35 lighten the stigma of the potential penalty in hopes that
36 enforcement is more likely to occur, then perhaps it should be
37 amended accordingly at AS 36.30.930.
38

39 If the intent is to be sure that the CPO is not merely rubber-
40 stamping someone else's product, then language similar to that
41 recommended above (added at AS 36.30.935) should be used.
42

43 Abuse of authority by ANY procurement officer, including the CPO,
44 should be handled by appropriate discipline and/or enforcement of
45 existing law.
46

47 The language suggested above will protect procurement officers from
48 undue pressures and insulate against political influence thereby
49 reducing potential for circumvention of the Code.
50

1 **RECOMMENDATION: Regarding Sec. 5. (b)**

2
3 Suggest that paragraph (b) of the proposed amendment (which
4 classifies as a class A misdemeanor, a false statement knowingly
5 made in a determination by the CPO) be added at AS 36.30.930 of the
6 statute, instead of at 36.30.315, if it is to be added at all.
7 Recommend it should not be added.

8
9 **RATIONALE:**

10
11 The State Procurement Code at AS 36.30.930 already says that
12 knowing violation of the statute is a class C felony. In addition,
13 AS 36.30.687(d) states that misrepresentation in connection with a
14 State procurement is a class C felony. The addition of a section
15 making such violations of this nature when committed by the CPO a
16 Class A misdemeanor appears to conflict with sections 687 and 930
17 and lighten the stigma of the charge when the CPO is the offender.
18 The opposite should be true. If the CPO violates the statute,
19 perhaps a more severe penalty should be assessed. At least, if the
20 emphasis is needed or intended, the class of crime should be
21 consistent with present law, or the classes stated in the existing
22 AS 36.30 should also be changed.

23
24 Abuse of authority by ANY procurement officer, including the CPO,
25 should be handled by appropriate discipline and/or enforcement of
26 existing law.

27
28 - Sec. 6.

29
30 The effective dates in this section should be reconciled with any
31 changes which occur as a result of the foregoing comments and
32 recommendations.

33
34 THE CHANGES SUGGESTED ABOVE ARE MOSTLY TECHNICAL, BUT SHOULD BE
35 MADE IN ORDER TO CLEAR UP POSSIBLE MISUNDERSTANDINGS, AND TO
36 MAINTAIN CONSISTENCY WITH OTHER (UNCHANGED) PROVISIONS OF AS 36.30.

37
38
39 - ADDITIONAL COMMENTS ON SECTIONS SUPPORTED WITHOUT CHANGE

40
41 - Sec. 1.

42
43 The concept of a six-year appointment for the CPO is a good one,
44 provided that the person is not restrained from accepting other
45 positions with the state, i.e., is free to apply for other
46 positions and vacate incumbency as CPO. It is appropriate that the
47 CPO not serve in any dual or conflicting role IN ADDITION TO
48 incumbency as CPO, and that the appointing authority be limited as
49 to assignment of extra duties to the CPO.
50

1 - Sec. 2. (e)
2

3 It is consistent with good management and competent salary surveys
4 that the compensation of the CPO be set at the proposed range 26,
5 step 1, of the salary schedule established in AS 39.27.011.
6 Putting the CPO salary range into law emphasizes the importance of
7 the role of the CPO. This should make it patently obvious that
8 State procurement is not merely a clerical function.
9

10 - Sec. 3.
11

12 It is consistent with other approval requirements in AS 36.30 to
13 invest authority in the CPO for limited competition procurement.
14

15 Explanation of the underlying philosophy for the concept of limited
16 competition may be helpful in considering how this section of the
17 Code was originally derived. Limited competition in the context of
18 the ABA Model Procurement Code as originally conceived is a
19 function of specification, i.e., whether a purchase description
20 (specification) allows full and open competition or whether it is
21 restrictive. The concept of competition goes all the way back to
22 the basic source of the item, the manufacturer who is the top tier
23 of the distribution system. Full and open competition does not
24 restrict competition at any level. A procurement which by its
25 terms or specification eliminates competition at any tier is
26 restrictive, i.e. limited competition.
27

28 - FULL AND OPEN COMPETITION - GENERIC SPECIFICATION
29

30 Purchase descriptions which are written as a technical
31 specification setting forth all dimensional, material, structural,
32 operational, and other characteristics of an item allow for full
33 and open competition, i.e., any producer who is willing can make
34 it, and any willing source can bid on it. The technical
35 specification in this context is written without calling out a
36 "particular brand name only" or "brand name or equal," and any
37 product which meets the parameters of the technical data will be
38 acceptable.
39

40 - FULL AND OPEN COMPETITION - BRAND NAME OR EQUAL SPECIFICATION
41

42 Purchase descriptions which specify a brand name or several brand
43 names, "or equal" permit the offering of items which are equivalent
44 to the brand name or names specified. This type of specification
45 permits full and open competition because any product which meets
46 the parameters, i.e., is one of the brand name(s) specified, or the
47 equivalent thereof will be acceptable.
48

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1 * The ABA Model Procurement Code R4-202.02.2 (b)(v) is cited as
2 follows:
3 "Nonrestrictive Use of Brand Name or Equal Specifications. Where a
4 brand name or equal specification is used . . . the use . . . is
5 not intended to limit or restrict competition."
6 [Emphasis supplied.]

