

ALASKA LEGISLATURE COMMITTEE FILES 1983 - 1984 8672

2702 SLC HB 211 (FILE 2) - (FILE 3)

290



# CITY OF DILLINGHAM

P.O. BOX 191

DILLINGHAM, ALASKA 99576

TELEPHONE (907) 842-5211 or 842-5212

March 1, 1984

TO: Legislative Affairs  
(For transmission to the State Legislative Delegation as indicated)

SUBJECT: PENDING LEGISLATION BEFORE HOUSE AND SENATE

✓ ATTENTION: SENATORS FAHRENKAMP, MULCAHY AND REP. HERRMANN

Subject: SB 375, Land Disposal and Management

The City of Dillingham supports your legislation, particularly that portion that requires the State to comply with local subdivision ordinances in connection with its land disposal program.

ATTENTION: SENATORS KERTTULA, MOSS & MULCAHY AND REP. HERRMANN

Subject: SB 361, Impact Payments

The City of Dillingham supports SB 361 regarding impact payments to municipalities. State owned land that requires services by the municipalities should be recognized and municipalities compensated accordingly.

✓ ATTENTION: SENATOR MULCAHY, REPRESENTATIVES COWDERY, FURNACE, RINGSTAD, UELING, WENDTE, PESTINGER, HERMANN

Subject: SB 67

The City of Dillingham is opposed to SB 67. We are concerned that the impacts that could be transferred from either the State and/or the utility to the municipality in the future are potentially very costly and could occur without the municipality having control over the design and engineering aspects which in turn relate to the costs that the municipality would have to bear concerning relocations. This appears to be very significant in smaller rural communities such as Dillingham that are facing rapid growth and will experience a number of major utility relocations over the next few years. Further complicating the problem in our own city is that Main Street, the major street into the City center, is a State route. Additional information on this bill and its impacts on various communities should be carefully studied before action taken.

TO: Legislative Affairs  
SUBJECT: PENDING LEGISLATION BEFORE HOUSE AND SENATE  
Page two

ATTENTION: SENATOR MULCAHY AND REPRESENTATIVE HERRMANN

Subject: SB 255, Payment of Attorney

The City of Dillingham is opposed to the municipality being burdened with attorney and legal costs associated with indigents charged with municipal offenses. It appears that the effect of such a law, particularly in small communities such as Dillingham that have large numbers of visitors from surrounding villages could be saddled with such extreme legal costs that the end effect would be a complete breakdown in the ability for local police to enforce municipal codes. We feel the system currently in effect to be the best for law and order in small and rural Alaskan communities.

ATTENTION: SENATOR MULCAHY AND REPRESENTATIVE HERRMANN

Subject: HB 474, Use of Grant Money Interest

The City of Dillingham is opposed to this bill, which completely eliminates discretionary authority of the grant recipient concerning interest on money earned from its investment policies on grant monies.

ATTENTION: SENATORS ELIASON AND MULCAHY AND REP. HERRMANN

Subject: HB 211, Professional Services Contracts

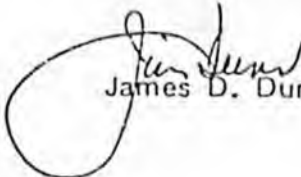
The City of Dillingham is opposed to HB 211. Any legislation which prohibits common sense judgments and discretion as it relates to project costs is not in the best interest of either the State or local government. This bill smacks of an effort by some professional architects, engineers and land surveyors to provide through legislation a system that would legally allow their costs to rapidly escalate and force a municipality to make a selection without benefit of cost information. The consequence seems obvious; more, bigger and better will prevail within the selection process, but can it be afforded. This is especially true in rural Alaska where often you have minimal competition for small projects that can't afford excessive project percentages to be spent on design and engineering. When you combine this bill and its effects with the already overly-strict interpretation and enforcement of the Little Davis Bacon Act by the Dept. of Labor, the return on contract dollars will be less and less.

ATTENTION: SENATOR MULCAHY AND REPRESENTATIVE HERRMANN

Subject: HB 581, Senior Citizen Program Supplementals

The City of Dillingham supports the passage of this bill.

FOR THE CITY OF DILLINGHAM

  
James D. Dunn, City Manager

IN THE HOUSE

BY THE LABOR AND  
COMMERCE COMMITTEE

SENATE CS FOR CS FOR HOUSE BILL NO. 211 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to contracts for architectural, engineering, and land surveying services; and providing for an effective date."

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

\* Section 1. AS 36.98.040 is amended to read:

Sec. 36.98.040. EVALUATION OF PROPOSALS AND AWARD OF CONTRACTS.


(a) After the responses are submitted, the state agency shall evaluate them. The evaluation shall consist of assigning point values to factors considered by the agency in evaluating each proposal. Each proposal received must be evaluated using the same factors as those set out in the request for proposal. In evaluating proposals including architectural, engineering, or land surveying professional services, the agency may not assign more than one half of the total possible point values for factors related to cost or price of the services.



## Dept. of Transportation & Public Facilities

# Position Paper

**BILL NO:** SCSCSHB211(L&C)

**APPROVED:**   
R. G. Knapp  
Commissioner

**TITLE:** "An Act relating to contracts for architectural engineering, and land surveying services; and providing for an effective date."

**DATE:** May 21, 1984

This Committee substitute for the HB 211 requires the Department of Transportation and Public Facilities (DOT&PF) to select Architects, Engineers, and Land Surveyors, based upon criteria currently utilized by the Department. The Department has no specific problem with the contract selection procedures proposed. Likewise, there will be little impact on the Department's current contracting procedures with passage of this bill.

The Department's main concern relates to the loss of Departmental flexibility once our present procedure has been written into law (as opposed to the Department policy and procedure manuals). The wording in the bill could allow for a broad range of interpretations. The less than specific wording of the bill could increase the number of objections and appeals leveled against the Department as a result of its personal services selection process. Project delays, costs for legal involvement, and more complicated contracting procedures may result.

The Department recommends one change on the draft SCSCSHB211(L&C). On page one, line 17, delete..."after consideration of the estimated value of the services to be rendered, and the scope, complexity, and professional nature of the services."



## Dept. of Transportation & Public Facilities

# Position Paper

BILL NO:CS for HB 211

**TITLE:** An Act relating to contracts for architectural, engineering, and land surveying services; and providing for and effective date.

APPROVED:

DATE:

*R. S. Knapp*  
R. S. Knapp  
Commissioner  
5/9/84

The Department of Transportation and Public Facilities acknowledges the merits of the argument that low bid selection for professional design services could lead to undesirable cost and operating efficiency problems with the facilities constructed as a result of these designs. In certain cases, the practice of bidding could put the public in a position of paying for facilities which are not in the best interest of the public even though substantial sums appear to have been "saved" during the design phase. The Department supports the concept of flexible selection criteria enabling the Department to adjust the number and weighting of various factors for selection, including cost to design. There remain numerous classes of design professional contracts wherein price consideration can continue to be of value to the state (architectural reviews for code compliance, projects which have a well defined design and construction scope, and various sorts of consulting services).

The Department believes that the major intent of the proposed legislation could be accomplished, and our concerns alleviated, if the language of the bill included a limitation on the extent to which price could be considered for design oriented contracts. The State wishes to include price as a factor in selecting AE&LS' services when, in the judgement of the State, the scope, nature, and amount of services required are sufficiently defined so as to reasonably enable proposing firms or individuals to compete with a substantially equal understanding and/or interpretation of the services required.

Suggested language change by DOT&PF

CS

\* in/HB 211

(e) Notwithstanding any other provisions of this section, the State may include price as a factor in selecting AE&LS' services when, in the judgement of the State, the scope, nature, and amount of services required are sufficiently defined so as to reasonably enable proposing firms or individuals to compete with a substantially equal understanding and/or interpretation of the services required.


In order to include price as a factor in selection, the State must have at least one person involved in the evaluation of proposals who is registered in the State of Alaska in the primary Architectural, Engineering or Land Surveying discipline of the contract.



## Dept. of Transportation & Public Facilities

# Position Paper

**BILL NO:** CS for HB 211

**APPROVED:**   
R. J. Knapp

Commissioner  
4/27/84

**TITLE:** An Act relating to contracts for architectural, engineering, and land surveying services; and providing for and effective date.

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The Department believes that the major intent of the proposed legislation could be accomplished, and our concerns alleviated, if the language of the bill included a limitation on the extent to which price could be considered for design oriented contracts. For example, the bill could state that "the consideration of price for design services may not exceed x% of the scoring formula used in evaluating proposals."

contractors that it proposes to enter into a contract for professional services. (§ 5 ch 144 SLA 1982)

Editor's notes. — As enacted, this section contained subsections (g) and (h). These provisions however, were renumbered as AS 36.98.035(a) and (b) by the revisor of statutes pursuant to AS 01.05.031(b).

**Sec. 36.98.035. Standard overhead rate.** (a) If a state agency has established a standard overhead rate applicable to contracts for services from the state agency, the standard overhead rate shall be included in a proposal for a contract submitted under AS 36.98.030(a).

(b) As used in this section, "standard overhead rate" means a charge established for services from a state agency that is designed to compensate the state agency for administration and support services incidentally provided with the professional services. (AS 36.98.030(g), (h); § 5 ch 144 SLA 1982)

Editor's notes. — This section was enacted as AS 36.98.030(g) and (h) but was renumbered by the revisor of statutes pursuant to AS 01.05.031(b).

**Sec. 36.98.040. Evaluation of proposals and award of contract.** (a) After the responses are submitted, the state agency shall evaluate them. The evaluation shall consist of assigning point values to factors considered by the agency in evaluating each proposal. Each proposal received must be evaluated using the same factors as those set out in the request for proposal.

(b) The contract shall be executed by the contractor and the project director for the contracting agency and be approved by the head of the contracting agency or the designee of the head of the contracting agency. If a contract is made by a board or commission, execution of the contract on behalf of the board or commission shall be authorized by the board or commission.

(c) A contract subject to this chapter shall be submitted to the commissioner for review and approval and, if approved, is effective from the date of the approval. A state agency must clearly provide in the request for proposal that the state is not obligated to perform under the contract until the approval required by this subsection is granted.

(d) A contract award under this chapter shall contain:

- (1) the amount of the contract stated on its first page;
- (2) the date for the work to begin;
- (3) the date by which the work must be completed;
- (4) a description of the services to be performed under the contract;

and

(5) a certificate by the project director for the contracting agency, the head of the contracting agency, or his designee that sufficient funds are available in an appropriation to be encumbered for the amount of the contract. (§ 5 ch 144 SLA 1982)

*added wording would be inserted here*

Editor's notes. — As enacted, this section contained a subsection (e). The provisions of that subsection, however, were renumbered as AS 36.98.045 by the revisor of statutes pursuant to AS 01.05.031(b).

**Sec. 36.98.045. Review and approval by Department of Law.** If a contract contains terms that are not provided in a state standard form contract or if the standard terms are deleted or modified by other terms that are not standard, the contract must be reviewed by the Department of Law and approved as to form. The review and approval required by this section must be completed before approval of the award of the contract by the commissioner under AS 36.98.040(c). (AS 36.98.040(e); § 5 ch 144 SLA 1982)

Editor's notes. — This section was enacted as AS 36.98.040(e) but was renumbered by the revisor of statutes pursuant to AS 01.05.031(b).

**Sec. 36.98.050. Contract administration.** (a) When a state agency has entered into a professional services contract, that agency is responsible for the diligent administration and monitoring of the performance of the provisions of the contract.

(b) When a professional services contract is completed, the contracting state agency shall evaluate the performance of the contractor under the contract and shall report on and evaluate the use of the final product of the contract. A copy of the report and evaluation prepared under this subsection shall be transmitted to the commissioner and shall be retained by the commissioner for as long as the commissioner is required to maintain copies of completed contracts. (§ 5 ch 144 SLA 1982)

**Sec. 36.98.060. Filing of proposal and contract.** A copy of each contract and the response to the request for proposal upon which the contract was awarded must be filed with both the commissioner and the contracting state agency and is open for public inspection. The request for proposal and the name and address of each person who submitted a response to it must also accompany the filed copies. (§ 5 ch 144 SLA 1982)

**Sec. 36.98.070. Regulations governing contract procedures.** The commission shall, by regulation adopted in accordance with the Administrative Procedure Act (AS 44.62), establish the manner and form by which state professional services contracts shall be prepared and processed, including, but not limited to, a review process for persons aggrieved under this chapter. (§ 5 ch 144 SLA 1982)

**Sec. 36.98.080. Definitions.** In this chapter

(1) "commissioner" means the commissioner of administration; except that for contracts entered into by the Department of Transportation and Public Facilities, "commissioner" means the commissioner of transportation and public facilities;

Offered: 4/14/83  
Referred: Judiciary

Original sponsors: Furnace, Abood,  
Barnes, et al

*Recommend Changes -*

BY THE LABOR AND  
COMMERCE COMMITTEE

1 IN THE HOUSE

*by John Scribner*

2

CS FOR HOUSE BILL NO. 211 (L&C) am

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IN THE LEGISLATURE OF THE STATE OF ALASKA

4

THIRTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

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For an Act entitled: "An Act relating to contracts for architectural,

7

engineering, and land surveying services; and provid-

8

ing for an effective date."

9

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

10

\* Section 1. AS 36.98 is amended by adding a new section to read:

11

Sec. 36.98.041. ARCHITECTURAL ENGINEERING AND LAND SURVEYING

12

CONTRACTS. (a) Notwithstanding the provisions of AS 36.98.010(3) and

13

AS 36.98.040, the state shall select persons or firms for the perfor-

14

mance of architectural, engineering, or land surveying services and

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award contracts for these services at fair and reasonable prices only

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on the basis of demonstrated competence and qualification for the type

17

of professional services required.

18

(b) In awarding a contract for the services of an architect,

19

engineer, or land surveyor registered under AS 08.48 the state shall

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select the person or firm best qualified to perform the desired work

21

on the basis of demonstrated competence and professional qualifica-

22

tions. An attempt shall be made to negotiate a contract with the

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person or firm selected at a price that is fair and reasonable.

