

ALASKA LEGISLATIVE COMMITTEE PRINTS

2015 HSA HB 523 - HB 546

WORK ORDER REQUEST FORM

M12- 1591

KEYWORDS: a: highways

ASSIGNED TO Pages

REQUEST FOR: BILL RESOLUTION RESEARCH OTHER

SUBJECT Access from Whittier to Portage

REQUESTED FOR Rep. Hecalife BY Daya Hammett EXT. 4976

* DELIVER TO Representative Hecalife TAKEN BY koah

INSTRUCTIONS, EXPLANATIONS House duplicate of SB 122 making a special appropriation of \$15,000,000 for construction of access from Whittier to Portage.

OBTAIN

SPECIAL DRAFTING INSTRUCTIONS ATTACHED

AUTHORIZED TO CONFER WITH _____

RETURN _____

TO REQUESTER

APPROVED: BGB Director, Legal Services

REVIEWED _____

IN 4/21 DUE _____

TYPED - Draft _____ DATE _____

Final _____ DATE _____

PROOFED _____ DELIVERED _____

SPECIAL INSTRUCTIONS TO TYPIST/PROOFREADER

DRAFT

FINAL

THE PRECEDING DOCUMENT(S) MAY NOT FILM
LEGIBLY BECAUSE OF POOR QUALITY OF THE
ORIGINAL.

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COMMITTEE REPORT

HOUSE

(5)

FURTHER:

4/30/81

Date: 3/4/82

Mr. Speaker:

The Committee on STATE AFFAIRS has had HB 546

"An Act relating to state contracts for professional services and establishing a penalty for violation of provisions of law relating to professional service contracts; and providing for an effective date."

under consideration and ~~(a majority of the committee)~~ ~~(the committee)~~ reports it back with the following recommendations:

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for HB 546 (SA) same title
 new title
- and recommends _____
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommerdation *individual* *as "as for"*
- referred to the _____ Committee

MEMBERS SIGNING

DO PASS

Ray P. [Signature]

[Signature]

[Signature]

MEMBERS HAVING

OTHER RECOMMENDATIONS:

[Signature]

[Signature]

Ray P. [Signature]

CHAIRMAN

COMMITTEE REPORT

HOUSE

4/30/81

FURTHER:

(5)

Date: _____

Mr. Speaker:

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"An Act relating to state contracts for professional services and establishing a penalty for violation of provisions of law relating to professional service contracts; and providing for an effective date."

under consideration and reports it back as follows:

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for _____ same title
 new title
- and recommends _____
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation
- referred to the _____ Committee

MEMBERS SIGNING
DO PASS

[Handwritten signatures]

MEMBERS HAVING
OTHER RECOMMENDATIONS:

[Handwritten signature] No Rec

CHAIRMAN

1 IN THE HOUSE

BY STATE AFFAIRS
COMMITTEE BY REQUEST

2
3 CS for HOUSE BILL 546

4 IN THE LEGISLATURE OF THE STATE OF ALASKA

5 TWELFTH LEGISLATURE - FIRST SESSION

6 A BILL

7
8 For an Act entitled: "An Act relating to state contracts for professional
9 services and establishing a penalty for violation
10 of provisions of law relating to professional
11 services contracts.

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

13 *Section 1. AS 36 is amended by adding a new chapter to read:

14 CHAPTER 98. PROFESSIONAL SERVICES CONTRACTS.

15 Sec. 36.98.010. APPLICATION. This chapter applies to contracts for
16 professional services to be provided to a state agency unless the total
17 amount of the contract or contracts awarded ^{By THE SAME STATE AGENCY} to a person in a 12-month
18 period does not exceed \$5,000.

19 Sec. 36.98.020. PROFESSIONAL SERVICES CONTRACTORS REGISTER. A person
20 who desires to provide professional services to a state agency shall
21 submit to the commissioner an application to be placed on the professional
22 services register.

23 Sec. 36.98.030. SOLICITATION OF SERVICES. (a) When a state agency
24 proposes to enter into a contract for professional services, the agency
25 shall

26 (1) review the register of professional services contractors
27 maintained by the commissioner under AS 36.98.020; and

28 (2) provide to each prospective contractor

29 (A) a general description of the proposed project for
30 which the agency is seeking professional services; and

31 (B) the procedure by which a person interested in the
32 professional services contract may apply to the agency for consideration
for the contract.

1 (b) In addition to complying with the requirements of (a) of this
2 subsection, when a state agency proposes to enter into a contract for
3 professional services, the agency shall give at least 30 days prior
4 public notice. This notice, by publication at least three times in one
5 or more newspapers in general circulation in the state, shall consist of

6 (1) a general description of the proposed project for
7 which the agency is seeking professional services; and

8 (2) the procedure by which a person interested in the
9 professional services contract may apply to the agency for consideration
10 for the contract.

11 (c) A solicitation of services need not be extended if

12 (1) there is a single source of the expertise or knowledge
13 required or if one person or firm can clearly perform the required tasks
14 more satisfactorily because of the person's or firm's prior work;
15 however, this exemption from a solicitation of services applies only
16 when the head of the state agency has submitted a written request to
17 the commissioner which details the reasons for the exemption and the
18 commissioner or his designee has authorized the state agency to enter
19 contract negotiations with the single source;

20 (2) the services required are professional services which
21 may, by law or regulation, be performed only by a person licensed to
22 perform the service;

23 (3) the commissioner determines that public necessity will
24 not permit delay incident to preparation of formal solicitations and
25 evaluation of responses; or

26 (4) the service is to be provided by an agency or department
27 of the state government.

28 (d) Unless the contract is for services exempt under AS 36.98.010
29 a contract must be submitted to the commissioner for review and
30 approval and, if approved, is effective from the date of such approval.
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1 Sec. 36.98.040. AWARD OF CONTRACT. If a contract is made by a board
2 or commission, execution of the contract on behalf of the board or
3 commission must be authorized by a majority vote of the full membership
4 of the board or commission. The contract must be executed by the
5 provider of the service and the project director, be approved by the
6 commissioner or deputy commissioner of the contracting agency, the
7 commissioner or his designee, and be approved as to form by the attorney
8 general.

9 Sec. 36.98.050. CONTRACT ADMINISTRATION. (a) When a state agency
10 has entered into a professional services contract, the agency is
11 responsible for the diligent administration and monitoring of the
12 performance of the provisions of the contract.

13 (b) When a professional services contract has been completed, the
14 state agency shall evaluate the performance of the contractor under
15 the contract and shall report on and evaluate the use of the final
16 product of the professional services contract. A copy of the report
17 and evaluations prepared under this subsection shall be transmitted
18 to the commissioner, and shall be retained by the commissioner.

19 Sec. 36.98.060. FILING. A copy of each contract must be filed with
20 the contracting agency, and is open for public inspection. The request
21 for proposals and each response submitted must be attached to the
22 filed copy unless the contract is one in which a request for proposals
23 is not required.

24 Sec. 36.98.070. CONTRACT PROCEDURES. The commissioner shall, by
25 regulation adopted in accordance with the Administrative Procedure Act
26 (AS 44.62), establish the manner and form by which state professional
27 services contracts shall be prepared and processed. —

28 Sec. 36.98.080. DEFINITIONS. In this chapter

29 (1) "commissioner" means the commissioner of administration;
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1 (2) "professional services contract" means a contract for
2 professional, technical, artistic, or consultant's services which are
3 predominantly intellectual in character and which

4 (A) include analysis, evaluation, prediction, planning
5 or recommendation; and

6 (B) result in the production of a report or the
7 completion of a task; the term does not include skilled tradesmen such
8 as carpenters, electricians, and plumbers.

9 (3) "public necessity" means an [urgent] public need which
10 could not have been reasonably anticipated or foreseen; the term also
11 includes emergency situations when work is necessary to protect life or
12 property;

13 (4) "state agency" means a department, institution, board,
14 commission, division, or other administrative unit of the executive branch
15 of state government; the term does not include the University of Alaska.

16 Sec. 36.98.090. PENALTY. An appointing authority may discipline,
17 reprimand, put on probation, demote, suspend or discharge a state
18 employee found to have violated a provision of this chapter.

19 *Section 2. AS 39.25.160 is amended by adding a new subsection to read:

20 (i) A person may not enter into a professional services contract
21 on behalf of a state agency in violation of the provisions of AS 36.98.
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IN THE HOUSE

BY STATE AFFAIRS
COMMITTEE BY REQUEST

CS for HOUSE BILL 546

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to state contracts for professional services and establishing a penalty for violation of provisions of law relating to professional service contracts; and providing for an effective date."

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

*Section 1. AS 36 is amended by adding a new chapter to read:

CHAPTER 98. PROFESSIONAL SERVICES CONTRACTS.

Sec. 36.98.010. APPLICATION. This chapter applies to contracts for professional services to be provided to a state agency unless

(1) the total amount of a contract or contracts awarded to a person in a 12-month period does not exceed [\$5,000;] 10,000

(2) the contract is an employment contract for services to be performed under direct supervision regardless of the existence of an employer-employee relationship and a written justification signed by the person responsible for awarding the contract is filed with the commissioner;

(3) the contract is for construction, repair, or maintenance of a structure and does not exceed \$5,000; or

(4) the contract is awarded based on competitive bids obtained under the competitive bid procedure provided in AS 37.05.230.

Sec. 36.98.020. PROFESSIONAL SERVICES CONTRACTORS REGISTER. (a) A person who desires to provide professional services to a state agency shall submit to the commissioner a statement of qualifications and performance data, and any other information which the commissioner, by regulation, may require.

1 (b) The commissioner may at any time require the person to revise
2 the statement of qualifications and performance data, or any other
3 information, submitted by the person if the commissioner believes
4 that the credentials or record of experience of the person have
5 materially changed since the last filing by the person.

6 X Sec. 36.98.030. SOLICITATION OF SERVICES. (a) When a state
7 agency proposes to enter into a contract for professional services,
8 the agency shall give public notice ~~of~~ the professional services
9 contract. At least 30 days before the date on which the agency expects
10 to enter into the contract for professional services it shall give
11 notice by publication at least three times in one or more newspapers
12 in general circulation in the state of

13 (1) a general description of the proposed project for which
14 the agency is seeking professional services; and

15 (2) the procedure by which a person interested in the pro-
16 fessional services contract may apply to the agency for consideration
17 for the contract.

18 (b) In addition to complying with the publication requirements of
19 (a) of this section, when a state agency proposes to enter into a
20 contract for professional services it shall

21 (1) review the register of professional services contractors
22 maintained by the commissioner under AS 36.98.020; and

23 (2) provide a request for proposals for the proposed pro-
24 fessional services contract to each prospective contractor which, after
25 review of the register of professional services contractors under (1)
26 of this subsection, the agency finds is qualified for consideration for
27 the contract.

28 X (c) A formal written request for proposals must be extended to a
29 sufficient number of providers of the required services to assure that
30 public interest in competition is adequately served. Proposals from
31 at least six firms shall be solicited for contracts in excess of
32 \$100,000 if the expertise required is widely available. Proposals

1 X from at least three firms shall be solicited for contracts of less than
2 \$100,000 if the expertise required is widely available.

