HB

225

1200

Alaska State Legislature

Representative Anna Fairclough – House District 17

MEMORANDUM

Date: March 23, 2010

To: Senator Menard Chair

From: Representative Anna Fairclough

Re: HB 225 "An Act relating to the State Procurement Code; relating to the procurement of supplies, services, professional services, construction services, state fisheries products, state agricultural products, state timber, and state lumber; relating to procurement preferences; relating to procurement by the office of the ombudsman, the Alaska Industrial Development and Export Authority, the Alaska Energy Authority, and other state agencies and public corporations; and providing for an effective date."

I am requesting a hearing for HB 225 "An Act relating to the State Procurement Code; relating to the procurement of supplies, services, professional services, construction services, state fisheries products, state agricultural products, state timber, and state lumber; relating to procurement preferences; relating to procurement by the office of the ombudsman, the Alaska Industrial Development and Export Authority, the Alaska Energy Authority, and other state agencies and public corporations; and providing for an effective date" at your earliest convenience. I have attached relevant materials for your committee.

Thank you in advance for your consideration.

Anna

Attachments:

I. Sponsor Statement
II. Section Analysis
III. CSHB 225(FIN) (Corrected)
IV. Backup Documentation

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Alaska State Legislature

Representative Anna Fairclough – House District 17

House Bill 225
Sponsor Statement
"An Act relating to the State Procurement Code..."

House Bill 225 makes numerous changes to the state's procurement code. Collectively, these changes streamline the procurement code to ensure consistent application of the law, and results in a more understandable, efficient procurement process. These changes are needed to prevent failed procurements and provide modern procurement tools and techniques to the State's workforce.

Streamlining is accomplished in part by simplifying the application of our many preferences, which is currently complex and confusing for our employees and vendors. The bill makes application of the preferences uniform – currently, preferences do not contain the same language so they must be applied differently. The bill eliminates the Alaska Offeror's preference and Employers of people with disabilities preference. The Offeror's preference is only contained in regulations, has no basis in statute, and limits competition for our RFPs. The employers of people with disabilities preference is a seldom used preference that is very difficult for the Division of Vocational rehabilitation to administer. As of today there are only two vendors receiving this preference, both of which are in the business of leasing office space to the state. This bill also eliminates bidder preferences for our office lease procurements and contains an Alaska Veteran preference, which mirrors HB 24.

Another problem we have in state procurement is solved by clarifying the Alaska business license requirements. Under the current law, a high percentage of offers on high dollar, complex projects are rejected on a technicality. The bill also modifies protest procedures to reduce frivolous protests, and affords us greater flexibility to renegotiate contracts.

HB 225 modernizes our Procurement Code and provides tools and techniques to our employees that have proven cost effective in the private sector. For example, the bill allows for electronic receipt of bids, and for successive rounds of negotiations which has been a very successful technique in other states and the private sector. The bill also eliminates the requirement to maintain outdated vendor lists in a time when commerce is moving online.

The dollar threshold for informal or small procurements is also increased, which will simplify many purchases that are now procured via time consuming and more complex formal procurement rules.

It has been many years since our procurement code has been modernized. These changes will position us to become more efficient and cost effective in our purchasing and contracting.

I urge your support on this piece of legislation.

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SENATE CS FOR CS FOR HOUSE BILL NO. 225(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - SECOND SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVE FAIRCLOUGH

A BILL

FOR AN ACT ENTITLED

"An Act relating to the State Procurement Code; relating to the procurement of supplies, services, professional services, construction services, state fisheries products, state agricultural products, state timber, and state lumber; relating to procurement preferences; relating to procurement by the office of the ombudsman, state agencies, and public corporations; and providing for an effective date."

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

*** Section 1.** AS 24.55.275 is amended to read:

Sec. 24.55.275. Contract procedures. The ombudsman shall adopt by regulation procedures consistent with AS 36.30 to be followed by the office of the ombudsman in contracting for services. However, the procedure for requests for proposals does not apply to contracts for investigations under AS 24.55.100, and the office of the ombudsman shall comply with **<u>the seven percent preference for bidders under AS 36.30.321(a)</u>** [AS 36.30.170(b)].

1 * **Sec. 2.** AS 36.15.050(a) is amended to read:
2 (a) When agricultural products are purchased by the state or by a school
3 district that receives state money, **a seven percent preference shall be applied to the**
4 **price of the products harvested in the state** [ONLY AGRICULTURAL
5 PRODUCTS HARVESTED IN THE STATE SHALL BE PURCHASED
6 WHENEVER PRICED NO MORE THAN SEVEN PERCENT ABOVE PRODUCTS
7 HARVESTED OUTSIDE THE STATE, AVAILABLE, AND OF LIKE QUALITY
8 COMPARED WITH AGRICULTURAL PRODUCTS HARVESTED OUTSIDE
9 THE STATE].
10 * **Sec. 3.** AS 36.15.050(b) is amended to read:
11 (b) When fisheries products are purchased by the state or by a school district
12 that receives state money, **a seven percent preference shall be applied to the price**
13 **of the products harvested or processed within the jurisdiction of the state** [ONLY
14 FISHERIES PRODUCTS HARVESTED OR PROCESSED WITHIN THE
15 JURISDICTION OF THE STATE SHALL BE PURCHASED WHENEVER PRICED
16 NO MORE THAN SEVEN PERCENT ABOVE PRODUCTS HARVESTED OR
17 PROCESSED OUTSIDE THE JURISDICTION OF THE STATE, AVAILABLE,
18 AND OF LIKE QUALITY COMPARED WITH FISHERIES PRODUCTS
19 HARVESTED OR PROCESSED OUTSIDE THE JURISDICTION OF THE
20 STATE].
21 * **Sec. 4.** AS 36.15.050 is amended by adding a new subsection to read:
22 (h) A bidder receiving a preference under this section may not receive a
23 preference under AS 36.30.322.
24 * **Sec. 5.** AS 36.30.015(e) is amended to read:
25 (e) The board of directors of the Alaska Railroad Corporation and the board of
26 directors of the Alaska Aerospace Corporation shall adopt procedures to govern the
27 procurement of supplies, services, professional services, and construction. The
28 procedures must be substantially equivalent to the procedures prescribed in this
29 chapter and in regulations adopted under this chapter. Notwithstanding the other
30 provisions of this subsection, the Alaska Railroad Corporation and the Alaska
31 Aerospace Corporation shall **apply the seven percent preference for bidders under**

AS 36.30.321(a) [COMPLY WITH AS 36.30.170(b)], and, when the Department of Transportation and Public Facilities authorizes the Alaska Railroad Corporation to perform construction work instead of the Department of Transportation and Public Facilities, the Alaska Railroad Corporation shall use competitive sealed bidding or competitive sealed proposals under AS 36.30.100 - 36.30.270 to procure the supplies, services, professional services, and construction services necessary for the work and, to ensure the state obtains the lowest cost for the project, may submit a bid or proposal for the work.

* **Sec. 6.** AS 36.30.015(f) is amended to read:

(f) The board of directors of the Alaska Housing Finance Corporation, notwithstanding AS 18.56.088, and the board of directors of the Knik Arm Bridge and Toll Authority under AS 19.75.111 [,] shall adopt regulations under AS 44.62 (Administrative Procedure Act) and the board of trustees of the Alaska Retirement Management Board shall adopt regulations under AS 37.10.240 to govern the procurement of supplies, services, professional services, and construction for the respective public corporation and board. The regulations must reflect competitive bidding principles and provide vendors reasonable and equitable opportunities to participate in the procurement process and must include procurement methods to meet emergency and extraordinary circumstances. Notwithstanding the other provisions of this subsection, the Alaska Housing Finance Corporation, the Knik Arm Bridge and Toll Authority, and the Alaska Retirement Management Board shall comply with **the seven percent preference for bidders under AS 36.30.321(a)** [AS 36.30.170(b)].

* **Sec. 7.** AS 36.30.015(h) is amended to read:

(h) The board of directors of the Alaska Seafood Marketing Institute shall adopt procedures to govern the procurement of supplies, services, and professional services. The procedures must be similar to the procedures prescribed in this chapter and in regulations adopted under this chapter, except that the Alaska Seafood Marketing Institute shall comply with **the seven percent preference for bidders under AS 36.30.321(a)** [AS 36.30.170(b)].

* **Sec. 8.** AS 36.30.020 is amended to read:

Sec. 36.30.020. Legislature. The legislative council shall adopt and publish

procedures to govern the procurement of supplies, services, professional services, and construction by the legislative branch. The procedures must be based on the competitive principles consistent with this chapter and must be adapted to the special needs of the legislative branch as determined by the legislative council. The procedures must contain provisions for prohibiting procurement from a person that has headquarters in a country listed in Tier 3 of the most recent Trafficking in Persons Report published by the United States Secretary of State under 22 U.S.C. 7107(b)(1)(C). The procedures may contain provisions for restricting procurement from a person that conducts business in but does not have headquarters in a country listed in Tier 3 of the most recent Trafficking in Persons Report published by the United States Secretary of State under 22 U.S.C. 7107(b)(1)(C). The procedures must be consistent with the provisions of AS 36.30.080(c) - (e) and 36.30.085. Notwithstanding the other provisions of this section, the legislative agencies subject to the legislative council's regulations shall comply with **the seven percent preference for bidders under AS 36.30.321(a)** [AS 36.30.170(b)].

*** Sec. 9.** AS 36.30.030 is amended to read:

Sec. 36.30.030. Court system. The administrative director of courts shall adopt and publish procedures to govern the procurement of supplies, services, professional services, and construction by the judicial branch. The procedures must be based on the competitive principles consistent with this chapter and must be adapted to the special needs of the judicial branch as determined by the administrative director of courts. The procedures must contain provisions for prohibiting procurement from a person that has headquarters in a country listed in Tier 3 of the most recent Trafficking in Persons Report published by the United States Secretary of State under 22 U.S.C. 7107(b)(1)(C). The procedures may contain provisions for restricting procurement from a person that conducts business in but does not have headquarters in a country listed in Tier 3 of the most recent Trafficking in Persons Report published by the United States Secretary of State under 22 U.S.C. 7107(b)(1)(C). The procedures must be consistent with the provisions of AS 36.30.080(c) - (e) and 36.30.085. Notwithstanding the other provisions of this section, the judicial branch shall comply with **the seven percent preference for bidders under AS 36.30.321(a)**

[AS 36.30.170(b)].

*** Sec. 10.** AS 36.30.080(f) is amended to read:

(f) When the department is acquiring leased space of **7,000** [3,000] square feet or less, the department may procure the leased space using the procedures for small procurements under AS 36.30.320, providing public notice is given to prospective offerors in the market area.

*** Sec. 11.** AS 36.30.110(b) is amended to read:

(b) The bidder **shall** [MUST] have a valid Alaska business license at the time designated in the invitation to bid for bid opening **in order to qualify as an Alaska bidder and to receive a preference under AS 36.30.321. If a bidder does not have a valid Alaska business license at the time designated in the invitation to bid for bid opening, the bidder shall provide proof that the bidder has a valid Alaska business license before the contract may be awarded, but does not qualify for a preference under AS 36.30.321**. A bidder for a construction contract shall also submit **proof** [EVIDENCE] of the bidder's registration under AS 08.18 **before the contract may be awarded**.

*** Sec. 12.** AS 36.30.130(a) is amended to read:

(a) The procurement officer shall give adequate public notice of the invitation to bid at least 21 days before the date for the opening of bids. If the procurement officer determines in writing that a shorter notice period is advantageous for a particular bid and adequate competition is anticipated, the 21-day period may be shortened. Notice shall be posted on the Alaska Online Public Notice System (AS 44.62.175). The time and manner of notice must be in accordance with regulations adopted by the commissioner of administration. When practicable, notice may include

(1) publication in a newspaper calculated to reach prospective bidders; **and**

(2) notices posted in public places within the area where the work is to be performed or the material furnished [; AND

(3) NOTICES MAILED TO ALL ACTIVE PROSPECTIVE CONTRACTORS ON THE APPROPRIATE LIST MAINTAINED UNDER

AS 36.30.050].

* **Sec. 13.** AS 36.30.170 is repealed and reenacted to read:

Sec. 36.30.170. Contract award after bids. After applying any preferences that apply under AS 36.15.050 and AS 36.30.321 - 36.30.338, a procurement officer shall award a contract based on the solicited bids with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set out in the invitation to bid.

* **Sec. 14.** AS 36.30 is amended by adding a new section to article 2 to read:

Sec. 36.30.195. Multi-step revised sealed bidding. (a) As provided in an invitation to bid and as conducted by a procurement officer under regulations adopted by the commissioner, a multi-step process that begins with an initial round of competitive sealed bidding may, when approved by the chief procurement officer, include successive steps of sealed bidding to obtain the best and final bid price from responsible bidders for the purpose of award.

(b) The provisions of (a) of this section do not apply to a procurement for a construction contract.

* **Sec. 15.** AS 36.30.200(b) is amended to read:

(b) The commissioner may provide by regulation that it is either not practicable or not advantageous to the state to procure [SPECIFIED TYPES OF] supplies, services, or construction by competitive sealed bidding that would otherwise be procured by that method. When the procurement officer determines in writing with particularity that the use of competitive sealed proposals is more advantageous to the state than competitive sealed bidding, a contract may be entered into by competitive sealed proposals.

* **Sec. 16.** AS 36.30.210(b) is amended to read:

(b) An offeror for a construction contract shall submit **proof** [EVIDENCE] of the offeror's registration as a contractor under AS 08.18 **before the contract may be awarded**. A request for sealed proposals for a construction contract, except a design-build construction contract, must require the offeror, no later than five working days after the proposal that is the most advantageous to the state is identified, to list subcontractors the offeror proposes to use in the performance of the construction

contract. The list must include the information required under AS 36.30.115(a). The provisions of AS 36.30.115(b) - (g) that apply to a construction contractor or an apparent low bidder apply to offerors submitting competitive sealed proposals for construction contracts, except design-build construction contracts.

*** Sec. 17.** AS 36.30.210(e) is amended to read:

(e) The offeror **shall** [MUST] have a valid Alaska business license at the time designated[,] in the request for proposals[,] for opening of the proposals **in order to qualify as an Alaska bidder and to receive a preference under AS 36.30.321. If an offeror does not have a valid Alaska business license at the time designated in the request for proposals for proposal opening, the offeror shall provide proof that the offeror has a valid Alaska business license before the contract may be awarded, but does not qualify for a preference under AS 36.30.321**.