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(Before selection and negotiaticn) the state may not request or con-

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sider any statement, bid or estimate of fees or charges for architec-

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tural, engineering, or land surveying services for the proposed proj-

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ect or request any other submission or action that would violate

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AS 08.48 or a regulation adopted under AS 08.48.

29

(c) Subject to the criteria in (b) of this section, a particular

*This is the way it should be  
John Scribner*

1 procedure for the selection of architects, eng<sup>g</sup>rs, or land survey-  
2 ors or for the award of contracts is not required. The state may  
3 publicly rank proposals or offers received in response to a request  
4 for services. The state may attempt to negotiate a fair and reason-  
5 able price with the contractor best qualified to perform the desired  
6 work and to negotiate a fair and reasonable price with other contrac-  
7 tors, in order of ranking, if negotiations with the first-ranked  
8 contractor are not successful. The state may reject all or part of a  
9 proposal.

10 (d) This section does not apply to contracts awarded in an emer-  
11 gency if the person responsible for execution of the contract on  
12 behalf of the state certifies in writing that an emergency exists.

13 (e) In this section "state" includes political subdivisions of  
14 the state and agencies of the state and its political subdivisions.

15 \* Sec. 2. AS 36.98.080 is amended by adding a new paragraph to read:

16 (6) "emergency" means a condition of imminent danger to the  
17 public health, safety or welfare or a condition that requires immedi-  
18 ate action to prevent harm to a person or property.

19 \* Sec. 3. AS 37.05.240 is amended by adding a new subsection to read:

20 (c) A contract for architectural, engineering, or land surveying  
21 services shall be awarded in accordance with AS 36.98.041.

22 \* Sec. 4. AS 37.05.230 is amended by adding a new paragraph to read:

23 (1) requests for and acceptance of bids or other proposals  
24 for architectural, engineering, or land surveying services shall  
25 comply with AS 36.98.041.

26 \* Sec. 5. This Act applies to requests for bids or proposals for archi-  
27 tectural, engineering, and land surveying services issued after the effec-  
28 tive date of this Act.

29 \* Sec. 6. This Act takes effect immediately in accordance with

1 AS 01.-10.070(c).

2

Introduced: 2/11/83  
Referred: Labor & Commerce  
and Judiciary

Phil Holdsworth

as  
proposed  
by

BY FURNACE, ABOOD, BARNES,  
COWDERY, FLOOD, HURLBERT,  
MARTIN, PHILLIPS, RINGSTAD,  
UEHLING AND HAYES

1 IN THE HOUSE

2

HOUSE BILL NO. 211

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

THIRTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

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ect or request any other submission or action that would violate

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1 procedure for the selection of architects, engineers, or land survey-  
2 ors or for the award of contracts is not required. The state may  
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25 comply with AS 36.98.041.

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27 tectural, engineering, and land surveying services issued after the effec-  
28 tive date of this Act.

29 \* Sec. 6. This Act takes effect immediately in accordance with AS 01.-

1 10.070(c).

tion Trades Council, vows that the trades "will be as vociferous as last year" in trying to defeat the bill.

Meanwhile, open-shop contractors elsewhere are challenging other little Davis-Bacon laws, spurred on by court approval of changes in the federal law. They successfully supported an amendment to the prevailing wage law in Colorado, and are involved in two lawsuits

to be heard soon in Illinois' supreme court challenging that state's law.

And in Florida, which repealed its little Davis-Bacon law in 1979, the Dade County Commission wrecked a proposed plan to pay prevailing wages to workers on county construction projects when it learned that the change would have increased construction costs by \$60 million over the next six years. ■

## Appeals court rejects worker wage-law suit

Although there is a split among federal appeals courts, another decision has been added to the growing number that say workers cannot sue employers that allegedly fail to pay prevailing wages required under the Davis-Bacon Act.

The U.S. Court of Appeals in Philadelphia recently ruled that the statute—which covers all federally-funded or assisted construction—does not give individuals a right to sue privately. The court explained that only the federal government can enforce the law.

The ruling involved a dispute between an insulator worker and Heat Control Co. over the prevailing-wage rate for work at a Veterans' Administration hospital in Lyons, N.J.

While the U.S. Court of Appeals in Chicago okayed such suits in a 1977 ruling, its reasoning was not followed by the Philadelphia court nor those in other circuits. In a 1980 ruling, the New Orleans appeals court affirmed a lower court decision dismissing a suit brought by two workers on a federally-funded project. It also held that Congress intended violations of the Davis-Bacon Act to be enforced through administrative action, not private lawsuits. ■

## Duval to replace Raftery as painters' union head

S. Frank Raftery, who headed the International Brotherhood of Painters and Allied Trades for two decades, is leaving that position June 3 for health reasons. Raftery will be succeeded by William A. Duval, a union vice president for 12 years who is not expected to bring dramatic changes to the union's management.

Raftery put strong emphasis on occupational health and safety during his presidency. He helped set up a national committee on such issues in the early 1970s and pressed a number of battles on toxic materials. In 1975, for example, the painters fought successfully for removal of asbestos from drywall taping compounds and later convinced states to require special training for painters working with toxic substances.

Raftery also will be remembered as a powerful advocate for wage increases and more extensive pension benefits.

Despite his efforts, the painters, like other building trade unions, have lost ground to the open shop. According to Duval, this problem will be a first priority in future bargaining, but he says the painters will also resist wage concessions. ■

## Electrical rules irk industry

The Occupational Safety and Health Administration held hearings last week on proposed changes to its safety standards for electrical construction, only to hear unhappy industry critics call for a major rewrite.

OSHA first proposed the changes last October in an effort to simplify its safety rules, which now incorporate by reference the entire National Electrical Code. However, the current rules are based on the 1971 version of the code, even though it has been updated several times since then, most recently this year. According to OSHA, the proposed rules are written in performance terms so that they would not include what it calls "superfluous detailed specifications" contained in the code.

"We feel that the current electrical standards, adopting as they do by reference a national consensus electrical code which is over 10 years old, do not provide adequate safety guidance to ei-

ther employers or employees," said OSHA safety standards director Barry J. White at the hearing. White pointed out that periodic rulemaking by OSHA to adopt code updates is not practical, while defending the agency's use of general standards that would allow for changes in technology.

OSHA has received some written public comment supporting its position, but industry representatives at the hearings were mostly critical. Some, including the International Brotherhood of Electrical Workers, suggested that the agency's entire approach is wrong and that the well-known code should remain the standard, with some additions. IBEW claimed that OSHA has exaggerated its problems in adopting updated codes.

While the hearing record will remain open for about six more weeks, OSHA officials say they have already begun work on a final electrical standard and hope to issue it by the end of the year. ■

## State gets mini-Brooks Law

From now on, Georgia agencies procuring engineering and architectural services must select design professionals initially on the basis of their qualifications, rather than price.

A new procurement law mandates the procedure for selection of architects, professional engineers, surveyors and landscape architect. The law "fills a critical void," says Robert H. Sparks, president of the Consulting Engineers Council of Georgia. Sparks points out that there are more than 15 state agencies and that they previously had purchased professional services differently.

The law applies to projects costing more than \$250,000 or having a professional fee of more than \$15,000. It requires contracting agencies to give public notice describing the projects, select "not less than three nor more than eight persons deemed to be the most highly qualified," and then "select a person to provide the professional ser-

vices based upon additional factors such as the cost."

Alternatively, agencies may choose professionals through negotiations. In that case, talks must begin with the firm ranked most qualified and proceed to the second most qualified if there is a failure to reach an agreement.

Ronald S. Edmondson, contract administrator for the Georgia Department of Transportation, says the department currently awards design contracts to the lowest bidder from a list of qualified bidders. He claims the law essentially codifies that practice.

Sparks says area consulting engineers are "pleased" with the law, but would have preferred professionals being selected totally on qualifications. "It's half good, half bad," adds Milton F. Lanch, general counsel of the National Society of Professional Engineers. He notes that Georgia is the 34th state to legislate selection standards. ■

HB 211 TITLE & SPONSOR SUMMARY

14:42 5/22/84 PAGE 1 OF 3

AMENDED TITLE: CS HB 211(L&C)AM

AN ACT RELATING TO CONTRACTS FOR ARCHITECTURAL, ENGINEERING,  
AND LAND SURVEYING SERVICES,  
AND PROVIDING FOR AN EFFECTIVE DATE

PRIME SPONSOR: FURNACE.

CO-SPONSORS: ABOOD, BARNES, COWDERY, FLOOD, HURLBERT, MARTIN, PHILLIPS,  
RINGSTAD, UEHLING, HAYES.

CURRENT STATUS: 5/12/83 IN (S) LABOR & COM REFERRAL: FINANCE

HB 211 HOUSE ACTION

14:42 5/22/84 PAGE 2 OF 3

DATE	SEQ	PAGE	LEGISLATIVE ACTION
02/17/83	01	0206	FIRST READING -- COMMITTEE REPORTS
04/14/83	02	0860	L&C -- CS04
04/14/83	03	0860	L&C F/NOTE EQUALS ZERO
04/29/83	04	1104	JUD - L&C CS(AM)04, NR00
05/10/83	05	1257	SECOND READING
05/10/83	06	1257	L&C CS ADOPTED BY UNAN CONSENT
05/10/83	07	1257	AM01 ADOPTED BY UNAN CONSENT
05/10/83	08	1257	AM02 ADOPTED BY UNAN CONSENT
05/10/83	09	1258	AM03 NOT ADOPTED BY DIV 10-21-01
05/10/83	10	1258	ADVANCED TO 3RD READING BY UNAN CONSENT
05/10/83	11	1258	THIRD READING
05/10/83	12	1259	PASSED BY DIV 26-13-01
05/10/83	13	1259	EFFECTIVE DATE PASSED BY DIV 39-00-01
05/10/83	14	1260	NOTICE OF RECONSIDERATION GIVEN
05/11/83	15	1260	RECONSIDERATION NOT TAKEN UP

HB 211 SENATE ACTION

14:43 5/22/84 PAGE 3 OF 3

DATE	SEQ	PAGE	LEGISLATIVE ACTION
05/12/83	16	0963	FIRST READING -- COMMITTEE REPORTS LABOR & COMMERCE FINANCE RULES





STATE OF ALASKA  
THE LEGISLATURE

POUCH Y STATE CAPITOL  
JUNEAU ALASKA 99811  
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

May 21, 1984

SUBJECT: Sectional Analysis of SCS CSHB 211 (L&C)

TO: Senator Richard I. Eliason  
Chairman of Senate Labor and Commerce

FROM: Billy G. Berrier *BGB*  
Director  
Division of Legal Services

You have requested a sectional analysis of the May 21 draft committee substitute for SCS CSHB 211 (L&C).

Section 1 of the bill adds a new section to AS 36.98. The state shall award a contract to the most qualified person for architectural, engineering and land surveying purposes regardless of the competitive bid requirements of AS 36.98.010(3) or the evaluation and award requirements of AS 36.98.040. The state shall consider the estimated value of the services in light of their scope, complexity and professional nature in arriving at fair and reasonable compensation.

The state may rank persons and shall negotiate a contract with persons in order of ranking. It may reject all or any part of a proposal.

This section does not apply to contracts awarded in an emergency if the person responsible for awarding the contract certifies that an emergency exists. It also does not apply to services which are repetitive and have been described in specific detail.

The term state includes state agency but does not include political subdivisions of the state.

Section 2 defines emergency.

Section 3 takes contracts included within this Act out of the provisions of AS 37.05.240 governing awards of contracts for which there are competitive bids.

Senator Richard I. Eliason  
Page 2  
May 21, 1984

Section 4 takes contracts included within this act out of the competitive bid requirements of AS 37.05.230.

Section 5 provides the Act applies to all requests bids or proposals for architectural, engineering and land surveying services issued after the effective date of this Act.

Section 6 provides an immediate effective date.

BGB:ojb  
J7/077  
Attachment



OFFICIAL BUSINESS

# ALASKA STATE LEGISLATURE - SENATE

## COMMITTEE ON LABOR AND COMMERCE

SENATOR RICHARD I. ELIASON  
CHAIRMAN

POUCH V • JUNEAU, ALASKA 99811  
(907) 465-3844

### MEMORANDUM

TO: All Members of the Senate

FROM: Sen. Dick Eliason, Chair  
Senate Labor and Commerce *Dick Eliason*

RE: HB 211 - "An Act relating to contracts for architectural,  
engineering, and land surveying services

DATE: March 12, 1984

Recently many of you have received communications from your constituents and other Alaskans expressing concern that HB 211 is being "held up" in the Senate Labor and Commerce Committee and urging this committee to schedule a hearing on HB 211.

This legislation would amend laws governing professional services contracts let by the state or municipalities for architectural, engineering, and land surveying contracts. These professional services would be exempt from the competitive bidding requirements, AS 37.05.230. HB 211 states "Before selection and negotiation, the state may not request or consider any statement, bid or estimate of fees ...".

On May 26, 1983, the Senate Labor and Commerce Committee heard testimony from a DOT/PF representative, a municipality representative, and several architects on this bill. At the time of the hearing, a law suit had been filed by the U.S. Department of Justice against the Board of Registration for Architects, Engineers, and Land Surveyors challenging the validity of a regulation prohibiting a professional to "knowingly bid" on a project. As HB 211 had the appearance of being "special interest legislation", it was tabled until this issue was resolved.

In January, 1984, the regulation in question was deleted from the Alaska Administrative Code according to the settlement negotiated between the Board and the Department of Justice.

Even though the issue over this regulation has been resolved, opposition to HB 211 has not diminished. Many municipalities, as well as DOT/PF, strongly feel that information on both pricing and qualifications is

necessary in order to make an objective decision. A proposal based solely on one or the other of these components would be inadequate.

In order to reach an equitable solution to these problems, the Senate Labor and Commerce Committee is encouraging talks between the architect community and DOT/PF officials. If a meaningful compromise can be worked out, a committee substitute will be drafted and a formal hearing will be scheduled.

I hope this above information will be helpful to you.