3 X (d) A request for proposals need not be extended if

4 (1) there is a single source of the expertise or knowledge
5 required or if one person or firm can clearly perform the required
6 tasks more satisfactorily because of the person's or firm's prior
7 work; however, this exemption from a request for proposals applies
8 only when the head of the state agency has submitted a written request
9 to the commissioner which details the reasons for the exemption and the
10 commissioner or his designee has authorized the state agency to enter
11 contract negotiations with the single source;

12 (2) the services required are professional services which
13 may, by law or regulation, be performed only by a person licensed to
14 perform the service;

15 (3) the commissioner determines that public necessity will
16 X not permit delay incident to preparation of formal solicitations and
17 evaluation of responses; or]

18 X (4) the service is to be provided by an agency or department
19 of the state government.

insert — (c) A request for proposals should be designed to demonstrate that
21 the proposed work represents a sound approach to an important public
22 task. A request for proposals should be self-contained and written
23 with care and thoroughness.

shows 359 in memo.
24 *deleted* (d) Unless the contract is for services exempt under AS 36.98.010
25 a contract must be submitted to the commissioner for review and
26 approval and, if approved, is effective from the date of such approval.

deleted Sec. 36.98.040. [AWARD OF CONTRACT. (a) If a contract is made by
27 a board or commission, execution of the contract on behalf of the
28 board or commission must be authorized by a majority vote of the full
29 membership of the board or commission. The contract must be executed
30 by the provider of the service and the project director, be approved
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32 *has feeling and add new*

1 by the commissioner or deputy commissioner of the contracting agency,
2 the commissioner or his designee, and be approved as to form by the
3 attorney general.

4 (b) A contract awarded under this section shall contain the amount
5 of the contract stated on its first page.]

6 Sec. 36.98.050. CONTRACT ADMINISTRATION. (a) When a state agency
7 has entered into a professional services contract, the agency is
8 responsible for the diligent administration and monitoring of the
9 performance of the provisions of the contract.

10 (b) When a professional services contract has been completed, the
11 state agency shall evaluate the performance of the contractor under the
12 contract and shall report on and evaluate the use of the final product
13 of the professional services contract. A copy of the report and
14 evaluations prepared under this subsection shall be transmitted to
15 the commissioner, and shall be retained by the commissioner for as
16 long as he is required to maintain copies of completed contracts.

17 Sec. 36.98.060. FILING. A copy of each contract must be filed
18 with the Department of Administration and the contracting agency, and
19 is open for public inspection. The request for proposals and each
20 response submitted must be attached to the filed copy unless the
21 contract is one in which a request for proposals is not required.

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23 regulation adopted in accordance with the Administrative Procedure Act,
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26 Sec. 36.98.080. DEFINITIONS. In this chapter

27 (1) "commissioner" means the commissioner of administration;

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29 professional, technical, or consultant's services which are predomi-
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32 or recommendation; and

(B) result in the production of a report or the
completion of a task;

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(3) "public necessity" means an urgent public need which could not have been anticipated or foreseen; the term also includes emergency situations when work is necessary to protect life or property;

(4) "state agency" means a department, institution, board, commission, division, or other administrative unit of the executive branch of state government; the term does not include the University of Alaska.

*Section 2. AS 39.25.160 is amended by adding a new subsection to read:

(i) A person may not enter into a professional services contract on behalf of a state agency in violation of the provisions of AS 36.98.

X *Section 3. This Act takes effect July 1, 1982

COMMON SENSE FOR ALASKA

**CITIZEN'S REVIEW
STATE OF ALASKA — EXECUTIVE BRANCH
PROFESSIONAL SERVICE CONTRACTS
JULY 1, 1980 — DECEMBER 31, 1980**

**Prepared by the
Research Committee of
Common Sense for Alaska**

CITIZENS' REVIEW OF PROFESSIONAL SERVICE CONTRACTS

STATE OF ALASKA: EXECUTIVE BRANCH

JULY 1, 1980 - DECEMBER 31, 1980

A Report By

COMMON SENSE FOR ALASKA

Prepared by the Research Committee

December 1981

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INTRODUCTION

Contracting for professional services without competitive bidding is generally regarded as a legitimate ministerial tool of government and should be utilized for legitimate public purposes wherever and whenever appropriate, so long as duly authorized funds are available. When professional services are available in the private sector to augment necessary government functions, they should generally be utilized in lieu of creating new agencies or adding employees to the government payroll. However, their use should be carefully, uniformly and fairly managed under cogent, effective and well-publicized policies in order to guard against abuse.

In December of 1980 the Board of Directors of Common Sense initiated an investigation of the procedures and practices used by the executive branch of the State of Alaska in awarding professional service contracts. Mr. Joe LaRocca, a news reporter and writer who has monitored government and public affairs in Alaska for 15 years, was contracted to collect and evaluate those professional service contracts awarded from July 1, 1980, to December 31, 1980. The Common Sense Research Committee was assigned the task of reviewing those contracts and determining to what extent the various agencies and departments were complying with the established internal policies.

The principle subject of this report is to relate the findings of Mr. LaRocca and the Common Sense Research Committee, and to emphasize the substantial work done on this subject by

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former State Ombudsman Frank Flavin and his staff, and Gerry Wilkerson and his staff in the Division of Legislative Audit.

BACKGROUND

Until 1957, the Alaska statutes required all purchasing and contracting for goods and services by the executive branch to follow established competitive bidding procedures (AS 37.05). According to the prevailing attorney general's ruling, the purpose of Chapter .05

"Was not only to protect the state and the public from uneconomic contracts let because of failure to request competitive bids and because of possible favoritism, but also to insure that contractors would be insured a certain amount of 'fair play' in dealing with the state government and in competing with one another for state contracts."

But in 1957, the territorial legislature exempted contracts for professional services from competitive bid requirements because they were perceived to be unrealistic in view of the small uncompetitive corps of professional services providers in Alaska's private sector at that time. In many cases there were only one or a few and sometimes no providers of certain types of professional services. Thus, competitive bidding requirements were considered superfluous.

After the legislative exemption was enacted in 1957, the Department of Administration, which is charged with the responsibility for overseeing all state purchasing and contracting by the executive branch, established a set of internal policies controlling the awarding and administering of contracts for professional services. All departments and agencies are supposed to adhere to these policies except for the Department

Page four

of Transportation and Public Facilities which has been statutorily endowed with separate and autonomous contracting authority with certain specific exceptions according to a March 23, 1979, attorney general's opinion. These internal policies are not regulations adopted under provisions of the state's Administrative Procedures Act; therefore, it has been agreed that they do not have the force and effect of law. However, it must be noted that by statute AS 37.05.220, the Department of Administration has been designated the state's purchasing agent and DOA has written these policies in mandatory terms. The argument here is that the legislature made DOA the state purchasing agent and agencies other than DOA are without authority to adopt their own policies; therefore, if agencies are not following DOA standards, they are acting without authority.

The division currently responsible for the monitoring of non-competitive contracts for professional services is the pre-audit section of the Division of Finance in the Department of Administration. Under its provisions, the department monitors various agencies within the executive branch which desire to seek and procure services. The department retains oversight and final approval powers over all contracts.

The policies for professional service contracts are contained in the State Administrative Manual issued by the Department of Administration and supplemental provisions are contained in another manual entitled Choosing and Using Contractors. The latter text was developed by a consultant as the manual for state-sponsored seminars conducted for administrators in 1980 on the proper use of contractors. Additionally, in 1981, the Division of General Services and Supply compiled a computerized listing of potential contractors by areas of specialization.

FINDINGS

The provisions contained in the Administrative Manual and the supplemental text, Choosing and Using Contractors, are myriad, detailed, often complicated and deal with every aspect of professional service contract administration. Unfortunately, Common Sense has found that the manual provisions are widely ignored, abused and breached by most executive agencies, including the Department of Administration, which is supposed to enforce them. Common Sense found that none of the thirteen agencies (Public Safety and Military Affairs were not examined) which negotiate, award and minister professional service contracts is free of these abuses, although some indulge in them more often than others.

Substantial work has been done by former State Ombudsman Frank Flavin and his staff, and Gerry Wilkerson and his staff in the Division of Legislative Audit on professional service contracting procedures. Both have repeatedly called attention to some of these abuses in written and oral reports to the legislature, and a few have been exposed by the news media. But, it appears that the vast bulk of abuses have remained hidden from public view. They are buried in the bureaucratic maze of state government. Moreover, the opportunities for abuse while virtually non-existent in 1957 have grown tremendously in recent years as a result of the enormous growth of the state budget.

In the first half of 1980, from January 1 to June 30,

various agencies of the state's 15 cabinet-level departments (including the Governor's office) awarded non-competitive contracts for professional services for fees totalling some \$25.8 million.

In the succeeding six-month period (the period covered by this report), fees for these types of contracts totalled \$88.5 million according to the state's figures. This sum represents an increase of more than 200%.

The principal reason for the widespread abuses of the policies is that they are not enforced. Since they are viewed as only guidelines and not regulations, there is no enforcement. Since it is believed that the policies do not have the force and effect of law, there is no incentive for administrators to heed them. In a special report issued last March, then Ombudsman Frank Flavin noted that

"some agencies fail to comply with correct procedures because of ignorance, poor planning, favoritism, or conscious disregard. In other words, some agencies follow appropriate procedures only when it is convenient. They are, after all, only guidelines with no penalty for their violation. While some agencies conscientiously follow in-house restrictions, others attempt to out-manuever Department of Administration oversight [sic] and provide only after-the-fact rationalization as to why their project [contract] was a special case. Because the policy guidelines in the Administrative Manual lack the force of law, in practice they have often been reduced to 'idealistic tools' by agencies which pay lip service to their existence while rejecting their substance and spirit. The Department of Administration's pre-audit, to insure compliance with procedural safeguards, then becomes manipulated into a post-audit rubber stamp. . . wholly dependent upon information submitted by the contracting agency.

And in a 1978 report to the legislature, Gerry Wilkerson

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of the Division of Legislative Audit asserted that

"without public competition for professional services, departments cannot be sure of obtaining contracts in the state's best interest or that all interested parties are given the opportunity to compete for state contracts. However, when unique circumstances make requesting proposals for professional services inappropriate, waiver procedures should be developed to allow alternatives in obtaining services."

Both the Ombudsman and Legislative Auditor have strongly urged the revision and adoption of the policies as regulations under the Administrative Procedures Act so that violations of them would be subject to penalties under statutory authority.

Following the 1978 legislative audit report, then Attorney General Avrum Gross told the Commissioner of the Department of Administration in a memo that the contracting policies represent

"an excellent effort to systematize the state's professional service contracts. It should be fairly simple to rewrite it in regulatory form. . . or it could be codified by reference alone. . . It seems to me that the important thing is that public notice be made, an opportunity [for the public] to comment be given, and a regulation adopted."

The attorney general's advice was never followed. The ensuing year, in March 1979, then Deputy Attorney General Will Condon suggested in a meeting with Department of Administration officials that the policies be adopted as regulations in order to "give the [Administrative] manual provisions the force of law," and once adopted could "be used to discipline . . . those responsible officials who enter into contracts which are improper," according to minutes of the meeting

Page eight

logged by one of the DCA officials. However, Condon's advice was also ignored.

In his March 1981 Special Report, Ombudsman Flavin noted that

"Despite these repeated recommendations and attempts, professional service contracting is today governed only by policy guidelines rather than Administrative Procedures Act regulations."

Common Sense has found the situation concerning the professional service contracting provisions remains the same today. The policies have not been incorporated into the administrative code pursuant to the Administrative Procedures Act; therefore, they still lack the force of law and, more importantly, they are still being abused.

PROFESSIONAL SERVICE CONTRACTS MANUAL

The provisions contained in the State Administrative Manual and its supplement, Choosing and Using Contractors, fills some 200 pages. They are concerned primarily with the basic procedures and practices involved in the initial stage of contracting for professional services, when the crucial decision to choose a contractor is made.

The policies require any agency wishing to contract for professional services whose estimated cost may exceed \$2,500 to submit a request to the Department of Administration for "Authority to Negotiate" [ATN] with at least three sources of the services sought. The ATN form prescribed by the DOA for filing the request states on its face that "This form must be executed prior to entering negotiations regarding Professional Service Contracts when the contract amount is in excess of \$2,500 in an annual period." [Emphasis added]. The form also states that "Agencies SHOULD list at least three choices (with which to negotiate) or explain why it is not possible." [Emphasis added]. The manual does not preclude negotiating with others as long as the agency negotiates with at least three.