*** Sec. 18.** AS 36.30 is amended by adding a new section to read:

Sec. 36.30.245. Multiple submissions and negotiations. (a) In a procurement that uses competitive sealed proposals, in order to obtain the best proposal for purposes of award, an agency may require more than one submission of proposals and may negotiate after each submission with the offerors whose proposals from that submission are reasonably susceptible of being selected for award. The negotiations conducted under this section may cover price, specifications, terms, or conditions or a combination of these items, and these items may be negotiated separately or in any combination. The submissions and negotiations allowed under this section are in addition to any discussions and revisions allowed under AS 36.30.240. The requirements for submissions and negotiations under this section shall be established by the department by regulation and in the request for proposals.

(b) The provisions of (a) of this section do not apply to a procurement for a construction contract.

*** Sec. 19.** AS 36.30.250(a) is amended to read:

(a) The procurement officer shall award a contract under competitive sealed proposals to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the state taking into consideration price and the evaluation factors set out in the request for proposals. **Except as provided by**

AS 36.30.255 and 36.30.336, other [OTHER] factors and criteria may not be used in the evaluation. The contract file must contain the basis on which the award is made.

* **Sec. 20.** AS 36.30 is amended by adding a new section to read:

Sec. 36.30.255. Preferences applied to competitive sealed proposals. When determining which proposal is most advantageous to the state under a competitive sealed proposal solicitation, the procurement officer shall apply the preferences provided in AS 36.15.050 and AS 36.30.321 - 36.30.338, but may not apply other preferences. The preferences shall be applied only to the price portion of a proposal.

* **Sec. 21.** AS 36.30 is amended by adding a new section to article 4 to read:

Sec. 36.30.290. Electronic bids. An agency may allow bids or proposals to be submitted in electronic form under AS 09.80.010 - 09.80.195 (Uniform Electronic Transactions Act).

* **Sec. 22.** AS 36.30.310 is amended to read:

Sec. 36.30.310. Emergency procurements. Procurements may be made under emergency conditions as defined in regulations adopted by the commissioner **of administration** 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 chief procurement officer **or, for construction contracts or procurements of the state equipment fleet, the commissioner of transportation and public facilities** of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The written determination must include findings of fact that support the determination. Except when there is insufficient time for the chief procurement officer **or the commissioner of transportation and public facilities, as appropriate,** to make the written determination required by this section, the **authority to make the determination** [CHIEF PROCUREMENT OFFICER] may not **be delegated** [DELEGATE THE AUTHORITY TO MAKE THE DETERMINATION].

* **Sec. 23.** AS 36.30.320(a) is amended to read:

(a) A procurement for supplies, services, or professional services that does not exceed an aggregate dollar amount of **$100,000** [$50,000], construction that does not exceed an aggregate dollar amount of **$200,000** [$100,000], or lease of space that does not exceed **7,000** [3,000] square feet **shall** [MAY] be made **under** [IN ACCORDANCE WITH] regulations adopted by the commissioner for small procurements.

* **Sec. 24.** AS 36.30 is amended by adding a new section to article 5 to read:

Sec. 36.30.321. Alaska bidder and related preferences. (a) If the bidder or offeror is an Alaska bidder, a preference of seven percent shall be applied to the price in the bid or proposal.

(b) Except as otherwise provided under (d), (e), or (g) of this section, if a bidder or offeror qualifies as an Alaska bidder and is offering services through an employment program, a 15 percent preference shall be applied to the price in the bid or proposal.

(c) If a bidder or offeror qualifies as an Alaska bidder and is an Alaska domestic insurer, and if the procurement is for an insurance-related contract, a five percent preference shall be applied to the price in the bid or proposal.

(d) A 10 percent preference shall be applied to a price in a bid or proposal if the bidder or offeror qualifies as an Alaska bidder and is a

(1) sole proprietorship owned by a person with a disability;

(2) partnership under AS 32.06, or AS 32.11 if each of the partners is a person with a disability;

(3) limited liability company organized under AS 10.50 if each of the members is a person with a disability;

(4) corporation that is wholly owned by individuals and each of the individuals is a person with a disability; or

(5) a joint venture that is composed of ventures that qualify under (1) - (4) of this subsection.

(e) The division of vocational rehabilitation in the Department of Labor and Workforce Development shall add to its current list of qualified employment programs a list of individuals who qualify as persons with a disability under (d) of this section.

A person must be on this list at the time the bid or proposal is opened in order to qualify for a preference under (d) of this section.

(f) If a bidder or offeror qualifies as an Alaska bidder and is a qualifying entity, a five percent preference shall be applied to the price in the bid or proposal. The preference may not exceed $5,000. In this subsection,

(1) "Alaska veteran" means an individual who is both a resident of the state and a veteran;

(2) "qualifying entity" means a

(A) sole proprietorship owned by an Alaska veteran;

(B) partnership under AS 32.06 or AS 32.11 if a majority of the partners are Alaska veterans;

(C) limited liability company organized under AS 10.50 if a majority of the members are Alaska veterans; or

(D) corporation that is wholly owned by individuals and a majority of the individuals are Alaska veterans;

(3) "veteran" means an individual who

(A) served in the

(i) armed forces of the United States, including a reserve unit of the United States armed forces; or

(ii) Alaska Territorial Guard, the Alaska Army National Guard, the Alaska Air National Guard, or the Alaska Naval Militia; and

(B) was separated from service under a condition that was not dishonorable.

(g) A bidder or offeror may not receive a preference under both (b) and (d) of this section for the same contract.

(h) Except as provided by (j) of this section, this section applies to all insurance contracts involving state money. In this subsection, "state money" has the meaning given in AS 36.30.990, but also includes state grants and reimbursements to municipalities, school districts, and other entities.

(i) In order to qualify for a preference under (b), (d), or (f) of this section, a bidder or offeror must add value by actually performing, controlling, managing, and

supervising the services provided, or the bidder or offeror must have sold supplies of the general nature solicited to other state agencies, governments, or the general public.

(j) This section does not apply to solicitations or contracts for lease space under AS 36.30.080, to procurements under AS 36.30.305 - 36.30.310, or, except as provided otherwise by regulation under AS 36.30.320, to small procurements under AS 36.30.320.

(k) In this section, "person with a disability" means an individual who

(1) has been determined to be permanently disabled by the

(A) United States Social Security Administration under 42 U.S.C. 1381 - 1385 (Social Security Act) or 42 U.S.C. 423 (Social Security Act);

(B) the teachers' retirement system under AS 14.25, the judicial retirement system under AS 22.25, the public employees' retirement system under AS 39.35, or the elected public officers' retirement system under former AS 39.37;

(C) federal civil service retirement system under 5 U.S.C. 2107, 3323, and 8331 - 8351;

(D) federal employees' retirement system under 5 U.S.C. 8401 - 8479; or

(E) division of vocational rehabilitation in the Department of Labor and Workforce Development using disability standards under 42 U.S.C. 1381 - 1385 (Social Security Act) for eligibility for certain state disability program purposes;

(2) is receiving permanent total disability under AS 23.30 (Alaska Workers' Compensation Act);

(3) has been discharged from military service under honorable conditions and is certified by the United States Department of Veterans Affairs as having incurred a 50 percent or greater disability during military service; or

(4) has served in the Alaska Territorial Guard and incurred a 50 percent or greater disability while serving in the Alaska Territorial Guard.

* **Sec. 25.** AS 36.30.322(a) is amended to read:

(a) Only timber, lumber, and manufactured lumber products originating in this state from Alaska forests may be procured by an agency or used in construction projects of an agency unless the manufacturers and suppliers who have notified the commissioner of commerce, community, and economic development of their willingness to manufacture or supply Alaska forest products

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

(2) **are not the low bidder after all applicable preferences have been applied to the price of the qualifying forest product under AS 36.30.336** [ARE UNABLE TO SUPPLY THE PRODUCTS AT A COST THAT IS WITHIN SEVEN PERCENT OF THE PRICE OFFERED BY A MANUFACTURER OR SUPPLIER OF NON-ALASKA FOREST PRODUCTS].

*** Sec. 26.** AS 36.30.336 is repealed and reenacted to read:

Sec. 36.30.336. Application of preferences. (a) Except as provided in AS 36.15.050(h) and AS 36.30.321(g), the preferences provided in AS 36.15.050 and AS 36.30.321 - 36.30.338 are cumulative. A bidder who would otherwise qualify for preferences under AS 36.30.321 may not be given a preference over another bidder who qualifies for the same preferences.

(b) Notwithstanding the other provisions of this chapter, AS 36.30.321 - 36.30.338 apply to all procurements subject to this chapter, except as provided in AS 36.15.050 and AS 36.30.322(b).

*** Sec. 27.** AS 36.30 is amended by adding a new section to read:

Sec. 36.30.364. Renegotiation. (a) The chief procurement officer may renegotiate the terms and conditions, including the contract period of performance and price, of a contract without using an additional competitive process, and may amend the contract if the procurement officer determines that

(1) the amendment is in the best interest of the state;

(2) the renegotiated contract is at least as favorable to the state as the original contract; and

(3) the additional period of performance of the renegotiated contract does not exceed five years, or, if an innovative procurement process under

AS 36.30.308 was used to procure the original contract, does not exceed the approval under AS 36.30.308(b).

(b) The chief procurement officer, under regulations adopted by the commissioner, may delegate the authority to make the determination under (a) of this section to a state procurement officer.

(c) This section does not apply to lease extensions under AS 36.30.083.

* **Sec. 28.** AS 36.30.560 is amended to read:

Sec. 36.30.560. Filing of a protest. An interested party may protest the award of a contract, the proposed award of a contract, or a solicitation for supplies, services, professional services, or construction by an agency. The protest shall be filed with the procurement officer of the contracting agency in writing **within the time period provided in AS 36.30.565,** and include the following information:

(1) the name, address, and telephone number of the protester;

(2) the signature of the protester or the protester's representative;

(3) identification of the contracting agency and the solicitation or contract at issue;

(4) a detailed statement of the legal and factual grounds of the protest, including copies of relevant documents; [AND]

(5) the form of relief requested**; and**

(6) the protest filing fee required under AS 36.30.567.

* **Sec. 29.** AS 36.30.565(b) is amended to read:

(b) If the protester shows good cause **why the protestor did not file a protest by the deadline established under (a) of this section**, the procurement officer of the contracting agency may consider a filed protest that is not timely.

* **Sec. 30.** AS 36.30 is amended by adding a new section to read:

Sec. 36.30.567. Protest filing fee. To file a protest under AS 36.30.560, the protester shall pay a $250 filing fee to the agency that conducted the procurement. The filing fee shall be refunded if the protest is sustained by the procurement officer under AS 36.30.585 or if the protest is withdrawn by the protester before an appeal is filed under AS 36.30.590.

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

Sec. 36.30.572. Temporary delay of award. (a) If a protest of a proposed award of a contract is filed timely under AS 36.30.565, the procurement officer may temporarily delay the award of the contract in order to make a decision under AS 36.30.580, extend the time for making the decision under AS 36.30.580, or address other circumstances that warrant temporarily delaying the award.

(b) Notice of a temporary delay of a contract award under (a) of this section shall be provided in writing to the protester and all other interested parties. The written notice must indicate when the temporary delay of the award will expire.

(c) A temporary delay of a contract award under this section does not constitute a stay of award under AS 36.30.575.

*** Sec. 32.** AS 36.30.655 is amended to read:

Sec. 36.30.655. List of persons debarred or suspended; removal from contractor lists. The commissioner shall maintain a list of all persons debarred or suspended from consideration for **the** award of contracts. [THE COMMISSIONER SHALL REMOVE A PERSON DEBARRED OR SUSPENDED FROM THE LISTS OF CONTRACTORS UNDER AS 36.30.050 FOR THE PERIOD OF DEBARMENT OR SUSPENSION.]

*** Sec. 33.** AS 36.30.850(b) is amended by adding new paragraphs to read:

(48) contracts for lease space for an agency's offices that are located in other states, the District of Columbia, or foreign countries;

(49) contracts for investigative services entered into by the department for the state personnel board established under AS 39.25.030, the office of public advocacy created under AS 44.21.400, or the Alaska Public Offices Commission created under AS 15.13.020;

(50) purchases of commodities used in the manufacture of products sold through an employment program of prison inmates subject to AS 23.15.580;

(51) contracts for training services provided by a professional organization.

*** Sec. 34.** AS 36.30.990 is amended by adding new paragraphs to read:

(25) "Alaska bidder" means a person who

(A) holds a current Alaska business license;

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

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

(D) is incorporated or qualified to do business under the laws of the state, is a sole proprietorship and the proprietor is a resident of the state, is a limited liability company organized under AS 10.50 and all members are residents of the state, or is a partnership under former AS 32.05, AS 32.06, or AS 32.11 and all partners are residents of the state; and

(E) if a joint venture, is composed entirely of ventures that qualify under (A) - (D) of this subsection;

(26) "in writing" has the meaning given to "written" in this section;

(27) "signature" means a manual identifier or electronic signature attached to or logically associated with a record that is intended by the person using it to have the same force and effect as a manual signature; in this paragraph, "electronic signature" has the meaning given in AS 09.80.190;

(28) "written" means the product of forming characters on paper, other materials, or viewable screens, that can be read, retrieved, and reproduced, including information that is electronically transmitted and stored.

* **Sec. 35.** AS 36.90.049(a) is amended to read:

(a) A marine vessel owned by the state shall be maintained and repaired at a shipyard facility located in the state unless the commissioner of the department that operates the marine vessel determines in writing that there is no shipyard facility located in the state that is equipped or qualified to perform the particular maintenance or repair required, or, after taking into consideration the **seven percent** Alaska bidder preference **for bidders under AS 36.30.321(a)** [SET OUT IN AS 36.30.170] and the interport differential, that the proposed cost of the maintenance or repair work is unreasonable. A detailed list of the costs and factors considered in calculating the interport differential must be provided to each person who expresses an interest in

submitting a bid to perform maintenance or repair work on a marine vessel owned by the state.