# City and Borough of Sitka

~~XXXXXX~~ · SITKA, ALASKA · 99835  
304 Lake Street  
Room 104

February 14, 1984

Senator Richard Eliason  
Alaska State Legislature  
Pouch V  
Juneau, Alaska 99811

Dear Dick:

Please be advised that we oppose HB211, and I am surprised the A/E profession would push for such self-serving legislation. Over the years I have had the opportunity to listen to a good number of A/E firms, and they have failed to convince me that cost does not rank with competence and qualifications. Sitka has made it a practice to deal only with competent and qualified A/E firms, therefore price is of great importance to us.

Sincerely,

Fermin Gutierrez  
Administrator

cc: Alaska Municipal League

Letters of Opposition to original bill



# *Kodiak Island Borough*

P.O. BOX 1246  
KODIAK, ALASKA 99615-1246  
PHONE (907) 486-5736

February 15, 1984

The Honorable Richard I. Eliason  
State Senate  
Pouch V  
Juneau, Alaska 99811

Re: House Bill 211

Dear Senator Eliason:

Enclosed please find a copy of a letter dated June 3, 1983 along with a copy of Kodiak Island Borough Resolution No. 83-68-R adopted June 2, 1983 opposing House Bill 211 and supporting competition in contracting regulations.

I believe you will find the letter and resolution self-explanatory. I would again reaffirm the Assembly's opposition to House Bill 211 which I understand prohibits consideration of cost in selecting architects, engineers and land surveyors until after the selection has been made.

As you can see from the June 3rd letter, we have used the Junior High Renovation project Phase I as an example of our reason for opposition to House Bill 211. This project was reviewed by several major architectural firms who submitted prices ranging from a low of \$405,000 to a high of \$837,541. The Borough successfully negotiated a contract utilizing price as one of the considerations and obtained a very satisfactory product while saving some \$432,541. The project was awarded last summer and will be completed this summer with minimum problems for a complex project of this size and scope.

This same negotiation process was utilized to select the design of the auditorium facility (Phase II) with proposals being received ranging from a high of \$551,300 to a low of \$223,644 again resulting in a savings of \$327,656 to the Borough. The architect is currently in final stages of design and the project is anticipated to go out to bid in May, 1984 with an eighteen month construction period.

I believe by the two above examples it is clearly indicated that the Kodiak Island Borough was able to effect a savings of \$760,197 by using price as part of the negotiation process. It is ludicrous to believe that we would be prohibited from doing this in the future.

Page 2

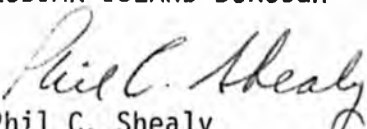
It is also interesting to note in the above examples that the highest price proposed was a firm which at that time was retained by the Borough to do other school projects. It is incomprehensible to me that with the range in prices indicated in these actual examples that the Borough would be in any position to negotiate a price once the A&E firm had been selected.

Consequently, it is imperative that this bill not proceed in any form which would restrict consideration of cost or fees as a factor in selecting any public contractor thereby reducing competition among professionals for public contracts.

If you have any further questions regarding this matter, I wish you would contact me at your convenience.

Sincerely,

KODIAK ISLAND BOROUGH

  
Phil C. Shealy  
Borough Manager

Enclosures (3)

CC Senator Bob Mulcahy  
Representative Fred F. Zharoff  
Alaska Municipal League  
David L. Soulak, City Manager, Palmer, Alaska  
Gary Thurlow, Borough Manager, Matanuska-Susitna Borough

mdd

# KODIAK ISLAND BOROUGH

Telephones 486-5736 - 486-5737 — Box 1246

KODIAK, ALASKA 99615

June 3, 1983

The Honorable Bob Mulcahy  
State Senate  
Pouch V  
Juneau, Alaska 99811

Dear Bob:

Enclosed please find a copy of Kodiak Island Borough Resolution No. 83-68-R opposing House Bill 211 and supporting competition in contracting procedures. This resolution was unanimously adopted at the regular meeting on June 2, 1983.

The Kodiak Island Borough Assembly has taken a position in opposition to House Bill 211, which proposes to restrict inquiries into prices or fees of architects and engineering firms prior to actual selection of the successful contract. This bill would apply to both state and local government proposals for architectural and engineering contracts.

It is my understanding that this bill has passed the house and is currently being considered by the senate. I am further advised that it is receiving a strong lobbying effort from architectural, engineering and land surveying professional groups. The Borough's position is that if House Bill 211 is enacted and applies to local government that the cost of projects will skyrocket dramatically.

An example of the increase in cost can best be illustrated by the Junior High renovation project currently underway in Kodiak. This project was recently designed and the Borough received proposals from several architectural firms with prices ranging from a low of \$600,000 to a high of 1.3 million dollars. The Borough successfully negotiated a contract utilizing price as one of the considerations and obtained a very satisfactory product while saving \$700,000. The project has now been advertised and awarded with work planned to start June 15, 1983.

It is interesting to note in the above example of the price range that the highest price proposed was by a firm which at that time was retained to do other school projects for the Borough. It is incomprehensible to me that with a range in price as indicated by this actual example that the Borough would be in any position to negotiate a price once the A&E firm is selected.

I am further advised that the State of Maryland requires architectural and engineering services to be awarded on a competitive basis. Proposals must be evaluated both on technical and price considerations. Maryland officials have indicated that the system has saved money and maintained

KODIAK ISLAND BOROUGH  
RESOLUTION NO. 83-68-R

A RESOLUTION OF THE KODIAK ISLAND BOROUGH ASSEMBLY OPPOSING HOUSE  
BILL 211 AND SUPPORTING COMPETITION IN CONTRACTING PROCEDURES.

WHEREAS, the Kodiak Island Borough Assembly has strongly and consistently supported maximum competition in procuring public contracts for services, goods and construction, and

WHEREAS, the Borough Code presently provides for competitive proposals for Borough contracts for professional services, and requires the contract to be awarded to the "best qualified" professional, and

WHEREAS, the Assembly finds that the Borough's purchasing procedures are adequate to assure that the Borough will seek and obtain competent and qualified professionals for performing professional services for the Borough, and

WHEREAS, the Assembly further finds that the cost of the professional services is also a relevant factor which should be considered in selecting the contractor, and

WHEREAS, House Bill 211, which provides, in part:

"The State (or local government) may not request or consider any statement, bid or estimate of fees or charges for architectural, engineering or land surveying services for the proposed project (before selecting the successful contractor.)"

would effectively eliminate cost of services as a factor in selecting certain professionals, and

WHEREAS, the result of this proposed legislation would be the decrease of competition for certain public contracts and an increase in cost to the public for public construction projects.

NOW, THEREFORE, BE IT RESOLVED that the Kodiak Island Borough Assembly opposes passage of House Bill 211 in any form which would restrict consideration of cost or fees as a factor in selecting any public contractor or which would reduce competition among professionals for public contracts.

BE IT FURTHER RESOLVED that, if House Bill 211 is adopted in any form, municipalities should be excluded from its effect and permitted to establish their own contracting procedures, pursuant to the principles of maximum local self-government under Article X, Section 1 of the Alaska Constitution.

PASSED AND APPROVED this 2nd day of June, 1983.

KODIAK ISLAND BOROUGH.

ATTEST:

By [Signature]  
Borough Mayor, Deputy

By [Signature]  
Borough Clerk

# Municipality of Anchorage



POUCH 6-650  
ANCHORAGE, ALASKA 99502-0650  
(907) 264-4111

TONY KNOWLES,  
MAYOR

OFFICE OF PROGRAM PLANNING & BUDGETING

March 9, 1984

Senator Dick Eliason  
Alaska State Senate  
Attn: Ms. Sheila Peterson, Legislative Aid  
Pouch V, Capitol Bldg., Room 417  
Juneau, AK 99811

Dear Sheila;

We wanted to make sure that you and Senator Eliason received our comments on CSHB 211 prior to any further action. I have also attached some letters from other communities concerning this bill.

As you can see, we are opposed to CSHB 211. Please pass our comments along to the Senator.

Thank you for your cooperation.

Sincerely,

A handwritten signature in cursive script, appearing to read "D. R. Cowden". The signature is written in dark ink and extends across the width of the page.

Daniel R. Cowden  
Programs and Projects Officer

# Municipality of Anchorage

## MEMORANDUM

DATE: March 9, 1984  
TO: Daniel Cowden, Program Planning and Budgeting Office  
FROM: Purchasing Officer  
SUBJECT: Comments on CS for HB 211

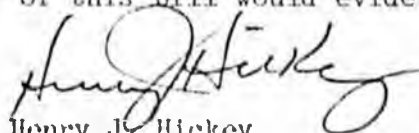
There are at least two areas of concern in CS for HB 211 from the Purchasing Division's perspective.

The first is under 36.98.041 (b) beginning at line 24 "Before selection and negotiation the State may not request or consider any statement, bid, or estimate of fees or charges for architectural, engineering, or land surveying services." This would be construed to prevent this 'political subdivision' or any 'political subdivision' from getting an estimate from any source to assist them in establishing 'fair and reasonable prices.'

It is obvious if we were prevented by law from requesting or considering competitive information on fees we would be at the mercy of the A/E community to establish the fee level. It is patently ridiculous to enter into fee negotiations and not be able to know current market conditions. Moreover, this act would put smaller political subdivisions at a major disadvantage. Smaller subdivisions only occasionally retain A/E consultants so they would not even possess the experience gained from their own negotiations - and could not seek pricing assistance even from other political subdivisions.

Although it is religiously resisted by the A/E community, there is an increasing propensity to receive unpriced proposals and, through negotiation discussions, define the work scope with several qualified consultants. When the scope is defined then competitive prices are solicited and the contract is awarded to the low priced offer. This process insures the best efforts of the consulting firms with regard to both work scope and price.

The second problem under 36.98 Section I, as proposed, is that it appears no consideration is given to small design and land surveying contracts. There are many small jobs where minimum technical effort is required. In other words, any professional of that particular design discipline should be able to equally perform. Price, then, is the only separating criterion. Passage of this bill would evidently prevent proceeding in this manner.

  
Henry J. Hickey  
Purchasing Officer

Copy to: Barbara Steckel, Municipal Manager  
Robert M. Nelson, Chief Fiscal Officer

Introduced by: Borough Manager  
Prepared by: Borough Attorney

MATANUSKA-SUSITNA BOROUGH

RESOLUTION SERIAL NO. 83-53

A RESOLUTION OF THE ASSEMBLY OF THE MATANUSKA-SUSITNA BOROUGH  
OPPOSING HOUSE BILL 211 AND SUPPORTING COMPETITION IN CONTRACTING  
PROCEDURES.

---

WHEREAS, the Assembly of the Matanuska-Susitna Borough has strongly and consistently supported maximum competition in procuring public contracts for services, goods and construction, and

WHEREAS, the Borough Code presently provides for competitive proposals for Borough contracts for professional services, and requires the contract to be awarded to the "best qualified" professional, and

WHEREAS, the Assembly finds that the Borough's purchasing procedures are adequate to assure that the Borough will seek and obtain competent and qualified professionals for performing professional services to the Borough, and

WHEREAS, the Assembly further finds that the cost of the professional services is also a relevant factor which should be considered in selecting the contractor, and

WHEREAS, House Bill 211, which provides, in part:

"The state [or local government] may not request or consider any statement, bid or estimate of fees or charges for architectural, engineering or land surveying services for the proposed project [before selecting the successful contractor.]"

would effectively eliminate cost of services as a factor in selecting certain professionals; and

WHEREAS, the result of this proposed legislation would be the decrease of competition for certain public contracts and an increase in cost to the public for public construction projects;

THEREFORE BE IT RESOLVED, that the Assembly of the Matanuska-Susitna Borough strongly opposes passage of House Bill 211 in any form which would restrict consideration of cost or fees as a factor in selecting any public contractor or which would reduce competition among professionals for public contracts;

BE IT FURTHER RESOLVED, that, if House Bill 211 is adopted in any form, that municipalities should be excluded from its effect and permitted to establish their own contracting procedures, pursuant to the principles of maximum local self-government under Article X, Section 1 of the Alaska Constitution.

PASSED AND APPROVED by the Assembly of the Matanuska-Susitna Borough, this 17<sup>th</sup> day of May, 1983.

Edna Armstrong  
Edna Armstrong, Mayor

ATTEST:

REVIEWED AND APPROVED:

Evelyn Thompson  
Evelyn Thompson, Borough Clerk

Gary Thurlow  
for Gary Thurlow, Borough Manager

(SEAL)

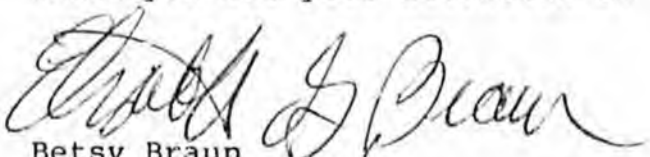
1736-A W. 11th Ave.  
Anchorage, Alaska 99501

Dear Senator Eliason,

I am writing you once again to continue my plea for HB 211. I can well understand your reluctance to support this bill. I have certain reservations about the intent of this legislation myself. However, I cannot help but think that the best interests of our built environment would be served by such legislation. Unfortunately, (or maybe fortunately) no two buildings are ever alike. Each one demands its own approach and unique solution. Each building is built to serve a community with its own unique problems. If we try to start doing "pret-de porter" buildings, the results could be disastrous. Even if we ignore the varied public needs, we cannot ignore the tremendous climactic diversity this state contains. A building that is perfect for Seward would be absurd in Prudhoe Bay. It is this need for individual attention that is at the heart of this bill. This individual attention is directly equivalent to a professional designers' time. If we start to competitively bid against each other for our hours of thought, the result will, of course, be less well thought out buildings.

I understand and admire your desire to obtain the best possible buildings for this state. I also understand the need to achieve this goal as economically as possible. As a libertarian, I also would be the last person to attempt to worm in legislation that was against free trade. But Architects DO compete against each other. The firms that have projects that consistently go over budget soon go out of business. I just cannot emphasize however how critical I see the distinction between a service and a product. The design of a building is NOT A PRODUCT. Please do not force us to treat it as such.

Thank you for your attention on this issue.

