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Jeanie Henry

House Judiciary	5/9/86	1:30 pm
"	5/9/86	7:00 pm

Alaska State Legislature

CO-CHAIRMAN
FINANCE COMMITTEE

907-465-3740



Senate

IAN FAIKS
POUCH V
CAPITOL BUILDING
UNEAU, ALASKA 99811

TO: SENATE SELECT INTERIM COMMITTEE ON PROCUREMENT PRACTICES AND PROCEDURES

FROM: SENATOR JAM FAIKS

SUBJECT: MODEL PROCUREMENT CODE

DATE: AUGUST 28, 1985

In February of 1979, the Model Procurement Code for State and Local Governments was adopted by the American Bar Association's House of Delegates. The Code represents over five years of intensive effort directed by a Coordinating Committee which is a joint committee of the Section of Public Contract Law and the Section of Urban, State and Local Government Law.

The Model Procurement Code provides the framework for creating a complete purchasing system at any level of government. Specifically, the Code contains: (1) the statutory principles and policy guidance for managing and controlling the procurement of supplies, services, and construction for public purposes; (2) administrative and judicial remedies for the resolution of controversies relating to public contracts; and (3) a set of ethical standards governing public and private participants in the procurement process.

The following jurisdictions have adopted modified versions of the Code: Kentucky (1979), Arkansas (1979), Louisiana (1980), Utah (1980), Maryland (1981), South Carolina (1981), Colorado (1982), Indiana (1982), Virginia (1983), Territory of Guam (1983), New Mexico (1984), and Arizona (1984).

Local governments/agencies have also adopted versions of the Code, including: Knoxville, TN (1977), Jefferson City, KY Board of Education (1980), Anchorage, AK (1980), Eau Claire, WI (1980), Rome, GA (1980), Davenport, IA (1980), Louisville, KY (1981), Michigan Public Transit Association (1981), Seminole County, FL (1983), Rockville, MD (1983), Kansas City, KS (1983), Atlanta, GA (1983), and Boca Raton, FL (1984).

Attached is an article on the Code entitled "Recent Developments in State and Local Procurement: Implementation of the Model Procurement Code Picks Up Pace" which provides an overview.

RECENT DEVELOPMENTS IN STATE AND LOCAL PROCUREMENT:
IMPLEMENTATION OF THE MODEL PROCUREMENT CODE PICKS UP PACE

Committee on State and Local Procurement Law

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I. Introduction

Tightening the budgetary belts of state and local governments often results from one of two factors: cities, counties, and states find themselves hard pressed to obtain needed goods and services due to inefficient commitments of scarce tax funds; or, governmental bodies engaged in trimming down on account of budget shortfalls and seeking more efficient methods for obtaining goods and services under a structured and cohesive contracting system. The Model Procurement Code for State and Local Governments (hereinafter the "MPC"),¹ a joint undertaking of the ABA Sections of Public Contract Law, and Urban, State and Local Government Law, provides the framework for creating a complete purchasing system at any level of government. Purposefully drafted as a model, rather than a uniform purchasing law,² enacting jurisdictions have enjoyed considerable flexibility in adapting the MPC in a manner that conforms to the unique needs of their constituents. This article will update readers on implementation activities and litigation under the MPC, since it was first mentioned in The Urban Lawyer in the summer of 1979.³ A general familiarity with the MPC is presumed, and it can easily be obtained by scanning the ABA approved document.

II. Enactments

A. States

The Coordinating Committee on A Model Procurement Code (hereinafter the "Coordinating Committee") cooperated with a number of Pilot Jurisdictions in the early development of the MPC's statutory language.⁴ To date, eleven states have adopted

legislation based upon the MPC, flowing from its formal approval by the ABA House of Delegates on February 13, 1979.⁵ By comparison, only two states (Pennsylvania and Massachusetts) had adopted the Uniform Commercial Code in the first six years of its "official" life after its release in September, 1951.⁶

The two most recent enactments of the MPC became effective in New Mexico and Arizona on November 1, 1984 and January 1, 1985, respectively.⁷ A brief digest of these two adaptations will give the reader a flavor of the methods that states have utilized in tailoring the MPC to fit their needs. Both of these enactments reflect the Coordinating Committee's drafting philosophy that the MPC should be used as a "mirror", reflecting the strengths and weaknesses of existing procurement statutes and serving as a vehicle for codifying and updating them.

The New Mexico Procurement Code is not separated into distinct articles by subject matter, although its sections flow from one topical area to another in the basic sequence of the MPC. Definitions were placed under a single section, thus eliminating the need for cross-references; and, the state's existing procurement organization was retained with the Secretary of the General Services Department exercising administrative control over the procurement process. Competitive sealed bids are the favored method of source selection as in the MPC, with local exceptions for procurements under existing contracts and purchases from anti-poverty program businesses. Professional services are to be obtained primarily by competitive sealed

proposals, and the State Procurement Standards and Specifications Committee is charged with developing a list of acceptable brand name items in addition to standardized specifications. Various provisions of the MPC which were already covered by state law were not placed under the New Mexico Procurement Code (e.g., Article 5, Construction Management and Bonding Provisions; and Article 8, Supply Management). New Mexico's Code requires that bid protests be submitted within fifteen days of the occurrence giving rise to the protest rather than the MPC's thirty days, and bid protest resolution provisions do not include award of monetary damages or attorney's fees. New Mexico encourages contracting with small businesses as defined by dollar volume, but their Code makes no provision for minority or disadvantaged businesses as a function of the procurement process.³

The Arizona Procurement Code embraces many MPC provisions, and effects substantial changes in the way the state purchases goods and services. From the viewpoint of procurement organization, however, many entities are excluded from mandatory application of the Arizona Code, including: political subdivisions; the University Board of Regents; the Legislature; the Judicial Branch; the Lottery Commission; the State Transportation Board for Engineering and Construction Services; health care provider contracts; and, purchases of raw materials by Industries for the Blind and Correctional Enterprises. The current purchasing organization was retained, with the Director of the Department of Administration serving as both the purchasing policy maker and the chief procurement officer (the

MPC recommends separation of these duties). The Arizona source selection and contract formation provisions closely parallel those found in Article 3 of the MPC, which forms the heart of any purchasing system. One interesting feature of the Arizona Code is its prohibition against the use of competitive sealed proposals in the procurement of construction. Arizona's Article 5 is unique in that it covers not only architect-engineer and land surveying services, but it also includes the services of assayers, geologists and landscape architects. Price may be considered as a selection factor under certain circumstances in the procurement of these professional services, a significant variance from MPC provisions on point. The remedies section (Article 9) provides exclusive means for asserting a contract claim against the state under the Arizona Procurement Code. Finally, Arizona has not included provisions found in MPC Articles 11 and 12, with the exception that the state must comply with all federal assistance requirements.⁹

As can be seen, states have taken a very active role in adapting the Code for their use, supplementing and codifying existing statutes using the MPC as a baseline drafting guide. These efforts have been assisted by state and local bar groups and representatives of the sponsoring ABA Sections in many jurisdictions.

B. Local Enactments

Local enactments of MPC based legislation have proven most difficult to track, due in no small part to the multiplicity of local jurisdictions which have reviewed the Code in whole or

in part, and the lack of centrally staffed "clearing house" for processing such information. To date, at least seventeen local jurisdictions are known to have adopted the MPC.¹⁰ Information or requests regarding local enactments should be directed to Professor Louis F. Del Duca, a member of the MPC Coordinating Committee and Director of the Model Procurement Code Annual Progress Report Project at Dickinson School of Law.¹¹

III. Litigation Survey

Billed as a "lawyer's relief act" early on by some in the purchasing community, MPC enactments have not spawned the tidal wave of lawsuits once predicted. Our initial litigation survey revealed that most of the reported cases have centered on the provisions of Articles 1, 3 and 9, with a lesser number of disputes arising under Articles 5, 8 and 12. As anticipated, the majority of cases reviewed have come from states in which the MPC has been in effect for some time, namely, Kentucky, Louisiana and Maryland (enactments effective in 1979, 1980, and 1981, respectively).¹² The remainder of this article will highlight these recent decisions or legislative refinements which have clarified, and in some cases confused, issues arising under MPC enactments. For ease of reference, the survey is arranged by MPC Articles, addressing the major issues as they have arisen thereunder each topical heading.

A. Article 1 -- General Provisions

Alternative B of MPC §1-104(3) (Local Application of this Code) authorizes, but does not require, political subdivisions to adopt any or all portions of the code, and the

Louisiana Procurement Code adopted this "optional" approach. In Council of the City of New Orleans v. Morial, et al.,¹³ the Council members sought judicial clarification of their Charter provisions requiring competitive bidding on all contracts for construction, repairs, maintenance or services; with an express exception for the procurement of "professional services" as defined.¹⁴ The question arose as to whether the administrative services required for a health care plan for city employees came within the bidding exemption for "professional services". Although the contract was entered into prior to the effective date of the Louisiana Procurement Code, the Morial court referred to that enactment's definitions of personal and professional services¹⁵ (in effect at the time of appeal), in order to underscore its finding that since the services in question were primarily clerical in nature, competitive bidding would indeed be required for that contract.¹⁶

The Kentucky General Assembly, after originally enacting provisions of its Code for mandatory local application, later made the Kentucky Procurement Code optional for its local public agencies.¹⁷ This significant change in local application did not occur without quite a bit of confusion, and the intervention of the State Attorney General. Two separate bills enacted in the 1980 Session were in direct conflict: the first bill enacted provided for optional applicability for local agencies and contained an "emergency" clause; whereas, the second bill which was approved by the Legislature a few weeks later required mandatory Code application for local governments, except

for the purchase of goods produced by convict labor.¹⁸ Acting upon requests from the executive and legislative branches of government, the Attorney General issued an Opinion (OAG 30-279) which held that the earlier optional enactment should prevail because it dealt more specifically with public procurement, and because it contained an emergency clause which connoted legislative preference for its efficacy.¹⁹ Thus, for those local units of government in Kentucky which do not choose to adopt the local application provisions of the state code (KRS 43A.345-460), the only requirement for public contracts is that those in excess of \$7,500.00 must be advertised (KRS 424.260). This situation has not been addressed directly by the Kentucky Courts to date, and it underscores the significance of the local application issue faced by each enacting state.

The "requirement of good faith" found in MPC §1-103 was tested in Millette Enterprises, Inc., et al. v. State Division of Administration, et al.,²⁰ wherein the Louisiana Court of Appeals concluded that the obligation of good faith could not be met in a situation where a state agency had predetermined the bidder to whom it would award a contract under the cloak of competitive bidding.²¹ This case involved a situation where an Invitation for Bids (IFB) for insurance claims processing services was rewritten after the first round of bidding, and its revised qualifications provisions had been altered to favor the incumbent contractor. This case is of particular interest in that the court granted standing to a disappointed bidder in addition to the taxpayer who had also initiated the suit.

B. Article 3 -- Source Selection and Contract Formation.

A brief explanation of the source selection methods available under the MPC is in order at this point, for a newcomer to this area of the law could easily become lost in the confusing maze of procurement terminology. Indeed, standardization of the procurement vocabulary is but one of the many benefits provided by MPC adoption, for similar terms are often given vastly different meanings in the field.

The MPC contains a firmly stated preference for "competitive sealed bidding" as the primary source selection method pursuant to §3-201; and §3-202 (Competitive Sealed Bids) specifically provides for the contents of the Invitation for Bids (IFB),²² public notice, bid acceptance and evaluation, and award of a contract to the lowest responsive and responsible bidder. The MPC lists the six following alternative source selection methods which may be used in appropriate situations after proper determinations have been made: competitive sealed proposals;²³ small purchases; sole source procurement; emergency procurement; professional services procurement as specified in §2-302; and, architect-engineer and land surveying services procurement.²⁴ Since an agency must assess the nature of the market for the goods and services it requires and then tailor its procurement methods to take advantage of these conditions in any given situation,²⁵ the MPC provides the necessary flexibility to obtain the universally desired goal of "performance purchasing" (optimum use of limited funds). Competitive sealed proposals, set forth

under MPC §3-203, may be utilized when competitive sealed bidding is either not practicable or not advantageous to the governmental body, following a written determination of the specific conditions authorizing the use of this innovative procurement method²⁶, which is frequently employed for the procurement of high-technology goods and services.

Not surprisingly, MPC Article 3 has generated more litigation than any other Code Article. Under the competitive sealed bidding method, award of the contract shall be made "to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids",²⁷ with the term "responsive bidder" defined as "a person who has submitted a bid which conforms in all material respects to the invitation for bids."²⁸ The language of the Maryland Procurement Code is identical,²⁹ and in Kennedy Temporaries v. Comptroller of the Treasury³⁰ an unsuccessful bidder challenged the responsiveness of the bid submitted by the successful bidder on a contract for the provision of temporary personnel for processing state income tax returns. The unsuccessful bidder claimed that the winning bid was nonresponsive in that the amount of the bid bond submitted with the bid was insufficient, and that this factor required rejection of that otherwise low bid under state regulations. The Court of Special Appeals, in overruling this challenge to the award of the contract, held that under the Maryland Code a procurement officer had the authority to "give the bidder...an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid...or waive the

deficiency, whichever is to the advantage of the State."³¹ Significantly, the court went on to find that the unsuccessful bidder had tendered a nonresponsive bid itself, since it had only submitted a letter of guarantee from its bank in lieu of the required bid bond.³² Judge Wilner also found that the complainant had effectively waived its right to appeal for failure to properly follow statutory appellate requirements, and a thorough review of this interesting case is recommended to the reader.