*** Sec. 36.** AS 38.35.017(a) is amended to read:

(a) Consistent with and in furtherance of the statements of general state policy guiding resource development set out in art. VIII, sec. 1, Constitution of the State of Alaska, that the resources of the state be developed "by making them available for maximum use consistent with the public interest" and in art. VIII, sec. 2, Constitution of the State of Alaska, directing that provision shall be made by the legislature for "the utilization, development, and conservation of all natural resources belonging to the State . . . for the maximum benefit of its people," and consistent with and in furtherance of the general legislative declaration of policy for this chapter set out in AS 38.35.010, it is the policy of this state that the overall strategy for development, use, and control of a pipeline or pipelines to develop the state's substantial North Slope natural gas resources be directed

(1) to enhance the standard of living of state residents by

(A) ensuring that, in conjunction with out-of-state market driven commercial demand for North Slope natural gas, state residents and businesses will have access, directly or indirectly, to that portion of the gas that will meet the reasonably foreseeable in-state demands for it, including substitution of the North Slope natural gas for depleting gas reserves in Southcentral Alaska in order to maintain a vital domestic and industrial energy source, and ensuring that the pipeline or pipelines for the transportation of North Slope natural gas will be designed and located to be responsive to these requirements;

(B) making the maximum contribution to the development of job opportunities in this state by

(i) providing direct short-term construction and long-term operation- and maintenance-related employment on the pipeline or pipelines, to the end that the resources be developed with qualified contractors and firms in this state for work to be performed, including the fabrication and installation of required facilities, and that state

residents be employed, consistent with law; for purposes of this sub-subparagraph, a person is considered a resident if the person is physically present in the state with the intent to remain in the state indefinitely and has a home in the state, and a contractor or firm is considered as qualified if the contractor or firm qualifies as an Alaska bidder**; in this sub-subparagraph, "Alaska bidder" has the meaning given in AS 36.30.990** [UNDER AS 36.30.170(b)]; and

(ii) providing necessary support services; and

(C) adding significant long-term property value to the tax base of the state and local governments, thereby providing the means to support public education, public health, transportation, and other essential state and local government projects and services;

(2) to ensure that the design, location, and construction of a pipeline or pipelines for delivery of North Slope natural gas to North American markets through connection to the North American natural gas pipeline network enhance opportunities for implementing gas deliveries using alternative technologies and the construction of other pipelines to deliver North Slope natural gas to foreign and domestic markets; and

(3) to ensure construction of the pipeline or pipelines consistent with careful protection of the state's natural environment, with minimum environmental degradation, to the greatest extent possible, and with protection of fish, wildlife, and biotic resources for the use of persons who depend upon them by using available transportation infrastructure to initiate and complete project construction and maintenance and by avoiding duplication of facilities.

*** Sec. 37.** AS 44.62.310(d) is amended to read:

(d) This section does not apply to

(1) a governmental body performing a judicial or quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff;

(5) meetings of the governmental body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges, or discipline;

(6) staff meetings or other gatherings of the employees of a public entity, including meetings of an employee group established by policy of the Board of Regents of the University of Alaska or held while acting in an advisory capacity to the Board of Regents;

(7) meetings held for the purpose of participating in or attending a gathering of a national, state, or regional organization of which the public entity, governmental body, or member of the governmental body is a member, but only if no action is taken and no business of the governmental body is conducted at the meetings; [OR]

(8) meetings of municipal service area boards established under AS 29.35.450 - 29.35.490 when meeting solely to act on matters that are administrative or managerial in nature**; or**

(9) meetings with offerors in negotiations for state procurement under AS 36.30.245, or meetings to renegotiate a contract under AS 36.30.364.

*** Sec. 38.** AS 36.30.050, 36.30.250(b), 36.30.335, and 36.30.362 are repealed.

*** Sec. 39.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITION: PENDING SOLICITATIONS FOR PROCUREMENTS AND CONTRACTS. (a) This Act does not apply to

(1) solicitations for procurement and the resulting contracts, if the solicitations are pending on the effective date of this Act and if the invitation to bid or other solicitation was issued before the effective date of this Act; and

(2) procurement contracts entered into before the effective date of this Act, including extensions of those contracts.

(b) Notwithstanding (a) of this section, this Act applies to procurements or contracts described in (a)(1) of this section if all parties to the procurement or contract agree in writing that the applicable provisions of this Act apply to the solicitation or contract.

*** Sec. 40.** The uncodified law of the State of Alaska is amended by adding a new section to

1 read:
2 TRANSITION: INFORMATION IN BIENNIAL REPORTS. In addition to the
3 information that must be included in the biennial report under AS 36.30.540, the Department
4 of Administration shall include in the two successive biennial reports that are prepared under
5 AS 36.30.540 after the effective date of this Act information on the savings that have been
6 achieved during the reporting period by using AS 36.30.195, enacted by sec. 14 of this Act,
7 and AS 36.30.364, enacted by sec. 27 of this Act.
8 * **Sec. 41.** The uncodified law of the State of Alaska is amended by adding a new section to
9 read:
10 REVISOR'S INSTRUCTION. The revisor of statutes shall change the catch line of
11 AS 36.30.360 from "Determination of responsibility" to "Determination of nonresponsibility."
12 * **Sec. 42.** This Act takes effect immediately under AS 01.10.070(c).

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Bannister
4/7/10

SENATE CS FOR CS FOR HOUSE BILL NO. 225(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - SECOND SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVE FAIRCLOUGH

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the State Procurement Code; relating to the procurement of**
2 **supplies, services, professional services, construction services, state fisheries products,**
3 **state agricultural products, state timber, and state lumber; relating to procurement**
4 **preferences; relating to procurement by the office of the ombudsman, state agencies,**
5 **and public corporations; and providing for an effective date."**

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

7 *** Section 1.** AS 24.55.275 is amended to read:
8 **Sec. 24.55.275. Contract procedures.** The ombudsman shall adopt by
9 regulation procedures consistent with AS 36.30 to be followed by the office of the
10 ombudsman in contracting for services. However, the procedure for requests for
11 proposals does not apply to contracts for investigations under AS 24.55.100, and the
12 office of the ombudsman shall comply with **<u>the five percent preference for bidders</u>**
13 **<u>under AS 36.30.321(a)</u>** [AS 36.30.170(b)].

1 * **Sec. 2.** AS 36.15.050(a) is amended to read:
2 (a) When agricultural products are purchased by the state or by a school
3 district that receives state money, **a seven percent preference shall be applied to the**
4 **price of the products harvested in the state** [ONLY AGRICULTURAL
5 PRODUCTS HARVESTED IN THE STATE SHALL BE PURCHASED
6 WHENEVER PRICED NO MORE THAN SEVEN PERCENT ABOVE PRODUCTS
7 HARVESTED OUTSIDE THE STATE, AVAILABLE, AND OF LIKE QUALITY
8 COMPARED WITH AGRICULTURAL PRODUCTS HARVESTED OUTSIDE
9 THE STATE].
10 * **Sec. 3.** AS 36.15.050(b) is amended to read:
11 (b) When fisheries products are purchased by the state or by a school district
12 that receives state money, **a seven percent preference shall be applied to the price**
13 **of the products harvested or processed within the jurisdiction of the state** [ONLY
14 FISHERIES PRODUCTS HARVESTED OR PROCESSED WITHIN THE
15 JURISDICTION OF THE STATE SHALL BE PURCHASED WHENEVER PRICED
16 NO MORE THAN SEVEN PERCENT ABOVE PRODUCTS HARVESTED OR
17 PROCESSED OUTSIDE THE JURISDICTION OF THE STATE, AVAILABLE,
18 AND OF LIKE QUALITY COMPARED WITH FISHERIES PRODUCTS
19 HARVESTED OR PROCESSED OUTSIDE THE JURISDICTION OF THE
20 STATE].
21 * **Sec. 4.** AS 36.15.050 is amended by adding a new subsection to read:
22 (h) A bidder receiving a preference under this section may not receive a
23 preference under AS 36.30.322.
24 * **Sec. 5.** AS 36.30.015(e) is amended to read:
25 (e) The board of directors of the Alaska Railroad Corporation and the board of
26 directors of the Alaska Aerospace Corporation shall adopt procedures to govern the
27 procurement of supplies, services, professional services, and construction. The
28 procedures must be substantially equivalent to the procedures prescribed in this
29 chapter and in regulations adopted under this chapter. Notwithstanding the other
30 provisions of this subsection, the Alaska Railroad Corporation and the Alaska
31 Aerospace Corporation shall **apply the five percent preference for bidders under**

AS 36.30.321(a) [COMPLY WITH AS 36.30.170(b)], and, when the Department of Transportation and Public Facilities authorizes the Alaska Railroad Corporation to perform construction work instead of the Department of Transportation and Public Facilities, the Alaska Railroad Corporation shall use competitive sealed bidding or competitive sealed proposals under AS 36.30.100 - 36.30.270 to procure the supplies, services, professional services, and construction services necessary for the work and, to ensure the state obtains the lowest cost for the project, may submit a bid or proposal for the work.

* **Sec. 6.** AS 36.30.015(f) is amended to read:

(f) The board of directors of the Alaska Housing Finance Corporation, notwithstanding AS 18.56.088, and the board of directors of the Knik Arm Bridge and Toll Authority under AS 19.75.111 [,] shall adopt regulations under AS 44.62 (Administrative Procedure Act) and the board of trustees of the Alaska Retirement Management Board shall adopt regulations under AS 37.10.240 to govern the procurement of supplies, services, professional services, and construction for the respective public corporation and board. The regulations must reflect competitive bidding principles and provide vendors reasonable and equitable opportunities to participate in the procurement process and must include procurement methods to meet emergency and extraordinary circumstances. Notwithstanding the other provisions of this subsection, the Alaska Housing Finance Corporation, the Knik Arm Bridge and Toll Authority, and the Alaska Retirement Management Board shall comply with **the five percent preference for bidders under AS 36.30.321(a)** [AS 36.30.170(b)].

* **Sec. 7.** AS 36.30.015(h) is amended to read:

(h) The board of directors of the Alaska Seafood Marketing Institute shall adopt procedures to govern the procurement of supplies, services, and professional services. The procedures must be similar to the procedures prescribed in this chapter and in regulations adopted under this chapter, except that the Alaska Seafood Marketing Institute shall comply with **the five percent preference for bidders under AS 36.30.321(a)** [AS 36.30.170(b)].

* **Sec. 8.** AS 36.30.020 is amended to read:

Sec. 36.30.020. Legislature. The legislative council shall adopt and publish

procedures to govern the procurement of supplies, services, professional services, and construction by the legislative branch. The procedures must be based on the competitive principles consistent with this chapter and must be adapted to the special needs of the legislative branch as determined by the legislative council. The procedures must contain provisions for prohibiting procurement from a person that has headquarters in a country listed in Tier 3 of the most recent Trafficking in Persons Report published by the United States Secretary of State under 22 U.S.C. 7107(b)(1)(C). The procedures may contain provisions for restricting procurement from a person that conducts business in but does not have headquarters in a country listed in Tier 3 of the most recent Trafficking in Persons Report published by the United States Secretary of State under 22 U.S.C. 7107(b)(1)(C). The procedures must be consistent with the provisions of AS 36.30.080(c) - (e) and 36.30.085. Notwithstanding the other provisions of this section, the legislative agencies subject to the legislative council's regulations shall comply with **the five percent preference for bidders under AS 36.30.321(a)** [AS 36.30.170(b)].

*** Sec. 9.** AS 36.30.030 is amended to read:

Sec. 36.30.030. Court system. The administrative director of courts shall adopt and publish procedures to govern the procurement of supplies, services, professional services, and construction by the judicial branch. The procedures must be based on the competitive principles consistent with this chapter and must be adapted to the special needs of the judicial branch as determined by the administrative director of courts. The procedures must contain provisions for prohibiting procurement from a person that has headquarters in a country listed in Tier 3 of the most recent Trafficking in Persons Report published by the United States Secretary of State under 22 U.S.C. 7107(b)(1)(C). The procedures may contain provisions for restricting procurement from a person that conducts business in but does not have headquarters in a country listed in Tier 3 of the most recent Trafficking in Persons Report published by the United States Secretary of State under 22 U.S.C. 7107(b)(1)(C). The procedures must be consistent with the provisions of AS 36.30.080(c) - (e) and 36.30.085. Notwithstanding the other provisions of this section, the judicial branch shall comply with **the five percent preference for bidders under AS 36.30.321(a)**

[AS 36.30.170(b)].

*** Sec. 10.** AS 36.30.080(f) is amended to read:

(f) When the department is acquiring leased space of **7,000** [3,000] square feet or less, the department may procure the leased space using the procedures for small procurements under AS 36.30.320, providing public notice is given to prospective offerors in the market area.

*** Sec. 11.** AS 36.30.110(b) is amended to read:

(b) The bidder **shall** [MUST] have a valid Alaska business license at the time designated in the invitation to bid for bid opening **in order to qualify as an Alaska bidder and to receive a preference under AS 36.30.321. If a bidder does not have a valid Alaska business license at the time designated in the invitation to bid for bid opening, the bidder shall provide proof that the bidder has a valid Alaska business license before the contract may be awarded, but does not qualify for a preference under AS 36.30.321**. A bidder for a construction contract shall also submit **proof** [EVIDENCE] of the bidder's registration under AS 08.18 **before the contract may be awarded**.

*** Sec. 12.** AS 36.30.130(a) is amended to read:

(a) The procurement officer shall give adequate public notice of the invitation to bid at least 21 days before the date for the opening of bids. If the procurement officer determines in writing that a shorter notice period is advantageous for a particular bid and adequate competition is anticipated, the 21-day period may be shortened. Notice shall be posted on the Alaska Online Public Notice System (AS 44.62.175). The time and manner of notice must be in accordance with regulations adopted by the commissioner of administration. When practicable, notice may include

(1) publication in a newspaper calculated to reach prospective bidders; **and**

(2) notices posted in public places within the area where the work is to be performed or the material furnished [; AND

(3) NOTICES MAILED TO ALL ACTIVE PROSPECTIVE CONTRACTORS ON THE APPROPRIATE LIST MAINTAINED UNDER

AS 36.30.050].

* **Sec. 13.** AS 36.30.170 is repealed and reenacted to read:

Sec. 36.30.170. Contract award after bids. After applying any preferences that apply under AS 36.15.050 and AS 36.30.321 - 36.30.338, a procurement officer shall award a contract based on the solicited bids with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set out in the invitation to bid.

* **Sec. 14.** AS 36.30 is amended by adding a new section to article 2 to read:

Sec. 36.30.195. Multi-step revised sealed bidding. (a) As provided in an invitation to bid and as conducted by a procurement officer under regulations adopted by the commissioner, a multi-step process that begins with an initial round of competitive sealed bidding may, when approved by the chief procurement officer, include successive steps of sealed bidding to obtain the best and final bid price from responsible bidders for the purpose of award.

(b) The provisions of (a) of this section do not apply to a procurement for a construction contract.