It further states that after a proposed contract has been negotiated with one of the sources, it "must be forwarded to the Department of Administration after contractor and Departmental [agency] signatures have been affixed but prior to execution or effective date, for final approval." [Emphasis added].

In certain cases, the policies permit the agencies to forego the listing of three choices with which to negotiate on the ATN form if a decision had been made instead to solicit formal proposals from three or more sources via a written "Request for Proposals" [RFP]; or, if the agency elects instead to advertise for proposals in the classified legal ad sections of newspapers. But it must be noted that an ATN must be submitted to and approved by the Department of Administration before RFP's are released, before newspaper advertising and before negotiations commence with any prospective contractor (Section 8140, Administrative Manual).

Note, however, that the agency has virtually absolute discretion to choose any one of the proposals in awarding the contract. Though its choice may ostensibly be indicated or dictated by the policies in the State Administrative Manual, the agency need not adhere to them when awarding the contract, and often does not, citing the need for "administrative flexibility."

While the DOA theoretically has the authority to overrule the agency's choice, that does not seem to happen in practice. The standard procedure, as noted by the Ombudsman, is for DOA to rubber-stamp the agency's choice without question, even in the face of obvious violations of the policies.

VIOLATIONS

For this report, 1,000 professional service contracts and contract amendments awarded by the executive branch between July 1 and December 1, 1980, were examined to gauge compliance or non-compliance with the pertinent policies. The detailed and specific findings are documented in the accompanying chart.

This report shows that the single most frequent abuse, by far, is the improper award of "sole source" contracts and major contract amendments without the requisite justification. While the policies provide for the legitimate award of sole source contracts and amendments under circumstances where a bona fide showing can be made that only a single practicable source for the services sought truly exists, in many cases sole source contracts are awarded for which no justification or explanation is provided by the contracting agency; while in many others, clearly or arguably inadequate rationalizations are proffered to attempt to justify them. In either case, the inadequacy or alleged inadequacy is irrelevant, since no punitive measures are prescribed or imposed.

Another frequent violation of the manual occurs when the Department of Administration official signs final approval of the contract after its execution or effective date. Some contracts which were approved after effective dates do include a "disclaimer" which states, "This contract has no effect except as an offer by the contractor until it is approved by the Department of Administration." But there is no "disclaimer

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clause" provided for in the policy manual. Section 8108 of the manual states, "all contracts must be approved by the Department of Administration before the commencement of work except when there is an emergency and such work is necessary to protect life and property." Even the unauthorized "disclaimer" appears meaningless when pay schedules and performance deadlines written into the contract proceed by many weeks or months the final approval signature. The impression being the final approval signature is merely a rubber stamp to an independent agency action. It must be noted that the Common Sense Research Committee counted those contracts which were signed by DOA after the contract's effective date, but did include the above mentioned "disclaimer clause" as a correct and complying contract. If the disclaimer clause had not been taken into consideration, some departments would have shown 100% non-compliance with the manual provisions.

Additional obvious violations by the agencies include: failure to forward a copy of the contract to the Department of Administration for inclusion in the Contractor's Index, substantially amending contracts without following through the process to acquire necessary authorizations, and unfairly "pyramidding" qualifications of one company or person who has worked with a state program without reviewing the current level of service available from other providers in the free market. Section 8152 of the manual covers the situation of continuing contracts, and notes that the "RFP specifically indicates that it is the intention of the State to negotiate with the same firm for work to be done in ensuing phases or years." Numerous contracts were awarded to specific firms or persons with the only justification being that the contractor had done similar work before. This procedure indefinitely locks a specific contractor into generic contract work for which there are many other qualified sources.

COMMON SENSE FOR ALASKA — CITIZENS' REVIEW
STATE OF ALASKA — EXECUTIVE BRANCH
PROFESSIONAL SERVICE CONTRACTS
JULY 1, 1980 — DEC. 31, 1980

DEPARTMENT	TOTAL NUMBER OF CONTRACTS AND AMENDMENTS IN CONTRACTOR'S INDEX	TOTAL DOLLARS OF CONTRACTS AND AMENDMENTS IN CONTRACTOR'S INDEX	TOTAL NUMBER NOT IN CONTRACTOR'S INDEX	TOTAL DOLLAR AMOUNT NOT IN CONTRACTOR'S INDEX	TOTAL NUMBER OF CONTRACTS AND AMENDMENTS REVIEWED	TOTAL DOLLARS OF CONTRACTS AND AMENDMENTS REVIEWED	NUMBER OF CONTRACTS AND AMENDMENTS COMPLIANT WITH GUIDELINES	TOTAL DOLLAR AMOUNT OF CONTRACTS AND AMENDMENTS COMPLYING WITH GUIDELINES	NUMBER OF NON-COMPLYING CONTRACTS AND AMENDMENTS	TOTAL DOLLARS OF NON-COMPLYING CONTRACTS AND AMENDMENTS	PERCENTAGE OF THE NUMBER OF NON-COMPLYING CONTRACTS AND AMENDMENTS
OFFICE OF THE GOVERNOR	70	11,173,898.00	0	0	59	10,931,521.00	27	1,075,690.00	32	9,855,841.00	54%
ADMINISTRATION	52	4,858,903.00	0	0	50	4,694,032.00	31	4,160,966.00	19	533,066.00	38%
LAW	30	3,013,417.00	4	1,602,500.00	33	4,577,252.00	8	2,378,772.00	25	2,198,480.00	75%
EDUCATION	105	1,890,110.00	2	37,500.00	95	1,695,972.00	60	517,248.00	35	1,178,724.00	36%
HEALTH & SOCIAL SERVICES	168	16,815,249.00	22	2,534,938.00	172	15,903,736.00	142	13,234,898.00	30	2,668,833.00	17%
LABOR	19	423,582.00	0	0	18	420,582.00	5	114,455.00	13	306,127.00	72%
COMMERCE & ECONOMIC DEVELOPMENT	185	15,923,358.00	0	0	160	9,069,379.00	151	8,379,159.00	9	690,220.00	5%
NATURAL RESOURCES	221	15,822,921.00	19	877,411.00	240	16,568,332.00	206	14,733,421.00	34	1,834,911.00	14%
FISH AND GAME	43	819,891.00*	0	0	43	819,891.00	37	748,490.00	6	71,401.00	13%
ENVIRONMENTAL CONSERVATION	21	605,110.00	0	0	21	605,110.00	13	251,375.00	8	353,735.00	38%
COMMUNITY AND REGIONAL AFFAIRS	53	9,538,908.00	3	173,422.00	55	9,462,330.00	41	7,944,302.00	14	1,518,028.00	25%
REVENUE	34	1,920,284.00	1	10,000.00	32	1,842,484.00	18	1,551,484.00	14	291,000.00	43%
TRANSPORTATION	29	3,214,042.00	0	0	22	2,761,165.00	15	1,600,958.00	7	1,160,207.00	31%
TOTAL	1030	86,019,673.00	51	5,228,771.00	1000	79,351,796.00	754	56,691,218.00	246	22,660,578.00	24% average

*A \$5,000.00 error found in the C.I. has been corrected.

RECOMMENDATIONS

Common Sense urges the Department of Administration to adopt rules and regulations with the full force of law to govern the contracting for professional services by the state agencies. Were the procedures and suggestions contained in the Administrative Manual and Choosing and Using Contractors strictly observed, the vast number of violations and abuses would be eliminated. It is essential, especially in these times of increased state spending, that the state government conduct its business in the most fair and professional manner possible. The policies need regulatory implementation pursuant to the Administrative Procedures Act (AS 44.62).

Secondly, Common Sense would recommend to the Legislative Budget and Audit Committee that a formal audit be conducted to review the professional service contracts awarded by the executive branch from June 30, 1980 through December 31, 1980. A citizens' review revealed numerous abuses which should be validated by a professional auditor. A spot check should be conducted to insure that all firms listed on the ATN were really contacted and actually negotiated with. In addition, the audit should verify when the work actually began on those contracts that were signed by DOA after the effective date of the contract, but included a "disclaimer." The auditor also should specifically investigate "over-ramidding" tendencies by some agencies who appear to be automatically awarding state contracts to the same contractors without

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following the provisions in the manual.

Finally, Common Sense believes that the legislature should address the problem of professional service contracting violations. Only through legislation can the enforcement of the contracting provisions be given penal teeth. This can be accomplished by adding specific language to ethics legislation or through the criminal code. There must be appropriate penal sanctions for violating or ignoring professional service contract provisions.

COMMON SENSE FOR ALASKA: RESEARCH COMMITTEE

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OFFICE OF THE OMBUDSMAN
STATE OF ALASKA

SPECIAL REPORT 81-3

PROPER USE OF
PROFESSIONAL SERVICES CONTRACTS

MARCH 27, 1981

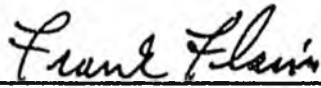
FRANK FLAVIN
OMBUDSMAN

OFFICE OF THE OMBUDSMAN
STATE OF ALASKA

SPECIAL REPORT 81-3

PROPER USE OF
PROFESSIONAL SERVICES CONTRACTS

MARCH 27, 1981



FRANK FLAVIN
OMBUDSMAN

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According to a recent report of the Comptroller General to the Congress, the "proper use" of consultants is viewed as a "normal, legitimate, and economical way to improve Government service and operations." In Alaska, consultant services are obtained through the use of Professional Services Contracts (PSC's); their "proper use," however, is a continuing controversy.

I. BACKGROUND

In May, 1979, staff of the Attorney General's Office wrote to the Ombudsman:

AS 37.05.230(1)(c)(vi) specifically exempts professional services contracts from bidding requirements. . . . However, the Department of Administration, pursuant to AS 37.05.220(1), has established certain internal guidelines for the approval of such contracts. These guidelines are not regulations promulgated under the Administrative Procedures Act, and therefore do not have the force and effect of law. (emphasis added)

Although the Division of General Services and Supply is the purchasing agent for the state, in his response to a 1978 Legislative Audit, then Commissioner of Administration, B.B. Allen, explained that PSC's:

. . . are negotiated by the (various) agencies. The Department of Administration determines that prescribed guidelines and procedural safeguards are followed. This activity more closely resembles a pre-audit rather than a procurement function.

PSC guidelines, previously in the Purchasing Regulations, were moved to form a new chapter in the State Administrative Manual.

In August, 1980, the Pre-Audit Section, Division of Finance, ". . . assumed the responsibility of reviewing and processing proposed professional services contractual agreements." Subsequently, the PSC chapter in the State Administrative Manual was reorganized and minimally revised to include reference to a manual, Choosing and Using Contractors. This guidebook was developed by an Atlanta firm as the text for state-sponsored seminars conducted during 1980 on the "proper use" of consultants.

Additionally, in 1981, the Division of General Services and Supply compiled a computerized listing of potential contractors by professional service commodity code (area of specialization).

II. PROBLEM

These incremental efforts to reform the system and educate those state employees who are subject to its controls are laudable and should continue, but are effective only if the guidelines are strictly observed.

In the Governor's Office response to a Legislative Audit on d-2 contracts, it was stated that, "Idealism oftentimes is tempered by reality." This argument, the substance of which has been used by various agencies when rejecting Ombudsman findings that proper procedures have been subverted or ignored, is that although agencies "endeavor to follow the ideal progression of events whenever possible," circumstances take precedence over guidelines.

Investigative findings in Ombudsman complaints reveal that some agencies fail to comply with correct procedures because of ignorance, poor planning, favoritism, or conscious disregard. In other words, some agencies follow appropriate procedures only when it is convenient. They are, after all, only guidelines, with no penalty for their violation. While some agencies conscientiously follow accepted procedures and some have imposed further in-house restrictions, others attempt to outmaneuver Department of Administration oversight and provide only after-the-fact rationalization as to why their project was a special case.