In Bilongo v. Department of Health and Human Resources, Louisiana's Court of Appeals held that bids which substantially deviate from specifications are nonresponsive and thus void ab initio, but when the deviation is insubstantial, valid competitive bidding occurs.³³ The court stated that summary judgment was an improper means for resolving this case in that there was a question of fact as to whether Bilongo's bid for new construction leased space deviated substantially from the specifications in the IFB. The Bilongo court also upheld the public body's wide discretion in determining the "lowest responsible bidder", which would only be overturned if the determination were made in an arbitrary or capricious manner.

As previously stated, competitive sealed bidding is the preferred method of source selection under the MPC.³⁴ In Louisiana, political subdivisions are subject to State statutory provisions concerning acquisition of construction, architect-engineer and land surveying services, which are covered outside the State's Procurement Code in Louisiana Revised

Statutes §§38:2131.³⁵ Budd Construction Co., Inc. v. City of Alexandria³⁶ is illustrative of strict adherence to bid requirements. In that case, the court required the City of Alexandria to abide by its own precise rules in determining the lowest bidder. The contract in question was awarded to a company (Slocum) whose bid contained a conflict between a written unit price for cement and the same unit price set forth in figures. City regulations required that the written price prevail when such conflicts arose, which would have made the appellant Budd Construction Company's bid lower than Slocum's. The City Council, based on oral representations from Slocum to adhere to the lower price set forth in figures, voted 4-3 to accept that unit price from Slocum, thus making it the low bidder.³⁷ The Court of Appeals, in affirming the trial court's grant of a preliminary injunction to Budd, held that the city had acted arbitrarily in rejecting the lowest bid from Budd and had directly violated statutory provisions regarding bid award.³⁸ This decision also affirmed the standing of a disappointed bidder to maintain an action to enjoin the city from awarding a contract.

In Maryland, competitive bidding need not be used under a city's loan guarantee program for development or redevelopment, when the proposed project relates to a specific location owned or to be owned by the borrower.³⁹ The Court of Appeals also noted in Hughes v. Schaefer that the plaintiffs failed to elevate Baltimore's loan programs for redevelopment to the status of "public works," which would have required competitive acquisition

procedures and rendered the City of Baltimore's acts under this program invalid.

A recent Louisiana case involving MPC Article 3 is Daves v. State Division of Administration, Office of Risk Management,⁴⁰ construing a proposed multi-term contract for the state's liability insurance on its fleet of vehicles. Daves Insurance Agency was the lowest responsive bidder and was awarded a three-year contract, and the major issue presented to the court was whether the contract was subject to an annual adjustment of premiums. Under Louisiana law, automobile liability insurance policies cannot be issued on a level rate for a multiple-year term, but must be adjusted after the first year.⁴¹ The First Circuit Court of Appeals held upon review of the administrative record that the State had no right to terminate the insurance contract in question or to contend that the bid fixed a level rate for the entire term of the contract, basing the latter finding on the fact that the bid from Daves expressly stated that it was subject to annual adjustments and the bid was accepted by the State with that understanding.⁴² The Court significantly found that the State was not entitled to insert a unilateral cancellation clause in the insurance contract, and that either party could cancel the contract only for legal cause.

C. Article 5 -- Procurement of Construction, Architect-Engineer and Land Surveying Services

MPC §5-301 details the requirements for bid security bonds. Maryland's Procurement Code requires a bid bond of five percent of the total amount bid in excess of \$25,000, and "[i]f

the invitation for bids or request for proposals require that a bid bond be provided, a bidder or offeror that does not comply shall be rejected."⁴³ In the previously cited case of Kennedy Temporaries v. Comptroller of the Treasury,⁴⁴ a letter of guarantee pledging collateral to secure contract performance from an otherwise responsive bidder's bank, was held to be in noncompliance with statutory and regulator bid security requirements.⁴⁵

D. Article 3 -- Supply Management

MPC §§3-201 contains broad language covering the sale or disposal of surplus supplies, said process located on the far end of the procurement spectrum. Kentucky's Model Procurement Code section dealing with the disposal of surplus property is not mandatory in requiring that agencies sell surplus goods in strict accordance with the Code's acquisition standards.⁴⁶ In accordance with the permissive nature of the section, the Kentucky Court of Appeals held in Ohio River Conversions v. City of Owensboro⁴⁷ that a city has wide discretion in accepting a lower offering price for the sale of a surplus facility (boat dock), when the buyer's use of the facility will be more beneficial to the citizenry than that of a buyer offering a higher price.⁴⁸ In this case, the higher bidder intended to remove the dock from the city, whereas the firm submitting a lower purchase price intended to continue to operate the dock in the City of Owensboro. The resulting benefit to its citizens was a legitimate overriding concern for the city in its award determination.⁴⁹

E. Article 9 -- Legal and Contractual Remedies

MPC §§9-101 deals with the authority to resolve protested solicitations and awards. The MPC allows actual or prospective bidders fourteen days to submit a written protest to the Chief Procurement Officer. Maryland's Code requires that the protest to be filed within seven days,⁵⁰ and state officials are given no authority to waive this seven-day period.⁵¹ A protest filed after the required time constitutes an implied waiver of the protestor's right to appeal to the State Board of Contract Appeals, which was one of the Court's findings in Kennedy Temporaries, supra.⁵²

In Millette Enterprises, Inc. v. State Division of Administration,⁵³ the Louisiana Court of Appeals stated that the provisions of the Procurement code did not mandate that an aggrieved party completely exhaust its administrative remedies prior to seeking relief in the courts. The MPC and the Louisiana adaptation specifically state that an aggrieved person may protest to the appropriate procurement officer, and the Louisiana Court's finding underscored the permissive context of that statutory language.⁵⁴

Several cases have arisen under MPC §9-401 (Waiver of Sovereign Immunity in Connection with Contracts), concerning the scope and extent of this very important provision. In Mass Transit Administration v. Granite Construction Co.,⁵⁵ the Maryland Court of Special Appeals held that the waiver of sovereign immunity for the Mass Transit Administration (MTA) applied only to contract claims based upon specific written

contract provisions, and that sovereign immunity was a complete bar to a contractor's claims based on unjust enrichment.⁵⁶ The dispute arose out of an ambiguity in contract drawings for the construction of a station for the Baltimore Rapid Transit System. A Granite Construction representative called the Project Engineer to inquire whether all gas line relocation work involved in the Project should be included in their bid. The MTA Engineer, after expressly stating to Granite that he was not the proper person to interpret the drawings, stated his personal and qualified opinion that the gas line work was to be done by Baltimore Gas and Electric Company and not the general contractor. Granite submitted a bid which did not include the gas line work, and MTA later estimated the omitted gas line work would cost approximately \$115,000 to complete.⁵⁷ The Court found no merit in Granite's claim for these additional funds upon its completion of all work based on the theory of unjust enrichment, since the contract terms and conditions specifically stated that oral explanations would not be binding on the State, and due to the fact that Granite executed the contract after it was aware that it was in fact required to do all of the gas line relocation work.⁵⁸ Significantly, the Court mentioned in its opinion that the amount for the work in question was less than one percent of the total contract amount.

Another case decided under MPA §9-401 was Maryland Port Administration v. C. J. Langenfelder & Son, Inc.,⁵⁹ wherein the Port Administration's contract with Langenfelder for dredging work in the Baltimore harbor contained a standard changes clause,

allowing the Administration to modify the scope of the work and provide Langenfelder with an "equitable adjustment" for any such changes. The Port Administration (MPA) initially refused to pay the increased costs associated with three requests from the contractor for "equitable adjustments," due to one MPA change order and two claims under the contract's "differing site conditions" clause. After a hearing, MPA paid the principal amount of two of the claims, but appealed the State Board of Contract Appeals' administrative decision on the other claim and all interest amounts awarded to the Baltimore City Court. Upon its review, the Maryland Court of Special Appeals held that the defense of sovereign immunity could not be used to bar the imposition of interest on a claim against the State, since the legislature only restricted the waiver of immunity to written contracts on actions filed within one year, and due to the fact that the statute only precluded punitive damages and not interest awards.⁶⁰ Similarly, the MPC expressly provides for the payment of interest "at the statutory rate applicable to judgments from the date the claim arose through the date of decision or judgment, whichever is later."⁶¹

MPC §9-402 sets forth the time limitations for bringing court actions based on a jurisdiction's waiver of sovereign immunity in contract. The case of Bluegrass Concrete Construction Company v. Commonwealth⁶² is illustrative of the confusion engendered by the application of this section in the states. The contractor's complaint in Bluegrass was dismissed by the Franklin Circuit Court for failure to timely file a complaint

based on additional expenses (\$8,211.48) incurred in completion of a State road project, although the contractor had sought to exhaust all administrative remedies prior to filing suit. At the time the contract was entered, the Kentucky Model Procurement Code required claims to be commenced "within one (1) year from the date of completion specified in the contract".⁵³ (Emphasis added). Upon review, the Court of Appeals found as fact that: May 15, 1980 was the date of completion of the project; June 30, 1982 was the date the Commonwealth (through the Commissioner of Highways) issued its final denial of Bluegrass' claim for additional compensation; and, September 9, 1982 was the date Bluegrass filed its complaint. The Court then held that under the express terms of the statute Bluegrass only had until May 15, 1981 in which to file its complaint (notwithstanding its attempt to seek all available administrative remedies), and ruled that the complaint was therefore properly dismissed. Although noting it was "unfortunate" that the contractor was misled by directives received from state officials, and that the result would have been different under the pre-Code statute, the Court nevertheless upheld the strict interpretation of this limitation statute.⁵⁴

Of little solace to the contractor in Bluegrass, and in response to this Opinion, the Kentucky General Assembly has since amended its Code (§45A.260) to read as follows:

Limitations on claims. - (1) Any claim arising from a construction contract executed and administered by the transportation cabinet pursuant to the provisions of KRS Chapter 175, 176, 177 and 180 shall be commenced in Franklin Circuit Court within one (1) year from the time the Commonwealth has determined final pay quantities and

issues a final pay estimate to the contracting party, notifying him of its final determination, or from the receipt of a final adverse decision of the Commonwealth, whichever occurs later. [Emphasis Added]⁶⁵

Under this amendment, June 30, 1982 would have been the measuring date for the one-year limitation, and the September 9, 1982 filing by the contractor in Bluegrass would have been timely.

F. Article 12 -- Ethics in Public Contracting.

The MPC states that, as a matter of policy, "[p]ublic employment is a public trust."⁶⁶ A breach of that trust occurs when public employees attempt to realize personal gain by the improper discharge of their duties.⁶⁷ Kentucky's Procurement Code contains virtually identical language.⁶⁸ In Buchignani v. Lexington-Fayette Urban County Government,⁶⁹ the County Jailer, an elected official under the Kentucky Constitution, was prohibited from operating a Detention Center Commissary for profit.⁷⁰ In addition to his official duties, the Jailer was paid for bookkeeping, fingerprinting, and photographing services performed as Director of Detention (a position created upon passage of the County's Urban Government Charter); and he also operated a prison Commissary, the profit from which he retained as compensation. Despite the fact that the profit was neither unreasonable nor excessive, and the fact that the operation of the Commissary contributed to the security of the Detention Center and thus the county; it was held that the jailer had technically breached the public trust through the for-profit Commissary activities conducted in addition to his Constitutional duties. Based on the defense of advice of counsel, the appellate

court reversed the imposition of monetary damages by the lower court, and directed a finding that the Jailer could not operate a Commissary for profit (while inviting "legislative initiative" in this area). The Kentucky Court of Appeals then held that the Jailer could contract with the County for duties not specifically related to his official duties, and upheld the contract for his services as Director of Detention.⁷¹

IV. Conclusion

The relatively few cases that have arisen under state adoptions of the Model Procurement Code are indicative of its success to date in accomplishing its stated purposes of injecting economy and efficiency into the procurement process.⁷² The MPC has spawned debate, research and writing,⁷³ which have contributed significantly to the development of the body of law concerning state and local procurement. The MPC provides a workable model with which states and localities can and have drafted legislation to make budgetary belt-tightening a rewarding evolution, producing structured and efficient procurement systems in the process.

FOOTNOTES

¹The MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS (A.B.A., approved by the House of Delegates on February 13, 1979). The overall structure of MPC is as follows:

Article 1 -- General Provisions

Article 2 -- Procurement Organization

Article 3 -- Source Selection and Contract Formation

Article 4 -- Specifications

Article 5 -- Procurement of Construction,
Architect-Engineer and Land Surveying Services

Article 6 -- Modification and Termination of Contracts
for Supplies and Services

Article 7 -- Cost Principles

Article 8 -- Supply Management

Article 9 -- Legal and Contractual Remedies

Article 10 -- Intergovernmental Relations

Article 11 -- Assistance to Small and Disadvantaged
Businesses; Federal Assistance or Contract Procurement
Requirements

Article 12 -- Ethics in Public Contracting

²Falvey, Birnkrant, and Friedman, ABA Proposes
Legislative Adoption of a Model Procurement Code for State and
Local Governments, 11 Urb. Law. 481 (1979).

³Id.

⁴Among those Pilot Jurisdictions were: Commonwealth of Kentucky; State of Tennessee; State of New Mexico; State of Louisiana; State of Utah; Louisville, Kentucky; Knoxville,

Tennessee; Baltimore, Maryland; Detroit, Michigan; and, San Diego, California. A.B.A., The Model Procurement Code for State and Local Governments -- Format for Working Committee Use, p. vii (1979).

⁵Kentucky, Jan 1, 1979: Ky. Rev. Stat. Ann. §45A.005-45A.990 (Baldwin 1980 & Supp. 1984); Arkansas, July 1, 1979: Ark. Stat. Ann. §§14-113 to 14-115 (1979 & Supp. 1983); Louisiana, July 1, 1980: La. Rev. Stat. Ann. §§39:1551 to 39:1755 (West Supp. 1985); Utah, July 1, 1980: Utah Code Ann. §§63-56-1 to 63-56-73 (Supp. 1983); Maryland, July 1, 1981: Md. Code Ann. Art. 21, §101 to 9-215 (1981 & Supp. 1984); South Carolina, July 30, 1981: S.C. Code Ann. §§11-35-10 to 11-35-5270 (Law. Co-op. 1983 Supp. 1984); Colorado, Jan 1, 1982: Colo. Rev. Stat. §§24-91-101 to 24-112-101 (Supp. 1984); Indiana, Jan 1, 1982: Ind. Code Ann. §§4-13.4-1-1 to 4-13.4-9-5 (Burns 1982 & Supp. 1984); Virginia, Jan. 1, 1983: Va. Code §§11-35 to 11-30 (Supp. 1984); Territory of Guam, October 1, 1983: cite unavailable; New Mexico, Nov. 1, 1984: N.M. Stat. Ann. §§13-1-28 to 13-1-199 (Supp. 1984); Arizona, Dec. 31, 1985: Ariz. Rev. Stat. Ann. Tit. §§41-2501 to 41-2637 (Supp. 1984-1985).

⁶Epstein and Martin, A Short History of the Preparation and Enactment of the Uniform Commercial Code, 22 U. Miami L. Rev. 1, 5, 11 (1967). Kentucky, Connecticut, New Hampshire and Rhode Island adopted the U.C.C. between 1958 and 1960, with the balance of the states, except Louisiana, adopting the U.C.C. between 1961 and 1967. Id. at 11.

⁷N.M. Stat. Ann. §§13-1-28 to 13-1-199 (Supp. 1984);
Ariz. Rev. Stat. Ann. §§41-2501 to 41-2637 (Supp. 1984-1985).

⁸A.B.A., New Directions in State and Local Purchasing:
The ABA Model Procurement Code Implementation Workshop (pp.
140-54, May 16, 1985).

⁹Id. at 156-65.

¹⁰The known local enacting jurisdictions are:
Knoxville, Tennessee; Louisville, Kentucky; Jefferson County
(Kentucky) Board of Education; Anchorage, Alaska; Eau Claire,
Wisconsin; Rome, Georgia; Davenport, Iowa; Louisville, Kentucky;
Michigan Public Transit Association; Seminole, Florida;
Rockville, Maryland; Kansas City, Kansas; Atlanta, Georgia; Boca
Raton, Florida; Lansing, Michigan; Greeley, Colorado; Richmond,
Indiana; and Alexandria, Virginia. A.B.A., New Directions in
State and Local Purchasing: The ABA Model Procurement Code
Implementation Workshop (pp. 177-78, May 16, 1985).

¹¹The Dickinson School of Law, 150 South College
Street, Carlisle, Pennsylvania 17013, Tel. (717) 243-5529.
Materials from the Model Procurement Code Implementation Workshop
may be obtained from the above address at a cost of \$25.00.

¹²See, supra note 7.

¹³390 So.2d 1361 (La. App. 4th Cir. 1980).

¹⁴New Orleans Home Rule Charter §6-307(5), quoted in
id. at 1362.

¹⁵La. Rev. Stat. §39:1484(15), (17) (West. Supp. 1985).

¹⁶Morial, supra, fn. 13 at 1365.

¹⁷See, Ethridge, Purchasing Predicament, Louisville Law Review, 30, 34 (Summer, 1980).

¹⁸Id. at 30-31.

¹⁹Id. at 32.

²⁰417 So.2d 6 (La. Ct. App., 1982).

²¹Id. at 10.

²²An invitation for bids is generally very specific as to the product sought. See Comment, Requests for Proposals in State Government Procurement, 130 U. Pa. Law Rev. 179, 184 (1981).

²³Id. at 186. This method utilizes "Requests for Proposals" (RFP's), which are not extremely detailed in relation to objective selection criteria, and in which price is but one of the factors used in determining contract award.

²⁴MPC §3-201(a)-(f).

²⁵Comment, op. Cit. (see Footnote 22), at 137.

²⁶MPC §3-203(1). Compare the MPC procedures with those of the Department of Defense: 1. Submission of technical proposals; evaluation; 2. Submission of cost proposals; evaluation; 3. Best and final offers submitted; selection of apparent winner; and 4. Negotiations with apparent winner; contract award. Smith, The New "Four Step Source Selection Procedure: Is the Solution Worse than the Problem?" 11 Pub. Cont. L. J. 322, 323 (1980).

²⁷MPC §3-202(7).

²⁸MPC §3-101(7)

²⁹Md. Ann. Code Art. 21, §3-202 (1981 & Supp, 1984).

3057 Md. App. 22, 468 A.2d 1026 (1984).

31COMAR 21.06.02.03, quoted in 468 A.2d 1026, at 1030.

32468 A.2d at 1030, 1033.

33Bilongo v. Dep't of Health and Human Resources, 428 So.2d 1021, 1022 (La. App. 1st Cir. 1983) (question of fact whether bid for leasing new construction office space substantially conformed to bid requirements).

34See, supra, text accompanying note 24 and Millette Enterprises, p. 7.

35A.B.A. The Changing Fact of Public Purchasing: The ABA Model Procurement Code and its Implementation 67-68 (1983).

36401 So.2d 1070 (La. App. 3rd Cir. 1981).

37Id. at 1078.

38Id. at 1081.

39Hughes v. Schaefer, 294 Md. 653, 452 A.2d 428, 434 (1982).

40459 So.2d 1255 (La. App. 1st Cir. 1984).

41Id. at 1258.

42Id. at 1258, 1259.

43Md. Ann. Code, Art. 21, §3-504(c) (Supp, 1984).

4457 Md. App. 22, 468 A.2d 1026 (1984).

45Id. at 1030, 1033.

46Ky. Rev. Stat. Ann. §45A.425 (Baldwin 1980 & Supp. 1984).

47663 S.W.2d 759 (Ky. App., 1984).

48Id. at 761.

49Id. at 760.

⁵⁰Md. Ann. Code, Art. 21, §7-101(a2) (1981 & Supp. 1984).

⁵¹See Footnote 44, Kennedy Temporaries at 1035 (unsuccessful bidder's appeal to Board of Contract Appeals more than 15 days after receipt of rejection letter was untimely).

⁵²Id. at 1036.

⁵³417 So.2d 6 (La. App. 1st Cir. 1982).

⁵⁴MPC §9-101(1); La. Rev. Stat. Ann. §39:1671.A (West. Supp. 1985).

⁵⁵57 Md. Ct. App. 766, 471 A.2d 1121 (1984).

⁵⁶Id. at 1129, quoting Md. Ann. Code Art. 21, §7-101.

⁵⁷471 A.2d 1121, 1124 (1984).

⁵⁸Id. at 1127, 1128. Cf. State Department of General Services v. Cherry Hill Sand & Gravel Co., Inc., 51 Md. App. 299, 443 A.2d 628 (1982) (prior oral statement admissible to prove terms of contract where contract not integrated and oral explanations not expressly precluded); see generally, State Department of General Services v. Roger E. Holtman & Associates, Ltd., 463 A.2d 803 (Md. App., 1983), (letter agreement, after effective date of statute waiving sovereign immunity, constituted separate contractual agreement protected by the statute despite its being labeled "extension" of earlier agreements).

⁵⁹438 A.2d 1374 (Md. App. 1982).

⁶⁰Id. at 1382; Md. Ann. Code Art. 21, §7-101-04 (1981).

⁶¹MPC §9-301.

⁶²664 S.W.2d 936 (Ky. App. 1983).

⁶³Id. at 937; Ky. Rev. Stat. Ann. §45A.260 (Baldwin 1980).

⁶⁴Id. at 938. Accord. Kovachevich v. University of Louisville, 597 S.W.2d 621 (Ky. App. 1980) (discharged medical school faculty member failed to file action within statutory one year time limit).

⁶⁵Ky. Rev. Stat. Ann. §45A.260 (Baldwin Supp. 1984).

⁶⁶MPC §12-201.

⁶⁷Id. §12-202-2(1).

⁶⁸Ky. Rev. Stat. Ann. §45A.450(1) (Baldwin 1980 & Supp. 1984).

⁶⁹632 S.W.2d 465 (Ky. App. 1982).

⁷⁰Id. at 467.

⁷¹Id.

⁷²MPC §1-101(2).

⁷³See, e.g., A.B.A., Identifying and Prosecuting Fraud and Abuse in State and Local Contracting (1984).

HOUSE CS FOR CS FOR SENATE BILL NO. 341 (State Affairs)
SECTIONAL ANALYSIS

(Unless otherwise indicated, "commissioner" means commissioner of administration)

SECTION 1. The purposes of the act are outlined to include: simplification, clarification, modernization of the laws; consistency among the branches of government; increased public confidence; fair and equitable treatment of all vendors; increased economy in state procurement; broad-based competition; safeguards for the maintenance of a procurement system of quality and integrity; and elimination and prevention of discrimination in state contracting.

SECTION 2. A new chapter is added to AS 36 entitled "State Procurement Code."

Article 1. Organization of State Procurement.

Sec. 36.30.005. Centralization of procurement of supplies and services for state agencies is under the authority of the commissioner of administration and the chief procurement officer. Procurement of construction and procurements to or disposals from the state equipment fleet and the control over construction and the state equipment fleet is under the commissioner of transportation and public facilities.

The University of Alaska is subject to the requirements of SB 341, but has independent administrative authority and the ability to issue its own regulations implementing the chapter in conformance with state APA requirements.

Sec. 36.30.010. The chief procurement officer is selected by the commissioner; is responsible for procurement of supplies and services for agencies in the executive branch; is a partially exempt employee; must have a minimum of 5 years in public procurement; and may be removed by the commissioner only for cause. The term of office of the Chief Procurement Officer is 4 years. Duties of the Chief Procurement Officer are enumerated.

Sec. 36.30.015. The commissioner of transportation and public facilities may delegate to another agency the authority to contract for construction, after written determination has been made that the agency is capable of implementing the delegated authority. The commissioner of administration may delegate to an agency the authority to contract for its own supplies and services after a written

determination has been made that the agency is capable of implementing the delegated authority.

The authority to adopt regulations or dispose of surplus supplies may not be delegated. Agency contracts for the services of legal counsel must be approved by the department of law.

The Board of Directors of the Alaska Railroad Corporation and the Alaska State Housing Authority must adopt procedures substantially equivalent to the procurement code and regulations adopted by the commissioner.

Sec. 36.30.020. Legislative Council must adopt procedures which are based on the competitive principles consistent with this chapter.

Sec. 36.30.030. The administrative director of the court system must adopt procedures which are based on the competitive principles consistent with this chapter.

Sec. 36.30.040. Procurement regulations must be adopted by the commissioner.

Sec. 36.30.050. A list of persons who desire to provide supplies, services or construction items to the state will be established and maintained by the commissioner. Evidence of a valid Alaska business license and a statement of the contractor's qualifications must be submitted to be included on the list. Construction contractors must also submit a valid certificate of registration. A biennial fee will be charged to offset the cost of administering the list. The list may be used by the state agencies in providing notice of intent to make small purchases.

Sec. 36.30.060. Specification regulations must be adopted by the commissioner. Specifications must promote overall economy for the purposes intended, encourage competition in satisfying the state's needs, and may not be unduly restrictive.

Sec. 36.30.070. Supply management is under the authority of the commissioner and regulations must be adopted which govern management of supplies, surplus supplies and transfer of excess supplies.

Sec. 36.30.080. The department shall lease necessary space, and contract for the lease of space for the use of the state or an agency. A lease or contract for a lease may not be for a period of occupancy greater than 40 years. The department may enter into lease-financing agreements, which are subject to annual appropriation. If the department intends to enter into a lease or lease financing agreement with an annual rent anticipated to

exceed \$1,000,000, notice must be provided the legislature for approval.

Article 2. Competitive Sealed Bidding.

Sec. 36.30.100. Competitive sealed bidding is the preferred method of contracting. Competitive sealed bidding is not required for certain purchases, including professional services, which are itemized.

Sec. 36.30.110. When competitive sealed bidding is used, an invitation to bid is issued which must include the date by which the bid must be received, purchase description, and all contractual terms and conditions. Subcontractors must be listed. Evidence of a valid Alaska business license for all bidders and subcontractors must be submitted when responding to the ITB. A bidder for construction contracts must also submit evidence of the bidder's registration under AS 08.18 and evidence of registration for each listed subcontractor.

Sec. 36.30.115. Within 24 hours after the opening of bids, the apparent low bidder shall submit a list of the subcontractors the bidder proposes to use in the performance of the contract. Conditions under which a bidder may substitute a subcontractor are listed. A bidder who violates this section may either have the contract cancelled, or after notice and a hearing, be assessed a penalty in an amount not exceeding 10% of the value of the subcontract at issue.

Sec. 36.30.120. Bid security shall be required for all competitive sealed bidding for construction contracts which exceed an amount established by regulation. Bid security may be required for other types of supplies and services.

Sec. 36.30.130. Public notice of the ITB must be provided 21 days before the date for the opening of the bid, unless otherwise determined in writing by the chief procurement officer, or the commissioner of transportation and public facilities for construction or state equipment bids. Notice of solicitations must be published in the Alaska Administrative Journal. The state is liable for failing to substantially comply with the notice requirements of this section.

Sec. 36.30.140. Bid opening must be public, in the presence of witnesses, and relevant information must be recorded, which is open to public inspection. The bids are not open for public inspection until after a notice of intent to award a contract has been issued.

Sec. 36.30.150. The procurement officer must evaluate bids based on the requirements set out in the ITB. The criteria used for the evaluation of an award must be objectively measurable. Criteria may not be used in bid evaluation if they are not set out in the ITB.

A contract based on total or life cycle costs may be awarded only when the chief procurement officer or the commissioner of transportation and public facilities determines in writing that the contract promotes overall economy for the purposes intended, encourages competition, is not unduly restrictive, and is in the best interest of the state.

Sec. 36.30.160. Bids received after the bid due date indicated on the ITB may not be accepted unless the delay was due to an error of the contracting agency.

Correction or withdrawal of inadvertently erroneous bids before or after bid opening, or cancellation of awards or contracts based on bid mistakes shall be permitted in accordance with regulations and supported by written justification.

Sec. 36.30.170. Awards to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set out in the ITB shall be promptly made. The Alaska bidder preference is expanded to apply to all construction contracts. The lowest responsible and responsive Alaskan bidder with a bid not more than 5% higher than the lowest bid of a nonresident shall be awarded the contract. An Alaskan bidder who qualifies as an "employment program" shall be given a 10% preference.

Sec. 36.30.190. Multi-step sealed bidding is allowed when it is considered impractical to initially prepare a definitive purchase description to support an award based on price. Unpriced technical offers are submitted, followed by an ITB limited to the bidders whose offers are determined to be technically qualified under the criteria established.

Article 3. Competitive Sealed Proposals.

Sec. 36.30.200. Contracts may be awarded by competitive sealed proposals when the chief procurement officer, or the commissioner of transportation and public facilities for construction and state equipment fleet contracts, determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the state.

Sec. 36.30.210. Request for proposals must contain the same information required for ITBs. The same notice provisions for ITBs apply for RFPs. An offeror must list the subcontractors within 48 hours after the date by which the proposals must be received. The same duties of bidders under ITBs apply to competitive sealed proposals.

Sec. 36.30.220. Standard overhead rate established by agencies and applicable to contracts for supplies and services, must be included in a RFP.

Sec. 36.30.230. Proposals are to be opened in a manner which avoids disclosure of contents to competing offerors during the process of negotiation. A register of proposals containing the name and address of each offeror shall be prepared and open for public inspection after the the notice of intent to award a contract is issued.

Sec. 36.30.240. Discussions with responsible offerors, who submit proposals determined to be reasonably susceptible of being selected for award, may be conducted for the purpose of clarification to assure full understanding of and responsiveness to the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals. Revisions may be permitted after submissions and before the award for the purpose of obtaining best and final offers. These discussions are exempted from the Alaska Open Meetings law.

Sec. 36.30.250. A contract under competitive sealed proposals shall be awarded to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the state taking into consideration price, the evaluation factors set out in the RFP, and whether the offeror qualifies as an Alaskan Bidder or is offering the services of an employment program.

Sec. 36.30.260. A contract awarded under competitive sealed proposals must contain: the amount of the contract; the date for supplies to be delivered or the term for services to be performed; a description of the services or supplies contracted for; and a certification that sufficient funds are available for the amount of the contract.

Sec. 36.30.270. Special procedures apply to contracts awarded to architects, engineers, and land surveyors.

Article 4. Other Procurement Methods.

Sec. 36.30.300. Sole source procurements may only be awarded if it is determined in writing that there is only one source for the required supply, service or construction. A sole source procurement may not be approved if a reasonable alternative source exists.

Sec. 36.30.310. Emergency procurements may be authorized under emergency conditions when there exists a threat to public health, welfare, or safety, and procurement through competitive sealed bids or competitive sealed proposals is impracticable, or contrary to the public interest, or to protect public or private property. A written determination of the basis for the emergency and for the selection of the particular contractor must be provided.

Sec. 36.30.320. Small procurements which do not exceed an aggregate amount of \$5,000 shall be made with competition that is practicable under the circumstances. A contract for professional services that does not exceed \$25,000 may be made in accordance with regulations adopted by the commissioner. Notice of small procurements shall be provided to Alaskan bidders designated by the commissioner under section 36.30.050(d).

Article 5. Contract Formation and Modification.

Sec. 36.30.340. If a contract contains a term that is in conflict with a state standard form contract term or if a standard term is deleted or modified by a term that is not standard, the contract must be approved by the department of law.

Sec. 36.30.350. Solicitations may be cancelled or any bids or proposals may be rejected, in whole or in part, or the date for opening bids or proposals may be delayed as may be specified in the solicitation, when it is in the best interest of the state. The reasons for cancellation, rejection, or delay in opening bids or proposals shall be made part of the contract file.

Sec. 36.30.360. A written determination of responsibility of a bidder or offeror shall be made by the procurement officer.

Sec. 36.30.362. The procurement officer must issue a written statement explaining the reasons a contract was awarded to a person who does not reside or maintain a place of business in Alaska, if the supplies, services, professional services or construction could have been obtained from in-state sources.

Sec. 36.30.365. At least 10 days before the formal award of a contract the procurement officer shall provide to

each bidder or offeror notice of intent to award a contract.

Sec. 36.30.370. Any type of contract that will promote the best interests of the state may be used, except that the use of a cost-plus-a-percentage-of cost contract is prohibited.

Sec. 36.30.380. Except with respect to contracts awarded through competitive sealed bidding or firm fixed-price contracts, a contract type may not be used unless it has been approved in writing by the procurement officer.

Sec. 36.30.390. Unless otherwise provided by law, multi-term contracts are permitted, but subject to availability and appropriation of funds. Written determination must support multi-term contracts.

When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal periods, the contract shall be cancelled. The contractor may only be reimbursed for the reasonable value of any nonrecurring costs incurred, but not amortized in the price of the supplies or services delivered under the contract that are not otherwise recoverable.

Sec. 36.30.400. Cost or pricing data must be submitted and certified by contractors. This does not apply when: the contract price is based on adequate price competition; the contract price is set by law or regulation; or it is determined in writing that the requirements of this section are waived and the reasons for waiver are stated in writing.

Sec. 36.30.410. The state has the right to inspect the plant or place of business of a contractor or subcontractor that is related to the performance of a contract awarded or to be awarded by the state.

Sec. 36.30.420. The state may audit books and records of a person who has submitted cost or pricing data or receives a contract.

Sec. 36.30.430. The commissioner shall adopt regulations permitting the inclusion of clauses providing for adjustments in prices, time of performance, or other contract provisions, and appropriate remedies.

Sec. 36.30.460. Standard clauses in state contract may be modified if supported by a written determination that states the circumstances justifying the variation.

Sec. 36.30.470. If the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget or the total contract budget, the procurement officer may not execute the contract modification, change order, or adjustment in contract price unless sufficient funds are available, or the scope of the project or contract is adjusted to permit the degree of completion that is feasible within the total project budget or total contract budget as it existed before the contract modification, change order, or adjustment in contract price.

Sec. 36.30.480. Cost principle regulations shall be adopted.

Article 6. Procurement Records and Reports.

Sec. 36.30.500. Procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the state archivist.

Sec. 36.30.510. A contract file open for public inspection must be kept by the commissioner and the contracting agency for each contract awarded under competitive sealed proposals. The file kept by the commissioner shall contain a summary of the information in the file of the contracting agency.

Sec. 36.30.520. The commissioner shall maintain for at least 5 years a record listing all sole source and emergency procurement contracts. An agency which has delegated procurement authority shall by October 1, of each year, submit records of all sole source and emergency procurement contracts to the commissioner.

Sec. 35.30.530. Procurement information is public except as otherwise provided by law.

Sec. 36.30.540. The commissioner shall biennially report to the legislature concerning procurements by agencies.

Article 7. Legal and Contractual Remedies.

Sec. 36.30.560. An interested party may protest the award of a contract, the proposed award of a contract, or a solicitation for goods, services or construction. The protest shall be filed with the procurement officer of the contracting agency in writing and must contain specified items.

Sec. 36.30.565. Time deadlines for filing protests are specified.

Sec. 36.30.570. Notice of a protest shall immediately be given to the contractor if a contract has been awarded or, if no award has been made, to all interested parties.

Sec. 36.30.575. If a protest is filed before a contract is awarded, the award may be made unless the procurement officer of the contracting agency determines in writing that: a reasonable probability exists that the protest will be sustained; or stay of the award is not contrary to the best interests of the state.

Sec. 36.30.580. A written decision by the procurement officer of the contracting agency shall be issued within 14 days after a protest has been filed, unless the time is extended up to 26 days for good cause. Notice shall be sent to the protester. If a decision is not made by the due date, the protester may proceed as if the procurement officer had issued a decision adverse to the protester.

Sec. 36.30.585. If the procurement officer sustains a protest the procurement officer shall implement an appropriate remedy.

Sec. 36.30.590. An appeal from a decision of a procurement officer on a protest must be filed with the appropriate commissioner within 5 days after the decision is received by the protester.

Sec. 36.30.595. The procurement officer shall immediately give notice of an appeal to the contractor if a contract has been awarded, or, if no award has been made, to all interested parties.

Sec. 36.30.600. If a protest appeal is filed before a contract is awarded and the award was stayed, the filing of the appeal automatically continues the stay until the commissioner of administration or transportation and public facilities makes a written determination that the award of the contract is necessary to protect substantial interests of the state.

Sec. 36.30.605. The procurement officer of the contracting agency shall file a complete report on the protest and decision with the commissioner of administration or transportation and public facilities within 7 days after a protest appeal is filed. The protester and all interested parties that have requested a copy of the appeal shall be furnished one. The protester may file comments on the protest report within 7 days after the report is received. Extensions may be granted.

Sec. 36.30.610. The commissioner of administration or transportation and public facilities shall dismiss a protest appeal before a hearing is held if it is determined in writing that the appeal is untimely. The

appropriate commissioner may issue a decision on an appeal without a hearing if the appeal involves questions of law without genuine issues of fact.

Sec. 36.30.615. A hearing on a protest appeal shall be conducted according to AS 36.30.670 and regulations adopted.

Sec. 36.30.620. If a controversy, asserted by a contractor, concerning a contract awarded under this chapter cannot be resolved by agreement, the procurement officer shall, after receiving a written request by the contractor, issue a written decision no more than 90 days after receipt of all necessary information from the contractor, unless the due date is extended for good cause.

The decision shall be sent to the contractor. If a decision is not made by the due date, the contractor may proceed as if the procurement officer had issued a decision adverse to the contractor. If a controversy asserted by the state concerning a contract awarded cannot be resolved by agreement, the matter shall be immediately referred to the commissioner of administration or transportation and public facilities.

Sec. 36.30.625. An appeal from a decision of the procurement officer on a contract controversy may be filed by the contractor with the commissioner of administration or transportation and public facilities. The appeal shall be filed within 14 days after the decision is received by the contractor.

Sec. 36.30.630. A hearing on a contract controversy appealed to the commissioner or referred to the commissioner shall be conducted according to AS 36.30.670 and regulations adopted.

Sec. 36.30.632. The commissioners of administration and transportation and public facilities may delegate responsibilities under Sec. 36.30.590 and Sec. 36.30.630 to the head of the contracting agency.

Sec. 36.30.635. The commissioners of administration and transportation and public facilities may debar or suspend a person from consideration for award of contracts. Notice and opportunity for a hearing are specified.

Sec. 36.30.640. Causes for debarment or suspension are enumerated.

Sec. 36.30.645. The commissioners of administration and transportation and public facilities shall issue a written decision to debar or suspend.

Sec. 36.30.650. A person suspended is entitled to a hearing if the person files a written request for a hearing within 7 days after receipt of the notice of suspension.

Sec. 36.30.655. The commissioner shall maintain a list of all persons debarred or suspended from consideration for award of contracts.

Sec. 36.30.660. The commissioner of administration or the commissioner of transportation and public facilities may, at any time after a final decision to debar a person, reinstate the person after determining that the cause for which the person was debarred no longer exists or has been substantially mitigated.

A debarred person may request reinstatement. A hearing may be held on a reinstatement petition. A decision on reinstatement shall be made in writing within 7 days after a reinstatement petition is submitted. A decision under this section is not subject to judicial appeal.

Sec. 36.30.665. The commissioner of administration or transportation and public facilities may permit a debarred person to participate in a contract on a limited basis during the debarment period.

Sec. 36.30.670. The commissioner of administration or transportation and public facilities shall act as a hearing officer or appoint a hearing officer for a hearing conducted under this chapter. The provisions of the Administrative Procedure Act do not apply to a hearing conducted under this chapter. The authority of a hearing officer is outlined.

Sec. 36.30.675. If the commissioner of administration or transportation and public facilities is not acting as hearing officer, the hearing officer shall recommend a decision to the appropriate commissioner based on the evidence presented. The recommendation shall include findings of fact and conclusions of law. The appropriate commissioner may affirm, modify or reject the hearing officer's recommendation or take any other appropriate action.

Sec. 36.30.680. A decision by the commissioner of administration is final, and shall be sent within 20 days after a hearing to all parties. A decision by the commissioner of transportation and public facilities involving procurement of construction shall be sent within 90 days after the hearing.

Sec. 36.30.685. A final decision of the commissioner of administration or transportation and public facilities may

be appealed to the superior court, in accordance with the Alaska Rules of Appellate Procedure.

Sec. 36.30.687. Civil and criminal sanctions are outlined for misrepresentations and fraudulent claims.

Sec. 36.30.690. This chapter and the regulations adopted under it are the exclusive procedures for asserting a claim against the state or an agency arising in relation to a procurement conducted under this chapter.

Sec. 36.30.695. The commissioner of administration may adopt by regulation additional rules of procedure.

Sec. 36.30.699. The definition of interested party is given.

Article 8. Intergovernmental Relations.

Sec. 36.30.700. Cooperative purchasing is authorized between public procurement units or external procurement activities in accordance with an agreement entered into between the participants.

Sec. 36.30.710. Sale, acquisition, or use of supplies among public procurement units or with external procurement activity may be done independent of certain requirements of this chapter.

Sec. 36.30.720. Joint use of facilities is allowable.

Sec. 36.30.730. A public procurement unit may provide personnel, information and technical services to a requesting public procurement unit or external procurement activity.

Sec. 36.30.735. Current Alaska law on restrictions of contracting with or employing experts on radiation hazards is retained.

Sec. 36.30.740. The commissioner may collect information concerning supplies, services or construction being procured or used by state public procurement units.

Sec. 36.30.750. Under a cooperative purchasing agreement, controversies arising between an administering public procurement unit and its bidders, offerors, or contractors shall be resolved in accordance with this chapter.

Sec. 36.30.790. Definitions for this article are provided.

Article 9. General Provisions.

Sec. 36.30.850. This chapter applies to contracts solicited or entered into after January 1, 1987, unless the parties agree to its application to a contract solicited or entered into before that date. This chapter applies to the disposal of state supplies and every expenditure of public funds irrespective of their sources, except as specified in AS 36.30.915.

This chapter does not apply to: grants; contracts for professional witnesses; contracts of the University of Alaska where the work is to be performed substantially by enrolled students; contracts for medical doctors and dentists; contracts for the purchase of residential child care services under AS 47.40; disposals of land or interest in land; disposals under AS 38.05; contracts for the preparation of ballots under AS 15.15.030; acquisitions or disposals of property and other contracts relating to airports; acquisitions of real property or disposals of obsolete property under AS 19.05.060, 19.05.100, 19.05.110 or 19.05.120; disposals of obsolete material or equipment under AS 35.20.060; leases of ferry terminal facilities under AS 19.60.010; or contracts of the department of fish and game for non-point-to-point flights requiring specialized flying and piloting skills.

Except for AS 36.30.700-36.30.895, this chapter does not apply to contracts between two or more agencies, the state and its political subdivisions, or the state and other governments.

Sec. 36.30.860. Unless displaced by the particular provision of this chapter, all other principles of law and equity shall supplement the provisions of this chapter.

Sec. 36.30.870. Regulations under this chapter shall be adopted in accordance with the Administrative Procedure Act. Regulations applicable to procurements of construction or procurements for or disposal of property of the state equipment fleet shall be adopted by the commissioner of administration only after consultation with the commissioner of transportation and public facilities.

Sec. 36.30.880. This chapter requires all parties involved in the negotiation, performance, or administration of state contracts to act in good faith.

Sec. 36.30.890. If a procurement involves the expenditure of federal funds or federal assistance and there is a conflict between a provision of this chapter or a

regulation adopted under a provision, the federal statute or regulation shall prevail.

Sec. 36.30.900. This chapter does not modify, amend, or alter laws regarding preference for Alaska forest products or preference to producers or dealers in Alaska, except as provided in AS 36.30.170(b) and (c).

Sec. 36.30.910. This chapter does not prevent purchasing through the general services administration as provided by law.

Sec. 36.30.920. Suspected anticompetitive practices are to be reported to the attorney general.

Sec. 36.30.930. In addition to penalties prescribed for unethical conduct, civil and criminal penalties are provided for violations of this chapter.

Sec. 36.30.940. The attorney general on behalf of the state shall enforce the provisions of this chapter.

Sec. 36.30.950. Severability clause is included.

Sec. 36.30.990. Definitions.

Sec. 36.30.995. This chapter may be cited as the State Procurement Code.

SECTION 3 through SECTION 64 amend other Alaska statutes to reflect the provisions of this chapter.

SECTION 65. The commissioner must report to the legislature by December 1, 1987, concerning procurements by state agencies during the first 6 months of 1987.

SECTION 66. The commissioner of administration shall adopt the regulations required under this chapter by January 1, 1987.

SECTION 67. This is the repealer section.

SECTION 68. Section 66 of this Act takes effect immediately.

SECTION 69. Except as provided in sec. 68, this Act takes effect January 1, 1987.

SENATE JUDICIARY COMMITTEE SUBSTITUTE
SENATE BILL 341
SECTIONAL ANALYSIS

(Unless otherwise indicated, "commissioner" means commissioner of administration)

SECTION 1. The purposes of the act are outlined to include: simplification, clarification, modernization of the laws; consistency among the branches of government; increased public confidence; fair and equitable treatment of all vendors; increased economy in state procurement; broad-based competition; safeguards for the maintenance of a procurement system of quality and integrity; and elimination and prevention of discrimination in state contracting.

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Sec. 36.30.005. Centralization of procurement of supplies and services for state agencies is under the authority of the commissioner of administration and the chief procurement officer. Procurement of construction and procurements to or disposals from the state equipment fleet and the control over construction and the state equipment fleet is under the commissioner of transportation and public facilities.

The University of Alaska is subject to the requirements of SB 341, but has independent administrative authority and the ability to issue its own regulations implementing the chapter in conformance with state APA requirements.

Sec. 36.30.010. The chief procurement officer is selected by the commissioner; is responsible for procurement of supplies and services for agencies in the executive branch; is a partially exempt employee; must have a minimum of 5 years in public procurement; and may be removed by the commissioner only for cause. The term of office of the Chief Procurement Officer is 4 years. Duties of the Chief Procurement Officer are enumerated.

Sec. 36.30.015. The commissioner of transportation and public facilities may delegate to another agency the authority to contract for construction, after written determination has been made that the agency is capable of implementing the delegated authority. The commissioner of administration may delegate to an agency the authority to contract for its own supplies and services after a written

determination has been made that the agency is capable of implementing the delegated authority.

The authority to adopt regulations or dispose of surplus supplies may not be delegated. Agency contracts for the services of legal counsel must be approved by the department of law.

The Board of Directors of the Alaska Railroad Corporation must adopt procedures substantially equivalent to the procurement code and regulations adopted by the commissioner.

Sec. 36.30.020. Legislative Council must adopt procedures which are substantially equivalent to the procurement code.

Sec. 36.30.030. The administrative director of the court system must adopt procedures governing the procurement of supplies, services, professional services and construction by the judicial branch. The procedures shall be based upon the competitive principles established under the code, but may be adapted to the special needs of the judicial branch as determined by the administrator of courts.

Sec. 36.30.040. Procurement regulations must be adopted by the commissioner.

Sec. 36.30.050. A list of persons who desire to provide supplies, services or construction items to the state will be established and maintained by the commissioner. Evidence of a valid Alaska business license and a statement of the contractor's qualifications must be submitted to be included on the list. Construction contractors must also submit a valid certificate of registration. A biennial fee will be charged to offset the cost of administering the list. The list may be used by the state agencies in providing notice of intent to make small purchases.

Sec. 36.30.060. Specification regulations must be adopted by the commissioner. Specifications must promote overall economy for the purposes intended, encourage competition in satisfying the state's needs, and may not be unduly restrictive.

Sec. 36.30.070. Supply management is under the authority of the commissioner and regulations must be adopted which govern management of supplies, surplus supplies and transfer of excess supplies.

Sec. 36.30.080. The department shall lease necessary space, and contract for the lease of space for the use of the state or an agency. A lease or contract for a lease

may not be for a period of occupancy greater than 40 years. The department may enter into lease-financing agreements, which are subject to annual appropriation. If the department intends to enter into a lease or lease financing agreement with an annual rent anticipated to exceed \$1,000,000, notice must be provided the legislature for approval.

Article 2. Competitive Sealed Bidding.

Sec. 36.30.100. Competitive sealed bidding is the preferred method of contracting. Competitive sealed bidding is not required for certain purchases, including professional services, which are itemized.

Sec. 36.30.110. When competitive sealed bidding is used, an invitation to bid is issued which must include the date by which the bid must be received, purchase description, and all contractual terms and conditions. Subcontractors must be listed. Evidence of a valid Alaska business license for all bidders and subcontractors must be submitted when responding to the ITB. A bidder for construction contracts must also submit evidence of the bidder's registration under AS 08.18 and evidence of registration for each listed subcontractor.

Sec. 36.30.115. Within 48 hours after the opening of bids, each bidder shall submit a list of the subcontractors the bidder proposes to use in the performance of the contract. Conditions under which a bidder may substitute a subcontractor are listed. A bidder who violates this section may either have the contract cancelled, or after notice and a hearing, be assessed a penalty in an amount not exceeding 10% of the value of the subcontract at issue.

Sec. 36.30.120. Bid security shall be required for all competitive sealed bidding for construction contracts which exceed an amount established by regulation. Bid security may be required for other types of supplies and services.

Sec. 36.30.130. Public notice of the ITB must be provided 21 days before the date for the opening of the bid, unless otherwise determined in writing by the chief procurement officer, or the commissioner of transportation and public facilities for construction or state equipment bids. Notice of solicitations must be published in the Alaska Administrative Journal. The state is liable for failing to substantially comply with the notice requirements of this section.

Sec. 36.30.140. Bid opening must be public, in the presence of witnesses, and relevant information must be recorded, which is open to public inspection. The bids are not open for public inspection until after a notice of intent to award a contract has been issued.

Sec. 36.30.150. The procurement officer must evaluate bids based on the requirements set out in the ITB. The criteria used for the evaluation of an award must be objectively measurable. Criteria may not be used in bid evaluation if they are not set out in the ITB.

A contract based on total or life cycle costs may be awarded only when the chief procurement officer or the commissioner of transportation and public facilities determines in writing that the contract promotes overall economy for the purposes intended, encourages competition, is not unduly restrictive, and is in the best interest of the state.

Sec. 36.30.160. Bids received after the bid due date indicated on the ITB may not be accepted unless the delay was due to an error of the contracting agency.

Correction or withdrawal of inadvertently erroneous bids before or after bid opening, or cancellation of awards or contracts based on bid mistakes shall be permitted in accordance with regulations and supported by written justification.

Sec. 36.30.170. Awards to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set out in the ITB shall be promptly made. The Alaska bidder preference is expanded to apply to all construction contracts. The lowest responsible and responsive Alaskan bidder with a bid not more than 10% higher than the lowest bid of a nonresident shall be awarded the contract. An Alaskan bidder who qualifies as an "employment program" shall be given preference also.

Sec. 36.30.190. Multi-step sealed bidding is allowed when it is considered impractical to initially prepare a definitive purchase description to support an award based on price. Unpriced technical offers are submitted, followed by an ITB limited to the bidders whose offers are determined to be technically qualified under the criteria established.

Article 3. Competitive Sealed Proposals.

Sec. 36.30.200. Contracts may be awarded by competitive sealed proposals when the chief procurement officer, or

the commissioner of transportation and public facilities for construction and state equipment fleet contracts, determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the state.

Sec. 36.30.210. Request for proposals must contain the same information required for ITBs. The same notice provisions for ITBs apply for RFPs. An offeror must list the subcontractors within 48 hours after the date by which the proposals must be received. The same duties of bidders under ITBs apply to competitive sealed proposals.

Sec. 36.30.220. Standard overhead rate established by agencies and applicable to contracts for supplies and services, must be included in a RFP.

Sec. 36.30.230. Proposals are to be opened in a manner which avoids disclosure of contents to competing offerors during the process of negotiation. A register of proposals containing the name and address of each offeror shall be prepared and open for public inspection after the the notice of intent to award a contract is issued.

Sec. 36.30.240. Discussions with responsible offerors, who submit proposals determined to be reasonably susceptible of being selected for award, may be conducted for the purpose of clarification to assure full understanding of and responsiveness to the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals. Revisions may be permitted after submissions and before the award for the purpose of obtaining best and final offers. These discussions are exempted from the Alaska Open Meetings law.

Sec. 36.30.250. A contract under competitive sealed proposals shall be awarded to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the state taking into consideration price, the evaluation factors set out in the RFP, and whether the offeror qualifies as an Alaskan Bidder or is offering the services of an employment program.

Sec. 36.30.260. A contract awarded under competitive sealed proposals must contain: the amount of the contract; the date for supplies to be delivered or the term for services to be performed; a description of the services or supplies contracted for; and a certification that sufficient funds are available for the amount of the contract.

Sec. 36.30.270. Special procedures apply to contracts awarded to architects, engineers, and land surveyors. These provisions only apply to contracts negotiated by the executive branch.

Article 4. Other Procurement Methods.

Sec. 36.30.300. Sole source procurements may only be awarded if it is determined in writing that there is only one source for the required supply, service or construction. A sole source procurement may not be approved if a reasonable alternative source exists.

Sec. 36.30.310. Emergency procurements may be authorized under emergency conditions when there exists a threat to public health, welfare, or safety, and procurement through competitive sealed bids or competitive sealed proposals is impracticable or contrary to the public interest, or to protect public or private property. A written determination is the basis for the emergency and for the selection of the particular contractor must be provided.

Sec. 36.30.320. Small procurements which do not exceed an aggregate amount of \$5,000 shall be made with competition that is practicable under the circumstances. A contract for professional services that does not exceed \$25,000 may be made in accordance with regulations adopted by the commissioner. Notice of small procurements shall be provided to Alaskan bidders designated by the commissioner under section 36.30.050(d).

Article 5. Contract Formation and Modification.

Sec. 36.30.340. If a contract contains a term that is in conflict with a state standard form contract term or if a standard term is deleted or modified by a term that is not standard, the contract must be approved by the department of law.

Sec. 36.30.350. Solicitations may be cancelled or any bids or proposals may be rejected, in whole or in part, or the date for opening bids or proposals may be delayed as may be specified in the solicitation, when it is in the best interest of the state. The reasons for cancellation, rejection, or delay in opening bids or proposals shall be made part of the contract file.

Sec. 36.30.360. A written determination of responsibility of a bidder or offeror shall be made by the procurement officer.

Sec. 36.30.362. The procurement officer must issue a written statement explaining the reasons a contract was awarded to a person who does not reside or maintain a place of business in Alaska, if the supplies, services, professional services or construction could have been obtained from in-state sources.

Sec. 36.30.365. At least 10 days before the formal award of a contract the procurement officer shall provide to each bidder or offeror notice of intent to award a contract.

Sec. 36.30.370. Any type of contract that will promote the best interests of the state may be used, except that the use of a cost-plus-a-percentage-of cost contract is prohibited.

Sec. 36.30.380. Except with respect to contracts awarded through competitive sealed bidding or firm fixed-price contracts, a contract type may not be used unless it has been approved in writing by the procurement officer.

Sec. 36.30.390. Unless otherwise provided by law, multi-term contracts are permitted, but subject to availability and appropriation of funds. Written determination must support multi-term contracts.

When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal periods, the contract shall be cancelled. The contractor may only be reimbursed for the reasonable value of any nonrecurring costs incurred, but not amortized in the price of the supplies or services delivered under the contract that are not otherwise recoverable.

Sec. 36.30.400. Cost or pricing data must be submitted and certified by contractors. This does not apply when: the contract price is based on adequate price competition; the contract price is set by law or regulation; or it is determined in writing that the requirements of this section are waived and the reasons for waiver are stated in writing.

Sec. 36.30.410. The state has the right to inspect the plant or place of business of a contractor or subcontractor that is related to the performance of a contract awarded or to be awarded by the state.

Sec. 36.30.420. The state may audit books and records of a person who has submitted cost or pricing data or receives a contract.

Sec. 36.30.430. The commissioner shall adopt regulations permitting the inclusion of clauses providing for adjustments in prices, time of performance, or other contract provisions, and appropriate remedies.

Sec. 36.30.460. Standard clauses in state contract may be modified if supported by a written determination that states the circumstances justifying the variation.

Sec. 36.30.470. If the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget or the total contract budget, the procurement officer may not execute the contract modification, change order, or adjustment in contract price unless sufficient funds are available, or the scope of the project or contract is adjusted to permit the degree of completion that is feasible within the total project budget or total contract budget as it existed before the contract modification, change order, or adjustment in contract price.

Sec. 36.30.480. Cost principle regulations shall be adopted.

Article 6. Procurement Records and Reports.

Sec. 36.30.500. Procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the state archivist.

Sec. 36.30.510. A contract file open for public inspection must be kept by the commissioner and the contracting agency for each contract awarded under competitive sealed proposals. The file kept by the commissioner shall contain a summary of the information in the file of the contracting agency.

Sec. 36.30.520. The commissioner shall maintain for at least 5 years a record listing all sole source and emergency procurement contracts. An agency which has delegated procurement authority shall by October 1, of each year, submit records of all sole source and emergency procurement contracts to the commissioner.

Sec. 35.30.530. Procurement information is public except as otherwise provided by law.

Sec. 36.30.540. The commissioner shall biennially report to the legislature concerning procurements by agencies.

Article 7. Legal and Contractual Remedies.

Sec. 36.30.560. An interested party may protest the award of a contract, the proposed award of a contract, or a solicitation for goods, services or construction. The protest shall be filed with the procurement officer of the contracting agency in writing and must contain specified items.

Sec. 36.30.565. Time deadlines for filing protests are specified.

Sec. 36.30.570. Notice of a protest shall immediately be given to the contractor if a contract has been awarded or, if no award has been made, to all interested parties.

Sec. 36.30.575. If a protest is filed before a contract is awarded, the award may be made unless the procurement officer of the contracting agency determines in writing that: a reasonable probability exists that the protest will be sustained; or stay of the award is not contrary to the best interests of the state.

Sec. 36.30.580. A written decision by the procurement officer of the contracting agency shall be issued within 14 days after a protest has been filed, unless the time is extended up to 26 days for good cause. Notice shall be sent to the protester. If a decision is not made by the due date, the protester may proceed as if the procurement officer had issued a decision adverse to the protester.

Sec. 36.30.585. If the procurement officer sustains a protest the procurement officer shall implement an appropriate remedy.

Sec. 36.30.590. An appeal from a decision of a procurement officer on a protest must be filed with the appropriate commissioner within 5 days after the decision is received by the protester.

Sec. 36.30.595. The procurement officer shall immediately give notice of an appeal to the contractor if a contract has been awarded, or, if no award has been made, to all interested parties.

Sec. 36.30.600. If a protest appeal is filed before a contract is awarded and the award was stayed, the filing of the appeal automatically continues the stay until the commissioner of administration or transportation and public facilities makes a written determination that the award of the contract is necessary to protect substantial interests of the state.

Sec. 36.30.605. The procurement officer of the contracting agency shall file a complete report on the protest and decision with the commissioner of administration or transportation and public facilities within 7 days after a protest appeal is filed. The protester and all interested parties that have requested a copy of the appeal shall be furnished one. The protester may file comments on the protest report within 7 days after the report is received. Extensions may be granted.

Sec. 36.30.610. The commissioner of administration or transportation and public facilities shall dismiss a protest appeal before a hearing is held if it is determined in writing that the appeal is untimely. The appropriate commissioner may issue a decision on an appeal without a hearing if the appeal involves questions of law without genuine issues of fact.

Sec. 36.30.615. A hearing on a protest appeal shall be conducted according to AS 36.30.670 and regulations adopted.

Sec. 36.30.620. If a controversy, asserted by a contractor, concerning a contract awarded under this chapter cannot be resolved by agreement, the procurement officer shall, after receiving a written request by the contractor, issue a written decision no more than 90 days after receipt of all necessary information from the contractor, unless the due date is extended for good cause.

The decision shall be sent to the contractor. If a decision is not made by the due date, the contractor may proceed as if the procurement officer had issued a decision adverse to the contractor. If a controversy asserted by the state concerning a contract awarded cannot be resolved by agreement, the matter shall be immediately referred to the commissioner of administration or transportation and public facilities.

Sec. 36.30.625. An appeal from a decision of the procurement officer on a contract controversy may be filed by the contractor with the commissioner of administration or transportation and public facilities. The appeal shall be filed within 14 days after the decision is received by the contractor.

Sec. 36.30.630. A hearing on a contract controversy appealed to the commissioner or referred to the commissioner shall be conducted according to AS 36.30.670 and regulations adopted.

Sec. 36.30.632. The commissioners of administration and transportation and public facilities may delegate responsibilities under Sec. 36.30.590 and Sec. 36.30.630 to the head of the contracting agency.

Sec. 36.30.635. The commissioners of administration and transportation and public facilities may debar or suspend a person from consideration for award of contracts. Notice and opportunity for a hearing are specified.

Sec. 36.30.640. Causes for debarment or suspension are enumerated.

Sec. 36.30.645. The commissioners of administration and transportation and public facilities shall issue a written decision to debar or suspend.

Sec. 36.30.650. A person suspended is entitled to a hearing if the person files a written request for a hearing within 7 days after receipt of the notice of suspension.

Sec. 36.30.655. The commissioner shall maintain a list of all persons debarred or suspended from consideration for award of contracts.

Sec. 36.30.660. The commissioner of administration or the commissioner of transportation and public facilities may, at any time after a final decision to debar a person, reinstate the person after determining that the cause for which the person was debarred no longer exists or has been substantially mitigated.

A debarred person may request reinstatement. A hearing may be held on a reinstatement petition. A decision on reinstatement shall be made in writing within 7 days after a reinstatement petition is submitted. A decision under this section is not subject to judicial appeal.

Sec. 36.30.665. The commissioner of administration or transportation and public facilities may permit a debarred person to participate in a contract on a limited basis during the debarment period.

Sec. 36.30.670. The commissioner of administration or transportation and public facilities shall act as a hearing officer or appoint a hearing officer for a hearing conducted under this chapter. The provisions of the Administrative Procedure Act do not apply to a hearing conducted under this chapter. The authority of a hearing officer is outlined.

Sec. 36.30.675. If the commissioner of administration or transportation and public facilities is not acting as hearing officer, the hearing officer shall recommend a decision to the appropriate commissioner based on the evidence presented. The recommendation shall include findings of fact and conclusions of law. The appropriate commissioner may affirm, modify or reject the hearing

officer's recommendation or take any other appropriate action.

Sec. 36.30.680. A decision by the commissioner of administration is final, and shall be sent within 20 days after a hearing to all parties. A decision by the commissioner of transportation and public facilities involving procurement of construction shall be sent within 90 days after the hearing.

Sec. 36.30.685. A final decision of the commissioner of administration or transportation and public facilities may be appealed to the superior court in accordance with the Alaska Rules of Appellate Procedure.

Sec. 36.30.687. Civil and criminal sanctions are outlined for misrepresentations and fraudulent claims.

Sec. 36.30.690. This chapter and the regulations adopted under it are the exclusive procedures for asserting a claim against the state or an agency arising in relation to a procurement conducted under this chapter.

Sec. 36.30.695. The commissioner of administration may adopt by regulation additional rules of procedure.

Sec. 36.30.699. The definition of interested party is given.

Article 8. Intergovernmental Relations.

Sec. 36.30.700. Cooperative purchasing is authorized between public procurement units or external procurement activities in accordance with an agreement entered into between the participants.

Sec. 36.30.710. Sale, acquisition, or use of supplies among public procurement units or with external procurement activity may be done independent of certain requirements of this chapter.

Sec. 36.30.720. Joint use of facilities is allowable.

Sec. 36.30.730. A public procurement unit may provide personnel, information and technical services to a requesting public procurement unit or external procurement activity.

Sec. 36.30.735. Current Alaska law on restrictions of contracting with or employing experts on radiation hazards is retained.

Sec. 36.30.740. The commissioner may collect information concerning supplies, services or construction being procured or used by state public procurement units.

Sec. 36.30.750. Under a cooperative purchasing agreement, controversies arising between an administering public procurement unit and its bidders, offerors, or contractors shall be resolved in accordance with this chapter.

Sec. 36.30.790. Definitions for this article are provided.

Article 9. General Provisions.

Sec. 36.30.850. This chapter applies to contracts solicited or entered into after January 1, 1987, unless the parties agree to its application to a contract solicited or entered into before that date. This chapter applies to the disposal of state supplies and every expenditure of public funds irrespective of their sources, except as specified in AS 36.30.915.

This chapter does not apply to: grants; contracts for professional witnesses; contracts of the University of Alaska where the work is to be performed substantially by enrolled students; contracts for medical doctors and dentists; contracts for the purchase of residential child care services under AS 47.40; disposals of land or interest in land; disposals under AS 38.05; contracts for the preparation of ballots under AS 15.15.030; acquisitions or disposals of property and other contracts relating to airports; acquisitions of real property or disposals of obsolete property under AS 19.05.060, 19.05.100, 19.05.110 or 19.05.120; disposals of obsolete material or equipment under AS 35.20.060; leases of ferry terminal facilities under AS 19.60.010; or contracts of the department of fish and game for non-point-to-point flights requiring specialized flying and piloting skills.

Except for AS 36.30.700-36.30.895, this chapter does not apply to contracts between two or more agencies, the state and its political subdivisions, or the state and other governments.

Sec. 36.30.860. Unless displaced by the particular provision of this chapter, all other principles of law and equity shall supplement the provisions of this chapter.

Sec. 36.30.870. Regulations under this chapter shall be adopted in accordance with the Administrative Procedure Act. Regulations applicable to procurements of construction or procurements for or disposal of property

of the state equipment fleet shall be adopted by the commissioner of administration only after consultation with the commissioner of transportation and public facilities.

Sec. 36.30.880. This chapter requires all parties involved in the negotiation, performance, or administration of state contracts to act in good faith.

Sec. 36.30.890. If a procurement involves the expenditure of federal funds or federal assistance and there is a conflict between a provision of this chapter or a regulation adopted under a provision, the federal statute or regulation shall prevail.

Sec. 36.30.900. This chapter does not modify, amend, or alter laws regarding preference for Alaska forest products or preference to producers or dealers in Alaska, except as provided in AS 36.30.170(b) and (c).

Sec. 36.30.910. This chapter does not prevent purchasing through the general services administration as provided by law.

Sec. 36.30.920. Suspected anticompetitive practices are to be reported to the attorney general.

Sec. 36.30.930. In addition to penalties prescribed for unethical conduct, civil and criminal penalties are provided for violations of this chapter.

Sec. 36.30.940. The attorney general on behalf of the state shall enforce the provisions of this chapter.

Sec. 36.30.990. Definitions.

Sec. 36.30.995. This chapter may be cited as the State Procurement Code.

SECTION 3 through SECTION 66 amend other Alaska statutes to reflect the provisions of this chapter.

SECTION 67. The commissioner must report to the legislature by December 1, 1987, concerning procurements by state agencies during the first 6 months of 1987.

SECTION 68. The commissioner of administration shall adopt the regulations required under this chapter by January 1, 1987.

SECTION 69. This is the repealer section.

SECTION 70. Section 68 of this Act takes effect immediately.

SECTION 71. Except as provided in sec. 70, this Act takes effect January 1, 1987.

ALASKA CHAPTER

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

ON

PROCUREMENT PRACTICES AND PROCEDURES

SB 341



AGC-Alaska on behalf of our over 800 member firms appreciates the opportunity to comment on SB 341. Following our general comments are some more specific comments relating to particular sections of the bill.

In general, we applaud the legislature and drafters for using "The Model Procurement Code for State and Local Governments" published by the American Bar Association as a basis. The thousands of hours and different perspectives represented by that document cannot easily be duplicated. For the same reason deviations from the "Model Procurement Code" (MPC) should be scrutinized.

One deviation from the MPC of great concern to the AGC is the required naming of subcontractors at bid submittal. The impact of this proposed requirement would be substantial. Accordingly, we have addressed our concerns on that issue separately.

Another major deviation from the MPC is the elimination of the State Procurement Policy Office. As stated in the MPC commentary at page 9:

A major conceptual basis of the Code, the separation of policymaking and operational functions, is best achieved through the establishment of an independent policy body such as the [State] Procurement Policy Office suggested above. This Section provides for placement of the Policy Office either as an independent entity within the executive branch of the government or within an existing department of government such as General Services, Finance, or Administration. Placement in the executive branch as a separate entity is the preferred arrangement as it would further ensure the professional integrity of this important

policymaking body, and appropriately elevate the entire procurement process in the public sector.

Under the MPC it is the Policy Office's responsibility to promulgate regulations. Under the bill the Commissioner of Administration, i.e. central Procurement Officer will promulgate regulations.

The principal of vesting the regulatory function in a policy office without line authority over individual procurement actions is fundamental to the MPC. Elimination of the Policy Office no longer separates the policy making from the day to day operation of the procurement process.

Perhaps the most important aspect of procurement requiring the separation of procurement policy from day to day procurement operation is the promulgation of regulations providing for adjustments in price, time of performance or other contract provisions. Utilization of a state policy office can insure the development of fair construction contract provisions. Fair construction documents avoid litigation and encourage reputable contractors to bid projects. Often times, tunnel vision by unenlightened public procurement officials bring about contract provisions which unfairly allocate risk and increase litigation between the parties.

In drafting the MPC the drafters obviously discussed this problem and arrived at the solution expressed in MPC § 2-101 and § 5-401. Requiring the Procurement Policy Office to address contract provisions relating to changes, variations in estimated quantities and different site conditions provides for broad input on this important policy related contract provision. Accordingly,

AGC-Alaska recommends the creation of a Procurement Policy Office comprised of three members who have demonstrated sufficient business and professional experience. (See MPC § 2-101(1) & (2) [Alternative A]).

Our second comment relates to the overall structure of the bill. The MPC recognizes construction as unique to the procurement process and devotes a separate article (Article 5) to the procurement of construction and related services. The bill does not devote a separate article to construction; instead SB 341 normally prefaces an article as relating only to construction.

This is a mere difference of opinion in drafting techniques; however, the special attention devoted to construction procurement by the drafters of the MPC is lost in SB 341.

One other broad area bears discussion at this time. A significant portion of public construction in Alaska is procured with state dollars by political subdivisions of the state and other "grant" recipients. AGC-Alaska strongly recommends that this committee propose legislation requiring any grant or appropriation recipient to utilize procurement practices consistent with this Procurement Practices and Procedure Act and its regulations.

Section by Section Comments and Recommendations

Section 1 (Similar to MPC § 1-101)

Recommendation: Eliminate Subsection (9), [page 1, line 29, page 2, line 1-2]

Comment: AGC-Alaska fails to understand the rationale for the inclusion of affirmative action language in a procurement act. AGC-Alaska is opposed to any special preference procurement program based on race, size, sex, residency or any other factor irrelevant to the contractors ability to perform. The best way to ensure discriminatory free procurement is competitive sealed bidding. Any other method allows for possible discrimination.

Section 36.30.005 (Similar to MPC § 2-301) [page 2, line 6]

Recommendation: Modify by providing for a "Policy Office" as in the MPC additionally the bill should be modified to reflect this fundamental change.

Comment: See previous general comments on "Policy Office"

Section 36.30.015 [page 5, line 9]

Recommendation: Delete part of (e)

Comment: The Alaska Railroad Corporation should abide by the same procurement code and regulations as the rest of the state.

Section 36.30.020 and 36.30.030 [page 5, line 15-26]

Recommendation: Delete "construction." Add new section transferring authority to contract for construction of public works for legislature or court system to DOT/PF subject to this act and its regulations.

Comment: The court system and the legislature are not in the business of procuring construction and the function should be transferred to DOT/PF. This will avoid arguments over the "substantial similarity" of procedures adopted by legislative counsel or the Supreme Court.

Section 36.30.850 [page 51, line 20 "grants"]

Recommendation: Add new section requiring any grant or appropriation recipient to adopt procedures to govern the procurement of supplies and services that are substantially equivalent to the procedures prescribed by this chapter. Require DOT/PF to contract for construction of any public work for any grant recipient.

Comment: Procurement problems are not limited to state

government. If state dollars are spent by others then similar safeguards on procurement with those state dollars should be instituted.

Section 36.30.130 (Source MPC § 3.202(3)) [page 13, line 8-9]

Recommendation: Require publication in a statewide newspaper of general circulation calculated to reach prospective bidders.

Section 35.30.160 (Source MPC § 3-202(6)) [page 14, line 24-25]

Comment & Recommendation: AGC-Alaska fails to understand the qualifying language "unless the delay was due to an error of a state employee directly responsible for opening the bids" contained in (a). This may lead to increased bid protests and accordingly we recommend deleting the language.

Section 36.30.190 & 36.30.200 [page 16, line 8 & page 16, line 16]

Comment: AGC-Alaska contests that multistep sealed bidding and competitive sealed proposals should not be used for construction. The prohibition should be stated in the document.

Section 36.30.300 [page 22, line 3]

Recommendation: Add the following language "sole source procurements may not be used for construction."

Comment: Fairness and public accountability requires competitive bidding.

Section 36.30.430 (Source MPC § 5-401 & § 6-101) [page 28, line 19]

Comment and Recommendation 1: Many of the provisions of this section relate only to construction contracts. To avoid confusion the MPC separated construction contracts and supply and service contracts. See MPC § 5-401 and § 6-101. AGC-Alaska recommends following the separation utilized by the MPC.

Section 36.30.580 [page 33, line 23]

Recommendation: Advise protestant of right to appeal.

Section 36.30.590

Recommendation 1: [page 34, line 20] Utilize Procurement appeals Board rather than the commissioner. See MPC § 9-501.

Recommendation 2: [page 34, line 25] 5 days to file an appeal is too short; a minimum of 10 is recommended.

Section 36.30.620(b) [page 37, line 19]

Recommendation: 30 days instead of 90 days to issue a decision.

Comment: 30 days to issue decision is sufficient time.

Section 36.30.630-650 [page 39, line 10]

Recommendation 1: Appeal should be to Procurement Appeals Board.

Recommendation 2: Add remedies, interest, and waiver of sovereign immunity sections contained in MPC § 9-202; § 9-203, § 9-301, and § 9-401.1

HOUSE

COMMITTEE REPORT

(7)

Date referred: 5/2/86

FURTHER REFERRALS: FINANCE

DATE: _____

The JUDICIARY Committee has considered CSSB 341(Jud) am

"An Act relating to state procurement practices and procedures; and providing for an effective date."

and recommends:

- do pass
- do not pass
- do pass with attached amendment(s)
- no recommendation
- replace with _____ same title
- _____ new title

and recommends _____

further referral to the _____ Committee

- and attaches:
- letter of intent
 - first fiscal note
 - new fiscal note
 - zero fiscal note

SIGNING DO PASS:

[Handwritten Signature]

[Handwritten Signature]

Robin L. Taylor

[Handwritten Signature]

SIGNING OTHER RECOMMENDATIONS:

[Handwritten Signature]

Chairman

STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

5/9/86

Revision Date : _____

REQUEST

Bill/Resolution No. : HCS-CSSB-341 (Jud)
 Title : State Procurement Practices
and Procedures
 Sponsor : Rules by Request
 Requestor : House Judiciary
 Date of Request : 5/9/86

FISCAL DETAIL

Agency Affected : University of Alaska
 BRU : University of Alaska
 Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		0				
TRAVEL						
CONTRACTUAL		0				
SUPPLIES		0				
EQUIPMENT		0				
LAND & STRUCTURES		0				
GRANTS, CLAIMS		0				
MISCELLANEOUS		0				
TOTAL OPERATING		0				

CAPITAL		0				
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REVENUE		0				
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FUNDING : (Thousands of Dollars)

GENERAL FUND		0				
FEDERAL FUNDS		0				
OTHER		0				
TOTAL		0				

POSITIONS :

FULL-TIME		0				
PART-TIME		0				
TEMPORARY		0				

ANALYSIS : Attach a separate page if necessary

The Judiciary HCS delays the effective date until FY88, so the only implementation costs in FY87 are regulation drafting and hearings, which will be incorporated into the existing Board of Regents meeting schedule. There will be costs to administer the new provisions in FY88; these costs will be presented in the University's FY88 budget request.

Prepared by: Brian Rogers Phone: 474-7593
 Division: University of Alaska Date: 5/9/86

Approved by Commissioner: *[Signature]* for Sherman Carter Date: 5/9/86
 Agency: University of Alaska

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

**STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE**

Revision Date May 1, 1986

REQUEST

Bill/Resolution No. : HCS-CSSB-341
 Title : An Act relating to state
 procurement practices and procedures;
 eff. date
 Sponsor : Rules/Governor
 Requestor : _____
 Date of Request : _____

FISCAL DETAIL

Agency Affected : University of Alaska
 BRU : Statewide Programs

 Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		59.8	62.8	65.9	69.2	72.7
TRAVEL		3.0	3.2	3.3	3.5	3.7
CONTRACTUAL		114.9	120.7	126.7	133.0	139.7
SUPPLIES		0.0	0.0	0.0	0.0	0.0
EQUIPMENT		14.6	0.0	0.0	0.0	0.0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		192.3	186.7	195.9	205.7	216.1

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

REVENUE						
----------------	--	--	--	--	--	--

FUNDING : (Thousands of Dollars)

GENERAL FUND		192.3	186.7	195.9	205.7	216.1
FEDERAL FUNDS						
OTHER						
TOTAL		192.3	186.7	195.9	205.7	216.1

POSITIONS :

FULL-TIME		2.0	2.0	2.0	2.0	2.0
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

See attached.

Prepared by : Brian Rogers
 Division : University of Alaska

Phone : 474-593
 Date : May 1, 1986

Approved by Commissioner : [Signature]
 Agency : University of Alaska

Date : May 1, 1986

Distribution (by Agency preparing fiscal note) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

HCS-SB-341

Analysis for impacts on University of Alaska of HCS-SB-341

Personal Services

One procurement clerk - Range 75	\$ 26,582
One clerk/typist - Range 72	20,114
<u>Staff Benefits</u>	<u>13,075</u>
Total	\$ 59,771

Travel

\$ 3,000

Contractual

Legal services - regulations, procedures	\$ 17,500
Advertising	
est. 300 additional bids @ \$275/3 papers	82,500
Telephone	2,200
Reproduction/postage	
<u>Additional costs for all RFPs</u>	<u>12,500</u>
Total	\$114,900

Equipment

Associated with new positions	\$ 5,800
<u>Computer equipment/software</u>	<u>8,800</u>
Total	\$ 14,600

Total	\$192,271
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STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No.: CS SB 341 (Fin)
 Title: Act relating to state
procurement practices & procedures

Sponsor: Rules by Request
 Requestor: _____
 Date of Request: _____

FISCAL DETAIL

Agency Affected: Dept of Administration
 BRU: General Services & Supply

Components: Purchasing

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		350.0	367.5	385.9	405.2	425.4

CAPITAL						
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REVENUE						
---------	--	--	--	--	--	--

FUNDING : (Thousands of Dollars)

GENERAL FUND		350.0	367.5	385.9	405.2	425.4
FEDERAL FUNDS						
OTHER						
TOTAL		350.0	367.5	385.9	405.2	425.4

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by: Senator Jan Faiks, Co-chairman Phone: 465-4523
 Division: Senate Finance Committee Date: 4/1/86

Approved by Commissioner: _____ Date: _____
 Agency: _____

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST
 Bill/Resolution NCS SB 341 (Jud)
 Title: State Procurement Practices

 Sponsor: Rules Committee
 Requestor: Interim Comm. on Procurement
 Date of Request: 1/16/86

FISCAL DETAIL
 Agency Affected: Public Safety
 BRU: Administration

 Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 36	FY 37	FY 38	FY 39	FY 90	FY 91
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

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

REVENUE						
----------------	--	--	--	--	--	--

FUNDING : (Thousands of Dollars)

	FY 36	FY 37	FY 38	FY 39	FY 90	FY 91
GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

	FY 36	FY 37	FY 38	FY 39	FY 90	FY 91
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by: Sid LaMonica, Administrative Officer Phone: 465-4328
 Division: Public Safety Date: 1/15/86

Approved by Commissioner: [Signature] Date: 1-22-86
 Agency: Public Safety

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

**STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE**

Revision Date : _____

REQUEST

Bill/Resolution No. : CS SB 341 (Jud)
 Title : Act relating to state
procurement practices & procedures

 Sponsor : Rules by Request
 Requestor : _____
 Date of Request : _____

FISCAL DETAIL

Agency Affected : Dept of Transportation
and Public Facilities
 BRU : _____
 Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL		0	0	0	0	0
REVENUE		0	0	0	0	0

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by : Senator Jan Faiks, Co-chairman *Jan Faiks* Phone : 4654523
 Division : Senate Finance Committee *Jan Faiks* Date : _____
 Approved by Commissioner : _____ Date : _____
 Agency : _____

Distribution (by Agency preparing fiscal note) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date : _____

REQUEST

FISCAL DETAIL

Bill/Resolution No. : CS SB 341 (Jud)
 Title : Act relating to state
procurement practices & procedures

Agency Affected : Dept of Environmental
 BRU : Conservation

Sponsor : Rules by Request
 Requestor : _____
 Date of Request : _____

Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL		0	0	0	0	0
REVENUE		0	0	0	0	0

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by : Senator Jan Faiks, Co-chairman
 Division : Senate Finance Committee

Phone : 465-4523
 Date : 4/1/86

Approved by Commissioner : _____
 Agency : _____

Date : _____

Distribution (by Agency preparing fiscal note) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

**STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE**

Revision Date : _____

REQUEST

Bill/Resolution No. : CS SB 341 (Jud)
 Title : Act relating to state

 Sponsor : Rules by Request
 Requestor : _____
 Date of Request : _____

FISCAL DETAIL

Agency Affected : Dept of Natural Resources
BRU: Management & Administration

 Components : Administrative Services

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0

CAPITAL		0	0	0	0	0
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REVENUE		0	0	0	0	0
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FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by : Senator Jan Faiks, Co-chairman Phone : 465-4523
 Division : Senate Finance Committee Date : 4/1/86

Approved by Commissioner : _____ Date : _____
 Agency : _____

Distribution (by Agency preparing fiscal note) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date : _____

REQUEST

FISCAL DETAIL

Bill/Resolution No.: CS SB 341 (Jud)
 Title: act relating to state
procurement practices & procedures

Agency Affected: Dept of Administration
 BRU: Div of Admin Services

Sponsor: Rules by Request
 Requestor: _____
 Date of Request: _____

Components: Administrative Services

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL		0	0	0	0	0
REVENUE		0	0	0	0	0

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by: Senator Jan Faiks, Co-chairman
 Division: Senate Finance Committee

Phone: 465-4523
 Date: 4/1/86

Approved by Commissioner: _____
 Agency: _____

Date: _____

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No.: CS SB 341 (Jud)
 Title: Act relating to state
procurement practices & procedures

FISCAL DETAIL

Agency Affected: Commerce & Economic Dev
 BRU: Alaska State Housing Authority

Sponsor Rules by Request _____
 Requestor: _____
 Date of Request: _____

Components: Housing Management

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL		0	0	0	0	0
REVENUE		0	0	0	0	0

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by: Senator Jan Faiks, Co-chairman Phone: 465-4523
 Division: Senate Finance Committee Date: 4/1/86

Approved by Commissioner: _____ Date: _____
 Agency: _____

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : CSSB 341 (Jud)
 Title : Act relating to state
procurement practices & procedures
 Sponsor : Rules by Request
 Requestor : _____
 Date of Request : _____

FISCAL DETAIL

Agency Affected: Community & Regional Affairs
 BRU: Local Govt Assistance;
Child Assistance, Disolated
Homemakers, Admin & Support
 Components: Grants Admin, Child Care,
Disolated Homemakers,
Admin Services

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL		0	0	0	0	0
REVENUE		0	0	0	0	0

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by: Senator Jan Faiks, Co-chairman
 Division: Senate Finance Committee

Phone: 465-4523
 Date: 4/17/86

Approved by Commissioner: _____
 Agency: _____

Date: _____

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No.: CSSB 341 (Jud) am
 Title: "An Act relating to state procure-
ment practices and procedures; and
providing for an effective date."
 Sponsor: Rules Committee by Request
 Requestor: House State Affairs
 Date of Request: 4/18/86

FISCAL DETAIL

Agency Affected: Public Safety
 BRU: DPS Administration

 Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						
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REVENUE						
---------	--	--	--	--	--	--

FUNDING : (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Reviewing the definition given for "sole source procurements", it appears that this Department would need to write more RFP's. It does not require an additional person; however, the overall service response time to the field Divisions will be affected.

Prepared by: Sid LaMonica

Phone: 465-4328

Division: Administrative Services

Date: 4/18/86

Approved by Commissioner: [Signature]

Date: 4/18/86

Agency: Public Safety

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

DEPARTMENT OF PUBLIC SAFETY
POSITION PAPER - CSSB 341 (Jud)am

SUPPORT

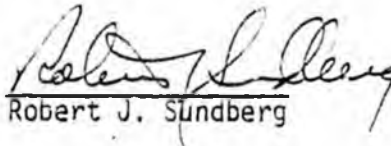
April 18, 1986

CSSB 341 (Jud)am - An Act relating to state procurement practices and procedures; and providing for an effective date."

The intent of the bill is to standardize procurement practices throughout State government.

The bill will accomplish the above intent by clearly indicating what is required of State government and by establishment of a Chief Procurement Officer to oversee the procurement operation.

Reviewing the definition given for "sole source procurements", it appears that this department would need to write more RFPs. It does not require an additional person; however, the overall service response time to the field Divisions will be affected.


Robert J. Sundberg

May 7, 1986

Lee C. Warnock
813 'D' Street
Anchorage, AK 99501

Honorable Senator Patrick Rodey
Chairman Senate Judiciary Committee
Pouch V
Juneau, AK 99811

Subject: SENATE BILL 341, STATE PROCUREMENT PROCEDURES

Dear Senator Rodey,

Thank you for sending me a copy of your proposed state procurement legislation. I have read most of the proposed legislation and make my comments accordingly. Unfortunately, due to the press of business, I have not been as timely returning my comments as I had planned. Please forgive my tardiness.

In discussions with members of your staff, I learned Senate Bill 341 is approaching finalization in the House Judiciary Committee and therefore will copy the Chairman of that committee with my comments. Also, by copy of this letter I will make my concerns known to other members of the House and Senate Judiciary Committees, and my Senator and Representatives.

It would appear Senate Bill 341 has received a great deal of effort and energy in order to establish uniform procurement procedures for Alaska. I support uniform procurement procedures for Alaska and recognize their need but feel SB 341 should receive additional work and review prior to enactment. SB 341 appears to follow The Model Procurement Code for State and Local Governments published by the Public Contract Law section of the American Bar Association. While this is a good starting point, I feel that due to Alaskan conditions, Alaska should perhaps look to the Federal Acquisition Regulations (FAR) as a more appropriate body of uniform procedures for procurement. The Federal Acquisition Regulations are a time tested, and court tested body of rules, regulations and procedures that if followed should provide Alaska the best procurement at minimal cost with the least bureaucracy. Some of the provisions within FAR are inappropriate to Alaska and should not be considered; and, where conditions unique to Alaska are not covered by FAR, SB 341 should provide accordingly. Notwithstanding the Senate Procurement Committee's great effort in this proposed legislation, I recommend suspending any further attempts of passage until at such time as SB 341 can be returned

Senator Patrick Rodey
May 7, 1986
Page 2 of 2

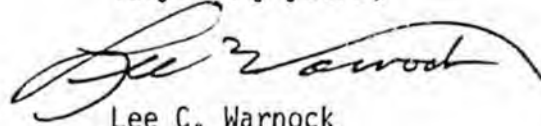
to the Senate Procurement Committee for improvement along the lines of FAR and my attached critique.

I understand several agencies and organizations are now taking active opposition to this proposed legislation and feel those comments should be considered as well.

I will endeavor to review the remainder of this bill as time permits. Acknowledging the shortness of the legislative schedule, and recognizing the legislature has bills of greater importance requiring enactment and in view of the concerns I and others have raised; I strongly request and recommend the summer of 1986 be used to refine SB 341 for future enactment.

The favor of your kind attention in postponing any action on SB 341 will be greatly appreciated and will be of even greater benefit to Alaska.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Lee C. Warnock".

Lee C. Warnock

Attachment

cc: Governor William Sheffield
Senator Tim Kelly - Vice Chairman
Senator Jan Faiks
Senator Rick Halford
Senator Robert Ziegler Sr.
Senator Mitch Abood
Representative Mike Miller - Chairman
Representative John Sund - Vice Chairman
Representative Robin Taylor
Representative Don Clocksin
Representative Fritz Pettyjohn
Representative Randy Phillips
Representative Drue Pearce
Representative Alyce Hanley
Hayden Kaden
Keylend Svendsen
Lynn Collins

ANALYSIS OF SENATE BILL 341
(by page by line)

Page 3, line 22. Define "cause" or reference Alaska statutes where cause is defined.

Page 4, lines 1 thru 12. Perhaps it would be more appropriate for Alaska to "procure or contract" with a corporation that specializes in this type of service, to do these services for Alaska. Competitive proposals could be solicited for these services which should offer the state the most efficient and inexpensive operation for this type of work.

Page 5, line 26, Section 36.30.040. Procurement Regulations. What agency has oversight to insure these regulations are fair and appropriate so that legal challenges and their attendant costs are avoided?

Page 7, line 7, Section 36.30.050. Lists of Contractors. This appears to create a new layer of bureaucracy within Alaska. Can we afford it? Why are lists of contractors necessary? How will the costs of creating the lists be controlled so Alaska gets the best service for the least cost? If the lists are for the benefit of the state, why charge a fee? Why would contractors pay a fee to be on lists when advertisement for public work will come their way through other sources without a fee?

Page 9, line 12. How shall notice be given?

Page 10, line 18, Section 36.30.115. Subcontractors. This section is apparently intended to eliminate bid shopping and/or bid peddling, which most contractors would agree to, providing every one conforms to it. Why not have the contractors submit with their bids, a list of proposed subcontractors, which to a certain extent can eliminate bid shopping and bid peddling? However, be advised that due to all sorts of reasons, business arrangements can change after a bid has been awarded. Why would the State want to be policeman in this area of public contracting? Let the contracting industry police themselves by establishing a bid depository.

Page 11, line 3. This precludes project insurance policies obtained by the prime contractor and portioned to subcontractors. Failure to allow this type of insurance program on state projects will increase the cost for state work.

Page 11, line 6. This is an impossibility for Alaska. I question why the State would involve itself in the business relationships between contractor and subcontractor. The prime contractor is responsible for the performance of his subcontractor and a procurement officer should not be involved with the determination of the responsibility of a bidder based upon his subcontractors. Define responsibility as used here or reference Alaska statutes that define responsibility.