* **Sec. 15.** AS 36.30.200(b) is amended to read:

(b) The commissioner may provide by regulation that it is either not practicable or not advantageous to the state to procure [SPECIFIED TYPES OF] supplies, services, or construction by competitive sealed bidding that would otherwise be procured by that method. When the procurement officer determines in writing with particularity that the use of competitive sealed proposals is more advantageous to the state than competitive sealed bidding, a contract may be entered into by competitive sealed proposals.

* **Sec. 16.** AS 36.30.210(b) is amended to read:

(b) An offeror for a construction contract shall submit **proof** [EVIDENCE] of the offeror's registration as a contractor under AS 08.18 **before the contract may be awarded**. A request for sealed proposals for a construction contract, except a design-build construction contract, must require the offeror, no later than five working days after the proposal that is the most advantageous to the state is identified, to list subcontractors the offeror proposes to use in the performance of the construction

contract. The list must include the information required under AS 36.30.115(a). The provisions of AS 36.30.115(b) - (g) that apply to a construction contractor or an apparent low bidder apply to offerors submitting competitive sealed proposals for construction contracts, except design-build construction contracts.

*** Sec. 17.** AS 36.30.210(e) is amended to read:

(e) The offeror **shall** [MUST] have a valid Alaska business license at the time designated[,] in the request for proposals[,] for opening of the proposals **in order to qualify as an Alaska bidder and to receive a preference under AS 36.30.321. If an offeror does not have a valid Alaska business license at the time designated in the request for proposals for proposal opening, the offeror shall provide proof that the offeror has a valid Alaska business license before the contract may be awarded, but does not qualify for a preference under AS 36.30.321**.

*** Sec. 18.** AS 36.30 is amended by adding a new section to read:

Sec. 36.30.245. Multiple submissions and negotiations. (a) In a procurement that uses competitive sealed proposals, in order to obtain the best proposal for purposes of award, an agency may require more than one submission of proposals and may negotiate after each submission with the offerors whose proposals from that submission are reasonably susceptible of being selected for award. The negotiations conducted under this section may cover price, specifications, terms, or conditions or a combination of these items, and these items may be negotiated separately or in any combination. The submissions and negotiations allowed under this section are in addition to any discussions and revisions allowed under AS 36.30.240. The requirements for submissions and negotiations under this section shall be established by the department by regulation and in the request for proposals.

(b) The provisions of (a) of this section do not apply to a procurement for a construction contract.

*** Sec. 19.** AS 36.30 is amended by adding a new section to read:

Sec. 36.30.255. Preferences applied to competitive sealed proposals. When determining which proposal is most advantageous to the state under a competitive sealed proposal solicitation, the procurement officer shall apply the preferences provided in AS 36.15.050 and AS 36.30.321 - 36.30.338.

1 * **Sec. 20.** AS 36.30 is amended by adding a new section to article 4 to read:
2 **Sec. 36.30.290. Electronic bids.** An agency may allow bids or proposals to be
3 submitted in electronic form under AS 09.80.010 - 09.80.195 (Uniform Electronic
4 Transactions Act).
5 * **Sec. 21.** AS 36.30.310 is amended to read:
6 **Sec. 36.30.310. Emergency procurements.** Procurements may be made under
7 emergency conditions as defined in regulations adopted by the commissioner **of**
8 **administration** when there exists a threat to public health, welfare, or safety, when a
9 situation exists that makes a procurement through competitive sealed bidding or
10 competitive sealed proposals impracticable or contrary to the public interest, or to
11 protect public or private property. An emergency procurement need not be made
12 through competitive sealed bidding or competitive sealed proposals but shall be made
13 with competition that is practicable under the circumstances. A written determination
14 by the chief procurement officer **or, for construction contracts or procurements of**
15 **the state equipment fleet, the commissioner of transportation and public facilities**
16 of the basis for the emergency and for the selection of the particular contractor shall be
17 included in the contract file. The written determination must include findings of fact
18 that support the determination. Except when there is insufficient time for the chief
19 procurement officer **or the commissioner of transportation and public facilities, as**
20 **appropriate,** to make the written determination required by this section, the **authority**
21 **to make the determination** [CHIEF PROCUREMENT OFFICER] may not **be**
22 **delegated** [DELEGATE THE AUTHORITY TO MAKE THE DETERMINATION].
23 * **Sec. 22.** AS 36.30.320(a) is amended to read:
24 (a) A procurement for supplies, services, or professional services that does not
25 exceed an aggregate dollar amount of **$100,000** [$50,000], construction that does not
26 exceed an aggregate dollar amount of **$200,000** [$100,000], or lease of space that does
27 not exceed **7,000** [3,000] square feet **shall** [MAY] be made **under** [IN
28 ACCORDANCE WITH] regulations adopted by the commissioner for small
29 procurements.
30 * **Sec. 23.** AS 36.30 is amended by adding a new section to article 5 to read:
31 **Sec. 36.30.321. Alaska bidder and related preferences.** (a) If the bidder or

1 offeror is an Alaska bidder, a preference of five percent shall be applied to the price in
2 the bid or proposal.
3 (b) Except as otherwise provided under (d), (e), or (g) of this section, if a
4 bidder or offeror qualifies as an Alaska bidder and is offering services through an
5 employment program, a 15 percent preference shall be applied to the price in the bid
6 or proposal.
7 (c) If a bidder or offeror qualifies as an Alaska bidder and is an Alaska
8 domestic insurer, and if the procurement is for an insurance-related contract, a five
9 percent preference shall be applied to the price in the bid or proposal.
10 (d) A 10 percent preference shall be applied to a price in a bid or proposal if
11 the bidder or offeror qualifies as an Alaska bidder and is a
12 (1) sole proprietorship owned by a person with a disability;
13 (2) partnership under AS 32.06, or AS 32.11 if each of the partners is a
14 person with a disability;
15 (3) limited liability company organized under AS 10.50 if each of the
16 members is a person with a disability;
17 (4) corporation that is wholly owned by individuals and each of the
18 individuals is a person with a disability; or
19 (5) a joint venture that is composed of ventures that qualify under (1) -
20 (4) of this subsection.
21 (e) The division of vocational rehabilitation in the Department of Labor and
22 Workforce Development shall add to its current list of qualified employment programs
23 a list of individuals who qualify as persons with a disability under (d) of this section.
24 A person must be on this list at the time the bid or proposal is opened in order to
25 qualify for a preference under (d) of this section.
26 (f) If a bidder or offeror qualifies as an Alaska bidder and is a qualifying
27 entity, a five percent preference shall be applied to the price in the bid or proposal.
28 The preference may not exceed $5,000. In this subsection,
29 (1) "Alaska veteran" means an individual who is both a resident of the
30 state and a veteran;
31 (2) "qualifying entity" means a

1 (A) sole proprietorship owned by an Alaska veteran;
2 (B) partnership under AS 32.06 or AS 32.11 if a majority of the
3 partners are Alaska veterans;
4 (C) limited liability company organized under AS 10.50 if a
5 majority of the members are Alaska veterans; or
6 (D) corporation that is wholly owned by individuals and a
7 majority of the individuals are Alaska veterans;
8 (3) "veteran" means an individual who
9 (A) served in the
10 (i) armed forces of the United States, including a
11 reserve unit of the United States armed forces; or
12 (ii) Alaska Territorial Guard, the Alaska Army National
13 Guard, the Alaska Air National Guard, or the Alaska Naval Militia; and
14 (B) was separated from service under a condition that was not
15 dishonorable.
16 (g) A bidder or offeror may not receive a preference under both (b) and (d) of
17 this section for the same contract.
18 (h) Except as provided by (j) of this section, this section applies to all
19 insurance contracts involving state money. In this subsection, "state money" has the
20 meaning given in AS 36.30.990, but also includes state grants and reimbursements to
21 municipalities, school districts, and other entities.
22 (i) In order to qualify for a preference under (b), (d), or (f) of this section, a
23 bidder or offeror must add value by actually performing, controlling, managing, and
24 supervising the services provided, or the bidder or offeror must have sold supplies of
25 the general nature solicited to other state agencies, governments, or the general public.
26 (j) This section does not apply to solicitations or contracts for lease space
27 under AS 36.30.080, to procurements under AS 36.30.305 - 36.30.310, or, except as
28 provided otherwise by regulation under AS 36.30.320, to small procurements under
29 AS 36.30.320.
30 (k) In this section, "person with a disability" means an individual who
31 (1) has been determined to be permanently disabled by the

(A) United States Social Security Administration under 42 U.S.C. 1381 - 1385 (Social Security Act) or 42 U.S.C. 423 (Social Security Act);

(B) the teachers' retirement system under AS 14.25, the judicial retirement system under AS 22.25, the public employees' retirement system under AS 39.35, or the elected public officers' retirement system under former AS 39.37;

(C) federal civil service retirement system under 5 U.S.C. 2107, 3323, and 8331 - 8351;

(D) federal employees' retirement system under 5 U.S.C. 8401 - 8479; or

(E) division of vocational rehabilitation in the Department of Labor and Workforce Development using disability standards under 42 U.S.C. 1381 - 1385 (Social Security Act) for eligibility for certain state disability program purposes;

(2) is receiving permanent total disability under AS 23.30 (Alaska Workers' Compensation Act);

(3) has been discharged from military service under honorable conditions and is certified by the United States Department of Veterans Affairs as having incurred a 50 percent or greater disability during military service; or

(4) has served in the Alaska Territorial Guard and incurred a 50 percent or greater disability while serving in the Alaska Territorial Guard.

* **Sec. 24.** AS 36.30.322(a) is amended to read:

(a) Only timber, lumber, and manufactured lumber products originating in this state from Alaska forests may be procured by an agency or used in construction projects of an agency unless the manufacturers and suppliers who have notified the commissioner of commerce, community, and economic development of their willingness to manufacture or supply Alaska forest products

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

(2) **<u>are not the low bidder after all applicable preferences have</u>**

1 **been applied to the price of the qualifying forest product under AS 36.30.336**
2 [ARE UNABLE TO SUPPLY THE PRODUCTS AT A COST THAT IS WITHIN
3 SEVEN PERCENT OF THE PRICE OFFERED BY A MANUFACTURER OR
4 SUPPLIER OF NON-ALASKA FOREST PRODUCTS].
5 * **Sec. 25.** AS 36.30.336 is repealed and reenacted to read:
6 **Sec. 36.30.336. Application of preferences.** (a) Except as provided in
7 AS 36.15.050(h) and AS 36.30.321(g), the preferences provided in AS 36.15.050 and
8 AS 36.30.321 - 36.30.338 are cumulative. A bidder who would otherwise qualify for
9 preferences under AS 36.30.321 may not be given a preference over another bidder
10 who qualifies for the same preferences.
11 (b) Notwithstanding the other provisions of this chapter, AS 36.30.321 -
12 36.30.338 apply to all procurements subject to this chapter, except as provided in
13 AS 36.15.050 and AS 36.30.322(b).
14 * **Sec. 26.** AS 36.30 is amended by adding a new section to read:
15 **Sec. 36.30.364. Renegotiation.** (a) The chief procurement officer may
16 renegotiate the terms and conditions, including the contract period of performance and
17 price, of a contract without using an additional competitive process, and may amend
18 the contract if the procurement officer determines that
19 (1) the amendment is in the best interest of the state;
20 (2) the renegotiated contract is at least as favorable to the state as the
21 original contract; and
22 (3) the additional period of performance of the renegotiated contract
23 does not exceed five years, or, if an innovative procurement process under
24 AS 36.30.308 was used to procure the original contract, does not exceed the approval
25 under AS 36.30.308(b).
26 (b) The chief procurement officer, under regulations adopted by the
27 commissioner, may delegate the authority to make the determination under (a) of this
28 section to a state procurement officer.
29 (c) This section does not apply to lease extensions under AS 36.30.083.
30 * **Sec. 27.** AS 36.30.560 is amended to read:
31 **Sec. 36.30.560. Filing of a protest.** An interested party may protest the award

of a contract, the proposed award of a contract, or a solicitation for supplies, services, professional services, or construction by an agency. The protest shall be filed with the procurement officer of the contracting agency in writing **within the time period provided in AS 36.30.565,** and include the following information:

(1) the name, address, and telephone number of the protester;

(2) the signature of the protester or the protester's representative;

(3) identification of the contracting agency and the solicitation or contract at issue;

(4) a detailed statement of the legal and factual grounds of the protest, including copies of relevant documents; [AND]

(5) the form of relief requested**; and**

(6) the protest filing fee required under AS 36.30.567.

* **Sec. 28.** AS 36.30.565(b) is amended to read:

(b) If the protester shows good cause **why the protestor did not file a protest by the deadline established under (a) of this section**, the procurement officer of the contracting agency may consider a filed protest that is not timely.

* **Sec. 29.** AS 36.30 is amended by adding a new section to read:

Sec. 36.30.567. Protest filing fee. To file a protest under AS 36.30.560, the protester shall pay a $250 filing fee to the agency that conducted the procurement. The filing fee shall be refunded if the protest is sustained by the procurement officer under AS 36.30.585 or if the protest is withdrawn by the protester before an appeal is filed under AS 36.30.590.

* **Sec. 30.** AS 36.30 is amended by adding a new section to read:

Sec. 36.30.572. Temporary delay of award. (a) If a protest of a proposed award of a contract is filed timely under AS 36.30.565, the procurement officer may temporarily delay the award of the contract in order to make a decision under AS 36.30.580, extend the time for making the decision under AS 36.30.580, or address other circumstances that warrant temporarily delaying the award.

(b) Notice of a temporary delay of a contract award under (a) of this section shall be provided in writing to the protester and all other interested parties. The written notice must indicate when the temporary delay of the award will expire.

(c) A temporary delay of a contract award under this section does not constitute a stay of award under AS 36.30.575.

* **Sec. 31.** AS 36.30.655 is amended to read:

Sec. 36.30.655. List of persons debarred or suspended; removal from contractor lists. The commissioner shall maintain a list of all persons debarred or suspended from consideration for **the** award of contracts. [THE COMMISSIONER SHALL REMOVE A PERSON DEBARRED OR SUSPENDED FROM THE LISTS OF CONTRACTORS UNDER AS 36.30.050 FOR THE PERIOD OF DEBARMENT OR SUSPENSION.]