Because the policy guidelines in the Administrative Manual lack the force of law, in practice they have often been reduced to "idealistic tools" by agencies which pay lip service to their existence while rejecting their substance and spirit. The Department of Administration's pre-audit, to ensure compliance with procedural safeguards, then becomes manipulated into a post-audit rubber stamp. At best it is a paperwork review prior to issuance of a Request for Proposals, wholly dependent upon information submitted by the contracting agency.

III. EXAMPLES

Following are examples of recent PSC complaints evidencing multiple problem areas, with selected Ombudsman findings and recommendations:

- A79-1133 et al (insurance coverage on fishing boats which were purchased with state loaned funds)

Summary:

Agency improperly and unfairly designated one company to work with a state program without fairly reviewing the current level of service available from other providers in the free market. This state endorsement created unfair competition for new customers.

Findings:

1. insufficient justification for sole source negotiations
2. no formal Request for Proposals (RFP) and insufficient proposal solicitation
3. no formal review of the few proposals submitted

Recommendations:

1. terminate favored status designation
2. take action to inform the public of state's withdrawal of the firm's special designation
3. develop guidelines to address future similar situations so that all businesses will have the opportunity to compete when a state endorsement will result in a considerable profit to the state designated entity.

- F80-0904 et al (land clearing)

Summary:

The process was in marked contrast to a 1959 Attorney General Opinion which states:

The purpose of the chapter (AS 37.05) was not only to protect the state and the public from uneconomic contracts let because of failure to request competitive bids and because of possible favoritism, but was also to insure that contractors would be insured a certain amount of "fair play" in dealing with the state government and in competing with one another for state contracts.

Findings:

1. insufficient planning resulted in a rushed procedure deficient in virtually every PSC guideline area
2. work to be performed did not meet criteria of a professional service and therefore should have gone to bid
3. negotiations began prior to submission or approval of Authority to Negotiate (ATN)
4. no formal RFP and questions as to whether those verbally asked to submit proposals started with the same information or were given the same response time
5. no written record of some proposal costs and other estimates submitted in such inconsistent form as to preclude cost comparisons
6. no formal evaluation process

Recommendations:

1. clarify definition of and rules for professional services contracting
2. revise the Administrative Manual to reflect recommendation 1
3. plan future projects sufficiently far in advance so that proper contracting procedures can be followed, and then follow them

- A79-0429 (public participation in transportation planning process)

Summary:

Sole source professional services contracts can be authorized under certain circumstances. However, once a determination is reached to request proposals, contracting procedures change dramatically to ensure a fair and impartial selection. All proposers should start on equal footing so that the process is competitive rather than a bureaucratic ruse.

Findings:

1. prior sole source negotiations were fundamentally unfair to private sector providers subsequently allowed to compete
2. vague RFP
3. insufficient time between RFP and proposal submission deadline
4. no accessible and knowledgeable agency contact person to respond to proposers' questions
5. agency official involved in prior sole source negotiations drafted subsequent RFP and participated in finalizing evaluation criteria
6. agency officials involved in prior sole source negotiations evaluated proposals submitted
7. proposals were distributed to evaluators prior to finalization of evaluation criteria
8. DOT has statutory contracting authority; DOA provides advice and oversight only to the extent of a voluntary agreement

Recommendations:

1. Administrative Manual professional services contracting procedures be promulgated pursuant to the Administrative Procedures Act to afford them the force of law
2. DOTPF should not be a contracting empire unto itself. Statutorily DOTPF should be made subject to Department of Administration PSC regulations
3. Department of Administration should maintain a central specialized listing of professional services contractors by area of expertise which must be consulted before contract negotiations are initiated.

- J79-0013 (telecommunications--tape delay center)

Summary:

In a rush to obtain the services of a perceived expert, well established administrative contracting policies were abrogated and fundamental fairness violated.

Findings:

1. some services contracted for had previously been provided by a state employee
2. insufficient justification for sole source negotiations
3. no ATN, RFP, or evaluation system to compare other unsolicited proposals

Recommendations:

1. request proposals and impartially evaluate them when the current contract expires
2. delete from future contracts those services which can be performed by state employees

- J79-0515 (public school alcoholism education program)

Summary:

Substantial problems found with the technical aspects of the RFP and the evaluation method used by the proposal evaluation committee.

Findings:

1. evaluation system developed after contracting process began
2. budget information in proposals inadequate to the extent that cost of services to be provided and cost effectiveness of different approaches could not be compared
3. selected contractor's proposal did not meet all RFP requirements

Recommendations:

1. request standardized financial information in RFP
2. develop evaluation criteria prior to, and include in, RFP
3. RFP requirements should be explicit, and areas of latitude/allowable deviation specifically identified in the RFP
4. develop aggrieved bidder appeal procedures

- A80-0285 (evaluation of alcoholism education program)

Summary/Suggestion:

When basic parameters of an RFP are disregarded or altered by a proposer, the proposal should be found non-responsive. If the issues raised by the non-responsive proposal merit serious consideration, the appropriate avenues might include rejection of all proposals, plus reissuance of a new RFP or securing authority to proceed sole source.

Findings:

1. a proposal should have been rejected as non-responsive since it did not meet the time frame set out in the RFP and ATN
2. another proposal should have been rejected as non-responsive because of excessive costs

IV. RECOMMENDATIONS

These complaints, and numerous others, evidence areas of contracting problems. Ironically, most of these issues are adequately addressed in the current policy guidelines. Were the procedures and suggestions contained in the Administrative Manual and Choosing and Using Contractors consistently followed, the magnitude of administrative discretion, and therefore possible abuse, would be vastly lessened. Especially in these times of increased state spending, the "proper use" of PSC's is essential.

1. The following areas in the current guidelines should be clarified (or consistently interpreted) and/or emphasized:

- when to contract for services; when to have current employees do the work; when to hire project employees
- what constitutes a professional service as opposed to those services which would more appropriately be solicited through a bid process
- when are sole source negotiations, or any waivers from normal procedures, permissible
- why prior approval of Authority to Negotiate is essential
- why lists of prequalified vendors or interested potential contractors must be solicited, kept current, and mandatorily used
- why the RFP is as important a document as the contract itself, and why an accessible and responsive agency contact person to answer proposers' questions is required
- why adequate RFP response time must be allowed and why decisions to allow deviations from RFP requirements must be communicated to all proposers
- why early development of evaluation criteria, and their inclusion in the RFP, is important and how to structure and conduct a fair and impartial evaluation process
- why and how contractor performance must be adequately monitored
- why contract amendments, renewals and extensions must be carefully negotiated and considered to ensure that the competitive process which led to the contract award isn't now being subverted by substantive change or delays caused by the contractor
- why contractor performance must be evaluated for results so that agencies will have the benefit of past experience in letting future contracts

2. The current policy guidelines on PSC's contained in the State Administrative Manual and in Choosing and Using Contractors should, after revision, be adopted as regulations under the Administrative Procedure Act.

The APA, at AS 44.62.640(a) (2) defines "regulation" as:

every rule, regulation, order, or standard of general application or the amendment, supplement or revision of a rule, regulation, order or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of a state agency; "regulation" does not include a form prescribed by a state agency or instructions relating to the use of the form, but this provision is not a limitation upon a requirement that a regulation be adopted under this chapter when one is needed to implement the law under which the form is issued; "regulation" includes "manuals," "policies," "instructions," "guides to enforcement," "interpretative bulletins," "interpretations," and the like, which have the effect of rules, orders, regulations or standards of general application, and this and similar phraseology shall not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public

According to AS 37.05.020

The Department of Administration shall adopt rules and regulations for the performance of its powers or duties, the execution of its business, and its relations to and business with other state agencies. (emphasis added)

Following this statute is an excerpt from a 1959 Attorney General Opinion:

A policy of publishing regulations concerning bidding and letting of contracts in the Administrative Code is consistent with the Alaska Administrative Procedure Act, since these regulations are regulations in which an important portion of the public has a vital interest and since they are of great use to the portion of the public interested in dealing and contracting with the state.

An April 25, 1978, Legislative Audit of Professional Service Contracting in the Department of Administration (see Appendix A) recommended that the DOA "develop and implement regulations requiring departments to publicly request proposals for all professional service contracts." B.B. Allen, who was then DOA Commissioner, responded for the Department on August 24, 1978:

This department has prepared, to the degree we consider necessary, a separate section of the State Administrative Manual dealing with professional service contracts. Your recommendation is covered to the degree that we believe necessary in this addition to the manual.

Following this Audit, DOA prepared the July 1978 addition to the Administrative Manual on PSC's and submitted it to the Attorney General's Office for review. On November 14, 1978, Avrum Gross, then Attorney General, wrote to the DOA Commissioner:

. . . the material has a direct, regulatory effect on the rights of persons, firms, and corporations who seek to provide the state with professional services on a contractual basis. Because of that, the material, "affects the public or is used by the agency in dealing with the public" AS 44.62.640(a)(2). Accordingly, the material does not have the legal effect you apparently intend unless and until it is adopted under the Administrative Procedures Act. Coghill v. Boucher, 511 .2d 1297, 1302 (Alaska 1973).

The manual addition is an excellent effort to systematize the state's professional services contracts. It should be fairly simple to rewrite it in regulatory form. However, if you prefer and the Lieutenant Governor agrees, it could be codified by reference alone under AS 44.62.130. It seems to me that the important thing is that public notice be made, an opportunity to comment be given, and a regulation be adopted.

The advice of the Attorney General was apparently not heeded, and the PSC chapter of the Administrative Manual was adopted as guidelines only.

On April 12, 1979, a meeting was held in the Attorney General's Office to discuss adoption of the Administrative Manual section dealing with PSC's under the APA. In attendance were then Deputy Attorney General Wil Condon, then Deputy Commissioner of the Department of Administration Sue Greene, and William Ladwig of the Division of Finance. An excerpt from Mr. Ladwig's April 19, 1979, memo summarizing the meeting follows:

Concerning adopting the contract provisions of the Administrative Manual under the APA, it was stated by Mr. Condon that his purpose for suggesting this adoption was to (1) give the manual provisions the force of law when dealing with members of the public in that the person from the public sector would be put on notice that the person signing the contract on behalf of the State agency is in fact an authorized representative of the State who had the legal authority to commit the State to a contract and (2) that the manual provisions, once they were adopted and modified, could be used to discipline to the extent deemed necessary by the circumstances, those responsible officials who enter into contracts which are improper. The vehicle for disciplining certifying officers already exists; however, there is no provision, short of termination, for reaching the "man behind the scenes."

Based upon the representation by Mr. Condon concerning this first area it was the consensus of the group that with assistance from members of the Office of the Attorney General, the Administrative Manual provisions would be modified as to language and be adopted by reference under the Administrative Procedures Act.

Despite these repeated recommendations and attempts, professional service contracting is today governed only by policy guidelines rather than APA regulations.

3. Statutory language, similar to that which follows, should be adopted regarding professional services contracts.

Legislative Finding and Purpose. A formal written Request for Proposals soliciting an offer to perform the services required under a contract must be extended to a sufficient number of providers of the required services to assure that public interest in competition is adequately served. It is hereby declared to be the policy of the state to publicly announce requirements for consultant or professional and technical services, to encourage all qualified persons to put themselves in a position to be considered for a contract and to negotiate contracts for consultant or professional and technical services on the basis of demonstrated competence and qualifications for the types of services required and on the basis of the furnishing of such services at fair and reasonable fees. The provisions of this act apply to professional services contracting with state or federal dollars unless compliance with this Act would result in non-compliance with federal law or regulation governing the use of federal funds.

Public Notice. When consultant or professional and technical services are required to be contracted for, public notice shall be given by the state agency if the cost of the project is estimated by the state agency to be more than \$2,500. Such public notice shall be given at least thirty days in advance by publication three times in one or more daily newspapers of general circulation in this state and shall contain a general description of the proposed project and shall indicate the procedure by which interested persons may apply for consideration for the contract.