  
Betsy Braun  
Intern Architect, CCC Architects

Letters of Support (Received approx 90)

*The Alaska Society of  
Professional Engineers*



Address Reply To:

P. O. Box 80148  
Fairbanks, Alaska 99708  
April 4, 1984

The Honorable Richard I. Eliason  
Chairman, Senate Labor and  
Commerce Committee  
Alaska State Senate  
Pouch V  
Juneau, Alaska 99811

Dear Senator Eliason:

The Fairbanks Branch of the Alaska Society of Professional Engineers urges you to consider the merits of CS for HB 211, "An Act relating to contracts for architectural, engineering and land surveying services." Overall, this Bill is supported by the five thousand registered architects, engineers and land surveyors licensed to practice in the State of Alaska. We ask that this Bill be considered by your committee and presented to the House for their study and hopefully passage.

This legislation is, in part, an effort by Alaska Professionals to overcome the effects of a consent decree now before the United States District Court for the District of Alaska brought by the United States Department of Justice and agreed to by the Attorney General for the State of Alaska over the vehement objections of the members of the Board of Architects, Engineers and Land Surveyors and the members of these Professions. The regulation which the decree attacks, as an invalid restraint of trade under the Sherman Act, was codified in 1972 as AS AAC 36.230 (b) and states in part:

"Each architect, engineer or land surveyor shall seek professional employment on the basis of qualifications for the proper accomplishment of the work. He may not knowingly solicit or submit proposals for professional services on the basis of competitive bidding."

We believe the decree is based upon a flawed understanding of the meaning of the regulation and of the way in which competition operates in our professions.

Professionals believe that CS for HB 211 explains in detail the procedures by which the State and other government entities can obtain the best professional services. Services which will result in the most economic overall cost in a competitive manner. It is modeled after the "Brook Act" P.L. 92-582-- a Federal law providing for procurement of professional services by Federal Agencies and therefore should not conflict with Federal regulations.

*The Alaska Society of  
Professional Engineers*



Address Reply To:

The Honorable R. I. Eliason  
Page two  
April 4, 1984

To believe that the lowest cost for professional services will result from a competitive bid is a misunderstanding of the process. The cost for services of an architect, engineer or land surveyor is only a small percentage of the total project cost. The professional architect, engineer or land surveyor offers his client his knowledge, experience, education and ingenuity. These qualities, properly applied to the clients' problems, will produce the most economical and efficient result.

There is but one State which has passed legislation requiring the bidding for professional services. The inefficiencies, the excessive costs and the administrative problems that have resulted from the legislation are so serious that the State, Maryland, is considering repeal.

We ask again that CS for HB 211 be considered by your committee and brought out on the floor of the Senate for review, comments and hopefully passage.

Sincerely,

THE ALASKA SOCIETY OF PROFESSIONAL ENGINEERS  
FAIRBANKS CHAPTER

*Earl H. Beistline*  
Earl H. Beistline  
President

ElB/jc

cc: Jan Hansen, State President, A.S.P.E.  
Bob Shary, President, Anchorage Chapter, A.S.O.E.  
Ben Haight, President, Juneau Chapter, A.S.P.E.  
Senator Bob Mulcahy  
Senator Fritz Pettyjohn  
Senator Patrick Rodey  
Senator John C. Sackett  
Senator Don Bennett  
Senator Bettye Fahrenkamp  
Representative Robert Bettisworth  
Representative Mike Davis  
Representative Niilo Koponen  
Representative Mike Miller  
Representative John Ringstad

2357 Hialeah Drive  
Anchorage, Alaska 99503

March 29, 1984

Senator Richard I. Eliason  
Alaska State Legislature  
Pouch V (MS 3100)  
Juneau, Alaska 99811

Dear Senator Eliason,

HB 211 pertaining to State selection procedures for obtaining architectural and engineering services is currently being considered by the Senate Labor and Commerce Committee. In essence, HB 211 would preclude the State from selecting architects and engineers on the basis of price alone.

Clients who are accustomed to procuring commodities believe that competitive bidding offers the advantage of safely obtaining design services at the lowest possible cost. While there is the advantage of potential savings in the cost of design services, the problems with bidding present the State with potential disadvantages that are very real:

1. A solicitation for design services that exactly describes the scope and quality of those services is difficult if not impossible to prepare. This would be analogous to the plans and specifications an architect or engineer would provide to a contractor that wished to prepare a bid for the construction of a new structure. Inasmuch as the scope and quality issues will be less specific and more ambiguous than plans and specifications, the architect will have to make assumptions on the kind and scope of services to provide. This situation can produce an adversarial relationship between the owner and the low bidder due to a lack of clarity in the scope documents. Defining a basic scope of work for a project would require that the owner-client conduct an extensive and knowledgeable in-house consultation process to develop this information prior to releasing scope documents to be used as the basis of consultant bidding.
2. All other things being equal, the low bidder will obtain the design commission due to his ability to produce the job in less time. By necessity, he will be required to limit the time he can allot for the development of his design solution. A structure that is economical to construct and economical to operate takes time and effort to design. Bidding may not allow the designer the flexibility to explore alternative solutions to design problems. Life-cycle maintenance and operating cost savings resulting from a thoughtful and deliberative

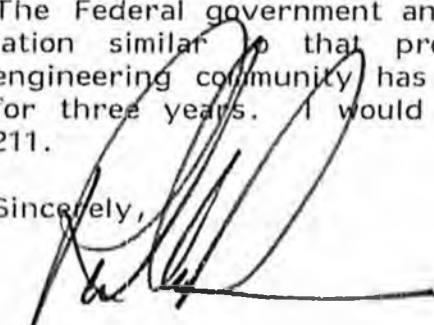
Senator Richard I. Eliason  
March 29, 1984  
Page 2

design process will be many times greater than the potential fee reduction resulting from bidding design services. The percentage of a project's total construction cost that is utilized for architectural and engineering fees is very small. In fact, total construction cost appears small when compared with a project's life-cycle cost.

3. Quantification of the architect's or engineer's experience, creativity, past performance, financial strength, and professional skill may not be possible in bidding, whereas the success of the project is, to a large part, dependent on these factors.
4. A great deal more money could be spent correcting construction or operational problems if the design or construction documents for a facility are reduced in quality as a result of the bidding process. The effect of bidding on liability insurance claims and costs is not documented at this time but is an issue of increasing concern to design consultants and their E&O insurers. It is felt that those firms successfully bidding for design commissions will be the ones who will feel comfortable treading that fine line between a set of minimally coordinated and detailed project documents and ones potentially containing errors and omissions caused by extremely tight production cost constraints.

The Federal government and twenty-nine other states have enacted legislation similar to that proposed by HB 211. The architectural and engineering community has been working toward the passage of this bill for three years. I would recommend and appreciate your support of HB 211.

Sincerely,



Richard B. Riegels, AIA  
Principal  
CCC Architects and Planners

RBR/nnl

cc: All legislators



ALASKA CHAPTER  
THE AMERICAN INSTITUTE OF ARCHITECTS

Honorable Dick Eliason  
Chairman Labor & Commerce  
Alaska State Legislature  
Pouch V-Capitol Bldg., Rm. 417  
Juneau, Alaska 99811

November 11, 1983

RE: H.B. 211

Dear Senator Eliason:

On behalf of the American Institute of Architects - Alaska State Chapter, enclosed please find the following:

- 1) H.B. 211 as past by the House in 1983 for procurement of Architectural and Engineering Services through a qualification process.
- 2) Recent Article depicting that the State of Maryland is not bidding work when costs and time is critical.
- 3) U. S. Public Law 92-582; 92nd Congress, H. R. 12807; October 27, 1972 An Act amend the Federal Procurement for Architectural and Engineering Services through a qualification process.
- 4) Excerpt from 1974 General Service Administration supporting the 1972 Procurement Act.
- 5) Letter from Insurance Company that covers Liability, Errors & Omission Policies for Architects & Engineers questioning their ability to offer coverage to those firms engaged in a low bid award procurement process.
- 6) 5-501 Part E Model Procurement Code by American Bar Association for Architects and Engineers recommending a qualification process.
- 7) A Summary For Selecting Architects For Public Projects.
- 8) Table summary of State Laws that govern procurement processes.

The controversy of whether to procure Architects & Engineers contracts by bidding or by qualifications has prompted the introduction and subsequent overwhelming House passage of H.B. 211 (Attachment 1). Arguments opposing H.B. 211, propose the bidding of professional services, which in theory reduces the costs of Architects & Engineers fees and mimimizes the chance for corruption by favortism.

Several recent court cases dealing with price fixing on highways, power plants and other bid type work is evidence enough that bidding will not eliminate or reduce the chances for corruption.

Concerns re: competitive bidding

PLEASE REPLY TO: 369 South Franklin Street, Juneau, Alaska 99801

Lowering the Architects & Engineers fees is possible and this is proving out to be the case in Maryland; however, overall costs of a project are sky rocketing resulting in loss of revenues buying power. If, for example the State expects to spend \$10,000,000 on construction of a project under the present system, one can expect the following total costs:

State Agency Administration	20%	\$2,000,000
Architects & Engineers Fees	10%	1,000,000
Construction Cost	100%	10,000,000
Life cycle cost of O & M	300%	<u>30,000,000</u>
Total Cost of Project		\$43,000,000

In Maryland certain trends are establishing themselves. A savings of over 25% is being experienced in regards to Architects & Engineering firms, however, administrative costs are up 20% to 100%. Architects & Engineers spending less time on alternative construction methods may have increased costs by 5% or more. Life cycle costs that increase only 1% add tremendous costs.

State Agency	24.0%	+ 20%	\$2,400,000
Architects & Engineers	7.5%	- 25%	750,000
Construction	100.0%	+ 5%	10,500,000
Life Cycle Costs	303.0%	+ 1% per yr.	<u>30,300,000</u>
Low Bid	Total Cost of Project		43,950,000
Negotiated Fee	Total Cost of Project		<u>43,000,000</u>
Increase because of Low Bidding			950,000

The figures used are conservative and any one increase off sets any possible savings. What appeared as a \$250,000 savings really cost the State \$950,000.

"Since the fee paid the Architects & Engineers is related to their time spent on the project, a reduction in the fee means a reduction of efforts on their part which could very well result in a more expensive construction and loss in the quality of the design and contract documents." Ralph D. Culbertson, Chief of Engineering Services, State of Wisconsin.

These concerns that are beginning to appear in Maryland; poorer quality of designs, higher construction costs and more costly operation and maintenance expenses caused Maryland to recently use the Negotiation Procurement Process. When a project is of significant importance to control the total cost and timely completion. The low bid procedure was not used. (Attachment 2)

Representing the procurement procedure by qualifications includes the Federal Government. In 1972, they passed a law (Attachment 3) requiring procurement of Design Professionals on a qualification selection for all federally funded projects. The arguments against this process was studied by the federally funded GSA in 1974 (Attachment 4). The results were clearly outlined in favor of procurement of Architects & Engineers firms by qualification process - not through bidding.

Page 3

To further emphasize the pitfalls of bidding design contracts, a letter presented by an insurance company stating that they would "seriously consider not covering those policyholders of ours who operate in this fashion (low bid)...."(Attachment 5)

Covering the legal ramifications in addition to what the Federal Government has presented, we have included the American Bar Association recommendations stating that the Procurement of Architects & Engineers contracts should be based on qualification with the fee negotiated after selection (Attachment 6). Considering their comments under commentary, items 2 & 3 in particular point out why price negotiations should be handled after selection. We have included a booklet summarizing the whys & what fors in selecting Architects & Engineers Firms (Attachment 7).

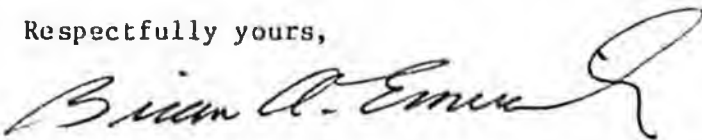
Enclosure #8 shows which states have laws governing Architects & Engineers Procurements. Note that out of 31 states, only two use low bidding in their evaluations.

Finally, the bidding process inherently creates an adversary position between the Consultant and the hiring agency. Consultants are forced to adhere strictly to the provisions of the contractual agreements, thus stalemating innovative and creative solutions. Anything not in the contract becomes an extra for additional fees. Bidding therefore becomes the implement of conversation so that the client's other interest are often lost. This lack of open exchange of information and legal inflexibility to alter tasks midstream creates a less than optimum design solution.

In conclusion there is an overwhelming amount of supporting evidence for the Procurement of Architects & Engineers contracts through selection by qualifications not through a bidding procedure. The recent U. S. Court decision imposed on the State of Alaska Architects & Engineers Board of Registration overturning the policy banning the bidding of work. It is even more important than ever that this H.B. 211 be inacted as soon as possible to forestall State agencies and related public groups from reformulating the present selection processes.

We urge you to pass on H.B. 211 from your committee with a unanimous approval as written.