* **Sec. 32.** AS 36.30.700 is amended to read:

Sec. 36.30.700. Cooperative purchasing authorized. A public procurement unit may [EITHER] participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of supplies, services, professional services, or construction with one or more public procurement units or external procurement activities in accordance with an agreement entered into between the participants. Cooperative purchasing may include joint or multi-party contracts between public procurement units and open-ended state public procurement units contracts that are made available to local public procurement units. **A state public procurement unit may use or participate in a contract procured by another public procurement unit or external procurement activity without being named in the solicitation for the contract.**

* **Sec. 33.** AS 36.30.700 is amended by adding a new subsection to read:

(b) When, under AS 36.30.700 - 36.30.790, a state public procurement unit participates with a public procurement unit or external procurement activity in cooperative purchasing or participates in a contract procured by an external procurement activity, the state public procurement unit is considered to have complied with AS 36.30.005 - 36.30.540, and AS 36.15 and AS 36.30.321 - 36.30.338 do not apply.

* **Sec. 34.** AS 36.30.850(b) is amended by adding new paragraphs to read:

(48) contracts for lease space for an agency's offices that are located in other states, the District of Columbia, or foreign countries;

(49) contracts for investigative services entered into by the department for the state personnel board established under AS 39.25.030, the office of public advocacy created under AS 44.21.400, or the Alaska Public Offices Commission created under AS 15.13.020;

(50) purchases of commodities used in the manufacture of products sold through an employment program of prison inmates subject to AS 23.15.580;

(51) contracts for training services provided by a professional organization.

*** Sec. 35.** AS 36.30.990 is amended by adding new paragraphs to read:

(25) "Alaska bidder" means a person who

(A) holds a current Alaska business license;

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

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

(D) is incorporated or qualified to do business under the laws of the state, is a sole proprietorship and the proprietor is a resident of the state, is a limited liability company organized under AS 10.50 and all members are residents of the state, or is a partnership under former AS 32.05, AS 32.06, or AS 32.11 and all partners are residents of the state; and

(E) if a joint venture, is composed entirely of ventures that qualify under (A) - (D) of this subsection;

(26) "in writing" has the meaning given to "written" in this section;

(27) "signature" means a manual identifier or electronic signature attached to or logically associated with a record that is intended by the person using it to have the same force and effect as a manual signature; in this paragraph, "electronic signature" has the meaning given in AS 09.80.190;

(28) "written" means the product of forming characters on paper, other materials, or viewable screens, that can be read, retrieved, and reproduced, including

information that is electronically transmitted and stored.

* **Sec. 36.** AS 36.90.049(a) is amended to read:

(a) A marine vessel owned by the state shall be maintained and repaired at a shipyard facility located in the state unless the commissioner of the department that operates the marine vessel determines in writing that there is no shipyard facility located in the state that is equipped or qualified to perform the particular maintenance or repair required, or, after taking into consideration the **five percent** Alaska bidder preference **for bidders under AS 36.30.321(a)** [SET OUT IN AS 36.30.170] and the interport differential, that the proposed cost of the maintenance or repair work is unreasonable. A detailed list of the costs and factors considered in calculating the interport differential must be provided to each person who expresses an interest in submitting a bid to perform maintenance or repair work on a marine vessel owned by the state.

* **Sec. 37.** AS 38.35.017(a) is amended to read:

(a) Consistent with and in furtherance of the statements of general state policy guiding resource development set out in art. VIII, sec. 1, Constitution of the State of Alaska, that the resources of the state be developed "by making them available for maximum use consistent with the public interest" and in art. VIII, sec. 2, Constitution of the State of Alaska, directing that provision shall be made by the legislature for "the utilization, development, and conservation of all natural resources belonging to the State . . . for the maximum benefit of its people," and consistent with and in furtherance of the general legislative declaration of policy for this chapter set out in AS 38.35.010, it is the policy of this state that the overall strategy for development, use, and control of a pipeline or pipelines to develop the state's substantial North Slope natural gas resources be directed

(1) to enhance the standard of living of state residents by

(A) ensuring that, in conjunction with out-of-state market driven commercial demand for North Slope natural gas, state residents and businesses will have access, directly or indirectly, to that portion of the gas that will meet the reasonably foreseeable in-state demands for it, including substitution of the North Slope natural gas for depleting gas reserves in

Southcentral Alaska in order to maintain a vital domestic and industrial energy source, and ensuring that the pipeline or pipelines for the transportation of North Slope natural gas will be designed and located to be responsive to these requirements;

(B) making the maximum contribution to the development of job opportunities in this state by

(i) providing direct short-term construction and long-term operation- and maintenance-related employment on the pipeline or pipelines, to the end that the resources be developed with qualified contractors and firms in this state for work to be performed, including the fabrication and installation of required facilities, and that state residents be employed, consistent with law; for purposes of this sub-subparagraph, a person is considered a resident if the person is physically present in the state with the intent to remain in the state indefinitely and has a home in the state, and a contractor or firm is considered as qualified if the contractor or firm qualifies as an Alaska bidder**; in this sub-subparagraph, "Alaska bidder" has the meaning given in AS 36.30.990** [UNDER AS 36.30.170(b)]; and

(ii) providing necessary support services; and

(C) adding significant long-term property value to the tax base of the state and local governments, thereby providing the means to support public education, public health, transportation, and other essential state and local government projects and services;

(2) to ensure that the design, location, and construction of a pipeline or pipelines for delivery of North Slope natural gas to North American markets through connection to the North American natural gas pipeline network enhance opportunities for implementing gas deliveries using alternative technologies and the construction of other pipelines to deliver North Slope natural gas to foreign and domestic markets; and

(3) to ensure construction of the pipeline or pipelines consistent with careful protection of the state's natural environment, with minimum environmental degradation, to the greatest extent possible, and with protection of fish, wildlife, and

biotic resources for the use of persons who depend upon them by using available transportation infrastructure to initiate and complete project construction and maintenance and by avoiding duplication of facilities.

*** Sec. 38.** AS 44.62.310(d) is amended to read:

(d) This section does not apply to

(1) a governmental body performing a judicial or quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff;

(5) meetings of the governmental body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges, or discipline;

(6) staff meetings or other gatherings of the employees of a public entity, including meetings of an employee group established by policy of the Board of Regents of the University of Alaska or held while acting in an advisory capacity to the Board of Regents;

(7) meetings held for the purpose of participating in or attending a gathering of a national, state, or regional organization of which the public entity, governmental body, or member of the governmental body is a member, but only if no action is taken and no business of the governmental body is conducted at the meetings; [OR]

(8) meetings of municipal service area boards established under AS 29.35.450 - 29.35.490 when meeting solely to act on matters that are administrative or managerial in nature**; or**

(9) meetings with offerors in negotiations for state procurement under AS 36.30.245, or meetings to renegotiate a contract under AS 36.30.364.

*** Sec. 39.** AS 36.30.050, 36.30.250(b), 36.30.335, and 36.30.362 are repealed.

*** Sec. 40.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITION: PENDING SOLICITATIONS FOR PROCUREMENTS AND CONTRACTS. (a) This Act does not apply to

(1) solicitations for procurement and the resulting contracts, if the solicitations are pending on the effective date of this Act and if the invitation to bid or other solicitation was issued before the effective date of this Act; and

(2) procurement contracts entered into before the effective date of this Act, including extensions of those contracts.

(b) Notwithstanding (a) of this section, this Act applies to procurements or contracts described in (a)(1) of this section if all parties to the procurement or contract agree in writing that the applicable provisions of this Act apply to the solicitation or contract.

*** Sec. 41.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITION: INFORMATION IN BIENNIAL REPORTS. In addition to the information that must be included in the biennial report under AS 36.30.540, the Department of Administration shall include in the two successive biennial reports that are prepared under AS 36.30.540 after the effective date of this Act information on the savings that have been achieved during the reporting period by using AS 36.30.195, enacted by sec. 14 of this Act, and AS 36.30.364, enacted by sec. 26 of this Act.

*** Sec. 42.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTION. The revisor of statutes shall change the catch line of AS 36.30.360 from "Determination of responsibility" to "Determination of nonresponsibility."

*** Sec. 43.** This Act takes effect immediately under AS 01.10.070(c).

Alaska State Legislature

Representative Anna Fairclough – **House District 17**

CSHB 225 (FIN)(Corrected)
Sectional Analysis

*** Section 1:** Amends AS 24.55.275

Updates a citation to reflect the renumbering of a preference.

*** Section 2:** Amends AS 36.15.050(a)

Amends the local agricultural preference to grant a seven percent cost preference to the qualifying bid rather than to the low bid, making this preference consistent with other procurement preferences.

*** Section 3:** Amends AS 36.15.050(b)

Amends the local fisheries preference to grant a seven percent cost preference to the qualifying bid rather than to the low bid, making this preference consistent with other procurement preferences.

*** Section 4:** Amends AS 36.15.050 by adding a new subsection (h)

Amends the local agricultural and fisheries preferences to disallow a bidder from being granted both a local agricultural/fisheries preference and an Alaska product preference under another statute.

*** Section 5:** Amends AS 36.30.015(e)

Updates a citation to reflect the renumbering of a preference.

*** Section 6:** Amends AS 36.30.015(f)

Adds the Alaska Industrial Development Authority and the Alaska Energy Authority to a list of agencies exempt from the procurement code and updates a citation to reflect the renumbering of a preference.

*** Section 7:** Amends AS 36.30.015(h)

Updates a citation to reflect the renumbering of a preference.

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*** Section 8:** Amends AS 36.30.020

Updates a citation to reflect the renumbering of a preference.

*** Section 9:** Amends AS 36.30.030

Updates a citation to reflect the renumbering of a preference.

*** Section 10:** Amends AS 36.30.080(f)

Increases the threshold limit for small procurements of leased space from 3,000 square feet to 7,000 square feet, consistent with section 24.

*** Section 11:** Amends AS 36.30.110(b)

Clarifies Alaska business license requirements for competitive sealed bids and qualification for the Alaska bidder preference. Change would require bidders to show proof of their Alaska Business License prior to award, but would require the license at the time of bid submission in order to qualify for the Alaska bidder preference.

*** Section 12:** Amends AS 36.30.130(a)

Eliminates reference to a procurement officer's use of vendor lists, reflecting the repeal of the statute establishing the vendor lists.

*** Section 13:** Amends AS 36.30.170

Updates a citation to reflect the renumbering of the Alaska bidder preference.

*** Section 14:** Amends AS 36.30 by adding a new section 36.30.195

Adds a new section to the procurement code that allows for multi-step revised sealed bidding, a new process that will allow a procurement officer to use successive steps of sealed bidding to obtain the best and final bid price for purposes of award. Excludes construction contracts from this provision

*** Section 15:** Amends AS 36.30.200(b)

Minor modification to language regarding construction procurements.

*** Section 16:** Amends AS 36.30.210(b)
Clarifies construction contractor registration requirements, now explicitly requiring registration before award of a contract.

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*** Section 17:** Amends AS 36.30.210(e)

Clarifies Alaska business license requirements for competitive sealed proposals and qualification for the Alaska bidder preference using language consistent with that used in Section 11.

*** Section 18:** Amends AS 36.30 by adding a new section 36.30.245

Adds a new section to the procurement code that allows for multi-step negotiations. This has essentially the same effect as Section 14, but it applies to the competitive sealed proposal process. A procurement officer will be able to gain the best and final proposal for purposes of award through successive steps of negotiation and proposal submission. Excludes construction contracts from this provision

*** Section 19:** Amends AS 36.30.250(a)

Updates a citation to reflect the renumbering of a preference.

*** Section 20:** Amends AS 36.30 by adding a new section 36.30.255

Directs procurement officers to consider only the preferences listed in statute when applying preferences under a competitive sealed proposal process, and instructs them to apply the preferences only to the price portion of a proposal. This effectively eliminates the Alaska offeror's preference contained in regulation at 2 AAC 12.260(e), and which has no basis in statute.

*** Section 21:** Amends AS 36.30 by adding a new section 36.30.290

Adds a new section allowing an agency to accept electronic bids and proposals.

*** Section 22:** Amends AS 36.30.310

Revises the statute relating to emergency procurements, clarifying that the commissioner of administration shall adopt regulations defining emergency conditions and who shall be responsible for written determinations of the basis for an emergency procurement.

*** Section 23:** Amends AS 36.30.320(a)

Increases the threshold under which a state agency may use informal procurement process to $100,000 for goods and professional services, to $200,000 for construction, and 7,000 square feet for lease of space.

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*** Section 24:** Amends AS 36.30 by adding a new section 36.30.321

Adds a new section consolidating the Alaska bidder and related preferences formerly at AS 36.30.170(b). This section also simplifies the qualification for the disability and employment program preferences, eliminates the seldom used employers of people with disabilities preference, and establishes the Alaska veteran preference and its qualifications.

*** Section 25:** Amends AS 36.30.322(a)

Modifies the use of local forest products statute to grant a seven percent cost preference to the qualifying bid rather than to the low bid, making this preference consistent with other preferences.

*** Section 26:** Amends AS 36.30.336 by repealing and reenacting

Clarifies which preferences are cumulative and which may not be combined. (example: bidders cannot claim both an employment program preference and disabled bidder preference)

*** Section 27:** Amends AS 36.30 by adding a new section 36.30.364

Adds a new section allowing the chief procurement officer to renegotiate a contract without an additional competitive process, subject to several conditions ensuring that the renegotiated contract is at least as favorable to the state as the original contract and that the additional period of performance does not exceed five years.

*** Section 28:** Amends AS 36.30.560

Clarifies the timeframe within with a protest must be filed.

*** Section 29:** Amends AS 36.30.565(b)

Clarifies the meaning of "good cause" requiring that a protestor show why they could not file a protest before the deadline, allowing a procurement officer to better determine whether to consider a filed protest that is not timely.

*** Section 30:** Amends AS 36.30 by adding a new section 36.30.567

Adds new sections relating to protests, requiring a protest filing to be accompanied by a refundable $250 filing fee.

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*** Section 31:** Amends AS 36.30 by adding a new section 36.30.572

Adds a new section to allow a procurement officer to temporarily delay award of a contract in order to address a protest, rather than issue a stay of award.

*** Section 32:** Amends AS 36.30.655

Eliminates reference to the removal of debarred or suspended persons from vendor lists, reflecting the repeal of a law establishing the vendor lists.

*** Section 33:** Amends AS 36.30.700

Adds language to the cooperative purchasing section that allows the state to more effectively use contracts established by other public procurement units.

*** Section 34:** Amends AS 36.30.700 by adding a new subsection (b)

Adds a new section explicitly authorizing the state to participate in cooperative procurements with other governments and waiving procurement preferences that otherwise prevent other public purchasing units from participating in cooperative purchase agreements sponsored or conducted by the state.