Professional Services Listings. (1) Any person desiring to provide consultant or professional and technical services to a state agency shall annually submit to the department a statement of qualifications and performance data and such other information as may be required by the department. The department may request such person to update such statement before the anniversary date to reflect changed conditions in the status of such person. (2) For each proposed project for which consultant or professional and technical services are required, the state agency for which the project is to be done shall evaluate current statements of qualifications and performance data on file with the department and shall send a Request for Proposals to all prospective contractors found qualified.

Duties of Commissioner. The commissioner, or his designee, shall perform all contract management and review functions for state contracts, excepting those functions presently performed by the contracting agency. In so doing, the commissioner shall, by regulation adopted under the Administrative Procedure Act, establish the manner and form in which all state contracts shall be prepared and processed and shall examine and approve or disapprove all state contracts as to content, purpose, propriety and budget ramifications. No agency shall execute a state contract without receiving the prior approval of the commissioner. All agencies shall afford full cooperation to the commissioner in the management and review of state contracts.

Duties of Contracting Agency. Before an agency may seek approval of a consultant or professional and technical services contract valued in excess of \$2,500, it shall certify to the commissioner that:

- (1) no state employee is competent or available to perform the services called for by the contract;
- (2) the normal competitive bidding mechanisms will not provide for adequate performance of the services;
- (3) the services are not available as a product of a prior consultant or professional and technical services contract, and the contractor has certified that the product of his services will be original in character;
- (4) required efforts were made to publicize the availability of the contract;
- (5) the agency has received, reviewed and accepted a detailed work plan from the contractor for performance under the contract; and
- (6) the agency has developed, and fully intends to implement, a written plan providing for (a) the assignment of specific agency personnel to a monitoring and liaison function, (b) the periodic review of interim reports or other indicia of part performance and (c) the ultimate utilization of the final product of the services.

Procedure for consultant and professional and technical services contracts. Before approving a proposed state contract for consultant or professional and technical services the commissioner shall have determined at a minimum that:

- (1) all provisions of the preceding section have been verified or complied with;
- (2) the work to be performed under the contract is necessary to the agency's achievement of its statutory responsibilities, and that there is statutory authority to enter into the contract;
- (3) the contract will not establish an employer/employee relationship between the state or the agency and any persons performing under the contract;
- (4) no current state employees will engage in the performance of the contract;
- (5) no state agency has previously performed or contracted for the performance of tasks which would be substantially duplicated under the proposed contract;
- (6) the contracting agency has specified a satisfactory method of evaluating and utilizing the results of the work to be performed.

Contract Terms. A consultant or technical and professional services contract shall by its terms permit the agency to unilaterally terminate the contract prior to completion, upon payment of just compensation, if the agency determines that further performance under the contract would not serve agency purposes or is not in the state's best interest. Each professional services contract shall contain a termination date.

Contract Administration. Upon entering into a state contract, an agency shall bear full responsibility for the diligent administration and monitoring of the contract. The commissioner may require an agency to report to him at any time on the status of any outstanding state contract to which the agency is a party. After completion of performance under a consultant or professional and technical services contract, the agency shall evaluate the performance under the contract and the utility of the final product. This evaluation shall be delivered to the commissioner who shall retain all such evaluations for future reference.

Rulemaking Authority. The commissioner shall adopt and enforce necessary regulations regarding the management and review of state professional service contracts. Regulations adopted pursuant to this section are subject to the Administrative Procedure Act (AS 44.62).

Validity of State Contracts. No state contracts shall be valid, nor shall the state be bound by the contract until it has first been executed by the head of the agency which is a party to the contract and has been approved in writing by the Commissioner, or his designee:

Liability. The following classes of people should be held accountable with regard to PSC violations specified. This could be accomplished through civil or criminal penalty provisions in this bill, through specific language to be included in ethics legislation, or through the criminal code.

(1) Any person, other than a bona fide employee working solely for a person providing consultant or professional and technical services, who offers, agrees, or contracts to solicit or secure for any other person state agency contracts for consultant or professional and technical services and who, in so doing, receives any fee, commission, gift, or other consideration contingent upon or resulting from the making of the contract.

(2) Any person providing consultant or professional and technical services who offers to pay or does pay any fee, commission, gift, or other consideration contingent upon or resulting from the making of a contract for consultant or professional and technical services with a state agency;

(3) Any state agency official or employee who solicits or secures or offers to solicit or secure a contract for consultant or professional and technical services with a state agency and who is paid any fee, commission, gift, or other consideration contingent upon the making of such contract;

(4) Any state employee who violates this statute or regulations promulgated under it, is subject to suspension or dismissal.

Definitions.

(1) Consultant or professional and technical services means services which are predominantly intellectual in character, which include analysis, evaluation, prediction, planning, or recommendation and which result in the production of a report or the completion of a task.

- (2) Department means Department of Administration.
- (3) Commissioner means Commissioner of the Department of Administration or his designee.
- (4) Agency means a department, office, institution, corporation, authority, organization, commission, committee, council or board in the executive legislative or judicial branches of the state government, and a department, office, institution, corporation, authority, organization, commission, committee, council or board of the state government independent of the executive legislative and judicial party, including the University of Alaska.

4. The Department of Transportation and Public Facilities should be subject to the same statutory and regulatory requirements regarding professional services contracts as other state agencies.

According to a March 23, 1979, Attorney General opinion (see Appendix B)

. . . it is clear that DOT/PF has statutory authority to enter into personal services contracts. It is equally clear that the Department of Administration does not have any statutory authority to override a decision by the Commissioner of the Department of Transportation to enter into a particular contract. This is not to say that the Department of Administration cannot, in an advisory capacity, make known its thoughts concerning the advisability of entering into a certain contract. It must be remembered, however, that in such a case the Department of Administration's opinion is in the nature of advice and that the only situation when the Department of Administration has the authority to "veto" a contractual agreement proposed by the DOT/PF is in the case where the proposed contractor is a state employee. And the source of this rests on the agreement referred to above between the Department of Administration and the Department of Transportation and Public Facilities.

The above-referenced agreement was proposed in November, 1977, by then DOT Deputy Commissioner Richard Holden, and agreed to that same month by then Commissioner B.B. Allen. It was agreed that:

1. Requests for proposals for professional services for the Department of Transportation and Public Facilities will be advertised.
2. Recommendations to your commissioner (DOT) will follow either Departmental or superseding federal procedure.
3. Following commissioner's approval, an Authority to Enter Contract Negotiations form will be submitted to the Department of Administration, Division of Finance. This form will list three firms when the proposed contract will exceed \$20,000.

4. Following submission of the Authority form, Department of Transportation and Public Facilities will proceed to negotiate the contract with the successful proposer. Contracts will contain a clause which declares the contract void should our Division of Finance find that by Internal Revenue Service definition, the contractor is, in fact, a State employee.
5. Division of Finance will return the Authority form after analysis. Should our analysis reveal an Internal Revenue Service violation, the contract will be voided or negotiations terminated.

It should be noted that DOT does have a policy "to promulgate standard procedures for selection of consultants for Department of Transportation and Public Facilities' negotiated agreements for architectural and engineering design, survey and related services." This P & P however, does not cover all the subject areas, nor address in detail the procedural safeguards presently contained in the Administrative Manual.

Apart from the sheer numbers of PSC's awarded by DOT, and the AG's opinion that this department has statutory authority to independently enter such contracts, there appears to be no valid reason why DOT should be exempt from requirements imposed on all other state agencies. Members of the public wishing to contract with the state should be able to reference one set of contracting regulatory procedures which are applicable to all agencies.

DOT's contracting authority as contained in:

AS 44.42.020(a)(6) and (b)(1),
AS 44.43.030,
AS 44.44.030,
AS 19.05.040(10), and
AS 35.05.040(7) and (10)

should be amended so as to subject the DOT to the same statutory and regulatory provisions as apply to other state agencies.

APPENDIX A

DIVISION OF LEGISLATIVE AUDIT

A REVIEW OF
PROFESSIONAL SERVICE CONTRACTING

A SPECIAL REVIEW OF
PROFESSIONAL SERVICE CONTRACTING
DEPARTMENT OF ADMINISTRATION

April 25, 1978

Commissioner of Administration
Deputy Commissioner of Administration

B. B. Allen
Robert S. Gates

STATE OF ALASKA

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

AUDIT DIVISION
POUCH W—ALASKA OFFICE BUILDING

FINANCE DIVISION
POUCH WF—STATE CAPITOL

JUNEAU, ALASKA 99811

April 25, 1978

Members of the
Legislative Budget and Audit Committee:

In accordance with your request and the provisions of Title
24 of the Alaska Statutes, the attached report is submitted
for your review:

A SPECIAL REVIEW OF
PROFESSIONAL SERVICE CONTRACTING
DEPARTMENT OF ADMINISTRATION

April 25, 1978

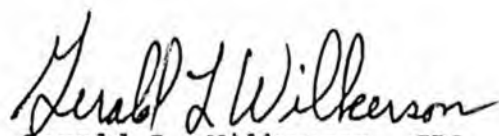

Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit

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PURPOSE OF THE REVIEW

In accordance with a special request of the Legislative Budget and Audit Committee and the provisions of Title 24 of the Alaska Statutes, this audit was conducted to review professional service contracting procedures currently in use throughout the State.

ORGANIZATION AND FUNCTION

The purpose of Article 4, Uniform Purchasing, of the Fiscal Procedures Act is to protect the State from uneconomic contracts let because of failure to request competitive bids and to insure that contractors would be insured a certain amount of "fair play" in dealing with the State and in competing with one another for State contracts.

However, legislation enacted in 1957, AS 37.05.230(1)(C)(iv), exempts professional services from competitive bidding. To provide uniform purchasing procedures with respect to professional services, the Department of Administration adopted chapter five of the State Purchasing Regulations, professional service contracts. This chapter defines a professional service as non-biddable duties or accomplishments that require personal knowledge and training to perform.

The Department of Administration's Division of Finance is currently responsible for the review and approval of professional service contracts. The Purchasing Regulations require all contracts negotiated by departments in excess of \$300 must be approved by the Division prior to execution. For contracts in excess of \$2,000, departments must have the Division's approval prior to commencing negotiations.

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

The Department of Administration should develop and implement regulations requiring departments to publicly request proposals for all professional service contracts.

The purpose of Article 4, Uniform Purchasing, of the Fiscal Procedures Act is, in part, to insure contractors a certain amount of "fair play" in dealing with the State and in competing with one another for State contracts.

Legislation enacted in 1957, AS 37.05.230(1)(C)(iv), exempted professional services from competitive bidding. In 1957, the majority of professional services were not competitive and probably, in some cases, difficult to obtain. Since then, professional services have traditionally been excluded from any type of public competition in spite of their growth and competitiveness now in Alaska.

More recently, several departments have been leaning towards competition in awarding certain professional service contracts. The Department of Community and Regional Affairs recently advertised for financial compliance auditing of CETA subgrantees, a professional service. Five certified public accounting firms responded with costs ranging from \$24,484 to \$91,600. Although price should not be the only consideration in the evaluation of professional service proposals, the above example does show a benefit the State received from public competition.

Without public competition for professional services, departments cannot be sure of obtaining contracts in the State's best interest or that all interested parties are given the opportunity to compete for State contracts.

However, when unique circumstances make requesting proposals for professional services inappropriate, waiver procedures should be developed to allow alternatives in obtaining services.

Recommendation No. 2

The responsibility for the maintenance of a professional service request for proposal system should be placed within the Division of General Services and Supply.

Implementation of Recommendation No. 1, requiring a request for proposal (RFP) system for professional services, will change and/or add new responsibilities to the Department of Administration. These responsibilities would best be performed within General Services and Supply.