Respectfully yours,



Brian A. Emerich, AIA  
Vice President Elect  
Chairman Legislative Affairs Committee

Originals to Senators: Dick Eliason, Chairman  
Bob Mulcahy, V-Chairman  
John Sackett  
Fritz Pettyjohn  
Pat Rodey

POUCH V (MS-3100)

JUNEAU AK 99811

REGARDING HOUSE BILL 211 PROFESSIONAL SERVICES CONTRACT

DEAR SENATOR ELIASON,

I WOULD ASK YOUR CONSIDERATION FOR ADDING REAL ESTATE APPRAISERS TO THE CATERGORIES OF PROFESSIONALS INCLUDED UNDER THIS BILL. ALTHOUGH NOT LICENSED BY THE STATE OF ALASKA, THE BULK OF THE SENIOR REAL ESTATE APPRAISERS IN THE STATE HOLD THE M.A.I. DESIGNATION AWARDED BY THE AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS. TO QUALIFY FOR THIS DESIGNATION, AN INDIVIDUAL MUST BE OF GOOD MORAL CHARACTER AND INTEGRITY AND RECEIVE A POSITIVE RECOMMENDATION FROM THE LOCAL BUSINESS COMMUNITY. IN ADDITION, APPROXIMATELY 1-3/4 YEARS OF POST GRADUATE WORK IS REQUIRED BEYOND A COLLEGE DEGREE. INCLUDED IN THIS ARE A SERIES OF 10 EXAMINATIONS TOGETHER WITH AN 8 HOUR COMPREHENSIVE EXAMINATION UPON COMPLETION OF ALL OTHER REQUIREMENTS. A MINIMUM OF FIVE YEARS EXPERIENCE IS REQUIRED AND IS REVIEWED ACCORDING TO NATIONAL GUIDELINES ON BOTH A QUALITATIVE AND QUANITATIVE BASIS. M.A.I.(S) AND CANDIDATES ARE REQUIRED TO OBSERVE A STRICT CODE OF ETHICS IN THE NATIONAL ORGANIZATION MAINTAINS AND ENFORCES STRICT DISCIPLINARY MEASURES. IN ADDITION, ALL M.A.I.(S) ARE REQUIRED TO COMPLETE 20 HOURS OF CONTINUING EDUCATION PER YEAR IN ORDER TO MAINTAIN A CERTIFIED STATUS. CERTAINLY M.A.I.(S) HAVE EQUIVALENT EDUCATIONAL AND EXPERIENCE REQUIREMENTS TO BOTH ARCHITECTS AND ENGINEERS, AND GREATLY SUPERIOR TO THAT OF SURVEYORS. THE QUALITY OF WORK AND PUBLIC INTEREST RATIONALE THAT JUSTIFIED THE INCLUSION OF THE THREE MENTIONED CATEGORY OF PROFESSIONALS IN THIS BILL APPLIES EQUALLY TO THOSE MEMBERS OF THE REAL ESTATE APPRAISAL PROFESSION (23 AT LAST COUNT) WHO HAVE QUALIFIED FOR PROFESSIONAL APPRAISAL DESIGNATION.

SINCERELY,

AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS,

ALASKA CHAPTER NBR 57

GARRETT W. WALDNER, M.A.I. NATIONAL GOVERNING COUNSELOR

*Real Estate  
Appraisers want  
to be included*

“(c) Provisions of this section shall be effective only in the cases of members who, on or before June 30, 1975, execute the required written agreement to remain in active service.”; and

(4) by inserting the following new item in the analysis:

“312a. Special pay: nuclear-trained and qualified enlisted members.”.

Sec. 2. The provisions of section 7545(c) of title 10, United States Code, shall not apply with respect to any gift made after the date of enactment of this Act and prior to January 1, 1973, by the Department of the Navy to the city of Clifton Forge, Virginia, of a Baldwin steam locomotive (No. 606) which is no longer needed by the Navy and which has certain historical significance for the city of Clifton Forge, Virginia.

Approved October 27, 1972.

## PUBLIC BUILDINGS—SELECTION OF ARCHITECTS AND ENGINEERS

*For Legislative History of Act, see p. 4767*

PUBLIC LAW 92-582; 86 STAT. 1278

[H. R. 12807]

An Act to amend the Federal Property and Administrative Services Act of 1949 in order to establish Federal policy concerning the selection of firms and individuals to perform architectural, engineering, and related services for the Federal Government.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:*

The Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 et seq.)<sup>64</sup> is amended by adding at the end thereof the following new title:

### “TITLE IX—SELECTION OF ARCHITECTS AND ENGINEERS

#### “DEFINITIONS

“Sec. 901. As used in this title—

“(1) The term ‘firm’ means any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering.

“(2) The term ‘agency head’ means the Secretary, Administrator, or head of a department, agency, or bureau of the Federal Government.

“(3) The term ‘architectural and engineering services’ includes those professional services of an architectural or engineering nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform.

#### “POLICY

“Sec. 902. The Congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for archi-

64. 40 U.S.C.A. § 471 et seq.

Oct. 27

Oct. 27

PUBLIC BUILDINGS

P.L. 92-582

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tectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

"REQUESTS FOR DATA ON ARCHITECTURAL AND ENGINEERING SERVICES

"Sec. 903. In the procurement of architectural and engineering services, the agency head shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency head, for each proposed project, shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, in order of preference, based upon criteria established and published by him, no less than three of the firms deemed to be the most highly qualified to provide the services required.

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"NEGOTIATION OF CONTRACTS FOR ARCHITECTURAL AND  
ENGINEERING SERVICES

"Sec. 904. (a) The agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government. In making such determination, the agency head shall take into account the estimated value of the services to be rendered, the scope, complexity, and professional nature thereof.

"(b) Should the agency head be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price he determines to be fair and reasonable to the Government, negotiations with that firm should be formally terminated. The agency head should then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the agency head should terminate negotiations. The agency head should then undertake negotiations with the third most qualified firm.

"(c) Should the agency head be unable to negotiate a satisfactory contract with any of the selected firms, he shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached."

Approved October 27, 1972.

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Editor's notes. — Section 11, ch. 144, SLA 1982, provides: "This Act applies to requests for bids or proposals for profes- sional services issued after the effective date of this Act (July 22, 1982)."

**Sec. 36.98.010. Application of chapter.** This chapter applies to contracts for professional services provided to a state agency unless

- (1) the total amount of the contract does not exceed \$25,000;
- (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 awarded based on competitive bids obtained under the procedure provided in AS 37.05.230. (§ 5 ch 144 SLA 1982)

**Sec. 36.98.020. Professional services contractors register.** (a) The commissioner shall establish and maintain a professional services contractors register.

(b) A person or firm that desires to provide professional services to a state agency may submit to the commissioner a statement of qualifications and performance data, and any other information that the commissioner, by regulation, may require.

(c) The commissioner may at any time require the person or firm to revise the statement of qualifications and performance data or any other information submitted by the person or firm if the commissioner believes that the credentials or record of experience of the person have materially changed since the last filing by the person or firm. (§ 5 ch 144 SLA 1982)

**Sec. 36.98.030. Solicitation of proposals.** (a) When a state agency proposes to enter into a contract for professional services, the agency shall give public notice soliciting proposals for the professional services contract by publication at least three times in one or more newspapers in general circulation in the state and, when appropriate, in a newspaper in local circulation where the work is to be performed. The first notice shall be published not less than 30 days before the date on which the agency expects to enter into the contract and each subsequent notice shall be published at intervals of no more than three days thereafter. The notice shall include

- (1) a general description of the proposed project for which the agency is seeking professional services; and
- (2) the procedure by which a person or firm interested in the professional services contract may make its proposal to the agency for consideration for the contract.

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

- (1) review the register of professional services contractors maintained by the commissioner under AS 36.98.020; and
- (2) provide a request for proposals for the proposed professional services contract to each prospective contractor who, after review of the register of professional services contractors under (1) of this subsection, the agency finds is qualified for consideration for the contract.

(c) A request for proposals must be extended to a sufficient number of prospective providers of the required services to assure that public interest in competition is adequately served. Proposals from at least six persons or firms with the required expertise shall be solicited for contracts equal to or greater than \$100,000. Proposals from at least three persons or firms with the required expertise shall be solicited for contracts of less than \$100,000 if the expertise required is available. If the expertise required is not available to enable an agency to solicit the number of proposals otherwise required under this subsection, the agency shall solicit proposals

(1) from each person or firm listed on the professional services contractors register maintained under AS 36.98.020 who appears to possess the required expertise;

(2) from each person or firm responding to the public notice given under (a) of this section who appears to possess the required expertise.

(d) The provisions of this section do not apply if

(1) the contracting agency demonstrates that there is a single source of the expertise or knowledge required or that one person or firm can clearly perform the required tasks more satisfactorily because of the person's or firm's prior work; however, this exemption applies only if the head of the state agency has submitted a written request to the commissioner that details the reasons for the exemption and the commissioner or deputy commissioner has authorized in writing the state agency to enter contract negotiations with the single source;

(2) the commissioner makes a written determination that public necessity will not permit delay incident to the procedures otherwise required by this chapter; or

(3) the service is to be provided by another state agency, a federal agency, or a political subdivision of the state.

(e) A request for proposals must contain a description of the work to be performed under the contract and the terms under which the work is to be performed. A request for proposals must contain that information necessary for a prospective contractor to submit a response or contain references to any information that cannot reasonably be included with the request. The request for proposals must provide a description of the factors that will be considered by the state agency when it evaluates the proposals received.

(f) Nothing in this section limits the authority of an agency to use additional means that it may consider appropriate to notify prospective

Statute Reference

contractors that it proposes to enter into a contract for professional services. (§ 5 ch 144 SLA 1982)

**Editor's notes.** — As enacted, this section contained subsections (g) and (h). These provisions, however, were renumbered as AS 36.98.035(a) and (b) by the revisor of statutes pursuant to AS 01.05.031(b).

**Sec. 36.98.035. Standard overhead rate.** (a) If a state agency has established a standard overhead rate applicable to contracts for services from the state agency, the standard overhead rate shall be included in a proposal for a contract submitted under AS 36.98.030(a).

(b) As used in this section, "standard overhead rate" means a charge established for services from a state agency that is designed to compensate the state agency for administration and support services incidentally provided with the professional services. (AS 36.98.030(g), (h); § 5 ch 144 SLA 1982)

**Editor's notes.** — This section was enacted as AS 36.98.030(g) and (h) but was renumbered by the revisor of statutes pursuant to AS 01.05.031(b).

**Sec. 36.98.040. Evaluation of proposals and award of contract.**

(a) After the responses are submitted, the state agency shall evaluate them. The evaluation shall consist of assigning point values to factors considered by the agency in evaluating each proposal. Each proposal received must be evaluated using the same factors as those set out in the request for proposal.

(b) The contract shall be executed by the contractor and the project director for the contracting agency and be approved by the head of the contracting agency or the designee of the head of the contracting agency. If a contract is made by a board or commission, execution of the contract on behalf of the board or commission shall be authorized by the board or commission.

(c) A contract subject to this chapter shall be submitted to the commissioner for review and approval and, if approved, is effective from the date of the approval. A state agency must clearly provide in the request for proposal that the state is not obligated to perform under the contract until the approval required by this subsection is granted.

(d) A contract award under this chapter shall contain:

- (1) the amount of the contract stated on its first page;
  - (2) the date for the work to begin;
  - (3) the date by which the work must be completed;
  - (4) a description of the services to be performed under the contract;
- and

(5) a certificate by the project director for the contracting agency, the head of the contracting agency, or his designee that sufficient funds are available in an appropriation to be encumbered for the amount of the contract. (§ 5 ch 144 SLA 1982)

**Editor's notes.** — As enacted, this section contained a subsection (e). The provisions of that subsection, however, were renumbered as AS 36.98.045 by the revisor of statutes pursuant to AS 01.05.031(b).

**Sec. 36.98.045. Review and approval by Department of Law.** If a contract contains terms that are not provided in a state standard form contract or if the standard terms are deleted or modified by other terms that are not standard, the contract must be reviewed by the Department of Law and approved as to form. The review and approval required by this section must be completed before approval of the award of the contract by the commissioner under AS 36.98.040(c). (AS 36.98.040(e); § 5 ch 144 SLA 1982)

**Editor's notes.** — This section was enacted as AS 36.98.040(e) but was renumbered by the revisor of statutes pursuant to AS 01.05.031(b).

**Sec. 36.98.050. Contract administration.** (a) When a state agency has entered into a professional services contract, that agency is responsible for the diligent administration and monitoring of the performance of the provisions of the contract.

(b) When a professional services contract is completed, the contracting state agency shall evaluate the performance of the contractor under the contract and shall report on and evaluate the use of the final product of the contract. A copy of the report and evaluation prepared under this subsection shall be transmitted to the commissioner and shall be retained by the commissioner for as long as the commissioner is required to maintain copies of completed contracts. (§ 5 ch 144 SLA 1982)

**Sec. 36.98.060. Filing of proposal and contract.** A copy of each contract and the response to the request for proposal upon which the contract was awarded must be filed with both the commissioner and the contracting state agency and is open for public inspection. The request for proposal and the name and address of each person who submitted a response to it must also accompany the filed copies. (§ 5 ch 144 SLA 1982)

**Sec. 36.98.070. Regulations governing contract procedures.** The commission shall, by regulation adopted in accordance with the Administrative Procedure Act (AS 44.62), establish the manner and form by which state professional services contracts shall be prepared and processed, including, but not limited to, a review process for persons aggrieved under this chapter. (§ 5 ch 144 SLA 1982)

**Sec. 36.98.080. Definitions.** In this chapter

(1) "commissioner" means the commissioner of administration; except that for contracts entered into by the Department of Transportation and Public Facilities, "commissioner" means the commissioner of transportation and public facilities;

HB

211

#3

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

BILL SHEFFIELD, GOVERNOR

REPLY TO:

1031 W 4th AVENUE  
SUITE 200  
ANCHORAGE, ALASKA 99501  
PHONE: (907) 276-3550

1st NATIONAL CENTER  
100 CUSHMAN ST.  
SUITE 400  
FAIRBANKS, ALASKA 99701  
PHONE: (907) 452-1568

POUCH K - STATE CAPITOL  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-3600

March 8, 1984

The Honorable Dick Eliason, Chair  
Senate Labor & Commerce Committee  
Alaska State Senate  
Pouch V  
Juneau, AK 99811

Re: United States v. Alaska Board  
of Registration for Archi-  
tects, Engineers and Land  
Surveyors  
(A-82-423 Civ.)

Dear Senator Eliason:

Your staff has asked for a brief summary of the progress in this case since the end of last session. This case involves a suit filed by the U.S. Department of Justice (DOJ) against the Board of Registration for Architects, Engineers, and Land Surveyors, challenging the validity of one of its regulations governing the professional conduct of those it registers. The regulation, 12 AAC 36.230(b), specifically prohibited solicitation or submission of proposals for professional services on the basis of competitive bidding.

HB 211, concerning state and local government procurement of these professional services, does not affect the validity or existence of this prohibition in any way. Therefore, that bill is not directly relevant to the litigation.

Here is a chronology of the case:

October 12, 1982	--	DOJ complaint filed in U.S. District Court at Anchorage.
November 22, 1982	--	Board answer filed in court
December 13, 1982	--	DOJ initiates formal discovery
January 28, 1983	--	Board Motion to Stay Proceedings until May 31, so Board

Re: Law Suite

could seek legislation to specifically authorize the 12 AAC 36.230(b) prohibition of competitive bidding. (HB 211 does not accomplish this).

February 14, 1983 -- DOJ opposition to Board's Motion to Stay and DOJ Motions to compel discovery and for a status conference.