7
8 - LIMITED COMPETITION - BRAND NAME ONLY - NO SUBSTITUTE
9

10 A purchase description which requires a particular brand name and
11 no substitute restricts competition and is not a full and open
12 competition procurement. "Limited competition" is derived from
13 this concept. Several lower tier vendors may be able to supply
14 such an item, but only one manufacturer's product will be
15 considered. A procurement for "brand name only - no substitute",
16 thus limits competition in that it restricts all but a single
17 producer from the distribution pattern, even though it is
18 competitive in the lower tiers. Therefore, such a procurement is
19 restrictive of competition. The competition "tree" does not spring
20 from several production sources and is thus "limited".
21

22 * The ABA Model Procurement Code R4-202.02.2 (c)(i) and (ii) are
23 cited as follows: "Brand Name Specification . . . use . . . is
24 restrictive . . . The Procurement Officer shall seek to identify
25 sources from which . . . the designated brand name . . . can be
26 obtained and shall solicit . . . whatever degree of competition is
27 practicable. If only one source can supply the requirement, the
28 procurement shall be made under . . . Sole Source . . ."
29 [Emphasis supplied.]
30

31 * The ABA Model Procurement Code citations at the asterisks above
32 demonstrate how competitive aspects of procurement are determined
33 by the degree of competition permitted or dictated by the
34 specification.
35

36 NOTE: Based on knowledge and belief the view advanced above in
37 defining the concept of "limited competition" is not incorporated
38 in any existing procurement regulations implementing the State
39 Procurement Code. This is probably due to semantics of discussions
40 prior to adoption of the Code, i.e., some of the meaning was lost
41 through well-meaning substitution of terms. Consequently, this
42 revelation of the underlying philosophy for limited competition may
43 come as a shock even to some procurement professionals.
44
45

PEGGY R. THOMAS
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Anchorage, AK 99516
(907) 786-1650 (Office) 346-3416 (Home)

OBJECTIVE: Qualification information herein is provided as background to an expert opinion rendered on the strength of over 35 years professional procurement and contracting experience gained through continued service and provision of sound procurement leadership in government organizations.

EMPLOYMENT HISTORY:

Sep 1988 to Present **Deputy Chief Procurement Officer**
University of Alaska, Anchorage, AK

Jan 1982 to Present **Owner (Consultant: Contracts and Procurement)**
Xprt Consultants, 9701 Brien, Anchorage, AK

Jan 1982 - Apr 1987 **Manager, Supply Division**
Nov 1979 - Jan 1982 **Manager, Supply & Procurement Division**
The Alaska Railroad, Anchorage, AK

Aug 1979 - Nov 1979 **Municipal Purchasing Officer**
Municipality Of Anchorage, Anchorage, AK

Feb 1978 - Aug 1979 **Chief, Contracting & General Services Branch**
U. S. Fish & Wildlife Service, Alaska Region,
Anchorage, AK

Dec 1976 - Feb 1978 **Chief, Services & Construction Contracts Branch**
Alaskan Air Command (AAC), Base Procurement,
Elmendorf AFB, AK

Sep 1973 - Dec 1976 **Deputy Chief, Procurement & Contracting**
Feb 1972 - Sep 1973 **Chief, Contract Administration Branch**
Sep 1971 - Feb 1972 **Chief, Supplies Procurement Branch**
Base Procurement Division, Mountain Home AFB, ID

Jun 1966 - Sep 1971 **Chief, Supplies Procurement Branch**
Jan 1962 - Jun 1966 **Contract Specialist (Construction)**
Dec 1960 - Jan 1962 **Purchasing Agent (Supplies/Services)**
Apr 1958 - Dec 1960 **Housewife, New Mother, Widowed in 1959**
Nov 1955 - Apr 1958 **Supervisory Purchasing Agent**
Dec 1953 - Nov 1955 **Procurement Administration Clerk**
Procurement Offices, Altus AFB, OK & Dyess AFB, TX

PROFESSIONAL CERTIFICATION: **Certified Purchasing Manager (C.P.M.)**
conferred by National Association of
Purchasing Management

AFFILIATIONS: 1983 - Present **Member of MENSA (American Mensa Ltd)**

Current **Purchasing Management Assoc. of AK**

HONORS AND AWARDS

Oct 1965 Outstanding Performance Rating & Quality Salary Increase
Sustained Superior Performance Award

Nov 1967 Dept. of Air Force Suggestion Program Award

May 1968 USAF Certificate of Achievement - Resources Conservation

Feb 1971 Military Airlift Command Personal Achievement Award

Dec 1972 Dept. of Air Force Suggestion Program Award

Dec 1973 Distinguished Public Service Award, Nationwide Program to
Keep America Beautiful

Jul 1974 Distinguished Public Service Commendation by Cecil D. Andrus
Governor, State of Idaho

Jul 1975 Tactical Air Command Certificate of Achievement

May 1976 Outstanding Performance Rating & Quality Salary Increase
Sustained Superior Performance Award

Jul 1976 Command Achievement Award for Resources Conservation FY 76

Nov 1976 Outstanding Procurement Office Award, Tactical Air Command

1983 Who's Who In America

1981-1983 Who's Who of American Women

1981-1983 World Who's Who of Women

1981-1983 Directory of Distinguished Americans

1982-1983 Personalities of America

1982-1983 Personalities of the West and Midwest

1982-1983 Who's Who in the West

1982-1983 International Who's Who of Intellectuals

1982-1983 Community Leaders of America

1982-1983 Two Thousand Notable Americans

1984-1985 Who's Who of Finance and Industry

1984 International Book of Honor

1984 Dictionary of International Biography

Sen. Randy Phillips
Chairman
Rep. Terry Martin
Vice Chairman
Sen. Al Adams
Sen. Steve Frank
Sen. Steve Rieger
Sen. Bert Sharp
Rep. John Davies
Rep. Mark Hanley
Rep. Ron Larson
Rep. Eileen MacLean

State of Alaska



Legislative Budget and Audit Committee

Sectional Analysis

CS SB 129 (STA)

Session
Rm. 103
State Capitol
Juneau, AK 99801
(907) 465-4949

Interim
P.O. Box 142
Eagle River AK 99577
(907) 694-4949

Section 1:

Changes the term of office of the Chief Procurement Officer from four (4) to six (6) years.