This Division, on behalf of the Department of Administration, is the purchasing agent for the State in other aspects of State buying. There is often a direct relation between proposed professional service contracts and other purchasing practices of the State. Having the necessary purchasing knowledge and expertise, General Services and Supply would best be able to evaluate and approve professional service RFP's. On the other hand, when the requested service does not meet the established criteria of a professional service, the Division would best be able to recommend other purchasing alternatives they feel would properly meet departments' needs in accordance with the State's Purchasing Regulations.

In addition, since the Division presently provides competitive bidding services for the State, the mechanism already exists to absorb the new responsibilities of professional service RFP's with a minimal amount of expansion. Once the Department has developed and implemented a workable system, one position within General Services and Supply should be adequate to properly monitor the RFP activity.

AUDITOR'S COMMENTS

Initial implementation of these recommendations should include:

1. prequalification of vendors in professional fields commonly providing services for the State;
2. establishment of professional service vendor lists;
3. public notice of the State's RFP policy, requesting any interested parties to contact General Services and Supply for inclusion on vendor listings;
4. complete revision of chapter five, professional services, of the State Purchasing Regulations; and
5. notice to departments that RFP waivers will not be granted when poor planning is apparent, thereby requiring departments to better anticipate and properly plan their professional service needs.

Provisions of the new regulations should give the Division of General Services and Supply the authority to approve or deny:

1. RFP's prior to advertisement;
2. departments' evaluation of submitted proposals and selection of contractor; and
3. final contracts prior to execution.

The following are items we feel should be considered in the development of a professional service RFP system.

Request for Proposals

1. Specifications should include the method of award. All criteria to be used in the award process should be listed so that those submitting proposals will know the areas in which they will be judged. Weighted values should be included in the specifications.
2. The RFP should clearly state that the contract will not be awarded solely on the basis of cost.
3. RFP's should be advertised within a reasonable period of time so that the State can receive the best possible proposals.
4. Proposals should be sent directly to General Services and Supply for formal opening.

Evaluation of Proposals

1. Vendor proposals should be given to the requesting agency for evaluation.
2. No contract for professional services should be awarded solely on the basis of price. Evaluation should include qualifications, past performance, etc.
3. The notice to the successful vendor should specify that negotiation of specific terms of the contract may be required and that failure to agree to negotiated terms is cause for nonacceptance of the proposal.
4. If a proposal is selected that is other than the lowest dollar amount submitted, notice should be sent to vendors offering a lower dollar price giving the reasons for nonselection.

Final Contracts

1. Contracts should specify a person or position within the agency as the project director who is responsible for the proper administration of the project.
2. Following completion of the project, a contractor evaluation should be prepared by the agency and submitted to General Services and Supply.

Waivers

1. Approval or denial authority should rest solely with the Commissioner of Administration.
2. Waivers should not be granted when poor agency planning is apparent.

STATE OF ALASKA

DEPARTMENT OF ADMINISTRATION

OFFICE OF THE COMMISSIONER

JAY S. HAMMOND, GOVERNOR

POUCH C - JUNEAU 99811

August 24, 1978

Gerald L. Wilkerson
Legislative Auditor
Division of Legislative Audit
Pouch W
Juneau, Alaska 99811

Dear Mr. Wilkerson:

Thank you for giving me the opportunity to respond to your audit findings on professional service contracts.

You have recommended that the Department develop and implement regulations requiring departments to publicly request proposals for all professional service contracts. This department has prepared, to the degree we consider necessary, a separate section of the State Administrative Manual dealing with professional service contracts. Your recommendation is covered to the degree that we believe necessary in this addition to the manual.

In drafting the Fiscal Procedures Act, I believe that legislative intent of "fair play" was to assure all vendors of a homogeneous product an equal opportunity to engage in business with the State. This belief appears logical in light of the fact that the legislature specifically excluded non-homogeneous products, professional services, from the area of competitive bidding since each professional service is unique unto the type of service and the vendor.

Your report cites an example of a state agency advertising via newspapers for professional services. What your example does not contain, in the figures given in an effort to demonstrate savings from competitive bidding, is the culmination of the contract which included amendments to increase the cost.

It is my belief that the current system and that to be implemented under the new manual additions, parallels competitive bidding procedures. The request for proposal being the counterpart of the newspaper advertisement or invitation to bid, the review of submitted proposals being the counterpart of the bid opening, etc. In addition, to mandate competitive bidding as such may also conflict with the canons of ethics of certain professional groups which prohibit open price bidding in the solicitation of business.

Gerald L. Wilkerson
Page two

August 24, 1978

In your second recommendation you suggest that the contract review become a function of the Division of General Services and Supply. The area of professional service is specialized and regardless of where the review function is performed the ultimate authority and responsibility rests with the Commissioner of Administration. The review function will remain in the Division of Finance.

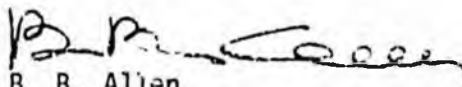
If professional contracts were negotiated and initiated by my department (such as purchase orders and leases) the function would be in the Division of General Services and Supply. Professional contracts, however, are negotiated by the agencies. The Department of Administration determines that prescribed guidelines and procedural safeguards are followed. This activity more closely resembles a pre-audit rather than a procurement function.

Also contained in the audit report is a section entitled, "Auditors Comments". Most of the points raised by the auditor are addressed in the new addition to the administrative manual. Comments that are not addressed in the manual are judgemental areas in which I feel you are requesting that my department make a value judgement on decisions and actions taken by other agencies thereby usurping their expertise in their appropriate areas.

Had the auditor assigned made an effort, other than the entrance conference, to talk to members of my staff to determine how contracts were being handled, areas of weakness in contract procedure and steps being taken to correct the deficiencies, most of his comments would not have had to have been made.

I believe the foregoing have been responsive to the issues raised by Mr. Welker. If I can be of additional assistance please let me know.

Sincerely,


B. B. Alien
Commissioner

APPENDIX B

ATTORNEY GENERAL OPINION

DEPARTMENT OF TRANSPORTATION
CONTRACTING AUTHORITY

economic costs of each alternative and its environmental and social effects;

(4) develop a comprehensive, long-range intermodal transportation plan for the state;

(5) study alternatives to existing modes of transportation in urban areas and develop plans to improve urban transportation;

(6) cooperate and coordinate with and enter into agreements with federal, state and local government agencies and private organizations and persons in exercising its powers and duties; . . .

(8) study alternative means of transportation in the state, considering the economic, social, and environmental impacts of each alternative; . . .

(b) The department may

(1) engage in experimental projects relating to available or future modes of transportation and any means of improving existing transportation facilities and service and communication;²

Since (a)(6) of AS 44.42.020 above gives the DOT the authority to enter into agreements with "private organizations and persons in exercising its powers and duties", AS 44.42.020 (a)(b) is the primary statutory source of the contracting authority of the DOT/PF.

There are, however, additional sources for DOT's authority to enter into contracts. By section 9(a) of Executive Order No. 39(19,7) the DOT/PF was vested with "the duties and powers formerly held by the Department of Public Works relating to planning, construction, maintenance and operation of transportation facilities . . ." Section 9(b) of Executive Order No. 39 vested in the DOT/PF all the duties and powers "formerly held by the Department of Highways relating to planning, construction, maintenance and operation of state transportation facilities, . . ." Finally, § 11 of Executive Order No. 39 provides that all references in the Alaska Statutes to the Department of Highways or to the Department of Public Works shall be read as references to the DOT/PF. § 11 reads as follows:

2. The definition of "transportation" and "transportation mode", pursuant to AS 44.42.900(3) "includes, but is not limited to, the following means of conveyance or travel, including their related or auxiliary structures, facilities or services: air, rail, water, highway and pipeline."

Sec. 11. All other references in the Alaska Statutes to the Department of Highways or the commissioner of highways, or to the Department of Public Works or the commissioner of public works, not expressly amended by or referred to in this Order shall be read as the Department of Transportation and Public Facilities or the commissioner of transportation and public facilities, respectively, in order to implement this Order.

The contracting authority of the old Department of Public Works and Department of Highways were found in AS 44.43.030 and AS 44.44.030 respectively.³ They provided as follows:

Sec. 44.43.030. Contracts for design and engineering services. If it is not feasible for the staff of the Department of Public Works to perform design and engineering services or surveys, the commissioner may contract with a private engineering firm for design and engineering services or surveys on a negotiated basis after reasonable public notice is given. The prices submitted or negotiated shall be available for public inspection upon request.

Sec. 44.44.030. Contracts for design and engineering services. If it is not feasible for the staff of the Department of Highways to perform design and engineering services or surveys, the commissioner may contract with a private engineering firm for design and engineering services or surveys on a negotiated basis after reasonable public notice is given. The prices submitted or negotiated shall be available for public inspection upon request.

Since 9(a) and 9(b) of Executive Order No. 39 gave to the DOT all powers formerly held by the Department of Public Works and Department of Highways, it follows that the DOT now possesses the same authority to enter into contracts that was formerly held by these two agencies pursuant to AS 44.43.030 and AS 44.44.030.

Pertinent sections of the Alaska Statutes relating to contracting authority and affected by § 11 of Executive Order No. 39 are AS 19.05.040(10) and AS 35.05.040(7) and (10). AS 19.05.040 has to do with the power of the old Department of Highways, while AS 35.05.040 sets out the powers of the old Department of Public Works. These sections read as follows:

Sec. 19.05.040. Powers of department. The department may . . .

3. AS 44.43 and AS 44.44 were repealed by § 13 of Executive Order No. 39.

(10) enter into contracts or agreements relating to highways with the federal government, municipalities, a political subdivision or with a foreign government, if the contract is approved by the federal government.

Sec. 35.05.040. Powers of department. The department may . . .

(7) enter into contracts or agreements relating to public works with the federal government and political subdivisions, and also enter into contracts with a foreign government if approved by the federal government;

(10) procure directly materials, labor and contractual services for planning, designing and constructing public facilities of the state.

Since § 11 of Executive Order No. 39 provides that all references in the Alaska Statutes to the Department of Highways and Department of Public Works are now to be read as the DOT/PF, it is clear that the DOT is vested with the contracting authority set out in AS 19.05.040(10) and AS 35.05.040(10) and AS 35.03.040(7) and (10).

So much for the analysis of the first part of your question. Now, the second part of the question will be considered: Does the DOA have the authority to override a decision by the Commissioner of the DOT/PF to enter into a particular contract? With the exception of a proposed contract with a state employee, it appears that the DOA has no such authority.⁴ The statutory duties of the DOA are set out in AS 44.21.020 and AS 37.05.220. AS 44.21.020 reads as follows:

Sec. 44.21.020. Duties of department. The Department of Administration shall

(1) (repealed by § 4 ch 97 SLA 1976.)

(2) make surveys and studies to improve administrative procedures, methods, and organization;

4. The authority of the DOA to "veto" a proposed contract with a state employee stems from the DOT's informal agreement with the DOA to submit the names of proposed contractors to the DOA for the purpose of establishing whether any contractor is a state employee. See Appendixes #2 and #3.

5. AS 44.21.160 sets out additional powers and duties of the DOA, but these have to do exclusively with the management of automatic data processing services.

- (3) keep general accounts;
- (4) approve vouchers and disburse funds for all purposes;
- (5) operate centralized purchasing and supply services, and necessary storerooms and warehouses;
- (6) allot space in state buildings to the various departments according to need and available space;
- (7) supervise telephone, mailing, messenger, duplicating, and similar services adaptable to centralized management;
- (8) administer the public employees' retirement system and teachers' retirement system;
- (9) administer a statewide personnel program, including central personnel services such as recruitment, examination, position classification, and pay administration;
- (10) administer the Alaska Pioneers' Homes;
- (11) administer and supervise a statewide automatic data processing program;
- (12) administer and maintain the recording system established under the laws of this state.