February 24, 1983 -- Board's Motion for Stay granted. DOJ motions denied.

May 31, 1983 -- Stay expired without legislative solution.

June 10, 1983 -- Settlement negotiations begin

October 17, 1983 -- Stipulation and Proposed Judgment signed for the Board by the Attorney General's office.

November 18, 1983 -- Stipulation and Proposed Judgment filed in court (copy attached).

December 3, 1983 -- First publication of notice of stipulation in Anchorage Daily News.

January, 1984 -- 12 AAC 36.230(b) is deleted from the Alaska Administrative Code according to stipulation and in anticipation of judgment.

February 1, 1984 -- End of 60 day public comment period - 3 adverse comments submitted from Alaska architects and engineers.

April 1, 1984 -- DOJ expects to have reply comments filed. The court may act on Stipulation and Proposed Judgment anytime after that filing.

The Honorable Dick Eliason, Chair  
Senate Labor & Commerce Committee

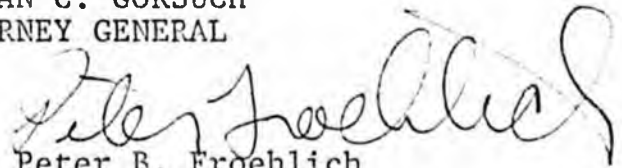
March 8, 1984  
Page 3

I hope this is helpful to you. Please let me know if I  
can provide any further information.

Sincerely yours,

NORMAN C. GORSUCH  
ATTORNEY GENERAL

By:



Peter B. Froehlich  
Assistant Attorney General

NCG: PBF:eja

Enclosure:

cc w/o enc.: Harry Traeger, Director  
Division of Occupational Licensing

Arthur H. Peterson  
Legislation Attorney  
Department of Law

Wayne Jensen, Chair  
Board of Registration for Architects,  
Engineers and Land Surveyors

FILED

UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA

OCT. 12 1962

UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ALASKA BOARD OF REGISTRATION )  
 FOR ARCHITECTS, ENGINEERS, AND )  
 LAND SURVEYORS, )  
 )  
 Defendant. )

By..... )  
 )  
 Civil No. )  
 )  
 Filed: )  
 )  
 15 U.S.C. §1 (Antitrust Vio- )  
 lation Alleged) )  
 )  
 15 U.S.C. §4 (Equitable )  
 Relief Sought) )

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above-named defendant and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed under Section 4 of the Sherman Act, as amended (15 U.S.C. §4), in order to prevent and restrain the continuing violation by the defendant, as hereinafter alleged, of Section 1 of said Act (15 U.S.C. §1).

2. The defendant, Alaska Board of Registration for Architects, Engineers, and Land Surveyors (hereinafter referred to as the "Board"), maintains its principal office, transacts business and is found within the District of Alaska.

II

DEFENDANT

3. The Board is made the defendant herein. The Board is comprised of practicing architects, professional engineers, and land surveyors and is organized and exists under Section 3 of

Chapter 179 of the 1972 Session Laws of Alaska, as amended (Alaska Statutes § 08.48.011 et seq.). The Board maintains its principal office in Juneau, Alaska.

### III

#### CO-CONSPIRATORS

4. Various other persons not made defendants herein have participated as co-conspirators with the defendant in the violation hereinafter alleged, and have performed acts and have made statements in furtherance thereof.

### IV

#### TRADE AND COMMERCE

5. There are approximately 2100 architects, professional engineers and land surveyors, more than one-half of whom are residents of states other than Alaska, licensed to practice in Alaska. These persons provide architectural, professional engineering or land surveying services to individuals, private businesses and governmental entities in Alaska. These services include the design, study and supervision of the construction of buildings, roads, bridges, dams, industrial plants and other structures. Over \$17 million dollars are spent annually by Alaska residents and governmental entities for such services.

6. The Board is the sole licensing authority for the practice of architecture, professional engineering and land surveying in the State of Alaska. The Board administers written examinations and otherwise supervises the qualification, certification and registration for practice within the State of Alaska of resident and nonresident architects, professional engineers, land surveyors and corporations offering architectural, professional engineering or land surveying services. Upon payment of a fee, the

Board annually issues certificates of registration to all properly certified or registered architects, professional engineers, and land surveyors.

7. It is unlawful in Alaska for individuals to practice or offer to practice the profession of architecture, professional engineering or land surveying, or to represent that they are architects, professional engineers or land surveyors unless they have been properly certified or registered by the Board and hold a current Board certificate of registration to practice architecture, professional engineering or land surveying in Alaska.

8. The Board consists of nine members appointed to six-year terms by the Governor of Alaska. Three of the Board members must be architects, one must be a land surveyor, two must be civil engineers, one must be a mining engineer, and two must be engineers from other branches of the engineering profession. Board members must have been residents of Alaska for at least three consecutive years before their appointments. Board members must hold Board certificates of registration and have a minimum of five years of professional practice in their respective fields. While serving their membership terms, Board members may, and do, continue to engage in the practice of architecture, professional engineering or land surveying in Alaska. Board members are compensated on a per diem basis when attending to the work of the Board. In addition, Board members are entitled to receive travel expenses incurred in carrying out their duties.

9. Pursuant to the terms of Section 3 of Chapter 179 of the 1972 Session Laws of Alaska, as amended, the Board may promulgate and amend a code of ethics or professional conduct for architects, professional engineers, and land surveyors.

Under Alaska law, the Board, except in emergencies, must hold a public hearing or proceeding before promulgating or amending its code of ethics or professional conduct. The laws of Alaska are silent as to the form or content of any such code of ethics or professional conduct and neither direct, require, nor mandate restrictions upon, or the regulation of, price competition in the offering of architectural, professional engineering, or land surveying services. Nor has any policy of restricting or regulating price competition in the offering of architectural, professional engineering or land surveying services been established or dictated by the State of Alaska.

10. In 1974, the Board adopted "Rules of Professional Conduct" intended to regulate the practice of architecture, professional engineering and land surveying in Alaska. Among the Board's rules is Rule ~~36.230~~ 36.230(b), which provides that an architect, professional engineer or land surveyor may not knowingly solicit or submit proposals for professional services on the basis of competitive bidding. This rule is still in effect. In December, 1980, the Board rejected a proposal to repeal Rule 36.230(b). In May, 1982, the Board refused to repeal Rule 36.230(b) on an emergency basis. In September, 1982, the Board voted to retain Rule 36.230(b).

11. Section 3 of Chapter 179 of the 1972 Session Laws of Alaska, as amended, provides that the Rules of Professional Conduct of the Board shall be made known in writing to every registrant and applicant for registration and shall be published with the roster of registrants, which the Board must annually publish, mail to registrants and state, borough, and city officials and distribute or sell to the public. Board Rule 36.240(b) provides that an architect, professional engineer or land surveyor having knowledge or reason to believe that another person or corporation may be in violation of any

of the Rules of Professional Conduct shall present that information to the Board in writing and shall cooperate with the Board in furnishing such further information or assistance as may be required.

12. The Board is authorized by Section 3 of Chapter 179 of the 1972 Session Laws of Alaska, as amended, to take disciplinary action against any Board certificate of registration holder who violates any of the Rules of Professional Conduct. Such disciplinary action may include the reprimand of a registrant or corporation or the suspension, refusal to renew, or revocation of the offender's certificate of registration.

13. The architectural, professional engineering and land surveying services provided by the Board certificate of registration holders involve and affect individuals, corporations and other business entities throughout the United States. These services facilitate, direct and shape the conduct of interstate business and contribute directly to the flow of persons, money, goods and services into and out of the State of Alaska.

14. In the course of rendering architectural, professional engineering and land surveying services, Board certificate of registration holders located in Alaska often travel to states other than Alaska and make substantial use of interstate mail and wire services in the transport of funds, documents, plans, reports, plats, drawings and other communications throughout the United States. In addition, many certificate of registration holders located outside Alaska perform architectural, professional engineering and land surveying services within Alaska.

15. The activities of the Board and its certificate of registration holders, as described herein, are within the flow

of interstate commerce and have a substantial effect upon interstate commerce.

V

VIOLATION ALLEGED

16. Beginning at least as early as 1974, and continuing up to and including the date of the filing of this complaint, the defendant and co-conspirators have been engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act. Said violation is continuing and will continue unless the relief hereinafter prayed for is granted.

17. The substantial terms of said agreement, understanding and concert of action have been and are that the defendant promulgate, adopt, publish and distribute a provision in its Rules of Professional Conduct, Rule 36.230(b), prohibiting certificate of registration holders and other architects, professional engineers and land surveyors practicing in Alaska from knowingly soliciting or submitting proposals for professional services on the basis of competitive bidding.

18. For the purpose of effectuating the aforesaid combination and conspiracy, the defendant and co-conspirators have done those things which, as hereinbefore alleged, they agreed and conspired to do.

VI

EFFECTS

19. The aforesaid combination and conspiracy has had the following effects, among others:

- (a) Competition in the sale of architectural, professional engineering and land surveying services has been suppressed and eliminated;
- (b) Consumers of architectural, professional engineering, and land surveying services have been deprived of the benefits of free and open competition in the sale of such services; and
- (c) Architects, professional engineers, and land surveyors have been restrained in their ability to make their services readily and fully available to customers requiring such services.

PRAYER .

WHEREFORE, plaintiff prays:

1. That the Court adjudge and decree that the defendant and co-conspirators have engaged in an unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in violation of Section 1 of the Sherman Act.

2. That the defendant, its members and all other persons acting or claiming to act on its behalf be enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing the aforesaid combination and conspiracy or from engaging in any other combination, conspiracy, contract, agreement, understanding or concert of action having similar purposes or effects, and from adopting, ratifying or following any practice, plan, program or device having similar purposes or effects.

3. That the defendant, its members and all persons acting or claiming to act on its behalf be enjoined and restrained from promulgating, publishing, distributing or otherwise

suggesting, and from adhering or agreeing to adhere to, any rule prohibiting competitive bidding by Board certificate of registration holders.

4. That the defendant be required to cancel Rule 36.230(b) of its Rules of Professional Conduct and every other resolution or statement of policy which has as its purpose or effect the suppression or elimination of competitive bidding by Board certificate of registration holders.

5. That the defendant be required to notify all Board certificate of registration holders, the general public, and all Alaska city, borough, and state officials that it has cancelled and rescinded Rule 36.230(b) of its Rules of Professional Conduct and every other resolution or statement of policy which has as its purpose or effect the suppression or elimination of competitive bidding by Board certificate of registration holders.

6. That the plaintiff have such other and further relief as the Court may deem just and proper.

7. That the plaintiff recover the costs of this suit.

*William F. Baxter*

WILLIAM F. BAXTER  
Assistant Attorney General

*Edward D. Eliasberg, Jr.*

EDWARD D. ELIASBERG, JR.

*Joseph H. Widmar*

JOSEPH H. WIDMAR

*Carolyn L. Davis*

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*Michael R. Freeman*

UNITED STATES ATTORNEY  
District of Alaska

Dated: October 7, 1982



---

Washington, D.C. 20530

JPMcG:JWP:EDE  
60-423-164

03 APR 1984

Ms. Jo Ann Myres  
Clerk  
United States District Court  
for the District of Alaska  
Federal Building & United States Courthouse  
701 C Street, Box 4  
Anchorage, Alaska 99513

Re: United States v. Alaska Board of Registration for  
Architects, Engineers, and Land Surveyors, Civil  
Action No. A 82-423 CIV (D. Alaska)

Dear Ms. Myres:

Enclosed for filing is Plaintiff's Response To Comments Regarding The Proposed Final Judgment. Copies of the three comments we received are attached to the Response. We have sent copies of the Response to the two engineers who prepared individual comments, counsel for the group of six engineers, architects, and land surveyors who submitted a joint comment, and counsel for the Board.

15 U.S.C. § 16(d) requires that the comments and response be published in the Federal Register before entry of the decree. This is the only requirement of the Antitrust Procedures and Penalties Act that remains outstanding. Once it is satisfied, we will be filing the Certificate of Compliance with the Act, after which time the Court can enter the proposed Judgment. We expect publication to take place in about five to seven working days.

Also enclosed for filing is a Motion For Enlargement Of Time. We had informed Chief Judge von der Heydt by letter dated March 12, 1984 that we would be filing such a Motion so that the Government could give proper consideration to the comments that had been received. We would appreciate it if you would present the Motion to the Chief Judge for his approval.

Should there be any questions about these procedures, please feel free to call me at (202) 633-2582 or 2425. As always, we appreciate your consideration.

Sincerely yours,

Edward D. Eliasberg, Jr.  
Attorney  
Antitrust Division

Enclosures

cc: Hon. James A. von der Heydt  
Peter B. Froehlich, Esquire  
Richard W. Garnett, III, Esquire  
Mr. Donald R. Dent, Jr.  
Mr. Vernon Akin

1 Michael R. Spaan  
2 U.S. Attorney  
3 Federal Building and United States Courthouse  
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4 Edward D. Eliasberg, Jr.  
5 Carolyn L. Davis,  
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8 Washington, D. C. 20530  
9 Telephone: (202) 633-2582  
10 Attorneys for Plaintiff

9 UNITED STATES DISTRICT COURT  
10 FOR THE DISTRICT OF ALASKA

10 UNITED STATES OF AMERICA, )  
11 )  
12 Plaintiff, )  
13 v. ) Civil No. A 82-423-CIV  
14 )  
15 ALASKA BOARD OF REGISTRATION )  
16 FOR ARCHITECTS, ENGINEERS, )  
17 AND LAND SURVEYORS, ) PLAINTIFF'S RESPONSE TO  
18 ) COMMENTS REGARDING THE  
19 ) PROPOSED FINAL JUDGMENT  
20 )  
21 Defendant. )

16 Plaintiff submits this Response pursuant to Section 2(a) of  
17 the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C.  
18 § 16(d), which provides that for a 60-day period prior to the  
19 entry of a proposed Final Judgment in a civil antitrust suit  
20 the United States shall receive and consider any written  
21 comments relating to that proposed Final Judgment. The APPA  
22 provides that at the close of that period the United States  
23 shall file with the District Court and cause to be published a  
24 response to such comments.