Section 2.

Prohibits the delegation of the duties of the Chief Procurement Officer.

Prohibits the Chief Procurement Officer from holding more than one state position.

Sets the salary of the Chief Procurement Officer at range 23.

Section 3. NEW Section

Allows for the delegation of authority for small procurements of professional services.

Section 4.

Requires the Chief Procurement Officer rather than the Commissioner to make the determination that a sole source procurement is necessary and in the public interest.

(New) Allows for the delegation of authority for small procurements of professional services.

Section 5:

Requires that the Chief Procurement Officer make the written determination on an emergency procurement.

(New) Allows for delegation of authority when there is insufficient time for the chief procurement officer to make the determination.

Section 6:

(a) Requires that the Chief Procurement officer independently examine the material facts of a procurement.

(b) Makes it a Class A misdemeanor for the Chief Procurement Officer to knowingly make a false statement in a determination under AS 36.30.300-36.30.310.

NEW Section 7:

Removes the requirement that a cost-reimbursement contract needs to have a written determination by the procurement officer that it is impractical to obtain the supplies or services in another manner.

NEW Section 8:

Clarifies the time period for rejection of an appeal.

NEW Section 9:

Adds two exceptions to the procurement code.

1. contracts performed outside the U.S.
2. contracts between the Department of Law and outside counsel

NEW Section 10:

Deletes the requirement for special determinations for total or life cycle cost contracts.

Section 11 Transitional Provisions:

(a) The six year term of the current Chief Procurement Officer shall include the time that the person held the position prior to the effective date of the act.

The other provisions of the act apply the Chief Procurement Officer and to procurements and determinations made after the effective date of the act.

Sen. Randy Phillips
Chairman
Rep. Terry Martin
Vice Chairman
Sen. Al Adams
Sen. Steve Frank
Sen. Steve Rieger
Sen. Bert Sharp
Rep. John Davies
Rep. Mark Hanley
Rep. Ron Larson
Rep. Eileen MacLean

State of Alaska



Session
Rm. 103
State Capital
Juneau, AK 99801
(907) 465-4949

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P.O. Box 142
Eagle River AK 99577
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Legislative Budget and Audit Committee Sectional Analysis

SB 129

Section 1:

Changes the term of office of the Chief Procurement Officer from four (4) to six (6) years.

Section 2.

Prohibits the delegation of the duties of the Chief Procurement Officer.

Prohibits the Chief Procurement Officer from holding more than one state position.

Sets the salary of the Chief Procurement Officer at range 26, step C.

State may oppose

Section 3.

Requires the Chief Procurement Officer rather than the Commissioner to make the determination that a sole source procurement is necessary and in the public interest.

Section 4

Requires that the Chief Procurement Officer make the written determination on an emergency procurement.

Section 5:

(a) Requires that the Chief Procurement officer independently examine the material facts of a procurement.

(b) Makes it a Class A misdemeanor for the Chief Procurement Officer to knowingly make a false statement in a determination under AS 36.30.300-36.30.310.

Department may not like

Section 6: Transitional provisions

(a) The six year term of the current Chief Procurement Officer shall include the time that the person held the position prior to the effective date of the act.

The other provisions of the act apply the Chief Procurement Officer and to procurements and determinations made after the effective date of the act.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CSSB 129 (STA)

Revision Date: March 17, 1993 Dept. Affected: Administration
 Title: An Act Relating to State Procurement BRU: General Services
 Component: Purchasing
 Sponsor: Senate Rules by Request of LB&A
 Requestor: Senate State Affairs Committee COMPONENT SERIAL NO. 60

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
----------------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
-----------------------------	--	--	--	--	--	--

FUNDING:

(Thousands of Dollars)



1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact \$ 0

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Portia Babcock, Committee Staff  Phone: 465-4522
 Division: Senate State Affairs Committee Date: March 17, 1993
 Approved by Commissioner: Senator Loren Leman, Chairman  Date: March 17, 1993
 Agency: Senate State Affairs Committee

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FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. SB 129

Revision Date: _____ Dept. Affected: Administration
 Title: An Act relating to the State's Chief Procurement Officer. BRU: General Services
 Component: Purchasing
 Sponsor: Senate Rules Committee
 Requestor: Senate State Affairs Committee COMPONENT SERIAL NO. 60

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	11.9	11.9	11.9	11.9	11.9	11.9
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	11.9	11.9	11.9	11.9	11.9	11.9

CAPITAL	0	0	0	0	0	0
---------	---	---	---	---	---	---

REVENUE FUND SOURCE:	0	0	0	0	0	0
----------------------	---	---	---	---	---	---

FUNDING:

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	11.9	11.9	11.9	11.9	11.9	11.9
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MF/FA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	11.9	11.9	11.9	11.9	11.9	11.9

POSITIONS

FULL-TIME	11.9	11.9	11.9	11.9	11.9	11.9
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY93) impact: \$ 0.00 (Assuming July 1, 1993 effective date.)

ANALYSIS: (attach a separate page if necessary.)

The fiscal impact of this bill is the difference in salary of the Chief Procurement Officer as currently compensated, and Range 26, step C as indicated in the bill. It is assumed that the range and step will remain constant with no yearly merit increases.

Prepared By: Dugan Petty, Director *Dugan Petty*
 Division: General Services

Phone: 465-2250
 Date: _____

Approved by Commissioner: Nancy Bear Userra *Nancy Bear Userra*
 Agency: Department of Administration

Date: 3/3/93

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SENATE BILL NO. 129

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - FIRST SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE LEGISLATIVE BUDGET AND
AUDIT COMMITTEEIntroduced: 2/22/93
Referred: STA, FIN

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the state's chief procurement officer."