From the above, it is clear that AS 44.21.020 does not grant the DOA the authority to override a decision by the Commissioner of the DOT to enter into a particular contract.

The pertinent parts of AS 37.05.220 are as follows:

Sec. 37.05.220. Purchasing agent. The Department of Administration is the purchasing agent for the state. The department shall

- (1) purchase, rent, or otherwise provide for the furnishing of supplies, materials, equipment, or contractual services for all state agencies;
- (2) have power to authorize an agency to purchase directly certain specified supplies, materials, equipment, or contractual services under conditions and procedures prescribed in § 230 of this chapter;

Now it might be argued that a conflict exists between the statutes that grant contracting authority to the DOT and AS 37.05.220 (1) and (2). This argument, however, has little merit in light of the general rule that apparently conflicting statutes ought to be construed as, as far as is reasonably possible, to be in harmony with one another. See 82 C.J.S. Statutes, § 368 at 838, and Sands, Sutherland Statutory Construction, 4 ed, Vol. 2A, § 51.02, at 290. With this in mind, it should be noted that AS 37.05. 220 (1) says the DOA will "otherwise provide for the furnishing of supplies . . . or contractual services." The use of the word "otherwise" is instructive because its use indicates that if a state agency already has an independent statutory source of contracting authority, then the DOA ought not to be considered the contracting authority for such an agency. Similarly, AS 37.05.220(2) must be interpreted, not as a veto power, but as a power to authorize or delegate contracting authority (i.e. the power to enter into contracts) to state agencies, which possess no independent sources of authority to enter into contracts. Given this interpretation of (1) and (2), all other references to contracting services in AS 37.05.220 must be considered to be applicable only to those agencies who do not possess independent contracting authority.

If, however, one insists on maintaining that an irreconcilable conflict does exist between AS 37.05.220 and the statutes that grant contracting authority to the DOT, then a rule of law exists that resolves such a conflict. And that rule is this: If there is an irreconcilable conflict between two statutes, then the more recent statute controls since it is the later expression of the legislature. See Sands, Sutherland Statutory Construction, 4 ed., Vol. 2A, § 51.02 at 290 and 82 C.J.S., Statutes, § 368 at 838. If this rule is applied here, then since AS 35.05.040 (10), AS 44.44.030 and AS 44.42.020 were all enacted subsequent to AS 37.05.220 (1) and (2), it becomes clear that the statutes giving contracting authority to the DOT are controlling, and that AS 37.05.220 does not grant the DOA the authority to override a decision by the Commissioner of the DOT to enter into a particular contract.⁶

Conclusion:

Based on the above, it is clear that DOT/PF has statutory authority to enter into personal service contracts. It is equally clear that the DOA does not have any statutory authority to override a decision by the Commissioner of the

6. AS 44.42.020 was enacted in 1977; AS 35.05.040(10) was enacted in 1975; and AS 44.44.030 was enacted in 1963. AS 37.05.220 was first enacted in 1955 and was later amended in 1960.

March 23, 1979

DOT to enter into a particular contract. This is not to say that the DOA cannot, in an advisory capacity, make known its thoughts concerning the advisability of entering into a certain contract. It must be remembered, however, that in such a case the DOA's opinion is in the nature of advice and is not binding on the DOT/PF. It must be concluded, therefore, that the only situation when the DOA has the authority to "veto" a contractual agreement proposed by the DOT/PF is in the case where the proposed contractor is a state employee. And the source of this authority, it must be noted, is not statutory but rests on the agreement referred to above between the DOA and the DOT/PF.

JM:clc:eb

Enclosures

The executive order submitted to the legislature on January 20, 1975, transferring the state museum from the office of the governor to the Department of Education was designated as Executive Order No. 34 on the interpretation that the number should follow the last executive order actually perfected. This executive order was incorporated in the Alaska Statutes as AS 14.57.

EXECUTIVE ORDER NO. 37

Revisor's note (1976)

Executive Order No. 37, dated January 20, 1975, abolishing the Department of Economic Development and reassigning functions of that department, was submitted to the legislature on that date and withdrawn from legislative consideration by the governor on March 4, 1975. Essentially the same purposes were accomplished by ch. 207, SLA 1975 (HCS CSSB 225 [Finance]).

EXECUTIVE ORDER NO. 38

Revisor's note (1976)

Executive Order No. 38, transferring the state archives from the Department of Administration to the Department of Education, was submitted to the legislature on January 12, 1976. That executive order was disapproved by 1976 House Special Committee Resolution No. 2.

EXECUTIVE ORDER NO. 39

Under the authority of Article III, Section 23 of the Constitution of the State of Alaska, and in accordance with AS 24.30.130(b), I order the following:

Section 1. FINDINGS AND PURPOSE. As governor, I find that the diverse transportation needs of the state would best be served by the creation of a single department for the planning, study, development, management and operation of integrated, intermodal transportation systems. The purpose of this department is to evaluate, plan, design, construct, manage, operate and maintain all state transportation modes and systems, relying on analysis of the relative advantages of different modes and systems and considering their social, economic, and environmental consequences.

Secs. 2-7. Permanent laws. See Table of Disposition of Acts.

Uniform Rules
Alaska State Legislature

Sec. 8. All litigation, hearings, investigations and other proceedings pending under a law amended or repealed by this Order, or in connection with functions transferred by this Order, continue in effect and may be continued and completed notwithstanding a transfer or amendment or repeal provided for in this Order. Certificates, orders, and regulations issued or adopted under authority of a law amended or repealed by this Order remain in effect for the term issued, until revoked, vacated, or otherwise modified under the provisions of this Order. All contracts, rights, liabilities, and obligations created by or under a law amended or repealed by this Order, and in effect on the effective date of this Order, remain in effect notwithstanding this Order's taking effect. Records, equipment, and other property of agencies of the state whose functions are transferred under this Order shall be transferred commensurate with the provisions of this Order.

Sec. 9. (a) The Department of Transportation and Public Facilities is vested with the duties and powers formerly held by the Department of Public Works relating to planning, construction, maintenance and operation of transportation facilities, including state ferries, airports and water and harbor facilities, and for design and construction of buildings and appurtenant structures, and specifically including all powers and duties formerly held by the Department of Public Works under AS 02, AS 30.05, AS 30.15, AS 35, AS 41.20 and AS 44.65.

(b) The Department of Transportation and Public Facilities is vested with the duties and powers formerly held by the Department of Highways relating to planning, construction, maintenance and operation of state transportation facilities including state highways, roads, bridges, traffic signs and signals, the supervision and maintenance of state automotive and mechanical equipment, the control of outdoor advertising visible from state highways and all other duties and powers of the Department of Highways, and specifically including powers and duties formerly held by the Department of Highways under AS 19, AS 28.01, AS 28.05, and AS 44.57.

Sec. 10. The commissioner of transportation and public facilities shall replace the commissioner of highways on the State Geographic Board, the Alaska Toll Bridge Authority, and all other boards and commissions.

Sec. 11. All other references in the Alaska Statutes to the Department of Highways or the commissioner of highways, or to the Department of Public Works or the commissioner of public works, not expressly amended by or referred to in this Order shall be read as the Department of Transportation and Public Facilities or the commissioner of transportation and public facilities, respectively, in order to implement this Order.

Sec. 12. During Fiscal Year 1978, all appropriation items made for that fiscal year and prior years for the Department of Highways and

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the Department of Public Works may, upon approval of the governor, be appropriately transferred to implement the purposes of this Order.

Sec. 13. Permanent law. See Table of Disposition of Acts.

Sec. 14. This Order takes effect July 1, 1977.

JAY S. HAMMOND
Governor
State of Alaska

Uniform Rules
Alaska State Legislature

MEMORANDUM

R. E. Allen, Commissioner
Department of Administration

DATE November 3, 1977

FROM: Richard A. Holden
Deputy Commissioner
Department of Transportation
and Public Facilities

SUBJECT: Negotiated Contracts

The Commissioner of the Department of Transportation and Public Facilities has statutory authority to contract for professional services.

AS 35.05.040 - "The department may (10) procure directly materials, labor and contractual services for planning, designing and constructing public facilities of the state."

The Commissioner is required to provide adequate public notice for entering into a contractual agreement.

AS 44.43.030 "The Commissioner may contract with a private engineering firm for design and engineering services or surveys on a negotiated basis after reasonable public notice is given."

This requirement has been interpreted to mean a request for professional services must be advertised to insure that adequate notice is provided to interested parties. The department's selection procedure follows certain criteria. Projects using federal funds are required to follow F.H.W.A. or F.A.A. guidelines. Selection for projects using state funds follow an evaluation procedure which utilizes a point system applied to all proposals by a recommending committee with a minimum of three members. It is obviously impossible to remove all subjectivity from any selection procedure. However, the use of a point system tends to minimize personal prejudices. When dealing with state funded projects, the department currently requires the submission of a minimum of three names when the probable contract amount will exceed \$20,000.

The department's contract forms are developed in conjunction with the Department of Law.

The Department of Administration has a responsibility to insure that personal services contractors are not in fact employees within the definition of the Internal Revenue Service. You have also expressed concern that proposed work receive adequate exposure within the professions. We believe that OQB Department's procedures provide for such exposure.

In the light of the above, we would propose to modify the process delineated in your memo of September 29, 1977. We propose the following:

1. Requests for proposals for professional services for Department of Transportation and Public Facilities will be advertised.
2. Recommendations to the Commissioner will follow either Departmental or superceding Federal procedure.
3. Following Commissioner's approval, your Authority to Enter Contract Negotiations form will be submitted to the Department of Administration, Division of Finance. This form will list three firms when the proposed contract will exceed \$20,000.
4. Following submission of the Authority form, Department of Transportation and Public Facilities will proceed to negotiate the contract with the successful proposer. Contracts will contain a clause which declares the contract void should your Division of Finance find that by Internal Revenue Service definition, the contractor is, in fact, a State employee. Given the nature of our work, we are confident that the possibility of such a ruling is extremely remote.
5. Division of Finance will return the Authority form after analysis. Should your analysis reveal an Internal Revenue Service violation, the contract will be voided or negotiations terminated.

We feel that the above procedure will adequately discharge your statutory responsibility as well as that of this department.

RAH:ora

Richard A. Holden
Deputy Commissione.
Department of Transportation
& Public Facilities

DATE: Nov 18, 1977

FILE NO.

TELEPHONE NO.

FROM: Commissioner B. B. Allen
Department of Administration

SUBJECT: Negotiated Contracts

My staff and I have reviewed your November 3, 1977 memo on subject and find your recommendations acceptable.

Specifically:

1. Requests for proposals for professional services for Department of Transportation and Public Facilities will be advertised.

2. Recommendations to your Commissioner will follow either Departmental or superseding Federal procedure.

3. Following Commissioner's approval, an Authority to Enter Contract Negotiations form will be submitted to the Department of Administration, Division of Finance. This form will list three firms when the proposed contract will exceed \$20,000.

4. Following submission of the Authority form, Department of Transportation and Public Facilities will proceed to negotiate the contract with the successful proposer. Contracts will contain a clause which declares the contract void should our Division of Finance find that by Internal Revenue Service definition, the contractor is, in fact, a State employee.