25 Three comments, copies of which are attached, were  
26 submitted to plaintiff regarding the proposed Final Judgment  
27  
28

1 during the 60-day period which ended on February 1, 1984.  
2 They, along with this response, will promptly be published in  
3 the Federal Register as required by 15 U.S.C. § 16(d). After  
4 reviewing these comments, plaintiff continues to believe that  
5 the proposed Final Judgment should be entered without  
6 modification.

7 A. Response to Comment of the Charles Tryck Group

8 In a pleading dated January 27, 1984, Charles Tryck, Walter  
9 Steige, Kenneth Walsh, Robert Hesseitine, Gustav Johnson, and  
10 Sam Best (hereinafter the "Tryck Group"), raise certain  
11 objections to the theory underlying the government's suit and  
12 to the entry of the proposed Final Judgment. First, they  
13 contend that the consent decree is based on a  
14 "misunderstanding" of the Board's rules in that those rules do  
15 not, they say, disallow competition. Second, they argue that  
16 competitive bidding for professional services is harmful to the  
17 public interest and will promote "mediocrity." Third, they  
18 contend that the Board's ban on such bidding is immune from  
19 antitrust challenge under the state action doctrine. 1/  
20 Finally, the Tryck Group contends that the proposed Final  
21 Judgment "would unduly interfere with legislative options" in  
22  
23

---

24 1/ The Tryck Group Comment suggests that the procedures  
25 leading to the proposed decree were "irregular" and "inadequate  
26 for a full review of the important legal and policy issues in  
27 this case." The Comment also suggests that the Alaska  
28 Assistant Attorney General acted contrary to the wishes of the  
Board in agreeing to the consent decree.

1 that it would bar the Board from adopting future restrictions  
2 on competition even if authorized by a "broad" authorization  
3 from the state legislature. The relief the Group seeks is that  
4 "entry of the decree be delayed for at least six (6) months  
5 until the Legislature has had full opportunity to review the  
6 decree and its own policy options." It further urges that "if  
7 the Court determines to approve the proposed decree . . . the  
8 decree should be modified to state specifically that its entry  
9 will have no effect upon the power of the Legislature to  
10 determine appropriate public policy for procurement of  
11 professional services, and the manner of implementing that  
12 policy."

13 A principal contention of the Tryck Group amounts to an  
14 argument that the underlying cause of action of this case is  
15 without merit. These arguments are not germane to the public  
16 interest determination which the Court must make in evaluating  
17 a proposed antitrust consent decree under the APPA. 15 U.S.C.  
18 § 16(e). That Act provides, in relevant part,

19  
20 Before entering any consent judgment  
21 proposed by the United States under this section,  
22 the court shall determine that the entry of such  
23 judgment is in the public interest. For the  
24 purpose of such determination, the court may  
25 consider --

26 (1) the competitive impact of such  
27 judgment, including termination of  
28 alleged violations, provisions for  
enforcement and modification, duration  
or relief sought, anticipated effects  
of alternative remedies actually  
considered, and any other  
considerations bearing upon the  
adequacy of such judgment;

1 (2) the impact of entry of such  
2 judgment upon the public generally and  
3 individuals alleging specific injury  
4 from the violations set forth in the  
5 complaint including consideration of  
6 the public benefit, if any, to be  
7 derived from a determination of the  
8 issues at trial.

9 In discussing the appropriate standard for evaluating proposed  
10 consent decrees, the Ninth Circuit has held that the Court's  
11 determination is not to be an evaluation of the merits or the  
12 propriety of plaintiff's case; the Court is not to try and  
13 decide the case which the parties have agreed to settle.  
14 Instead the test under the APPA is simply whether the proposed  
15 judgment is adequate to remedy the violations alleged in the  
16 complaint. United States v. Bechtel Corp., 648 F.2d 660,  
17 665-66 (9th Cir. 1981), cert. denied, 454 U.S. 1083 (1981).  
18 See United States v. AT&T, 552 F. Supp. 131, 149-51 (D.D.C.  
19 1982); United States v. Agri-Mark, Inc., 512 F. Supp. 737, 739  
20 (D.Vt. 1981); United States v. Nat'l Broadcasting Co., 449 F.  
21 Supp. 1127, 1143-45 (C.D. Calif. 1978), cert. denied, 444 U.S.  
22 991 (1981); United States v. Gillette Co., 406 F. Supp. 713,  
23 716 (D. Mass. 1975). Furthermore, the Court's review is not  
24 meant to be "an unrestricted evaluation of what relief would  
25 best serve the public," but rather, whether the relief  
26 requested in the proposed Final Judgment is consistent with the  
27 theory of the case. Bechtel, supra at 665-66; AT&T, supra;  
28 Agri-Mark, supra at 739-40; NBC, supra at 1144-45; Gillette,  
supra. The latitude which the reviewing Court should afford to  
decrees negotiated by the parties is founded on the sound

1 policy of the APPA encouraging entry of consent decrees and  
2 leaving the balancing of competing interests affected by the  
3 consent decrees to the discretion of the Attorney General.

4 Bechtel, supra at 666; AT&T, supra at 150-51; Agri-Mark, supra  
5 at 739; NBC, supra at 1141-43; Gillette, supra at 716.

6 In sum, questions raised as to the wisdom of the  
7 litigation, the validity of the theory of the case or  
8 sufficiency of evidence to support that theory are beyond the  
9 scope of the inquiry mandated under the APPA. The Comment of  
10 the Tryck Group, questioning whether competition is lessened by  
11 the Board's rules and whether competitive bidding is harmful to  
12 the public interest or whether the state action doctrine should  
13 shield the Board's activities obviously go to the merits of the  
14 underlying claim in this case. The Court should refuse to  
15 consider such contentions under the APPA. Bechtel, supra at  
16 666. The Court's task is to assess whether the relief proposed  
17 under the decree is adequate to remedy the alleged violation of  
18 the antitrust laws. Id. The relief proposed, removal of the  
19 rules challenged in the complaint, is, we submit, obviously  
20 consistent with that standard as set forth in Bechtel.

21 Moreover, the arguments of the Tryck Group relating to the  
22 substantive issues in this case would be without merit even if  
23 they were now timely. Bans on competitive bidding such as that  
24 challenged in this litigation have been held to be per se  
25 illegal. National Society of Professional Engineers v. United  
26 States, 435 U.S. 679 (1978); United States v. Texas State Board  
27 of Public Accountancy, 464 F. Supp. 400 (W.D. Tex. 1978),  
28

1 aff'd., 592 F.2d 919 (5th Cir. 1979), cert. denied, 444 U.S.  
2 925 (1979). See Catalano, Inc. v. Target Sales, Inc., 446 U.S.  
3 643, 647 (1980). It is well established that bidding bans are  
4 "naked restraints" on competition which will be struck down  
5 without regard to the purported public interest arguments that  
6 competition is harmful which the Tryck Group makes. National  
7 Society of Professional Engineers, supra at 695; Texas State  
8 Board of Public Accountancy, supra at 402-3. Furthermore, the  
9 Tryck Group's comments imply, erroneously, that the decree  
10 mandates or compels competitive bidding. It does not. It  
11 simply permits engineers, architects, surveyors, and their  
12 customers to engage in the competitive bidding process if they  
13 think it is in their interest to do so.

14 The comment of the Tryck Group also implies that the Court  
15 should give special scrutiny to this proposed decree because,  
16 it asserts, the defendant "is without legal representation,"  
17 i.e., it is represented by the Attorney General of Alaska who  
18 has consented to provisions that purportedly are not agreeable  
19 to at least some members of the Board. Although the Court may  
20 properly consider whether consent was lacking by a party  
21 entering into a decree, Bechtel, supra at 663, in this case the  
22 Attorney General of Alaska possessed the power to negotiate and  
23 enter the proposed Final Judgment for the defendant. Under  
24 Alaska law, the Attorney General has the sole authority to  
25 represent all state agencies in judicial proceedings.  
26 AS 44.23.020; AS 08.48.141. That authority includes the power  
27 to control and dispose of litigation, including consenting to  
28

1 the entry of a final judgment. State v. First Nat'l Bank of  
2 Anchorage, 660 P.2d 406, 420-21 (Alask. S. Ct. 1982); Public  
3 Defender Agency v. Superior Court, 534 P.2d 947, 949-51 (Alask.  
4 S. Ct. 1975). An individual state agency may not overrule the  
5 Attorney General of Alaska in the exercise of that discretion.  
6 Public Defender Agency, supra; see Opinion of Alaska Attorney  
7 General Wilson L. Condon to the Department of Internal Revenue  
8 (October 7, 1981). The comments do not suggest any procedural  
9 irregularity by the Attorney General. Thus, the Attorney  
10 General of Alaska had the authority to, and did, consent to the  
11 entry of the proposed Final Judgment.

12 Although this matter has already been stayed by the Court  
13 for four months in order to permit the Alaska Legislature to  
14 consider legislation regarding competitive bidding (see, Minute  
15 Order from Chambers, February 24, 1983), the Tryck Group  
16 requests yet another stay of six months so that the Legislature  
17 can again consider possible legislation and, also "review" this  
18 proposed decree. In the alternative, the Group requests that  
19 the decree be modified to state that its entry "will have no  
20 effect upon the power of the legislature to determine  
21 appropriate public policy for procurement of professional  
22 services, and the manner of implementing that policy." Such  
23 a request is unjustified and unnecessary.

24 The proposed decree does not prevent the Legislature of  
25 the State of Alaska from enacting legislation to prevent or  
26 regulate competitive bidding in the rendering of services. For  
27 example, the Legislature is clearly free to enact legislation  
28

1 making all or certain kinds of competitive bidding for  
2 engineering, architectural or surveying services unlawful or  
3 requiring that state agencies not engage in competitive  
4 bidding. The only possible conflict with the provisions of  
5 this decree would occur if the Legislature enacted new  
6 legislation which required, or appeared to require, the Board  
7 to restrict competitive bidding -- legislation which it has  
8 previously declined to enact. If such a case arose there would  
9 be various questions to resolve including what kind of  
10 restraint on competitive bidding was intended by the  
11 Legislature and whether such a restraint had been so clearly  
12 articulated as state policy as to confer a so-called "state  
13 action" defense exemption under the antitrust laws. Community  
14 Communications Co. v. City of Boulder, 455 U.S. 40 (1982);  
15 California Liquor Dealers Assn. v. Midcal Aluminum, 445 U.S. 97  
16 (1980); New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S.  
17 96 (1978). <sup>2/</sup> We submit that it is clearly premature to deal  
18 with such a hypothetical situation now.

19 Given the Legislature's past refusals to enact any legis-  
20 lation restricting competitive bidding, the Tryck Group's  
21

---

22 <sup>2/</sup> As the Tryck Group points out, questions regarding this  
23 defense are now before the United States Supreme Court in  
24 Ronwin v. State Bar of Arizona, 686 F.2d 692 (9th Cir. 1982),  
25 cert. granted sub nom. Hoover v. Ronwin, 103 S.Ct. 2084  
26 (1983). The issues in that case, however, are inapplicable to  
the facts of this case. The question in Ronwin is under what  
circumstances a specific statutory grant provides state action

Footnote Continued

1 objection that the Legislature may someday enact legislation  
2 that would require Board promulgation of a ban on competitive  
3 bidding is necessarily speculative. In any event, under  
4 Section XII of the proposed Final Judgment, the defendant  
5 retains the right to request that the Court consider the  
6 propriety of amending the Judgment if such legislation were  
7 ever enacted. A potential conflict between the requirements of  
8 a decree and legislation is not grounds to justify rejection of  
9 the decree. If substantive changes are required, the  
10 modification provisions of the decree are available to  
11 defendant. Cf. Bechtel, supra at 666.

12 In the event such legislation were enacted, the Board would  
13 be required under the decree to request that the Court amend  
14 the judgment to permit it to act in accordance with the  
15 legislation. This procedure is entirely appropriate and in the  
16 public interest in that the Court would have the opportunity to  
17 determine whether the statute constituted state action and  
18 hence would otherwise immunize the Board's conduct from  
19 challenge under the antitrust laws.

20 Finally, the Tryck Group's request for a six months stay  
21 prior to entry of the decree should be rejected as unwarranted  
22 and improper at this stage of the proceeding. The Court's sole  
23

24 2/ Footnote Continued

25 protection. In contrast, the present case involves only a  
26 general enabling statute. See generally, City of Boulder,  
27 supra.

1 function under the APPA is to either approve the settlement or  
2 to state what amendments it will require to the proposed Final  
3 Judgment before approving the decree. AT&T, supra at 153; NBC,  
4 supra at 1142-43. It would be inappropriate and inconsistent  
5 with the APPA to grant third parties extensions of time to seek  
6 what they perceive as curative legislation where as here the  
7 parties have stipulated to a decree resolving the controversy.  
8 AT&T, supra at 153; NBC, supra at 1142-43; Cf., Landis v. North  
9 American Co., 299 U.S. 248 (1936). Indeed, such a stay would  
10 be particularly inappropriate in this case since the Court  
11 previously has granted the defendant a four month stay in which  
12 it unsuccessfully sought legislation. (See, Minute Order From  
13 Chambers, February 24, 1983).

14 B. Response to Comment of Donald R. Dent

15 By letter dated January 27, 1984, Donald R. Dent, a  
16 professional engineer and land surveyor in Anchorage, Alaska,  
17 made general objections to the bringing and settling of this  
18 suit. He noted that he agreed with the comments of the Tryck  
19 Group, except he believed that the Final Judgment should be  
20 dismissed immediately "as being without basis in fact or law"  
21 rather than delayed six months for legislative action as the  
22 Tryck Group had requested. He also stated in his letter that  
23 he did not believe that the actions taken by the United States  
24 or the Alaska Attorney General "have been open and above  
25 reproach" in this case and that "the cases cited by the [United  
26 States] Department of Justice . . . as a basis of attack are  
27 applicable to this situation, or this State Agency." He  
28

1 further stated that "many statements made in the Competitive  
2 Impact Statement . . . are speculative and without basis in  
3 fact" and that "this Final Judgment would allow the Department  
4 to avoid proving its allegations." All of Mr. Dent's  
5 objections except one are basically among those raised by the  
6 Tryck Group discussed above. Our response to their comments  
7 are equally applicable to his.