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

3 * Section 1. AS 36.30.010(a) is amended to read:

4 (a) The commissioner shall appoint to the partially exempt service the chief
5 procurement officer of the state. The chief procurement officer must have at least five
6 years of prior experience in public procurement, including large scale procurement of
7 supplies, services, or professional services, and must be a person with demonstrated
8 executive and organizational ability. The chief procurement officer may be removed
9 by the commissioner only for cause. The term of office of the chief procurement
10 officer is six [FOUR] years.

11 * Sec. 2. AS 36.30.010 is amended by adding new subsections to read:

12 (c) The chief procurement officer may not delegate the duties of the chief
13 procurement officer established under this chapter.

14 (d) While a person performs the duties of the chief procurement officer under

1 this chapter, the person may not be employed in or appointed to another position with
2 the state.

3 (e) The annual salary of the chief procurement officer is range 26, step C, of
4 the salary schedule established in AS 39.27.011.

5 * Sec. 3. AS 36.30.305(a) is amended to read:

6 (a) A contract for supplies, services, professional services, or a construction
7 contract under \$100,000, may be awarded without competitive sealed bidding or
8 competitive sealed proposals, in accordance with regulations adopted by the
9 commissioner. A contract may be awarded under this section only when the chief
10 procurement officer [COMMISSIONER], or, for construction contracts under
11 \$100,000 or procurements for the state equipment fleet, the commissioner of
12 transportation and public facilities, determines in writing that a situation exists that
13 makes competitive sealed bidding or competitive sealed proposals impractical or
14 contrary to the public interest. Procurements under this section shall be made with
15 competition that is practicable under the circumstance. Except for procurements of
16 supplies, services, or construction that do not exceed the amount for small
17 procurements under AS 36.30.320(a), the authority to make a determination required
18 by this section may not be delegated.

19 * Sec. 4. AS 36.30.310 is amended to read:

20 Sec. 36.30.310. EMERGENCY PROCUREMENTS. Procurements may be
21 made under emergency conditions as defined in regulations adopted by the
22 commissioner when there exists a threat to public health, welfare, or safety, when a
23 situation exists that makes a procurement through competitive sealed bidding or
24 competitive sealed proposals impracticable or contrary to the public interest, or to
25 protect public or private property. An emergency procurement need not be made
26 through competitive sealed bidding or competitive sealed proposals but shall be made
27 with competition that is practicable under the circumstances. A written determination
28 by the chief procurement officer of the basis for the emergency and for the selection
29 of the particular contractor shall be included in the contract file. The written
30 determination must include findings of fact that support the determination.

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

1 Sec. 36.30.315. DETERMINATIONS BY CHIEF PROCUREMENT
2 OFFICER; CRIMINAL PENALTY. (a) In a determination made by the chief
3 procurement officer under AS 36.30.300 - 36.30.310, the chief procurement officer
4 shall independently examine the material facts of the contract and independently
5 determine whether the contract is eligible for the procurement procedure selected for
6 the contract.

7 (b) If the chief procurement officer knowingly makes a false statement in a
8 determination made by the chief procurement officer under AS 36.30.300 - 36.30.310,
9 the chief procurement officer is guilty of a class A misdemeanor.

10 * Sec. 6. TRANSITIONAL PROVISIONS. (a) With respect to the person holding the
11 position of chief procurement officer on the effective date of this Act, the six-year term of the
12 chief procurement officer under AS 36.30.010(a), as amended by sec. 1 of this Act, shall
13 include the time the person holds the position before the effective date of this Act.

14 (b) AS 36.30.010(c) - (e), added by sec. 2 of this Act, apply to the chief procurement
15 officer on and after the effective date of this Act.

16 (c) AS 36.30.305 and 36.30.310, amended by secs. 3 and 4 of this Act, apply to a
17 procurement that begins on or after the effective date of this Act.

18 (d) AS 36.30.315, enacted by sec. 5 of this Act, applies to a determination made on
19 or after the effective date of this Act.

8-LSJ591N
Bannister
3/16/93

CS FOR SENATE BILL NO. 129(STA)
IN THE LEGISLATURE OF THE STATE OF ALASKA
EIGHTEENTH LEGISLATURE - FIRST SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE LEGISLATIVE BUDGET AND
AUDIT COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to state procurement."

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

3 * Section 1. AS 36.30.010(a) is amended to read:

4 (a) The commissioner shall appoint to the partially exempt service the chief
5 procurement officer of the state. The chief procurement officer must have at least five
6 years of prior experience in public procurement, including large scale procurement of
7 supplies, services, or professional services, and must be a person with demonstrated
8 executive and organizational ability. The chief procurement officer may be removed
9 by the commissioner only for cause. The term of office of the chief procurement
10 officer is six [FOUR] years.

11 * Sec. 2. AS 36.30.010 is amended by adding new subsections to read:

12 (c) While a person performs the duties of the chief procurement officer under
13 this chapter, the person may not be employed in or appointed to another position with
14 the state.

1 (d) The annual salary of the chief procurement officer is range 23 of the salary
2 schedule established in AS 39.27.011.

3 * Sec. 3. AS 36.30.300(a) is amended to read:

4 (a) A contract may be awarded for supplies, services, professional services, or
5 construction without competitive sealed bidding, competitive sealed proposals, or other
6 competition in accordance with regulations adopted by the commissioner. A contract
7 may be awarded under this section only when the chief procurement officer or, for
8 construction contracts or procurements for the state equipment fleet, the commissioner
9 of transportation and public facilities determines in writing that there is only one
10 source for the required procurement or construction. A sole source procurement may
11 not be awarded if a reasonable alternative source exists. The written determination
12 must include findings of fact that support by clear and convincing evidence the
13 determination that only one source exists. Except for procurements of supplies,
14 services, professional services, or construction that do not exceed the amount for
15 small procurements under AS 36.30.320(a) or (b), as applicable [AS 36.30.320(a)],
16 the authority to make the determination required by this subsection may not be
17 delegated.

18 * Sec. 4. AS 36.30.305(a) is amended to read:

19 (a) A contract for supplies, services, professional services, or a construction
20 contract under \$100,000, may be awarded without competitive sealed bidding or
21 competitive sealed proposals, in accordance with regulations adopted by the
22 commissioner. A contract may be awarded under this section only when the chief
23 procurement officer [COMMISSIONER], or, for construction contracts under
24 \$100,000 or procurements for the state equipment fleet, the commissioner of
25 transportation and public facilities, determines in writing that a situation exists that
26 makes competitive sealed bidding or competitive sealed proposals impractical or
27 contrary to the public interest. Procurements under this section shall be made with
28 competition that is practicable under the circumstance. Except for procurements of
29 supplies, services, professional services, or construction that do not exceed the amount
30 for small procurements under AS 36.30.320(a) or (b), as applicable
31 [AS 36.30.320(a)], the authority to make a determination required by this section may

1 * Sec. 5. AS 36.30.310 is amended to read:

2 Sec. 36.30.310. EMERGENCY PROCUREMENTS. Procurements may be
3 made under emergency conditions as defined in regulations adopted by the
4 commissioner when there exists a threat to public health, welfare, or safety, when a
5 situation exists that makes a procurement through competitive sealed bidding or
6 competitive sealed proposals impracticable or contrary to the public interest, or to
7 protect public or private property. An emergency procurement need not be made
8 through competitive sealed bidding or competitive sealed proposals but shall be made
9 with competition that is practicable under the circumstances. A written determination
10 by the chief procurement officer of the basis for the emergency and for the selection
11 of the particular contractor shall be included in the contract file. The written
12 determination must include findings of fact that support the determination. Except
13 when there is insufficient time for the chief procurement officer to make the
14 written determination required by this section, the chief procurement officer may
15 not delegate the authority to make the determination.

16 * Sec. 6. AS 36.30 is amended by adding a new section to read:

17 Sec. 36.30.315. DETERMINATIONS BY CHIEF PROCUREMENT
18 OFFICER; CRIMINAL PENALTY. (a) In a determination made by the chief
19 procurement officer under AS 36.30.300 - 36.30.310, the chief procurement officer
20 shall independently examine the material facts of the procurement and independently
21 determine whether the procurement is eligible for the procurement method requested.
22 (b) If the chief procurement officer knowingly makes a false statement in a
23 determination made by the chief procurement officer under AS 36.30.300 - 36.30.310,
24 the chief procurement officer is guilty of a class A misdemeanor.

25 * Sec. 7. AS 36.30.370 is amended to read:

26 Sec. 36.30.370. TYPES OF CONTRACTS. Any [SUBJECT TO
27 LIMITATIONS OF THIS SECTION, ANY] type of contract that will promote the best
28 interests of the state may be used, except that the use of a
29 cost-plus-a-percentage-of-cost contract is prohibited. [A COST-REIMBURSEMENT
30 CONTRACT MAY BE USED ONLY WHEN A DETERMINATION IS MADE IN
31 WRITING BY THE PROCUREMENT OFFICER THAT A

1 COST-REIMBURSEMENT CONTRACT IS LIKELY TO BE LESS COSTLY TO
2 THE STATE THAN ANY OTHER TYPE OR THAT IT IS IMPRACTICABLE TO
3 OBTAIN THE SUPPLIES, SERVICES, PROFESSIONAL SERVICES, OR
4 CONSTRUCTION REQUIRED EXCEPT UNDER A COST-REIMBURSEMENT
5 CONTRACT.]

6 * Sec. 8. AS 36.30.610(c) is amended to read:

7 (c) The commissioner of administration or the commissioner of transportation
8 and public facilities, as appropriate, shall, within 15 days from the date the
9 appellant's comments on the protest report are due under AS 36.30.605(c) and (d)
10 [AFTER RECEIPT OF AN APPEAL], notify the appellant of the acceptance or
11 rejection of the appeal and, if rejected, the reasons for the rejection.

12 * Sec. 9. AS 36.30.850(b) is amended by adding new paragraphs to read:

13 (30) contracts that are to be performed in an area outside of the country
14 and that require a knowledge of the customs, procedures, rules, or laws of the area;

15 (31) contracts that are between the Department of Law and attorneys
16 who are not employed by the state and that are for the review or prosecution of
17 possible violations of the criminal law of the state in situations where the attorney
18 general concludes that an actual or potential conflict of interest makes it inappropriate
19 for the Department of Law to review or prosecute the possible violations.

20 * Sec. 10. AS 36.30.150(b) is repealed.

21 * Sec. 11. TRANSITIONAL PROVISIONS. (a) With respect to the person holding the
22 position of chief procurement officer on the effective date of this Act, the six-year term of the
23 chief procurement officer under AS 36.30.010(a), as amended by sec. 1 of this Act, shall
24 include the time the person holds the position before the effective date of this Act.

25 (b) AS 36.30.010(c) and (d), added by sec. 2 of this Act, apply to the chief
26 procurement officer on and after the effective date of this Act.

27 (c) AS 36.30.300(a), 36.30.305(a), 36.30.310, 36.30.370, amended by secs. 3 - 5 and
28 7 of this Act, and 36.30.850(b)(30) and (31), added by sec. 9 of this Act, apply to a
29 procurement that begins on or after the effective date of this Act.

30 (d) AS 36.30.315, enacted by sec. 6 of this Act, applies to a determination made on
31 or after the effective date of this Act.

1 (e) AS 36.30.610(c), amended by sec. 8 of this Act, applies to a protest report filed
2 under AS 36.30.605 on or after the effective date of this Act.

Dugan Petty
or 465-2250
Vern Jones

SB129

Fax # 465-2189

Proposed substitute language for SB 129 to address the concerns raised in DOA's bill analysis:

Section 2

Suggest deletion of subsection (c).

Concerns over the delegation of the determination necessary for a sole source procurement are already addressed in AS 36.30.300, which states, "Except for procurements of supplies, services, or construction that do not exceed the amount for small procurements under AS 36.30.320(a), the authority to make the determination required by this subsection may not be delegated."

Similar language is present in AS 36.30.305 which prohibits the delegation for determinations required for limited competition procurements.

Suggested substitute language to prohibit delegations for determining certain types of emergency conditions is included in Section 4.

Section 4

AS 36.30.310 is amended to read:

Sec. 36.30.310. EMERGENCY PROCUREMENTS. (a) Procurements may be made under emergency conditions as defined in regulations adopted by the commissioner when there exists a threat to public health, welfare, or safety, when a situation exists that makes a procurement through competitive sealed bidding or competitive sealed proposals impracticable or contrary to the public interest, or to protect public or private property. An emergency procurement need

not be made through competitive sealed bidding or competitive sealed proposals but shall be made with competition that is practicable under the circumstances. A written determination by the procurement officer of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The determination must include findings of fact that support the determination.

(b) When emergency conditions exist that make procurements through competitive sealed bidding or competitive sealed proposals impracticable or contrary to the public interest, and there is sufficient time to submit findings of fact and receive a written determination by the chief procurement officer, the chief procurement officer shall determine, in writing, the basis for the emergency and the means by which the procurement shall be made. Except for procurements of supplies, services, or construction that do not exceed the amount for small procurements under AS 36.30.320(a), the authority to make a determination required by this subsection may not be delegated.

Section 5

Suggest that subsection (a) be changed as follows:

In a determination made by the chief procurement officer under AS 36.30.300 - 36.30.310, when, in the chief procurement officer's judgment, there is a need to verify the facts as represented by the requesting agency, the chief procurement officer shall independently examine the material facts of the procurement [contract] and independently determine whether the procurement [contract] is eligible for the procurement method [procedure] requested [selected for the contract].

OK

?

NO

NO

A BILL

FOR AN ACT ENTITLED

1 "An act relating to state procurement delegations, protest
2 appeal responses, printing requirements, establishing
3 professional services in foreign countries, establishing
4 professional services contracts for special prosecutors, and
5 the requirement for certain determinations."

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

7 * Section 1. AS 36.30.150 is amended to read:

8 [(a)] Bids shall be unconditionally accepted without
9 alteration or correction, except as authorized in AS
10 36.30.160. The procurement officer shall evaluate bids based
11 on the requirements set out in the invitation to bid, which
12 may include criteria to determine acceptability such as
13 inspection, testing, quality, delivery, and suitability for a
14 particular purpose. The criteria that will affect the bid
15 price and be considered in evaluation for award must be
16 objectively measurable, such as discounts, transportation
17 costs, and total or life cycle costs. The invitation to bid
18 must set out the evaluation criteria to be used. Criteria may
19 not be used in bid evaluation if they are not set out in the
20 invitation to bid.

21 [(b) A CONTRACT BASED ON TOTAL OR LIFE CYCLE COSTS MAY BE
22 AWARDED ONLY WHEN THE CHIEF PROCUREMENT OFFICER OR, FOR

23 CONSTRUCTION CONTRACTS OR PROCUREMENTS FOR THE STATE EQUIPMENT
24 FLEET, THE COMMISSIONER OF TRANSPORTATION AND PUBLIC
25 FACILITIES, DETERMINES IN WRITING AT THE TIME OF CONTRACT
26 SOLICITATION THAT THE CONTRACT PROMOTES OVERALL ECONOMY FOR
27 THE PURPOSE INTENDED, ENCOURAGES COMPETITION, IS NOT UNDULY
28 RESTRICTIVE, AND IS IN THE BEST INTERESTS OF THE STATE.]

29 * Section 2. AS 36.30.300(a) is amended to read:

30 (a) A contract may be awarded for supplies, services,
31 professional services, or construction without competitive
32 sealed bidding, competitive sealed proposals, or other
33 competition in accordance with regulations adopted by the
34 commissioner. A contract may be awarded under this section
35 only when the chief procurement officer or, for construction
36 contracts or procurements for the state equipment fleet, the
37 commissioner of transportation and public facilities
38 determines in writing that there is only one source for the
39 required procurement or construction. A sole source
40 procurement may not be awarded if a reasonable alternative
41 source exists. The written determination must include findings
42 of fact that support by clear and convincing evidence the
43 determination that only one source exists. Except for
44 procurements of supplies, services, professional services, or
45 construction that do not exceed the amount for small
46 procurements under AS 36.30.320(a), the authority to make the
47 determination required by this subsection may not be
48 delegated.

49 * Section 3. AS 36.30.305(a) is amended to read:

50 (a) A contract for supplies, services, professional
51 services, or a construction contract under \$100,000, may be
52 awarded without competitive sealed bidding or competitive
53 sealed proposals, in accordance with regulations adopted by
54 the commissioner. A contract may be awarded under this section
55 only when the commissioner, or, for construction contracts
56 under \$100,000 or procurements for the state equipment fleet,
57 the commissioner of transportation and public facilities,
58 determines in writing that a situation exists that makes
59 competitive sealed bidding or competitive sealed proposals
60 impractical or contrary to the public interest. Procurements
61 under this section shall be made with competition that is
62 practicable under the circumstance. Except for procurements of
63 supplies, services, professional services, or construction
64 that do not exceed the amount for small procurements under AS
65 36.30.320(a), the authority to make a determination required
66 by this section may not be delegated.

67 * Section 4. AS 36.30.370 is amended to read:

68 Subject to limitations of this section, any type of
69 contract that will promote the best interests of the state may
70 be used, except that the use of a cost-plus-a-percentage-of-
71 cost contract is prohibited. [A COST-REIMBURSEMENT CONTRACT
72 MAY BE USED ONLY WHEN A DETERMINATION IS MADE IN WRITING BY
73 THE PROCUREMENT OFFICER THAT A COST-REIMBURSEMENT CONTRACT IS
74 LIKELY TO BE LESS COSTLY TO THE STATE THAN ANY OTHER TYPE OR

75 THAT IT IS IMPRACTICABLE TO OBTAIN THE SUPPLIES, SERVICES,
76 PROFESSIONAL SERVICES, OR CONSTRUCTION REQUIRED EXCEPT UNDER
77 A COST-REIMBURSEMENT CONTRACT.]

78 * Section 5. AS 36.30.610(c) is amended to read:

79 (c) The commissioner of administration or the
80 commissioner of transportation and public facilities, as
81 appropriate, shall, within 15 days, beginning at the
82 conclusion of the time allotted for comments by the appellant
83 on the protest report, [AFTER RECEIPT OF AN APPEAL] notify the
84 appellant of the acceptance or rejection of the appeal and, if
85 rejected, the reasons for the rejection.

86 * Section 6. AS 36.30.850(b) is amended to read:

87 (b) This chapter applies to every expenditure of state
88 money by the state, acting through an agency, under a
89 contract, except that this chapter does not apply to

90 (1) grants;

91 (2) contracts for professional witnesses to provide for
92 professional services or testimony relating to existing or
93 probable lawsuits in which the state is or may become a
94 party;

95 (3) contracts of the University of Alaska where the work
96 is to be performed substantially by students enrolled in the
97 university;

98 (4) contracts for medical doctors and dentists;

99 (5) acquisitions or disposals of real property or
100 interest in real property, except as provided in AS 36.30.080;

101 (6) disposals under AS 38.05;
102 (7) contracts for the preparation of ballots under AS
103 15.15.030;
104 (8) acquisitions or disposals of property and other
105 contracts relating to airports under AS 02.15.070, 02.15.090,
106 02.15.091, and AS 44.88;
107 (9) disposals of obsolete property under AS 19.05.060;
108 (10) disposals of obsolete material or equipment under AS
109 35.20.060;
110 (11) agreements with providers of services under AS
111 44.47.250; AS 47.07; AS 47.08; AS 47.10; AS 47.17; AS 47.24;
112 AS 47.25.195, and 47.25.310;
113 (12) contracts of the Department of Fish and Game for
114 flights that involve specialized flying and piloting skills
115 and are not point-to-point;
116 (13) purchases of income-producing assets for the state
117 treasury or a public corporation of the state;
118 (14) operation of the state boarding school established
119 under AS 14.16, if the State Board of Education or the
120 commissioner of education adopts regulations for use by the
121 state boarding school in procurement and contracting;
122 (15) a contract that is a delegation, in whole or in
123 part, of investment powers held by the commissioner of revenue
124 under AS 14.25.180, AS 14.40.400, AS 14.42.200, 14.42.210, AS
125 18.56.095, AS 22.25.048, AS 26.05.228, AS 37.10.070, AS
126 37.10.071, AS 37.14, or AS 39.35.080;

127 (16) a contract that is a delegation, in whole or in
128 part, of investment powers or fiduciary duties of

129 (A) the Board of Trustees of the Alaska Permanent
130 Fund Corporation under AS 37.13;

131 (B) the Alaska Mental Health Trust Authority under
132 AS 37.14.001 - 37.14.099;

133 (17) the purchase of books, book binding services,
134 newspapers, periodicals, audio-visual materials, network
135 information services access, approval plans, professional
136 memberships, archival materials, objects of art, and items for
137 museum or archival acquisition having cultural, historical, or
138 archaeological significance; in this paragraph

139 (A) "approval plans" means book selection services
140 in which current book titles meeting an agency's
141 customized specifications are loaned to the agency
142 subject to the right of the agency to return those books
143 that do not meet with the agency's approval;

144 (B) "archival materials" means the noncurrent
145 records of an agency that are preserved after appraisal
146 because of their value;

147 (C) "audio-visual materials" means nonbook
148 prerecorded materials, including records, tapes, slides,
149 transparencies, films, filmstrips, cassettes, videos,
150 compact discs, laser discs, and items that require the
151 use of equipment to render them usable;

152 (D) "network information services" means a group of

153 resources from which cataloging information, holdings
154 records, inter-library loans, acquisitions information,
155 and other reference resources can be obtained;

156 (18) contracts for the purchase of standardized
157 examinations for licensure under AS 08;

158 (19) contracts for home health care and adult residential
159 and foster care services provided under regulations adopted by
160 the Department of Health and Social Services;

161 (20) contracts for supplies or services for research
162 projects funded by money received from the federal government
163 or private grants;

164 (21) guest speakers or performers for an educational or
165 cultural activity; or

166 (22) contracts of the Alaska Industrial Development and
167 Export Authority for a clean coal technology demonstration
168 project that

169 (A) is attempting to develop a coal-fired electric
170 generation project;

171 (B) uses technology that is capable of
172 commercialization during the 1990's; and

173 (C) qualifies for federal financial participation
174 under P.L. 99-190 as amended.

175 (23) disposals of supplies acquired through foreclosure
176 of loans issued under AS 03.10;

177 (24) purchases of curatorial and conservation services to
178 maintain, preserve, and interpret

179 (A) objects of art; and
180 (B) items having cultural, historical, or
181 archaeological significance to the state;

182 (25) acquisition of confidential seismic survey data
183 necessary for pre-sale oil and gas lease analyses under AS
184 38.05.180;

185 (26) contracts for village public safety officers;

186 (27) purchases of supplies and services to support the
187 operation of the Alaska state troopers or the division of fish
188 and wildlife protection if the procurement officer for the
189 Department of Public Safety makes a written determination that
190 publicity of the purchases would jeopardize the safety or
191 personnel or the success of a covert operation;

192 (28) expenditures when rates are set by law or ordinance;

193 (29) construction of new vessels by the Department of
194 Transportation and Public Facilities for the Alaska marine
195 highways system.

196 (30) Contracts to be performed in areas outside of the
197 country requiring knowledge of the customs, procedures, rules
198 or laws of the area.

199 (31) Contracts between attorneys not employed by the
200 state and the Department of Law for review or prosecution of
201 possible violations of criminal law of the state in situations
202 where the Attorney General concludes that an actual or
203 potential conflict of interest makes it inappropriate for the
204 Department of Law to review or prosecute the possible

205 violation.

206 * Section 7. AS 44.99.200 is amended to read:

207 (a) The publications of a state agency shall be produced
208 at a [STATE OPERATED] facility located in the state unless
209 [THE PERSON OR ENTITY DESIGNATED UNDER (b) OF THIS SECTION FOR
210 THE AGENCY DETERMINES IN WRITING THAT THE NEEDS OF THE STATE
211 REQUIRE A PUBLICATION THAT DOES NOT COMPLY WITH THE STANDARDS
212 ESTABLISHED UNDER AS 44.99.230 OR THAT CANNOT BE PRODUCED BY
213 A STATE OPERATED FACILITY] they would be less costly to
214 produce at a facility located outside the state.

215 [(b) THE DETERMINATION UNDER (a) OF THIS SECTION SHALL
216 BE MADE BY THE

217 (1) COMMISSIONER OF ADMINISTRATION FOR A STATE AGENCY IN
218 THE EXECUTIVE BRANCH, EXCEPT AS PROVIDED IN (4) - (7) OF THIS
219 SUBSECTION;

220 (2) ADMINISTRATIVE DIRECTOR OF THE JUDICIAL BRANCH FOR
221 AN AGENCY IN THE JUDICIAL BRANCH;

222 (3) ALASKA LEGISLATIVE COUNCIL FOR AN AGENCY IN THE
223 LEGISLATIVE BRANCH;

224 (4) BOARD OF REGENTS OR PRESIDENT OF THE UNIVERSITY OF
225 ALASKA FOR THE UNIVERSITY;

226 (5) [REPEALED, 140 CH 4 FSSLA 1992.]

227 (6) BOARD OF DIRECTORS OF THE ALASKA RAILROAD
228 CORPORATION FOR THE CORPORATION; AND

229 (7) BOARD OF DIRECTORS OF THE ALASKA AEROSPACE

230 DEVELOPMENT CORPORATION FOR THE CORPORATION.)

231 * Section 8. AS 44.99.210 is amended to read

232 If a publication of a state agency is [EXEMPTED UNDER AS
233 44.99.200(a) FROM BEING] not produced at a state-operated
234 facility and if the actual costs for the publication that are
235 paid from the general fund exceed \$1,500, the publication must
236 include a statement that gives the name of the agency
237 releasing the publication, the purpose of the publication, the
238 cost for each copy of the publication, and the city and state
239 where the printing was done. The statement must read: "This
240 publication was released by ...(name of state agency)...,
241 produced at a cost of \$..... per copy to ...(statement of
242 purpose)..., and printed in(city and state where
243 printed)." If the publication is required by law, the
244 statement must also include: "This publication is required by
245 ...(appropriate citation to Alaska law)." The statement may
246 include, if applicable, a declaration of the revenue raised by
247 the sale of the publication or from the purchase of
248 advertising in the publication. The statement shall be
249 printed in one conspicuous place in the body of the
250 publication in a type size that is not smaller than eight
251 points and shall be placed in a box composed of at least one
252 point rule. In this section, "cost for each copy" means the
253 figure that results after dividing the total contract cost of
254 producing the publication by the number of copies produced.
255 This section does not apply to a publication that is intended

256 primarily for foreign or other out-of-state use.

NO

MEMORANDUM

TO: Tam Cook, Director
Legislative Legal Division

FROM: Senator Loren Leman, Chairman
Senate State Affairs Committee

DATE: March 15, 1993

SUBJECT: Proposed Changes for State Affairs Committee Substitute
For SB 129

Section 2:

Page 1, line 12

Delete subsection (c)

Page 2, line 3

Delete "range 26, step C,"
Insert "range 23"

Section 4

Page 2, line 20

Following "EMERGENCY PROCUREMENTS", insert (a)

Page 2, line 28

Delete "chief"

Section 4

Insert new subsection:

"(b) When emergency conditions exist that make procurements through competitive sealed bidding or competitive sealed proposals impracticable or contrary to the public interest, and there is sufficient time to submit findings of fact and receive a written determination by the chief procurement officer, the chief procurement officer shall determine, in writing, the basis for the emergency and the means by which the procurement shall be made. Except for procurements of supplies, services, or construction that do not exceed the amount for small procurements under AS 36.30.320(a), the authority to make a determination required by this subsection may not be delegated."

*Seizing
Barrister
is
cleaning
up the
baggage.*

Section 5

Page 3, line 4

Delete "contract"
Insert "procurement"

Page 3, line 5

Delete "contract"
Insert "procurement"

Page 3, line 5

Delete "procurement"
Insert "method"

Page 3, line 5

Delete "selected for the contract"
Insert "requested."

MEMORANDUM

TO: Tam Cook, Director
Legislative Legal Division

FROM: Senator Loren Leman, Chairman
Senate State Affairs Committee

DATE: March 15, 1993

SUBJECT: Additional Changes to Incorporate into SB 129

Please incorporate the highlighted sections of the attached document into the Senate State Affairs CS for SB 129.