*** Section 35:** Amends AS 36.30.850(b) by adding new paragraphs

Adds new exemptions for; contracts for lease space located outside the state; for contracts for investigative services entered into by the department for the Alaska personnel board, the office of public advocacy, and the Alaska Public Offices Commission; for commodities used in the prisoner employment program; and for professional training.

*** Section 36:** Amends AS 36.30.900(1)

Adds the exemption for the Alaska Industrial Development and Export Authority and the Alaska Energy Authority.

*** Section 37:** Amends AS 36.30.900 by adding new paragraphs

Moves the definition for "Alaska bidder" (formerly contained in 36.30.170(b)), and adds new definitions for "electronic signature," "in writing," "signature," and "written."

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*** Section 38:** Amends AS 36.90.049(a)

Updates a citation to reflect the renumbering of a preference.

*** Section 39:** Amends AS 38.35.017(a)

Updates a citation to reflect the renumbering of a preference.

*** Section 40:** Amends AS 44.62.310(d)

Adds language to clarify that the Administrative Procedure Act does not apply to meetings with offerors under the multi-step negotiation process contained in section 18 or to renegotiation of contracts in section 28.

*** Section 41:** Amends AS 44.88.085(a)

Technical change regarding application of the Administrative Procedure Act to AIDEA.

*** Section 42:** Repeals statutes establishing the vendor list and relationships to other preferences.

*** Section 43:** Amends the uncodified law of the State of Alaska

Clarifies the application of the procurement act to pending solicitations during transition period.

*** Section 44:** Amends the uncodified law of the State of Alaska

Adds in transition language stating that the Dept. of Administration shall include in the two successive biennial reports after the effective date of this Act information on the savings that have been achieved by Sections 14 and 28 of this Act.

*** Section 45:** Amends the uncodified law of the State of Alaska

Changes the catch line of 36.30.360 from "Determination of responsibility" to Determination of nonresponsibility."

*** Section 46:** Effective Date

Language making the procurement act effective immediately.

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FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

Fiscal Note Number: HB225-DOC-OC-02-08-10
Bill Version:
() Publish Date:

Identifier (file name): HB225-DOC-OC-02-08-10
Title "Act relating to State Procurement Code; procurement of supplies services, professional services, construction services, and preferences ..."
Sponsor Representative Fairclough
Requester Governor

Dept. Affected: DOC
RDU Administration & Support
Component Commissioner's Office
Component Number 694

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2011**	**FY 2011**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**
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**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES ( )							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2010) cost:

POSITIONS

Full-time							
Part-time							
Temporary							

ANALYSIS: *(Attach a separate page if necessary)*

This legislation provides language revisions that offer clarification or flexibility in handling certain procurement situations.

Passage of this legislation should have no financial impact to the Department of Corrections.

Prepared by: Leslie Houston, Director
Division Administration and Support
Phone (907) 465-3339
Date/Time 02/08/2010 0950

Approved by: Dwayne Peeples, Deputy Commissioner
Department of Corrections
Date 02/08//2010

(Revised 11/6/2009 OMB)

1247

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: **CSHB225**
() Publish Date:

Identifier (file name): HB225CS-DOA-DGS-03-09-10
Title "An Act relating to the State Procurement Code..."
Sponsor Representative Fairclough
Requester (H)FIN

Dept. Affected: DOA
RDU Centralized Administrative Services
Component Purchasing
Component Number 60

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2011**	**FY 2011**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES ( )							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Other Interagency Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2010) cost:

POSITIONS

Full-time							
Part-time							
Temporary							

ANALYSIS: *(Attach a separate page if necessary)*

This legislation makes numerous changes to the state's procurement code. Collectively, these changes streamline the procurement code to ensure consistent application of the law, and result in a more understandable, efficient process. It has been many years since our procurement code has been modernized. These changes will help reduce the number of failed procurements, simplify confusing and burdensome requirements, and allow for modern procurement techniques.

Prepared by: Vern Jones, Chief Procurement Officer — Phone 907-465-2250
Division: Division of General Services — Date/Time 3/9/10 10:30AM
Approved by: Kevin Brooks, Deputy Commissioner, Department of Administration — Date 3/9/2010

Crystal Koeneman

From: Jones, Vern O (DOA) [vern.jones@alaska.gov]
Sent: Friday, March 12, 2010 1:21 PM
To: Crystal Koeneman
Subject: Questions on HB 225

Several questions were posed in (or immediately after) the House Finance Committee hearing yesterday regarding HB225. Three of the questions that I could not immediately answer are addressed below:

Question: How many states have in-state preferences that require a "principal place of business" in the state to qualify?

Response: After the hearing, I emailed this question to my counterparts around the country via the National Association of State Procurement Officials (NASPO) listserv. So far, I have received ten responses. None of the states responding have such a preference. Keep in mind that only a few states have in-state preferences to begin with. I know of no states that have such a restrictive definition connected to their in-state preference, so these results seem to validate my assumption on this question – that no other states have a preference like this.

Question: How many of the state's office space leases fall in the range of 7,000 square feet?

Response: Of the 250 current office space leases, 160 are under 7,000 square feet, and 80 are over 7,000 square feet in size. However, the total square footage of all the leases under 7,000 square feet is 380,960 square feet, with lease payments of $7,958,331/year. The total square footage of all leases over 7,000 square feet is 2,261,190, with lease payments of $35,389,383/year. This illustrates my point about needing to focus or efforts more on the higher stakes leases we acquire with the more in depth, complicated and lengthy formal procurement process, and access the lower value leases via the simplified small procurement process. As I mentioned in the hearing, using the small procurement process for leases in no way implies a less transparent or competitive process.

Question: How many disabled people are supported by the "employers of the disabled" preference HB 225 would eliminate?

Response: The information we have indicates that a total of two disabled employees are supported by this preference.

Crystal Koeneman

Subject: FW: lease space question...

From: Jones, Vern O (DOA) [mailto:vern.jones@alaska.gov]
Sent: Tuesday, March 16, 2010 1:21 PM
To: Crystal Koeneman
Subject: RE: lease space question...

Crystal:

Of the 160 state leases of 7,000 square feet or less, 116 are located outside Juneau, Anchorage, or Fairbanks. This supports the need to increase this threshold, because doing so would put these leases in the "small" or "informal" category. We get complaints about our lease procurement documents being too large, complex and cumbersome, especially for our less sophisticated lessors. The lessors we deal with in rural areas are typically smaller businesses not accustomed to the more complex and time consuming formal procurement process. I've heard from several potential lessors that they do not compete for state leases because of all the paperwork involved in bidding. Moving these leases to the "informal" category simplifies the process for our lessors and would make it less expensive and time consuming for them to participate. As I mentioned earlier, changing this threshold in no way limits competition, because we provide the same form of public notice as we do for formal procurements.

I would also like to point out that the numbers of leases we manage in DGS has grown with the size of government, yet our staff of leasing Contracting Officers has shrunk by half since I've been involved in the process. Making this change will help us become more efficient in managing this increasing workload.

An example of the cost of the employers with disabilities preference:
RFP 2003-0800-4074, for an office building lease in Fairbanks. The Bachner Company won because of their employers of the disabled preference (one disabled employee). Had that preference not been counted, Thompson Investment would have won the award. Thompson Investment's cost was $55,321 less than Bachner's.

From: Crystal Koeneman [mailto:Crystal_Koeneman@legis.state.ak.us]
Sent: Tuesday, March 16, 2010 10:36 AM
To: Jones, Vern O (DOA)
Subject: lease space question...

Hi Vern...

So with your response about how many lease spaces are under 7000sqft can you provide us the number of leases outside of Anc, Fbx, Jnu or other large muni, of those that are under 7000.

Also can you give us an example of one purchase (if there has been one) that was qualified by the employers of persons with disabilities preference so we can see the impact to the state...

Crystal Koeneman
Office of Rep. Anna Fairclough
District 17, Eagle River, Alaska
Phone ~ 465-3777 Fax ~ 465-2819

the Blomfield co

COMMERCIAL DESIGN • CONSTRUCTION • LEASING • MANAGEMENT • RECREATIONAL FACILITIES

March 3, 2010

10200 Prospect Dr.
Anchorage, Alaska 99507

Representative Anna Fairclough
10928 Eagle River Rd. Suite 238
Eagle River AK, 99577

RE: HB 225

Representative Anna Fairclough:

Please consider disabled employees when revising the current structure of the State Procurement Code. As proposed the revised code will have grave consequences for our company and its present/future employee(s). As a young professional, a business owner, and an employer of persons with disabilities preference holder I can assure you that eliminating this program we depend on will lead to the dismissal of disabled persons that have become and are currently productive members of society. Not all disabled persons are capable of owning a business under the proposed structure of HB 225.

Please consider modifying the following:

- **Remove section, "(j) This section does not apply to solicitations or contracts for lease space 11 under AS 36.30.080, to procurements under AS 36.30.305 - 36.30.310, or, except as12 provided otherwise by regulation under AS 36.30.320, to small procurements under 13 AS 36.30.320"**
- **Do not delete the preference, "employers of people with disabilities"**

Thank you for understanding our dire need to revise these two items. Please feel free to contact me at anytime with questions or concerns.

Sincerely,

Adam Blomfield

Adam Blomfield, The Blomfield Company BE 2010-03

10200 Prospect Drive • Anchorage, AK 99507
(907) 562-2766 • Fax: (907) 346-3306 • blomfield@gci.net

Sean Parnell, Governor

801 W. 10th Street, Suite A
Juneau, AK 99801
V/TTY: (907) 465-2814
Fax: (907) 465-2856

Department of Labor and Workforce Development
DIVISION OF VOCATIONAL REHABILITATION

December 21, 2009

Mr. Adam Blomfield
The Blomfield Company
10200 Prospect Drive
Anchorage, AK 99507

Dear Mr. Blomfield:

The Division of Vocational Rehabilitation hereby certifies that *The Blomfield Company* qualifies for a procurement preference under AS 36.30.170(f).

The **2010** certification number is **BE 2010-03** and *The Blomfield Company* is eligible for a 10% procurement preference.

Please remember to renew your certification at the end of each year. A renewal form will be sent to you in December.

Sincerely,

Cheryl A. Walsh
Director

At-a-Glance
Preferences for State of Alaska Contracts

Except when restricted by Federal regulations, certain preferences apply to all State of Alaska contracts for professional services, regardless of their dollar value. **The Alaskan Bidder/Offeror preferences** are the two most common preferences involved in the State of Alaska procurement process.

ALASKAN BIDDER'S PREFERENCE AS 36.30.170(B)

A contract award is made to the lowest responsive and responsible bidder after applying the 5% bidders preference.

An "Alaska bidder" means a bidder/offeror who:

- holds a current Alaska business license;
- submits a bid for supplies, services, or construction under the name appearing on the person's current Alaska business license;
- has maintained a place of business within the state staffed by the bidder or an employee of the bidder for a period of six months immediately preceding the bid date;
- is incorporated or qualified to do business under the laws of the state, is a sole proprietorship and the proprietor is a resident of the state, is a limited liability company organized under AS 10.50 and all members are residents of the state, or is a partnership under AS 32.05 or AS 32.11 and all partners are residents of the state; and
- if a joint venture, is composed entirely of ventures that qualify under (1) -- (4) of this subsection.

ALASKA OFFEROR'S PREFERENCE (2 AAC 12.260E)

In some circumstances, supplies and services are obtained through the use of a Request for Proposals (RFP). Responses to those RFPs are evaluated using a numerical rating system that considers factors in addition to cost. When a numerical rating system is used, vendors that qualify for the Alaska bidder preference will receive a 10% evaluation point preference (10% of the total available points).

NOTE: The application of all preferences are for evaluation purposes only. The vendor is still paid the full price identified in their bid/offer for the goods or services rendered.

Additional preferences are listed on the back of this page, with excerpts from the relevant statutes and codes.

For additional information, contact the department that manages the particular preference program, or the Department of Administration, Division of General Services, PO Box 110210, Juneau, AK 99811-0210 Phone: (907) 465-2250, Fax: 465-2189 TDD: (907) 465-2205. Or download the booklet: *How to do Business with the State of Alaska at* http://www.state.ak.us/local/akpages/ADMIN/dgs/pdf/htdbws.pdf

PREFERENCE	HOW PREFERENCE IS APPLIED	TERMS
USE OF LOCAL FOREST PRODUCTS AS 36.15.010	In a project financed by State money...	...only timber, lumber, and manufactured lumber products originating in this state shall be used, unless impractical.
LOCAL AGRICULTURAL AND FISHERIES PRODUCTS PREFERENCE AS 36.15.050	When agricultural products are purchased using State money...	...only those products harvested or processed within the jurisdiction of Alaska, will be purchased, provided they are available, of comparable quality, and priced no more than seven percent (7%) higher than products harvested outside the state, or in the case of fisheries products harvested or processed of the state, in accordance with AS 36.15.050. **NOTE:** "Agricultural products" includes dairy products, timber and lumber, and products manufactured in the state from timber and lumber.
ALASKA PRODUCT PREFERENCE AS 36.30.332 3 AAC 92.010	A bidder with materials and supplies: **Class I**, 25% – 50% produced/manufactured in state, receives 3% bid preference; **Class II**, 50% - 75% produced/manufactured in state, receives 5% bid preference; **Class III**, 75% plus, produced/manufactured in state, receives 7% bid preference.	The company and the product must be on the Alaska Product Preference list published by the Department of Commerce, Community and Economic Development at least 30 days prior the issuing date of the solicitation. http://www.commerce.state.ak.us/oed/prodpref/pppcompany.cfm To apply for certification to get on the list: Department of Commerce, Community and Economic Development 550 West 7th Street, Suite 1770, Anchorage, AK 99503 Phone: (907) 269-8110, Fax: (907) 269-8125
RECYCLED PRODUCTS PREFERENCE (AS 36.30.337)	Bids or offers that include the use of recycled products that meet specs in solicitation and minimum recycled content set by the State, receive a 5% cost evaluation preference.	Recycled products must meet the eligibility criteria set by the State for the product at the time of the bid opening or proposal deadline.
EMPLOYMENT PROGRAM PREFERENCE AS 36.30.170(c) 2 AAC 12.050. AS 36.30.990(10)	Preferred Alaskan Bidder offers goods/services through employment program, and is lowest responsive and responsible bidder with a bid no higher than 15% above lowest bid	The Department of Labor & Workforce Development, Division of Vocational Rehabilitation maintains a listing of vendors who qualify for the three disability related preferences. For disability preference certification, please contact: Department of Labor & Workforce Development Division of Vocational Rehabilitation 801 West 10th Street, Suite A, Juneau, Alaska 99801-1894 Phone: (907) 465-2814, Fax: (907) 465-2856 http://www.labor.state.ak.us/dvr/home.htm In order to qualify for one of the three disability related preferences, a bidder/offeror must add value by actually performing, controlling, managing, and supervising the services provided, or they must have sold supplies of the general nature solicited to other State agencies, governments, or the general public. **NOTE: A bidder/offer cannot claim more than one of the three disability related preferences for the same bid/offer.**
ALASKANS WITH DISABILITIES PREFERENCE AS 36.30.170(e)(j)	Preferred Alaskan Bidder is a qualifying entity under AS 36.30.170(e) and (j); is lowest responsive and responsible bidder with bid no higher than 10% of lowest bid	
EMPLOYERS OF PEOPLE WITH DISABILITIES PREFERENCE AS 36.30.170(f)(j)	Preferred Alaskan Bidder, responsible and responsive bidder/offeror, is employing 50% plus disabled persons at time of bid/offer submission, and bid price or offer is not higher than 10% than the lowest bid/offer received.	

PREFERENCE QUALIFICATION LETTER: The Department of Labor Division of Vocational Rehabilitation will issue a certification letter. A bidder/offeror must be on this Division's list at the time the bid is opened, and must provide a copy of the certification letter to procurement officer, ***and*** attach a copy of it to their bid. If the certification letter is NOT attached to their bid, the State will disallow the preference.

The Division also maintains lists of Alaskan; [1] employment programs that qualify for preference, [2] individuals who qualify for preference as Alaskan's with disabilities, and, [3] employers who qualify for preference as employers of people with disabilities. In order to qualify for one of these preferences, a bidder must add value by actually performing, controlling, managing, and supervising services provided, or for supplies, a bidder must have sold supplies of general nature solicited to other state agencies, government, or the general public.

Stacking of Preferences

- A bidder or offeror may not receive both the Employment Program and Disability preferences.

- A bidder or offeror may not receive both a Forest, Agricultural, and/or Fisheries Product preference and a Alaska Products preference for the same product.

Preference Title	Cite (HB225)	Value
Alaska Bidder	AS 36.30.321(a)	5%
Employment Program*	AS 36.30.321(b)	15%
- OR -		
Disability*	AS 36.30.321(d)	10%
Veteran*	AS 36.30.321(f)	5%
Forest Products	AS 36.30.322(a)	7%
Agricultural Products	AS 36.15.050(a)	7%
Fisheries Products	AS 36.15.050(b)	7%
- OR -		
Alaska Products Class I	AS 36.30.330(a)(1)	4%
Alaska Products Class II	AS 36.30.330(a)(2)	6%
Alaska Products Class III	AS 36.30.330(a)(3)	8%

* Must qualify as an Alaska bidder under AS 36.30.990(25) to receive these preferences.

Several questions were posed in (or immediately after) the House Finance Committee hearing yesterday regarding HB225. Three of the questions that I could not immediately answer are addressed below:

Question: How many states have in-state preferences that require a "principal place of business" in the state to qualify?

Response: After the hearing, I emailed this question to my counterparts around the country via the National Association of State Procurement Officials (NASPO) listserv. So far, I have received ten responses. None of the states responding have such a preference. Keep in mind that only a few states have in-state preferences to begin with. I know of no states that have such a restrictive definition connected to their in-state preference, so these results seem to validate my assumption on this question – that no other states have a preference like this.

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Question: How many disabled people are supported by the "employers of the disabled" preference HB 225 would eliminate?

Response: The information we have indicates that a total of two disabled employees are supported by this preference.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 15, 2010

SUBJECT: Questions regarding draft CSHB 225(FIN) relating to state procurement (Work Order No. 26-LS0791\P)

TO: Representative Anna Fairclough
Attn: Crystal Koeneman

FROM: Theresa Bannister
Legislative Counsel

You have asked several questions regarding the bill described above.

1. Why is the insurance provision at sec. 36.30.321(c) (page 9, ll. 20 - 22 of this bill) different from Department of Law's original draft? The bill version was a result of reorganization of the material and, with two exceptions, is basically the same as Law's draft. AS 36.30.170(d) reads:

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

Law's draft was almost identical to AS 36.30.170(d), except that it added "is applied to cost" after "five percent." The bill version uses "price" instead of "cost," which, as I understand it, amounts to the same thing. The bill version also applies to proposals as well as bids.

In this bill, the direction to award the contract based on bids "to the lowest responsive and responsible bidder" after application of a preference is found in the general language at sec. 36.30.170 (p. 6, ll. 7 - 12) of the bill. Since the language at sec. 36.30.321(c) now covers proposals as well as bids, the corresponding general language for awarding a proposal found at sec. 36.30.255 (p. 8, ll. 8 - 13) would apply to proposals.

The bill requires the bidder or offeror to qualify as an Alaska bidder. In the bill, the meaning of "Alaska bidder" has been moved (from AS 36.30.170) to a general definition in AS 36.30.990 (sec. 37 of the bill). Since there is a general definition, the bill uses the term and does not refer to a person who "meets the criteria set out in (b)(1) - (5) of this section."

The meaning of "Alaska domestic insurer" is not defined in the current procurement statutes or in the bill. The term would be interpreted to mean an insurer who is organized under the laws of this state. The term, "domestic insurer," is defined at AS 21.90.900 for AS 21.90 to have this meaning. If you want to clarify the meaning for the bill, a definition could be added to refer to that meaning.

2. Exemptions from preferences. There has been a question whether the bill could exempt contracts for insurance, medical services, and legal services from the preference provisions. Contracts for medical doctors and dentists are exempted from the procurement code under AS 36.30.850(b)(4).

The exemptions could be added if they satisfy state and federal equal protection requirements. It is likely that the right to receive a preference for a state contract would be characterized as an economic right. Under federal law, the scrutiny is minimal and, unless the objective is economic protectionism, a legitimate state objective will suffice. Under state equal protection requirements, as an economic matter, minimum scrutiny requires showing that the state's objectives are legitimate and that the legislation bears a substantial relationship to its purpose.[1] Aside from these considerations, whether or not to adopt the exemptions will be a policy call.

3. Changes to "Alaska bidder" requirements. There has been a question whether the "Alaska bidder" preference could be changed to require that the business's principal place of business be located in Alaska or that the majority of the business be owned by state residents.

Since the state is buying services and products for itself directly, it would be considered a market participant, and the commerce clause has an exception when the state is acting as a market participant. So that clause does not appear to present a problem.[2]

The privileges and immunities clause probably is not an issue here because these contracts do not appear to be closely enough tied to employment to qualify as affecting a fundamental right. Even if they were determined to affect a fundamental right, the privileges and immunities clause has an exception for when the state is acting as a market participant. However, a variable standard is applied to determine what amount of deference is due to a state when acting as a market participant, so it is not clear how much deference would be given in this situation.[3]

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[1] See Glover v. State, Department of Transportation, Alaska Marine Highway Sys., 175 P.3d 1240, 1257 (Alaska 2008).

[2] See White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204, 214 - 215 (1983).

[3] See Robison v. Francis, 713 P.2d 259, 264 - 265 (1986).

With regard to the federal equal protection clause,[4] which has a very lenient test in commercial matters, it must at least be shown that the provision does not have a rational relationship to the achievement of a legitimate state goal. This clause becomes an issue only if the reason for these changes is economic protectionism, which is not considered a legitimate state goal for state laws.[5] The state equal protection clause[6] does not appear to be an issue because art. I, sec. 23, allows the state to give preferences to state residents to the extent allowed by federal law. However, this provision has not been interpreted.

If I may be of further assistance, please advise.

TLB:ljw
10-178.ljw

---

[4] Amendment XIV, section 1 of the Constitution of the United States.

[5] Protection of in-state industries from out-of-state competition is almost never a legitimate local purpose. State laws that amount to economic protectionism are virtually always invalid. Philadelphia v. New Jersey, 437 U.S. 617, 624, 57 L.Ed.2d 475, 481 (1978) (discussing the privileges and immunities clause).

[6] Art. I, sec. 1, Constitution of the State of Alaska.

Southeast Conference

RESOLUTION 10-13

A Resolution Supporting the Alaska Offeror's Preference, & Opposing HB 225 if it eliminates the Alaska Offeror's Preference

WHEREAS, the State of Alaska currently has an ALASKA OFFEROR'S PREFERENCE (2 AAC 12.260E) providing Alaska's many small businesses and companies a "level playing field" advantage over non-Alaska companies wishing to bid on State of Alaska proposals;

WHEREAS, since the 1980's this law has helped hundreds of companies across Alaska successfully compete for Alaska procurement opportunities, created thousands of employment opportunities for Alaskans, and has allowed millions (if not billions) of state dollars to remain in Alaska;

WHEREAS, keeping Alaska jobs and state dollars in Alaska through the Alaska Offeror's Preference has been a key support mechanism for Alaska's private sector and for Alaska's economy;

WHEREAS, the multiplier effect of the dollars spent in Alaska thanks to the Alaska Offeror's Preference in Alaska has provided significant beneficial economic impacts in communities across Alaska during the last two decades;

WHEREAS, passage of HB 225 would eliminate the Alaska Offeror's Preference;

WHEREAS, HB 225 is entitled, ""An Act relating to the State Procurement Code; relating to the procurement of supplies, services, professional services, construction services, state fisheries products, state agricultural products, state timber, and state lumber; relating to procurement preferences; relating to procurement by the office of the ombudsman, the Alaska Industrial Development and Export Authority, the Alaska Energy Authority, and other state agencies and public corporations; and providing for an effective date";

WHEREAS, the language of HB 225 is confusing as while it eliminates the highly significant Alaska Offeror's Preference, it does maintain the less advantageous Alaska Bidder's Preference (thereby reducing the overall Alaska advantage on a proposal from 12% to 2%);

WHEREAS, the removal of the Alaska Offeror's Preference would put Alaska companies at a huge disadvantage in competing against outside firms, and would result in the loss of a significant number of Alaska jobs by shipping those jobs outside Alaska.

THEREFORE, BE IT RESOLVED that Southeast Conference opposes passage of HB 225 if it eliminates the Alaska Offeror's Preference and changes the requirement for valid Alaska Business license at time of bid opening.

Passed and Approved by the Southeast Conference Board of Directors on April 3, 2010

Witness by:

Maxine L. Thompson

Maxine Thompson, President

Attest:

Shelly Wright

Shelly Wright, Executive Director

26-LS1665\A
Bannister
4/7/10

SENATE CONCURRENT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - SECOND SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Introduced:
Referred:

A RESOLUTION

1 **Suspending Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State**
2 **Legislature, concerning House Bill No. 225, relating to the State Procurement Code;**
3 **relating to the procurement of supplies, services, professional services, construction**
4 **services, state fisheries products, state agricultural products, state timber, and state**
5 **lumber; relating to procurement preferences; and relating to procurement by the office**
6 **of the ombudsman, the Alaska Industrial Development and Export Authority, the**
7 **Alaska Energy Authority, and other state agencies and public corporations.**

8 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

9 That under Rule 54, Uniform Rules of the Alaska State Legislature, the provisions of
10 Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, regarding
11 changes to the title of a bill, are suspended in consideration of House Bill No. 225, relating to
12 the State Procurement Code; relating to the procurement of supplies, services, professional
13 services, construction services, state fisheries products, state agricultural products, state
14 timber, and state lumber; relating to procurement preferences; and relating to procurement by

L
1261

1 the office of the ombudsman, the Alaska Industrial Development and Export Authority, the
2 Alaska Energy Authority, and other state agencies and public corporations.

JAMES L. BALDWIN
ATTORNEY AT LAW

April 3, 2010

Sander Schijvens
Wostmann & Associates
226 Seward Street
Suite 210
Juneau, Alaska
99801

Re: CS HB 225(Fin)(Corr) as applied to state competitive sealed proposals

Dear Mr. Schijvens:

You requested that I review CS HB 225 (Fin)(Corrected) to determine whether it would materially change the evaluation method for state contracts awarded by competitive sealed proposal.

Under existing law, the Department of Administration is granted authority to adopt regulations that implement the Alaska Bidder provisions of AS 36.30.170 for competitive sealed proposals. This regulation authority is set out in AS 36.30.250(b). The regulation adopted by the department provides in pertinent part:

> (e) If a numerical rating system is used, an Alaska offeror's preference of at least 10 percent of the total possible value of the rating system must be assigned to a proposal of an offeror who qualifies as an Alaska bidder under AS 36.30.170(b).

2 AAC 12.260(e).

I interpret HB 225 to remove the authority for the foregoing regulation by repealing AS 36.30.250(b) in section 42 of the bill. In section 20, the bill would direct that the Alaska Bidder preference be applied only to the price portion of a proposal. The bill would reduce the effect of the Alaska bidder preference on competitive sealed proposals. This

LAW OFFICE - - 227 HARRIS STREET JUNEAU, ALASKA 99801-1212. TEL: 907-586-9988, CELL: 723-2322, E-MAIL: REDALDERLAW@AK.NET

change might be greater in effect than would be experienced by similarly situated persons seeking to obtain sealed bid contracts.

As you know, competitive sealed proposals can be evaluated on a number of factors beside price. These other factors include whether the offeror is qualified and otherwise competent to provide the requested goods and services. For a competitive sealed bid procurement, the sole basis for award is whether the bidder has submitted the lowest responsive bid. For a competitive sealed proposal procurement, price is only a part of the evaluation which might be given a weight of 40 percent or less of the total evaluation points. Application of a preference solely to the contract price stated in a bid is fair and easily administered. However, that is not the case for evaluation of an offer submitted as a competitive sealed proposal which considers factors other than price.

If an Alaska resident offeror and a non resident offeror are otherwise equally qualified, the resident offeror may be at a competitive disadvantage if the bidder preference is applied only to price. Differentials between instate and out-of state overhead costs of operation may substantially devalue the effectiveness of a preference that is intended to level the playing field. A preference directed only to the price factor treats a competitive sealed proposal procurement materially different than sealed bid procurements. The value of a preference limited to price is much different for an offeror than it would be for a bidder. A preference of five percent becomes worth much less in real terms if price is not the sole factor influencing award. This difference in treatment would be a significant change in the procurement code if CS HB 225(FIN)(Cor.) were to become law.

At your request, I have prepared the attached amendment which would maintain the status quo while retaining the other laudable provisions of the bill to remain intact. In summary, the amendment would delete the repeal of AS 36.30.250(b), would make conforming amendments to that section consistent with other sections of the bill, and would remove any restriction on the application of preferences implemented by regulation to only the price factor of competitive sealed proposal procurements.

Let me know if I can be of further assistance.

James L. Baldwin
Attorney at Law

AMENDMENT

OFFERED IN THE STATE AFFAIRS COMMITTEE

TO: CS HB 225 (Fin)(Corrected)

Page 8, between lines 7 and 8:

insert the following new material to read:

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

(b) In determining whether a proposal is advantageous to the state, the procurement officer shall take into account, in accordance with regulations of the commissioner, whether the offeror qualifies as an Alaska bidder [UNDER AS 36.30.170(b)], is offering the service of an employment program **under AS 36.30 321.(b)**, or qualifies for a preference under **AS 36.321(d) or (f)** [AS 36.30.170 (e) or (f)]."

Renumber the following bill sections accordingly.

Page 8, line 12:

after " AS 36.15.050" insert ", AS 36.30.250(b),"

Page 8,line 13:

after "preferences" insert " provided in AS 36.15.050 and AS 36.30.321 – 36.30.338"

Page 20, line 12:

after "AS 36.30.050" delete "AS 36.30.250(b)"

Page 21, line 2:

delete "sec. 27" insert "sec. 28"

Southeast Conference

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WHEREAS, keeping Alaska jobs and state dollars in Alaska through the Alaska Offeror's Preference has been a key support mechanism for Alaska's private sector and for Alaska's economy;

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WHEREAS, HB 225 is entitled, ""An Act relating to the State Procurement Code; relating to the procurement of supplies, services, professional services, construction services, state fisheries products, state agricultural products, state timber, and state lumber; relating to procurement preferences; relating to procurement by the office of the ombudsman, the Alaska Industrial Development and Export Authority, the Alaska Energy Authority, and other state agencies and public corporations; and providing for an effective date";

WHEREAS, the language of HB 225 is confusing as while it eliminates the highly significant Alaska Offeror's Preference, it does maintain the less advantageous Alaska Bidder's Preference (thereby reducing the overall Alaska advantage on a proposal from 12% to 2%);

WHEREAS, the removal of the Alaska Offeror's Preference would put Alaska companies at a huge disadvantage in competing against outside firms, and would result in the loss of a significant number of Alaska jobs by shipping those jobs outside Alaska.

THEREFORE, BE IT RESOLVED that Southeast Conference opposes passage of HB 225 if it eliminates the Alaska Offeror's Preference and changes the requirement for valid Alaska Business license at time of bid opening.

Passed and Approved by the Southeast Conference Board of Directors on April 3, 2010

Witness by:

Maxine L. Thompson

Maxine Thompson, President

Attest:

Shelly Wright

Shelly Wright, Executive Director

AIDEA
Alaska Industrial Development and Export Authority

ALASKA ENERGY AUTHORITY

April 9, 2010

The Honorable Linda Menard
Chair, Senate State Affairs Committee
Alaska State Legislature
State Capitol Room 9
Juneau AK, 99801

Re: Testimony on HB 225

Dear Senator Menard:

This letter is in response to the testimony that was provided in Senate State Affairs in opposition to the Alaska Energy Authority (AEA) seeking to be treated like AHFC, and several other public corporations in the state procurement code (AS 36.30) as provided in section 6 of HB 225. Several statements were incorrect and have led to misunderstandings regarding AEA's procurement practices and AEA's motives to seek the procurement provisions of section 6.

During public testimony it was mentioned that AEA was subject to a Legislative Audit 2008 audit. AEA concurred with the finding that AEA should update the Rural Energy Group procurement policies and procedures for the Rural Power System Upgrade (RPSU) program. HB 225 allows us to update the RPSU and other AEA programs procedures in the most appropriate manner. Because the RPSU program is a grant program using federal funds; therefore, the RPSU program and its procurements are currently exempt from AS 36.30. For this program, AEA has adopted procurement policies and procedures that are similar to Department of Transportation and Public Facilities (DOT&PF) and Department of Administration (DOA) established policies and procedures; however, we believe it is important to provide clarity in the process and codify comprehensive procurement procedures for all of AEA's programs through regulations. The language we are seeking in HB 225, similar to other state corporations, will be the statutory basis for AEA to adopt comprehensive AEA procurement regulations including the federally funded RPSU program.

Section 6 of HB 225 will:

- Require AEA to have its own procurement regulations in place that would parallel AS 36.30 and provide accountability and responsibility for procurement actions. (Allowing for public comment on these regulations.)
- Provide for contract claims and protests to be elevated to the Executive Director and Board of Directors, not DOT&PF or DOA Commissioners.
- Still require AEA to use competitive processes.
- Still require AEA to follow Davis Bacon and other related statutes regarding public works bonding and licensing.
- Still require AEA to use Alaska bidder preferences.

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- Still allow AEA to benefit from statewide procured contracts.

The testimony provided by Mr. Meiners warrants a response to correct his misstatements regarding AEA procurement practices:

Mr. Meiners stated that "3 or 4 people manage over $300 million over the past 8 years and very few are bid out." This is incorrect.

- All RPSU projects over $100,000 are competitively solicited and have been over the past 8 years. Small procurements over $5,000 and less than $100,000 for construction projects are informally solicited from multiple sources. These are the same processes followed by DOT&PF and DOA.

- Competitively solicited term contracts have been used for both Engineering services as well as Construction Management services in order to expedite the delivery of services and projects for grantees. The current contracts were issued in a manner similar to DOA and DOT&PF processes.

Mr. Meiners stated that "Information is not available to the public." Again this is incorrect.

- All formal bids and Request For Proposals are posted on the State of Alaska on-line public notice web site in the same manner as State Agency Bids. All bidding and contract documents are considered public documents. These are the same processes followed by DOT&PF and DOA.

Mr. Meiners stated that: "Bids are put together and direct projects to particular contractors." Again he is mistaken.

- Formal bids are publicly noticed and competitively solicited with a specific set of requirements. AEA encourages competition for the goods and services we need to procure. AEA's process provides that interested bidders may protest the specifications or requirements if they believe the agency is overly restrictive. These are the same processes followed by DOT&PF and DOA.

Mr. Meiners noted a single source contract with GB Services:

- AEA did award the contracts for System Control and Data Acquisition (SCADA) software to GB Services. These purchases were made on behalf of several rural Alaska communities which received the RPSU grants from the Denali Commission. The justifications were made by staff, reviewed by the procurement department, and approved by the Executive Director in a similar manner as DOA and DOT&PF procurements.

- AEA subsequently issued a formal competitive RFP following AS 36.30 for software and services in November 2009. AEA conducted a pre-solicitation meeting and re-issued the RFP based on comments received from the vendor community. Twelve different

vendors indicated an initial interest in the RFP, two responded, and the contract was awarded to GB services in February 2010. The price and rates charged by GB services were substantially lower, approximately $4,000 versus $50,000 per installation in each community.

In summary, it is AEA's goal to take the extra step to develop regulations and put transparent and reasonable procedures in place that are:

- Consistent with the requirements of AS 36.30,
- Clearly define the authority and responsibility of staff in making and documenting all procurement transactions,
- Provide efficiency in the operations,
- Guard the procurement integrity of AEA, and
- Can be easily maintained and understood by procurement staff and vendor community.

We would welcome any additional discussion you would want to have on this subject. Thank you for your consideration of this legislation.

Sincerely,

ALASKA ENERGY AUTHORITY

Steven Haagenson
Executive Director

cc: Senator Kevin Meyer
Senator Hollis French
Senator Joe Paskvan
Senator Albert Kookesh
Representative Anna Fairclough

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Steven H. Haagenson, P.E.
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STATE OF ALASKA

SEAN PARNELL, GOVERNOR

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April 9, 2010

Mr. Steve Haagenson
Executive Director
Alaska Energy Authority
813 W. Northern Lights Blvd.
Anchorage, AK 99503

Re: HB 225 (An act relating to the state procurement code)
Response to testimony to Senate State Affairs Committee from plaintiff's attorney regarding litigation against AEA in *Powercorp Alaska, LLC v. AEA*, 171 P.3d 159 (Alaska 2007) and *Powercorp Alaska, LLC v. AEA et al.*, Case No. 3AN-07-06732 CI

Dear Mr. Haagenson:

You asked that I review and address testimony given to the Senate State Affairs Committee by Mr. Thomas Wickwire at the committee's April 8, 2010 hearing on HB 225, relating to the state procurement code. Mr. Wickwire is the attorney for Powercorp Alaska LLC (Powercorp) in litigation brought by Powercorp against the Alaska Energy Authority (AEA) and certain AEA personnel. I am the Assistant Attorney General representing AEA and its personnel in this litigation. In his testimony, Mr. Wickwire made certain representations about the litigation and AEA's procurement activities. As discussed below, he was incorrect and mischaracterized these matters.

By way of background, Powercorp has brought two separate legal actions challenging the procurement that Mr. Wickwire complains of. One case has been concluded, having been decided by the Alaska Supreme Court in favor of AEA, and the other is pending before the Alaska Supreme Court on appeal by Powercorp after a Superior Court ruling in favor of AEA. To date, all judges and hearing officers have ruled squarely against Powercorp and have upheld the procurement and AEA's actions. In the first case, Powercorp appealed the agency's decision rejecting Powercorp's procurement protest. An independent hearing officer ruled against Powercorp, the Superior Court affirmed, and the Alaska Supreme Court affirmed that no procurement

violations occurred. *Powercorp Alaska v. Alaska Energy Authority*, 171 P.3d 159 (Alaska 2007). In the second case, Powercorp directly sued AEA and two of its personnel alleging that they committed misconduct in the course of the same procurement. A different Superior Court judge again ruled against Powercorp, granting AEA's motion for summary judgment on all counts and dismissing Powercorp's lawsuit. Powercorp again has appealed to the Alaska Supreme Court, which has not yet heard the appeal.

At the April 8 hearing, Mr. Wickwire incorrectly testified that "[i]n pending litigation, Powercorp has proven that Alaska Energy Authority, acting through [employee's name omitted], has succeeded in giving over $1 million worth of contract to an out-of-state corporation, and doing that only by using a sole source waiver to exclude all competition and then write up the bid specifications so that only this favored company of theirs [could bid]." Mr. Wickwire is incorrect. Powercorp, through Mr. Wickwire, made these arguments in the litigation that has been concluded, and the hearing officer, Superior Court, and Supreme Court all rejected these arguments. As the Supreme Court said in its opinion, "We affirm the agency's [independent hearing officer's] determination that no violation occurred." 171 P.3d at 161. In the current litigation, AEA argued that Powercorp is trying to re-litigate claims that already have been decided against it. The Superior Court agreed with AEA and dismissed all of Powercorp's claims.

Also at the April 8 hearing, Mr. Wickwire incorrectly testified that "[t]here is pending litigation where we have alleged and submitted proof to the attorney general that this certain employee has essentially violated the procurement code, which is a felony. We have reported that to the Attorney General. The current version of the procurement code, [AS] 36.30.940 says the Attorney General shall enforce this section and there has been no interest and no response that the Attorney General is doing that. So it looks like the Energy Authority has drafted this provision to get themselves out of a difficult box they're in in pending litigation. I don't think that's appropriate for an agency to do that through trying to amend the law while litigation is pending." Again Mr. Wickwire is incorrect. As discussed above, the courts have rejected Powercorp's claims that AEA personnel violated the procurement code. Apart from the litigation, in August and October 2009 Powercorp through Mr. Wickwire requested investigation by the Attorney General. An Assistant Attorney General who had no involvement in the litigation reviewed Powercorp's claims and responded to him. Finally, the Superior Court in the pending litigation rejected all of Powercorp's claims, so in no sense is AEA in a "difficult box." In any event, any statutory change would not affect the litigation.

Thus, in his testimony to the Senate State Affairs Committee on April 8, 2010, Mr. Wickwire was incorrect in his characterizations of the litigation, AEA's procurement activities, and the Attorney General's Office's response to Powercorp's claims.

Sincerely,

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By:
Michael G. Mitchell
Assistant Attorney General

MGM/awb

Ray Gillespie
Gillespie & Associates
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To: Senate State Affairs Committee
From: Ray Gillespie, ATT Lobbyist
Re: SCSHB 225(STA) work draft version C-4/7/10

ATT has a couple of concerns regarding the HB 225 as identified ~~above:~~ Below

1. Sec 26 (AS 36.30.364) would allow the chief procurement officer to renegotiate a contract without using a competitive bidding process.

   ATT recommends deletion of this section. Alaskans can most often get the best price and terms through a competitive bidding process.

2. ATT suggests that the following be added to Section 18 concerning "Multiple submissions and negotiations": "In conducting discussions, the procurement officer may not disclose information derived from proposals submitted by competing offerors."

   This is identical language to that which appears in existing statutes at AS 36.30.240 concerning "Discussions with responsible offerors and revisions to proposals" see attached memorandum.

   Thank you for your time and attention. Please let me know if you have questions.

Ray 907-230-8843 — Pls - Call !!

Section 18: This adds a new section 36.30.245 and adds language to the procurement code that allows for multi-step negotiations in the competitive sealed proposal process. A similar statute, 36.30.240 will remain in effect, and negotiations allowed under the new section will be in addition to those already allowed by 36.30.240.

Language in 36.30.240 makes it clear that during the negotiating process the procurement officer must continue to keep all information from competing offerors confidential (see highlighted language) and the same protection should be added into 36.30.245 in order to protect the competitive process (see redlining).

New Language	**Closest Existing Language (which will remain in statutes)**
36.30.245. Multiple submissions and negotiations. In a procurement that uses competitive sealed proposals, in order to obtain the best proposal for purposes of award, an agency may require more than one submission of proposals and may negotiate after each submission with the offerors whose proposals from that submission are reasonably susceptible of being selected for award. The negotiations conducted under this section may cover price, specifications, terms, or conditions or a combination of these items, and these items may be negotiated separately or in any combination. The submissions and negotiations allowed under this section are in addition to any discussions and revisions allowed under AS 36.30.240. <u>In conducting discussions, the procurement officer may not disclose information derived from proposals submitted by competing offerors.</u> The requirements for submissions and negotiations under this section shall be established by the department by regulation and in the request for proposals.	*§ 36.30.240. Discussion with responsible offerors and revisions to proposals.* As provided in the request for proposals, and under regulations adopted by the commissioner, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors reasonably susceptible of being selected for award shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before the award of the contract for the purpose of obtaining best and final offers. In conducting discussions, the procurement officer may not disclose information derived from proposals submitted by competing offerors. AS 44.62.310 does not apply to meetings with offerors under this section.

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