5. Division of Finance will return the Authority form after analysis. Should our analysis reveal an Internal Revenue Service violation, the contract will be voided or negotiations terminated.

cc: Division of Finance
Division of General Services
& Supply

Division of Finance	
Post Card Unit	
Administrative Services	
Accounting	
Construction	
Design	
General Services	
Information Systems	
Legal Services	
Planning & Development	
Public Works	
Records Management	
Security	
Telephone Services	
Training	
Transportation	
Utilities	

State Administrative Manual

§ 8146 Rev Nov 1980

Review: Harry, etc of
at Lila Dyer
Cherry & Day
Editors

"In addition to comply with other guidelines in this part of the manual, whenever an agency contemplates the negotiation of a contract in the probable amount of \$20,000 or more it must comply with the following

1. Preparation of a program review memorandum of funds have not been budgeted. Section 8128
2. Preparation of a formal request for proposal. Section 8142
3. Solicitation of proposals by newspaper advertising in addition to solicitation by other means.
4. Utilization of a review committee and a point system to evaluate proposals. Section 8144

Wm W
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... For most contracts in \$0 to \$20,000 and over, if an agency does not comply with the above requests, it must explain its justification and request concurrence of the Dept of Administration.

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

PART I

I. REQUEST

Bill/Resolution No. CS HB 546

Title An Act Relating to State Contract for Professional Services

Requested by House State Affairs

Date May 19, 1981

II. FISCAL DETAIL

Agency Affected Department of Administration -

Program Category Affected Centralized Administration

BRU, Program, or Subprogram(s) Affected Accounting

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES		88.3	95.4	103	111.2	120
200 TRAVEL		1.0	1.1	1.2	1.3	1.4
300 CONTRACTUAL		288.4	52.6	56.8	61.4	66.3
400 COMMODITIES		2.0	2.2	2.3	2.5	2.7
500 EQUIPMENT		14.0				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		393.7	151.3	163.3	176.4	190.4

FUNDING (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
GENERAL FUND		393.7	151.3	163.3	176.4	190.4
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
FULL TIME		3	3	3	3	3
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

Contractual

Computer Program Development:

Register Development

Evaluation System/Form/Tracting System

Application Form

On-line Cap

\$160.0

Printing of Labels

4.0

Printing of Applications

1.0

(continued)

IV. DATE May 19, 1981

PREPARED BY George Elgee

AGENCY Administration

PHONE 465-2250

Original: Legislative Finance

cc: Budget and Management

Prime Sponsor (First Legislator Named) Rep. Miller

Office of the Governor Keith Specking

33-001 (Rev. 12/30)

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

PART II

I. REQUEST

Bill/Resolution No. CS HB 546
Title An Act Relating to State Contracts for Professional Services
Requested by House State Affairs Date May 19, 1981

II. FISCAL DETAIL

Agency Affected All Agencies
Program Category Affected All
BRU, Program, or Subprogram(s) Affected All

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL		856.0	941.6	1,035.8	1,139.4	1,253.4
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		856.0	941.6	1,035.8	1,139.4	1,253.4

FUNDING (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
GENERAL FUND		856.0	941.6	1,035.8	1,139.4	1,253.4
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

Advertisement \$700,000
(\$50 per ad) x (3 ads) x (3 papers -- Juneau, Anchorage, Fairbanks) x 2000 contracts
Less (\$100,000 spent this year) + (Sole Source Contracts -- \$100,000)

Letter of Intent and Postage 56,000
18¢ x 100 x 2000 = \$36,000 postage
10¢ x 100 x 2000 = \$20,000 printing

RFP Printing and Mailing 100,000
EST based on multi-page RFP

\$856,000

IV. DATE May 19, 1981

PREPARED BY George Elgee
AGENCY Department of Administration
PHONE 465-2250

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named) Rep. Miller
Office of the Governor Keith Specking

Contractual

Procedures:

Training in procuring contracts and operating
within new regulations
Re-write of Existing Procedures
Administration Code Drafts
Administration Code Public Hearings \$100.0

Advertising:

Professional Listing 2.4

Services associated with required positions --
phone, office space, computer terminal rental, etc. 11.0
\$288.4

1	POSITION TITLE Clerk Typist III				RANGE/STEP 8B	BARG. UNIT. G	LOCATION Juneau	GOV	APPROV	DISAPP.
2	TYPE OF POSITION PFT	STAFF MONTHS 12	RP No.	PCN No.	PRIORITY		FORM 12 PAGE/LINE	LEG		
3	TYPE OF EXPENDITURE			AMOUNT		JUSTIFICATION: As sole administrative support to the Accountant III and Accounting Clerk III this position will be responsible for maintaining records central over all incoming correspondence. A substantive knowledge of documents and clerical processes is required to perform these duties independently. Procedures and directions governing work are available in manuals which may require considerable interpretation or extensive search to locate applicable guidelines. Accuracy is required, since work is only occasionally checked, and errors may cause significant disruption in the work cycle and are costly and time consuming to correct. Independent operation of a magnetic tape selectric typewriter and/or regular and significant use of a composer system with responsibility for final proofing of content, format, and layout may be involved, especially in the preparation of reports of contractor's activity. Person-to-person contacts will involve the exchange, collection, or furnishing of non-routine and sensitive information requiring interpretation during the preparation of Regulation and Procedures for State agencies and the public.				
	1	2	3							
4	PERSONAL SERVICES:									
	SALARY	1,433/m.o.	17.196							
5	BENEFITS	.1579	2,715							
6	FICA	.0613	1,054							
7	HEALTH INS.	150 x 2	1,800							
8	TOTAL PERSONAL SERVICES	01	22.8							
9	TRAVEL	02								
10	CONTRACTUAL	03	4.0							
11	COMMODITIES	04	1.0							
12	EQUIPMENT	05	10.8							
13	OTHER									
14	TOTAL COST		38.6							
	CODE	FUNDING SOURCE								
15		FED RCPTS. 1002								
16		GF MATCH. 1003								
17	00	GEN. FUND 1004		38.6						
18		I-A RCPTS. 1005								
19		PGM RCPTS 1006								
20		OTHER								
21	CONTINUATION									
22	ADDITION			FOR B&M USE ONLY						
4A KEY NUMBER				COLUMN NO.						

AGENCY Administration

PROGRAM Centralized Administrative Services

BRU _____

13 REQUEST FOR NEW POSITION.

COMPONENT _____

Page _____ of _____

REVISED DATE _____

FY 82

1	POSITION TITLE Accounting Clerk III				RANGE/STEP 10B	BARG. UNIT. G	LOCATION Juneau	GOV.	APPROV.	DISAPP.				
2	TYPE OF POSITION PFT	STAFF MONTHS 12	RP No.	PCN No.	PRIORITY		FORM 12 PAGE/LINE	LEG.						
3	TYPE OF EXPENDITURE			AMOUNT		JUSTIFICATION: Under general supervision performs the highest level of clerical accounting maintenance duties involving responsibility for the processing and maintenance of a variety of financial and statistical documents, records, ledgers and procedures, for a specialized accounts maintenance function. This specialized function (Professional Services Contracts Tracking System) requires the incumbent to perform the following professional service contract related tasks: <ol style="list-style-type: none"> 1. Pre-audit a variety of expenditure and encumbrance documents; 2. Maintain and adjust summary ledgers, and individual accounts; 3. Determine liability for payments due the State (prepare supporting documentation and billings for collection or legal action); 4. Prepare expenditure reports derived from records of accounts, projects, and funds; 5. Computes ratio of expenditures; and, 6. Apply statutory provisions, and rules and regulations, in accomplishing work. 								
	1	2	3											
4	PERSONAL SERVICES:													
	SALARY	1,613/mo	19,356											
5	BENEFITS	.1579	3,056											
6	FICA	.0613	1,187											
7	HEALTH INS.		1,800											
8	TOTAL PERSONAL SERVICES			01	25.4									
9	TRAVEL			02										
10	CONTRACTUAL			03	3.0									
11	COMMODITIES			04	.5									
12	EQUIPMENT			05	1.8									
13	OTHER													
14	TOTAL COST				30.7									
	CODE	FUNDING SOURCE												
15		FED RCPTS. 1002												
16		GF MATCH. 1003												
17	100	GEN. FUND 1004			30.7									
18		I-A RCPTS. 1005												
19		PGM RCPTS 1006												
20		OTHER												
21	CONTINUATION													
22	ADDITION													
				FOR B&M USE ONLY										
4A KEY NUMBER _____				COLUMN NO _____										

AGENCY Administration PROGRAM Centralized Administrative Services

13 REQUEST FOR NEW
POSITION.

BRU _____
COMPONENT _____

Page _____ of _____

REVISED
DATE _____

FY 82

1	POSITION TITLE Accountant III				RANGE/STEP 18A	BARG. UNIT. G	LOCATION Juneau	GOV	APPROV	DISAPP
2	TYPE OF POSITION PFT	STAFF MONTHS 12	RP No.	PCN No.	PRIORITY		FORM 12 PAGE/LINE	LEG		
3	TYPE OF EXPENDITURE			AMOUNT		<p>JUSTIFICATION: This position is needed so that full-time support can be given to professional service contracts.</p> <p>CS for HB 546 requires the State to exercise a more aggressive role in the solicitation, negotiation, administration and evaluation of professional service contracts. The incumbent of this position will be a contract specialist and a resource person to other agencies.</p> <p>This position will be responsible for:</p> <ol style="list-style-type: none"> Administering the Professional Service Contract Tracking System (PSCTS) -- a new computer system. Reviewing ATNS and PSCS to determine compliance with the provisions of AS 36.98 and regulations adopted thereunder. Preparing drafts of new materials and revisions of sections of the State Administrative Manual and regulations pertaining to professional service contracts. Coordinating the PSCTS with the Professional Services Contractors Register -- another new computer system. Advising the Commissioner of Administration and others in the Department of Administration on matters pertaining to professional contracting in general and on specific problem areas. Assisting agencies in their day-to-day activities pertaining to the solicitation, negotiation, administration and evaluation of professional service contracts. 				
	1	2	3							
4	PERSONAL SERVICES:									
	SALARY	2,640	31,680							
5	BENEFITS	.1579	5,002							
6	FICA	.0613	1,942							
7	HEALTH INS.	150 x 12	1,800							
8	TOTAL PERSONAL SERVICES	01	40.4							
9	TRAVEL	02	1.0							
10	CONTRACTUAL	03	4.0							
11	COMMODITIES	04	5							
12	EQUIPMENT	05	1.8							
13	OTHER									
14	TOTAL COST		47.7							
	CODE	FUNDING SOURCE								
15		FED RCPTS. 1002								
16		GF MATCH. 1003								
17		GEN. FUND 1004		47.7						
18		I-A RCPTS. 1005								
19		PGM RCPTS 1028								
20		OTHER								
21	CONTINUATION		FOR B&M USE ONLY							
22	ADDITION									
4A KEY NUMBER		COLUMN NO.								

AGENCY Administration PROGRAM Centralized Administrative Services

13 REQUEST FOR NEW POSITION.

BRU _____

COMPONENT _____

Page _____ of _____

REVISED DATE _____

FY 82

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
 Bill/Resolution No. CS for House Bill 546 (Judiciary)
 Title Relating to contracts for professional services
 Requested by State Affairs Date 4-05-82

II. FISCAL DETAIL
 Agency Affected All
 Program Category Affected All
 BRU, Program, Or Subprogram(s) Affected All
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL	700.0	756.0	816.5	881.8	952.3	1,028.5
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	700.0	756.0	816.5	881.8	952.3	1,028.5

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND	700.0	756.0	816.5	881.8	952.3	1,028.5
FEDERAL FUNDS	0	0	0	0	0	0
OTHER (Specify Source)	0	0	0	0	0	0

POSITIONS

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
FULL TIME	0	0	0	0	0	0
PART TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

(\$50 per ad) x (3 ads) x (3 papers - Juneau, Anchorage, Fairbanks)
 2,000 contracts less - (\$100,000 spent in FY 81) less \$100,000 for
 Sole Source Contracts.

\$700,000

This is not a request for funds. This analysis indicates the estimated fiscal impact which will have to be absorbed by all State agencies.

IV. DATE 4-09-82 PREPARED BY George Elgee
 AGENCY Administration
 Original: Legislative Finance PHONE 465-2250
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)
 33-001 (Rev. 12/81)