8 Mr. Dent raises one additional comment concerning Sections  
9 IV and V of the proposed Final Judgment. He asserts that  
10 these Articles are in conflict with one another in that "the  
11 Board . . . would not be able to exercise its rights in  
12 'advocating or seeking legislation concerning competitive  
13 bidding', allowed by Article V, without violating Article IV."  
14 This is not correct. Article V clearly provides that "nothing  
15 in this Final Judgment shall prohibit defendant from advocating  
16 or seeking legislation concerning competitive bidding or  
17 quoting prices, provided that such advocacy or discussion makes  
18 clear that defendant is not thereby suppressing, restraining or  
19 discouraging Board certificate of registration holders from  
20 submitting competitive bids or price quotations."

21 C. Response to Comment of Vernon Akin

22 By a one page letter dated February 1, 1984, Vernon Akin, a  
23 consulting engineer with offices in Juneau, Alaska, also made a  
24 general objection to the entry of the proposed decree. He  
25 indicated that he had read and endorsed the position Charles  
26 Tryck and his colleagues had taken in their comment. Mr. Akin  
27 also stated that, as was the case with the Tryck Group, his  
28

1 basic position is that the ban does not unreasonably restrain  
2 competition, that competitive bidding is harmful to the public  
3 interest, and that the present Alaska Attorney General has  
4 "'sold down the river'" the defendant and the profession. He  
5 asked that the Court delay entry of the decree until members of  
6 the profession have had an opportunity "to prove" that "their  
7 stand is valid."

8 Mr. Akin's objections are among those raised by the Tryck  
9 Group. Our response to their comments are equally applicable  
10 to his.

11 CONCLUSION

12 After reviewing these comments, the United States still  
13 submits that prompt entry of the proposed judgment is in the  
14 public interest.

15  
16 Respectfully submitted,

17 *Edward D. Eliasberg, Jr.*  
18 EDWARD D. ELIASBERG, JR.

19  
20 *Carolyn L. Davis*  
21 CAROLYN L. DAVIS

22 Attorneys, Department of  
23 Justice, Antitrust Division  
24 10th & Pennsylvania Avenue, N.W.  
Washington, D.C. 20530  
Telephone: (202) 633-2582

25 Dated: April 3, 1984



# Department of Justice

FOR IMMEDIATE RELEASE  
FRIDAY, NOVEMBER 18, 1983

AT  
202-633-2016

The Department of Justice today filed a proposed consent decree that would terminate its civil antitrust suit against the Alaska Board of Registration for Architects, Engineers, and Land Surveyors.

Attorney General William French Smith said the proposed decree, which was filed in U.S. District Court in Anchorage, will become final upon approval by the court.

William F. Baxter, Assistant Attorney General in charge of the Antitrust Division, said the suit, filed on October 12, 1982, alleged that the Board violated Section 1 of the Sherman Act by adopting a code of ethics provision which prohibits architects, professional engineers, and land surveyors licensed to practice in Alaska from engaging in competitive bidding.

The proposed decree will enjoin the Board from adopting, continuing, advocating, or furthering any agreement, plan, or course of action which has the purpose or effect of suppressing or discouraging Alaska architects, professional engineers, and land surveyors from submitting competitive bids or price quotations.

The Board is also required to delete the competitive bidding ban from its code of ethics and to notify licensed practitioners, purchasers of architectural, professional engineering, and land surveying services, and the general public in Alaska of the rule change.

(MORE)

STATE OF ALASKA

OFFICE OF THE GOVERNOR  
JUNEAU

BILL SHEFFIELD  
GOVERNOR

# NEWS RELEASE



FOR INFORMATION CONTACT:  
Pete Spivey  
Press Secretary

John Greely  
Deputy Press Secretary  
Office of the Governor  
Pouch A, Juneau, AK 99811

Bus. Phone: (907) 465-3500

---

SETTLEMENT WITH DEPARTMENT OF JUSTICE

October 27, 1983

#83-

## FOR IMMEDIATE RELEASE

JUNEAU - Attorney General Norman Gorsuch announced today that the State of Alaska has signed a stipulation (see attachment) with the U. S. Department of Justice to settle an antitrust case filed against the Alaska Board of Registration for Architects, Engineers, and Land Surveyors. The issue in United States v. Alaska Board of Registration for Architects, Engineers, and Land Surveyors was the Board's regulation forbidding every registered architect, engineer or land surveyor to "knowingly solicit or submit proposals for professional services on the basis of competitive bidding."

Under the terms of the proposed final judgment, which will be filed in federal district court in Anchorage in early November, the prohibition against competitive bidding will be deleted. If the final judgment is approved by the court following a 60 day public comment period required by federal law, architects, engineers and surveyors will be able to solicit work

- MORE -

or submit proposals on the basis of competitive bidding and will be able to offer price quotations, hourly rates, or price estimates to all potential customers.

Since 1978, the Attorney General's office has repeatedly advised the Board that its ban on competitive bidding was probably illegal under state and federal antitrust laws. The Board has consistently refused to follow the advice to repeal the regulation. The Department of Justice filed the lawsuit in October, 1982 to invalidate the regulation, after warning the Board in May that its failure to repeal the ban would require litigation.

Attorney General Gorsuch said it was simply not in the best interest of the public to spend the time and money to defend the bidding ban in light of its doubtful legality.

The Attorney General expressed hope that Alaska's surveyors, architects and engineers would welcome the return to competitive bidding which will benefit the Alaska consumer. The Attorney General noted that the free market system works best where healthy competition is encouraged--including competition among individuals who provide professional services, whether they are doctors, lawyers or architects.

Persons interested in commenting on the proposed judgment and stipulation should contact the Clerk of the District court by calling 271-5568, or writing Clerk of the Court, 701 C St., Anchorage, AK 99501.

Michael R. Spaan  
U.S. Attorney  
Federal Building and United States Courthouse  
Room C-252, Mail Box 9  
701 C Street  
Anchorage, Alaska 99513

RECEIVED  
Department of Justice

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AM 7 8 9 10 11 12 1 2 3 4 5 6 PM

Edward D. Eliasberg, Jr.  
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United States Department of Justice  
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Telephone: (202) 633-2582  
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. A82-423 CIV
	)	
ALASKA BOARD OF REGISTRATION	)	Filed:
FOR ARCHITECTS, ENGINEERS,	)	
AND LAND SURVEYORS,	)	<u>STIPULATION</u>
	)	
Defendant.	)	

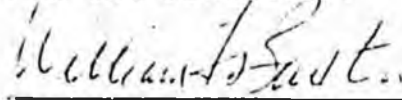
It is stipulated by and between the undersigned parties, by their respective attorneys, that:

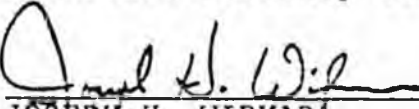
1. The parties consent that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16), and without further notice to any party or other proceedings, provided that plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendant and by filing that notice with the Court.

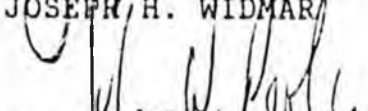
2. In the event plaintiff withdraws its consent or if the proposed Final Judgment is not entered pursuant to this Stipulation, this Stipulation shall be of no effect whatever and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

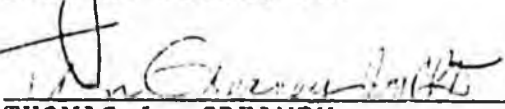
Dated:

FOR THE PLAINTIFF:


  
\_\_\_\_\_  
WILLIAM F. BAXTER  
Assistant Attorney General

  
\_\_\_\_\_  
JOSEPH H. WIDMAR

  
\_\_\_\_\_  
JOHN W. POOLE, JR.

  
\_\_\_\_\_  
THOMAS L. GREANEY  
Attorneys, Antitrust Division  
U. S. Department of Justice


  
\_\_\_\_\_  
EDWARD D. ELIASBERG, JR.

  
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\_\_\_\_\_  
MARK R. DAVIS  
Assistant United States Attorney  
District of Alaska

FOR THE DEFENDANT:

NORMAN GORSUCH  
Attorney General

  
\_\_\_\_\_  
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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. A82-423 CIV
	)	
ALASKA BOARD OF REGISTRATION	)	Filed:
FOR ARCHITECTS, ENGINEERS,	)	
AND LAND SURVEYORS,	)	<u>FINAL JUDGMENT</u>
	)	
Defendant.	)	

Plaintiff, United States of America, having filed its Complaint herein on October 12, 1982, and plaintiff and defendant, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence against or an admission by any party with respect to any such issue;

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein and upon consent of the parties hereto, it is hereby,

ORDERED, ADJUDGED, AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter of this action and of each of the parties consenting hereto. The Complaint states a claim upon which relief may be granted against defendant under Section 1 of the Sherman Act (15 U.S.C. § 1).

II.

As used in this Final Judgment: "Board certificate of registration holder" means any person holding a current certificate of registration as a professional architect, engineer or land surveyor issued by defendant, or any corporation holding a current certificate of authorization to practice architecture, engineering or land surveying issued by defendant.

III.

This Final Judgment applies to the defendant and to defendant's officers, directors, agents, employees, subsidiaries, successors and assigns, and to all other persons in active concert or participation with it who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV.

Defendant is hereby enjoined and restrained from directly or indirectly:

(A) Continuing, maintaining, adopting, entering into, carrying out, advocating or furthering any agreement, plan, program, or course of action which has the purpose or effect of

suppressing, restraining, or discouraging Board certificate of registration holders from submitting competitive bids or price quotations.

(B) Promulgating, maintaining, adopting, disseminating, publishing, enforcing or seeking adherence to any rule, by-law, guideline, standard, code of ethics, statement of principle, policy, or collective statement which has the purpose or effect of suppressing, restraining, or discouraging Board certificate of registration holders from submitting competitive bids or price quotations, or which states or implies that competitive bidding or quoting prices is prohibited, unethical, unprofessional, or contrary to any policy of defendant.

(C) Refusing to issue a certificate to any applicant, or rescinding, suspending or refusing to renew a certificate of any holder, because of use or submission of competitive bids or price quotations, or solicitation of proposals for professional services on the basis of competitive bidding.

V.

Nothing in this Final Judgment shall prohibit defendant from advocating or seeking legislation concerning competitive bidding or quoting prices, provided that such advocacy or discussion makes clear that defendant is not thereby suppressing, restraining or discouraging Board certificate of registration holders from submitting competitive bids or price quotations.

VI.

Subsection 230(b) of the defendant's Rules of Professional Conduct [12 AAC 36.230(b)] which states that:

Each architect, engineer or land surveyor shall seek professional employment on the basis of qualifications for the proper accomplishment of the work. He may not knowingly solicit or submit proposals for professional services on the basis of competitive bidding.

is hereby declared null and void because the subsection is in violation of Section 1 of the Sherman Act [15 U.S.C. § 1 (1977)]. Subsection 230(b) must be deleted from the Alaska Administrative Code within 60 days from the entry of this Final Judgment. Defendant is also ordered and directed to delete any other provision in its Rules of Professional Conduct, by-laws, resolutions, and policy statements, whether formal or informal, which prohibits, limits, or otherwise discourages the use or submission of competitive bids or price quotations, or solicitation of proposals for professional services on the basis of competitive bidding, by Board certificate of registration holders and applicants, or which implies that the use, submission, or solicitation of competitive bids or price quotations is prohibited, unethical, unprofessional, or contrary to any policy of the defendant.

VII.

Within 60 days from entry of this Final Judgment:

A. The defendant is ordered to insert in the place of the text of subsection 230(b) [12 AAC 36.230(b)] and any other provision deleted pursuant to Section VI, above, a statement that

subsection 230(b) [12 AAC 36.230(b)] or other such provision has been deleted and the date of the deletion.

B. The defendant is further ordered to insert in the Alaska Administrative Code on the page where subsection 230(b) [12 AAC 36.230(b)] previously appeared the following Editor's Footnote:

Editor's Note: As of Register 88, Jan. 1984, 12 AAC 36.230(b) was deleted by the regulations attorney in accordance with a Final Judgment entered, with the consent of the Board and the United States Department of Justice, by the United States District Court for the District of Alaska in United States v. Alaska Bd. of Registration for Architects, Engineers and Land Surveyors, Civil Action No. A82-423 CIV. This Judgment was entered because 12 AAC 36.230(b) was in violation of Section 1 of the Sherman Antitrust Act [15 U.S.C. § 1 (1977)]. The Final Judgment also prohibits further enforcement of any ban or Board policy against competitive bidding.

#### VIII.

Within 60 days from entry of this Final Judgment, notice of this Final Judgment consisting of a letter on the letterhead of the Division of Occupational Licensing of the Alaska Department of Commerce and Economic Development with a text identical to that of Appendix A of this Final Judgment, shall be sent: (1) to each current Board certificate of registration holder; (2) to each state, city and borough entity in Alaska which may purchase architecture, engineering, or land surveying services and to which the Board's roster is mailed under AS 08.48.081; and (3) to each trade association for contractors in the State of Alaska. In addition within 60 days from entry of this Final Judgment, such notice shall be published in the Alaska Construction and Oil

magazine, and in the Anchorage Times, Juneau Empire, Fairbanks News-Miner, Sitka Sentinel, Peninsula Clarion, Nome Nugget, Tundra Times, Ketchikan Daily News, and Kodiak Mirror newspapers in their general readership sections.

Furthermore, for a period of ten (10) years following the date of entry of this Final Judgment, such notice shall be sent to each new Board certificate of registration holder and to all others who receive the Board's roster under AS 08.48.081. The letter will also be published in every printing of the Board's pamphlet of statutes and regulations for a period of ten (10) years after the date of entry of this Final Judgment.

IX.

The defendant is ordered and directed to file with the Court and serve upon plaintiff, within one-hundred-twenty (120) days after entry of this Final Judgment, an affidavit as to the fact and manner of its compliance with Sections VI, VII and the first paragraph of Section VIII.

X.

For the purpose of determining or securing compliance with this Final Judgment, and subject to any legally recognized privilege, from time to time:

(A) Duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant