

**ALASKA LEGISLATURE COMMITTEE FILES 1900-1900 00/2**  
**3414 HJUD SB 341**

Reference subsections C, D, and E. Lower tiered specialty subcontractors highly efficient due to their specialization are prevented from working on State projects by this language and thus Alaska fails to gain the most competitive price.

Page 12, line 19. Define "adequate public notice". Thirty day advance notice of public notice of invitation to bid would disseminate information about forthcoming work over a broader market and thus offer Alaska the best prices through enhanced competition. Inclusion of state liability for damages in subsection B removes the inherent risks of bidding and contracting from the contractor and places the risks squarely on Alaska; a practice I recommend not be done in view of present budget concerns. This would create a welfare state for contractors inefficient at bidding but proficient at filing claims against the State for damages incurred during the bidding process.

Page 13, line 12, Section 36.30.140. Bid Opening. Lack of immediate public disclosure of projects within the public domain, serves no purpose except to establish an air of secrecy and distrust of the procurement procedures. A fact which this proposed legislation is intended to eliminate in the wake of the Fairbanks state office building lease. Failure to immediately disclose bid results and to offer public bid documents for review eliminates the policing aspects of the industry in the areas of responsiveness and responsibility. Further, it is contrary to the concept of 'government in the open' and review of government actions effecting the public domain. Likewise, I believe this section will increase the likelihood of bid protests and attendant litigation expenses. While the State contemplates issuance of notice of intent to award, others will allege through the courts that certain bidders should be disqualified and as a result, the courts will be forced to intervene and disclose the bid results, thus making a shambles of this section of the proposed legislation. In short, the public interest is not served by secrecy of bid openings involving public money.

Page 14, line 15, section 36.30.160. Late Bids; Correction or Withdrawal of Bids; Cancellation of Awards. Opportunities for correction of ones bid are entirely inappropriate unless held to the stringent tests established within the Federal Acquisition Regulations or the Defense Acquisition Regulations (DAR). Other state and federal organizations, such as the Corp of Engineers, have had to deal with similar conditions and their experience and strict procedures should be followed here. The proposed language will provide innumerable opportunities for protests and litigation, all of which are expensive wastes of time and money. By allowing corrections, the contracting agency prevents the self-regulating aspects of the contracting industry from eliminating those who are not responsive. It could be alleged during the process of bid correction that collusion or conspiracy existed between the contracting agency and the correcting contractor. At line 28, the State attempts to eliminate the cold cruel world of contracting by allowing a

bidder to withdraw his bid without jeopardizing his bid security. This is counterproductive to Alaska's interest and will allow frivolous bidders to walk away at their whim without penalty. Why require a bid bond at all?

Page 15, Section 36.30.170. Contract Award After Bids. The proposed ten percent Local Business Enterprise (LBE) incentive is inappropriate if Alaska intends to require the best possible product for the lowest possible price. In this period of budget concern, can Alaska really afford to pay ten percent more for its work when the budget is in the hundreds of millions? Language as currently written between lines 12 and 23 of this subsection precludes corporations having done business in Alaska for many years from being considered as an Alaskan bidder even though they have Alaskan interests at heart but are incorporated in another state. Language intended to assure Alaska corporations bidding on Alaska work and hiring Alaskans does not necessarily guarantee the latter will follow if they can move people up from the lower 48 and still spend less than the ten percent advantage developed at bid opening. Further, for projects such as Bradley Lake, Red Dog Mine, or a North Slope gas pipeline to energize the railbelt and provide export for the state; world class corporations would be precluded from participating in such projects by this proposed language. This would prevent the best minds, procedures and efficiencies from participating in these projects, thus making it difficult for Alaska to get the best possible return for its participatory investment.

Page 16, line 6. How shall this be determined?

Page 16, line 27. Define "specify with particularity".

Page 17, line 13. Why not submit with proposal?

Page 18, Section 36.30.220. Standard Overhead Rate. This subsection allows state agencies to compete against private business, especially if the agency's overhead is low because it is subsidized by state funds. If this language is to remain within this proposed legislation, then the overhead rates should be established by an outside agency independent of the contracting agency, thus insuring impartiality. In my opinion the proposed language precludes any incentive for efficiency and thus precludes private industry, enhances bureaucracy and prevents the state from getting the best product for the least amount of money.

Page 18, line 25. What penalties shall be imposed upon employees for disclosing confidential contents of proposals?

Page 23, line 14, Subsection D. What penalties shall be levied for those who artificially subdivide or fragment procurement?

Page 24, line 12. Define "promptly".

Page 25, line 19, Subsection 2. Define "is adequate to allocate costs in accordance with generally accepted accounting principles".

Page 26, Section 36.30.400. Cost or Pricing Data. If Alaska really wants honest adherence and fair settlement of change orders or contract modifications, it must include in its bidding documents and conformed contract the tools for insuring proper cost or pricing data. Again, I suggest the procurement legislation take into account the provisions of DAR or FAR. Both sets of procurement regulations have time tested procedures for dealing with pricing change orders or contract modifications. As written the proposed legislation indicates all contractors will have to reveal their proprietary pricing and production details in order to gain a contract. Such disclosure will eliminate the desire for Alaskan work and thus only the most inefficient, expensive contractors will be interested in doing work because their cost and pricing data will not be proprietary.

Cost and pricing data submitted for use as comparison against engineers estimates for the purpose of settlement of change orders is worthless unless the data is comparable. Estimators preparing pricing data must be looking at the same scope of work in the same way. The significant portions of work must be broken down by the same relative comparative categories such as labor, materials, equipment, subcontractors, overhead and profit. Further credit change orders are not addressed by this proposed legislation. Without these fundamental tools in place within the bid or contract documents, modification and/or change order settlement will not be timely and the window of opportunity for the most advantageous settlement will be lost. Unsettled modifications or change orders result in disputes becoming claims which add expensive legal fees for both sides to the direct cost of the change. If Alaska becomes strangled by a bureaucracy that frustrates settlement of changes, less honorable individuals may feel the need to 'get even' and the price of work will rise accordingly. Based upon my years of experience, I believe Alaska would be best served by streamlining administrative procedures for inclusion in bid documents so contractors know that specific, timely relief will be offered for changes. Further, I believe Alaska should prepare procedures and/or legislation that incorporate the best of The Contract Disputes Act of 1978 into their procurement code. In addition, How should an audit be conducted? Under what guidelines? Again, may I suggest DAR and FAR be consulted.

Page 27, line 13. Define "adequate".

Page 28, lines 14 and 15. Who shall have administrative review of this procedure? While it's true most contracts go through a legal and technical review for adequacy under the law and sound engineering principles, an administrative review of the contract is also necessary. Alaska's best interests are often overlooked and the cost of administrating a contract

is higher than necessary in the absence of an administrative plan for managing the contract.

Page 29, Sections 36.30.470 and 36.30.480. Such an ambiguous procedure creates an impossibility for contracting agencies to settle change orders taking advantage of any contractor's competitive pricing opportunity.

Page 32, Article 7, Legal and Contractual Remedies, Section 36.30.560 through Section 36.30.615. The proposed bid protest procedure is both convoluted and bureaucratic. In my opinion it enhances an atmosphere of unnecessary litigation with overlapping areas of bureaucracy that place various elements of state contracting agencies in the position of prosecutor, judge and jury, which by all legislation creates numerous conflicts of interest within the public domain and will strangle contracting agencies attempting to perform public work.

Page 35, line 4. Who shall determine confidentiality of material?

Page 36, section 36.30.610. Decision Without Hearing. What if the protest from the very beginning was frivolous and the State's time, energy and money were wasted by this protest? This proposed legislation should protect Alaska from this type of needless expense.

Page 37, section 36.30.620. Contract Controversies. As previously mentioned, Alaska should utilize some language similar to the 1978 Contract Disputes Act. This would require contractors to submit and certify that all information and pricing data given as part of a contract controversy was in fact all there was and nothing further was needed for rendering a decision. This would prevent frivolous claims and limit wasteful and unproductive legal expenses for Alaska. Further, should the contractor submit a certified claim and be found either frivolous or fraudulent, Alaska would then have remedies for recovery of its expenses for dealing with the previously certified claim later found frivolous or fraudulent.

Alaska should identify and define what was considered to be frivolous or fraudulent. This may sound rather harsh for the contractor, however, such disputes legislation has responsibilities for Alaska as well. It would prevent contracting agencies from delaying behind vague language such as "all information necessary" in providing an opinion on the contractor's claim. It was precisely due to ambiguous procedures by Federal contracting agencies that the Contract Disputes Act of 1978 was created. Currently this section does not indicate contractors will be dealt with fairly.

Page 42, line 20. Define "substantially mitigated".

Page 44, line 22. Define "appropriate action".

STATE OF ALASKA  
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

FOURTH FLOOR STATE CAPITOL  
JUNEAU ALASKA 99811  
907 465 1800

MEMORANDUM

April 21, 1986

TO: THE HONORABLE KATIE HURLEY  
CHAIRMAN, HOUSE STATE AFFAIRS COMMITTEE

FROM: Warren W. Endicott, Executive Director *WWE*

SUBJECT: Amend CSSB 341(Jud)am

This is to request amendment of CSSB 341(Jud)am, "The State procurement code" as it pertains to the Legislature.

Because of time constraints in the legislative branch and cost savings by not always using the State contract award, it is requested that the language in AS 36.30.020 be amended as follows:

"Sec. 36.30.020. LEGISLATURE. The Legislative Council shall adopt procedures to govern the procurement of supplies, services, professional services, and construction by the legislature, legislators, and legislative agencies and committees. The procedures must be based on the competitive principles established under this chapter and must be adapted to the special needs of the legislative branch as determined by the Legislative Council [substantially equivalent to the procedures prescribed in this chapter]."

WWE:mm

A M E N D M E N T S

CSSB 341 (Jud) am

#1

Page 10, line 20 through Page 12, line 1:

Delete all material

#2

Page 15, line 26-28:

Delete:

"(4) is incorporated under the laws of the state, is a sole proprietorship, and the proprietor is a resident of the state or is a partnership, and all partners are residents of the state; and"

#3

Page 16, line 8:

Add a new subsection (d)

"(d) The provisions of (b) of this section do not apply to construction contracts for highways and public works if the construction contract exceeds \$5,000."

#4

Page 51, line 20:

Delete:

"(1) grants;"

Re-number following sections accordingly.

#6

Page 54, Line 20:

After the word "for" Delete:

"the University of Alaska,"

#7

Page 54, Line 21:

After the word "Authority" Delete:

"and the Alaska Railroad Corporation;"

Amendment CSSB 341

P. 52, after line 6, add a new item (13) to read:

(13) acquisitions or contracts by utilities who operate and maintain state facilities under contract with the Alaska Power Authority.



# ombudsman

John B. Chenoweth

October 21, 1985

Senator Jan Faiks, Chair  
Senate Select Committee on Procurement Practices  
1024 West Sixth Avenue  
Anchorage, Alaska 99501

Dear Senator Faiks:

This letter is by way of response to Senator Josephson's August 30 invitation to comment from experience to the Select Committee on the ombudsman's office's experience with procurement-related matters.

As my September 10 letter indicated, I undertook review of pertinent complaints. That review considered more than 400 complaints filed with the ombudsman's office and closed since 1980. The review grouped the procurement-related complaints received among six general categories:

- competitive bidding generally;
- leasing;
- sole source procurement;
- bid waivers;
- bid award and professional service contract award appeals; and
- professional services contracting.

Our impressions about the public's principal concerns for the state's procurement process and our general recommendations to the committee about public contracting concerns are set out below. An accompanying appendix provides supplementary information as to the statistical basis of the complaints received and examined and a summary of significant complaints which have been received.

Alaska's statutes make a basic distinction between "procurement" (AS 37.05.220 - 37.05.280) and "professional services contracting" (AS 36.98). The information based on examination of complaints received by this office is reported following that distinction. A third section collects and reports material common to both broad categories. I trust that this is a form useful to the committee's deliberations.

State of Alaska

Reply to:

- 3201 C Street, Suite 606  
Anchorage, Alaska 99503  
(907) 278-4011
- Pouch W0  
Juneau, Alaska 99811  
(907) 485-4970
- P.O. Box 74358  
Fairbanks, Alaska 99707  
(907) 452-4001

D. The appeal mechanism relating to award of competitive bids does not permit a review of the merits;

E. The legislature should determine by law the contracting authority and procedures which may be exercised by the Legislative Affairs Agency (and associated agencies, including this office), the administration of the Alaska Court System, and the University of Alaska system. It should provide by law an outline of contracting systems intended to safeguard the interests of the agencies and the rights of bidders and aggrieved bidders, thereafter allowing the agencies opportunity to implement and make certain their respective contracting authorities.

## II

### Professional Services Contracting:

Though the number of complaints filed with respect to professional services contracts (AS 36.98) has fallen substantially since the legislature's comprehensive revision of state law covering professional services contracts in 1982, elements of professional services contracting still raises significant questions. In the intervening years, the public has raised objections or presented complaints generally as follows:

A. Exceptions which the agencies have been able to implement in their use of "professional services" contracting;

B. In framing and offering requests for proposals in contemplation of a professional services contract, agencies handle RFP's improperly;

C. In evaluating requests for proposals, agencies have erred;

D. The appeal process applicable to professional services contracting discourages or does not permit fair evaluation of grievances of unsuccessful responders on their merits; and

E. Exception of the Department of Transportation and Public Facilities from oversight by the Department of Administration essentially precludes uniformity of contracting within the executive branch; no professional services contracting process is specifically identified in law for the University of Alaska. Additionally, the committee may wish to consider whether to extend the provisions of

(1) the incomplete and rather haphazard form of the state's general procurement statute;

(2) the dearth of meaningful regulations to implement, interpret and make specific the procurement system;

(3) the maintenance of contracting systems by the other departments tied back to the Department of Administration by only the loosest of bonds; and

(4) the separate procurement processes used by the legislature and judiciary, and the University.

For someone with no more than occasional exposure to it, Alaska's procurement system is not an easy process to understand. To the owner of a small business, the process is characterized by confusion. Contracting within the executive branch typically involves two departments--the issuing agency and the Department of Administration.

Despite a good effort by the Division of General Services and Supply to prepare a comprehensive volume explaining purchasing and procurement in an effort to develop some uniformity in the system, at the start of the term of the current administration, Commissioner Rudd reemphasized that the process of advertising and awarding contracts would be decentralized through a system of "delegations of purchasing authority" and individual "internal departmental policy and procedures manuals." While this approach to management of the state's procurement process in the executive branch is generally consistent with current AS 37.05.220, the absence of a generally uniform system of procedures to which the public may have easy access is, to my mind, the source of a significant portion of the misunderstanding, frustration, and complaint about the process.

So that, as a general matter, the public may better understand, use, and have confidence in the state's procurement system, and so that the legislature and its committee staffs may more readily evaluate individual procurement decisions, the committee can and should:

(1) revise the applicable provisions of the "Purchasing" article of the state's Fiscal Procedures Act--Administration refers to this as the "Uniform Purchasing Act"--to establish a uniform system, applicable to all agencies, with few (if any) exceptions;

(2) strictly and specifically limit exceptions to the competitive bid process;

-- where exceptions are authorized based on a proposed dollar amount for a contract, the exception should have a reasonable basis documented in the legislative history of the bill;

# **CORRECTION**

**THIS DOCUMENT  
HAS BEEN REPHOTOGRAPHED  
TO ASSURE LEGIBILITY**



# ombudsman

John B. Chenoweth

October 21, 1985

Senator Jan Faiks, Chair  
Senate Select Committee on Procurement Practices  
1024 West Sixth Avenue  
Anchorage, Alaska 99501

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In the main, my concerns go to the contract issuance process and the clarity of that process to the public. The experience of this office suggests that, while the procurement-related statutes should be closely examined and the contracting process clarified, within some fairly well defined limits the revision should allow agencies to enjoy a measure of discretion in contract award and management. The public interest requires, however, that agencies which are provided that discretion shall explain their decisions.

This document does not treat contract-related subject matter in detail. No legislation you may consider will answer all questions or objections which the public will raise. I have tried to identify the key points which legislation which you have or will have under consideration should address. The points set out below are those which I believe the public has indicated to be as particularly deficient (based on an examination of the number of complaints filed and a review of investigations completed) or those which I believe should be addressed in order to provide a procedurally-complete contracting system.

#### Procurement (Competitive bidding and related techniques):

In this letter, I reserve the use of the term "procurement" to cover contract award process authorized by the state's Fiscal Procedures Act (and similar authority applicable to the legislative and judicial branches, and the University of Alaska) as distinguished from professional services contracting.

The common thread running through the overwhelming number of the procurement-related complaints filed with the ombudsman's offices is that key elements of the process are unfair. Broadly speaking, those allegations of unfairness seem to be most often directed to the following:

A. Procurement procedures are unclear or uncertain, resulting in an award of a contract which is allegedly improper;

B. Agencies improperly use, and the Department of Administration erroneously allows use of, "bid waiver," "brand name," "sole source," and "negotiated contract" procurement techniques in situations which, the public suggests, are properly subject to competitive bid;

C. The process by which the issuing agency evaluates and accepts or rejects bids and by which the issuing agency determines whether the low bid has been submitted by the lowest responsible bidder is uncertain;

D. The appeal mechanism relating to award of competitive bids does not permit a review of the merits;

E. The legislature should determine by law the contracting authority and procedures which may be exercised by the Legislative Affairs Agency (and associated agencies, including this office), the administration of the Alaska Court System, and the University of Alaska system. It should provide by law an outline of contracting systems intended to safeguard the interests of the agencies and the rights of bidders and aggrieved bidders, thereafter allowing the agencies opportunity to implement and make certain their respective contracting authorities.

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A. Exceptions which the agencies have been able to implement in their use of "professional services" contracting;

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D. The appeal process applicable to professional services contracting discourages or does not permit fair evaluation of grievances of unsuccessful responders on their merits; and

E. Exception of the Department of Transportation and Public Facilities from oversight by the Department of Administration essentially precludes uniformity of contracting within the executive branch; no professional services contracting process is specifically identified in law for the University of Alaska. Additionally, the committee may wish to consider whether to extend the provisions of

AS 36.98 to regional educational attendance areas or, alternatively, to require the commissioner of education to assure that all school districts have in place a professional services contracting process.

III

Considerations applicable to both categories:

The public's complaints and our own work on them suggest other facets of public contracting--both procurement and professional services related--which is deserving of the committee's attention:

- A. Contracts are awarded to firms who are not qualified to do business in Alaska at the time of contract award;
- B. The use of contract extensions or continuations is not well regulated;
- C. Nonprofit firms operated with public support and government agencies compete for public contract work at an advantage to firms in the private sector;
- D. State law covering public release of information contained in the documents submitted in response to invitations to bid or requests for proposals is unclear;
- E. State law is too uncertain as to certain ethical concerns involving state officials or employees responsible for contracts who are related by blood or marriage to, who have a financial or associational interest in, or who are former employees of a firm submitting a bid or responding to an RFP.

Each of these is deserving of brief explanation or example.

I

A. Competitive Bidding. Without doubt, a major factor contributing to public objection to the state's contracting practices is the public's (and prospective contractors') lack of familiarity with specifics of applicable contracting practices. A significant part of the work of the office in the area of public contracting has been to work with aggrieved bidders to explain--so far as we are able to obtain information about particulars--specific questions or concerns.

The public's difficulties arise, I suggest to you, from

(1) the incomplete and rather haphazard form of the state's general procurement statute;

(2) the dearth of meaningful regulations to implement, interpret and make specific the procurement system;

(3) the maintenance of contracting systems by the other departments tied back to the Department of Administration by only the loosest of bonds; and

(4) the separate procurement processes used by the legislature and judiciary, and the University.

For someone with no more than occasional exposure to it, Alaska's procurement system is not an easy process to understand. To the owner of a small business, the process is characterized by confusion. Contracting within the executive branch typically involves two departments--the issuing agency and the Department of Administration.

Despite a good effort by the Division of General Services and Supply to prepare a comprehensive volume explaining purchasing and procurement in an effort to develop some uniformity in the system, at the start of the term of the current administration, Commissioner Rudd reemphasized that the process of advertising and awarding contracts would be decentralized through a system of "delegations of purchasing authority" and individual "internal departmental policy and procedures manuals." While this approach to management of the state's procurement process in the executive branch is generally consistent with current AS 37.05.220, the absence of a generally uniform system of procedures to which the public may have easy access is, to my mind, the source of a significant portion of the misunderstanding, frustration, and complaint about the process.

So that, as a general matter, the public may better understand, use, and have confidence in the state's procurement system, and so that the legislature and its committee staffs may more readily evaluate individual procurement decisions, the committee can and should:

(1) revise the applicable provisions of the "Purchasing" article of the state's Fiscal Procedures Act--Administration refers to this as the "Uniform Purchasing Act"--to establish a uniform system, applicable to all agencies, with few (if any) exceptions;

(2) strictly and specifically limit exceptions to the competitive bid process;

-- where exceptions are authorized based on a proposed dollar amount for a contract, the exception should have a reasonable basis documented in the legislative history of the bill;

-- where exception is made for any other reason, they should be authorized and approved only if consistent with identified standards of evaluation;

(3) require one agency--probably the Department of Administration--to implement, interpret, or make specific the re-enacted provisions in a way that is uniformly applicable;

(4) recast the procurement system in a way that does not rely procedurally on "delegations of authority" and internal "procedure manuals;" because procurement affects the public, it should be made a public process: a description of the procurement process applicable to all agencies should be adopted into the Alaska Administrative Code in accordance with the Administrative Procedure Act.

Secondly, in any revision of the "Purchasing" article of the Fiscal Procedures Act, specific attention should be given to a number of key facets that have been the basis of significant complaints to this office that are not now carefully prescribed by law:

(1) the issuing agency should be required to identify and describe evaluation procedures and performance criteria before bids are solicited;

(2) bid specifications or criteria should be certain, not vague, and direct vendor involvement in the development of specifications should be prevented;

(3) sufficient time should be allowed for bid submissions; and

(4) agency decisions concerning the disposition of bids should be promptly communicated to all bidders;

3. Alternative procurement procedures. The committee should undertake a careful review of the statutes authorizing alternative procurement techniques. In this category I place the use of "negotiated contracts" (AS 37.05.230(2)), "bid waiver" (AS 37.05.220(2) and AS 37.05.230(1); AS 35.05.040(3)), "brand name", and "sole source" (AS 37.05.230(2); AS 35.05.040(9)) techniques.

Use of these techniques has given rise to one of the largest categories of complaints involving procurement practices. Typically, the complaints are submitted by prospective competitors who learn of the contract award only after the fact. Our experience has been that the agencies often fail to document, or incompletely explain, the reasons for using one or another of these techniques. Our experience has also

been that the Department of Administration's Contract Review Committee, which passes on these submissions with a recommendation to the commissioner or her designee, is little more than a rubber stamp--indeed, the committee typically operates with a rubber stamp--that does little to effectively check on the appropriateness of these exceptional situations.

Surely there is a legitimate place for exceptions within a government procurement system. But the legislature should act to assure that the use of these techniques is confined to uncommon situations.

I suggest to the committee that no method of internal review and recommendation can be as effective as public scrutiny; simply stated, the legislature should provide a system by which the public may have the opportunity to better understand and be able to evaluate these authorized exceptions and their use.

To that end, my recommendations to the committee are these:

(1) The committee should reconsider the "best interest of the state" standard. Agencies relying on that standard, or on any standard which the committee may substitute for it, should not be allowed to proceed merely by concluding that a use of the proposed exception is in the "best interest of the state." Rather, the agency should demonstrate and document, in advance of contract award, exactly how the state's interests are to be best served by the proposed decision.

(2) Unless an exception is clearly required by an emergency condition--and here I have in mind the qualifying definition of AS 44.62.270--the intention of an agency to enter into a contract based on a "sole source," "brand name," or "bid waiver" exception should be publicly advertised for not less than, say, 10 to 14 days preceding contract award; advertisement or publication of notice to award in the Alaska Administrative Journal (AS 44.62.175) may well be sufficient for purposes of public review without incurring to the state substantial additional costs of publication.

C. Low bidder versus lowest responsible bidder. A third common category of complaint to this office arises when an agency fails to award a contract to the low bidder. Under current law, the award of contract is made to the "lowest responsible bidder," and the determination of the identity of the "lowest responsible bidder" rests with the issuing agency. The applicable statute is AS 37.05.240(a). Typically, in the instances we have examined, the agency has reason to withhold the bid award, citing factors which it believes renders the low bidder "nonresponsible."

Investigation of several complaints suggests, however, that there are shortcomings in the process by which the issuing agency evaluates bids and determines that the "low bidder" and "lowest responsible bidder" are not synonymous. Where, for example, failure to award to the low bidder turns on a question of unit price, failure to meet qualifications specified in the bid invitation documents, failure to provide a bond, or other bid-related factor, these can be objectively reviewed, and we usually find no merit in the complainant's grievance. If, however, the agency's decision not to award to the low bidder is based on more subjective factors--the agency's evaluation of the bidder's past performance and reputation, estimated capabilities, or financial capacity--our review necessarily involves an examination of the veracity of these factors and whether the agency has appropriately applied them.

The committee's revision of the "Procurement" article should assure that, in circumstances in which the agency decides to find a low bidder or bidders "nonresponsive" and to award to another party, the issuing agency provides to the low bidder, to the lowest responsible bidder, and to anyone who may have an interest in the outcome, a complete statement of the basis for the agency's decision to find a bidder or bidders "nonresponsive." That notice should be given in advance of, or simultaneously with, bid award. The legislation should require strict adherence to the provision: if the agency fails to provide a complete statement at the time required, award of the bid should be disallowed.

D. Appeal procedures. It has been my experience that complainants approach the office of the ombudsman to protest bid awards because they do not know that 2 AAC 15.100 provides opportunity for administrative appeal or because they were unable to use 2 AAC 15.100 because of its requirement of prompt (i.e. five day) protest. Save only for the five day requirement (imposed by AS 37.05.240(a)), the appellate process available to disgruntled bidders is wholly a product of regulation, without specific statutory direction.

While I have no specific criticism of the agency's handling of complaints on appeal--and, indeed, the process, when it works, seems to provide sound and timely decisions--in this review, the committee should consider the sufficiency and effectiveness of the current appeal procedure. It should, to my mind, determine either to spell out, in statute, specific procedures for appeal or, alternatively, direct and require one agency (probably the Department of Administration) to fashion a comprehensive appeal mechanism containing such safeguards as the committee may find necessary.

In any event, the committee should reconsider the time limit in which the aggrieved bidder must submit the appeal and the content of what is to be submitted: five days is simply not sufficient time to aggrieved bidders to gather and submit information sufficient to allow the department to review these matters on their merits.

E. Procurement processes applicable to state government agencies outside the executive branch. Significant numbers of procurement-related complaints have been filed against the University of Alaska system. Investigation of them is almost always a significant exercise, largely because of the few references available to guide the investigator. The authority of the university system to contract substantially independently of the Department of Administration rests, in statute, on the thin thread of AS 14.40.340, a statute which directs only that the "competitive bid practices set forth in AS 37.05.230 apply to the University." University officials themselves are without direction as to whether any other procurement elements of the Purchasing article of the State Fiscal Procedures Act apply. Hence, the University's approach to contracting is independent of other executive branch units. Surely in a system that mandates adherence to competitive bidding, the legislature should act to assure that state statutes establishing the university system either impose or otherwise assure that the University of Alaska has developed a comprehensive, uniform, and procedurally sound purchasing procedure.

So far as I have been able to determine, the legislative branch acts without the benefit or constraints of any body of legislatively-enacted procurement law. There is a fine irony, then, that for the period under consideration few complaints have been lodged against contracting practices of the line agencies of the legislative branch, and even fewer against the Court System. The same suggestion applicable to the university system should be understood, however, to apply to these.

## II

### Professional services contracting:

Fewer significant problems seem to attend the issuance and performance of professional services contracts. The enactment of AS 36.98 and the department's subsequent adoption of pertinent regulations in 2 AAC 17 (17 AAC 7 for professional services contracts issued by the Department of Transportation and Public Facilities) has provided a sound general procedural basis. In the main, the complaints we have received have been directed at the substantive decisions made in conjunction with the process rather than against the process itself. The legislature's enactment of AS 36.98 and the departments' efforts directed at improving professional services contracting have been useful in reducing the number of complaints.

A. Exceptions which the agencies have developed to the proper use of "professional services" contracting. In the 1982 enactment covering contracts let for professional services, the term "professional services" is defined as

. . . professional, technical, or consultant's services that are predominantly intellectual in character and that

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

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

Complaints reaching this office call into question the strict applicability of the professional service contract requirements to certain professions which cannot be readily evaluated through an RFP. The specific complaints relate to attorneys' services--principally contracts issued by the Department of Law and the University of Alaska--and raise a question as to whether there should be created an exception to the professional services contracting statute for services of professionals using a limited solicitation process where the interests of the state demonstrably so require.

3. The framing and offering of requests for proposals. A fair number of complaints received since mid-1982 have called into question agency compliance with the offering requirements of AS 36.98 and related regulations (2 AAC 17 and 17 AAC 7). Typical challenges have had to do with failure to circulate an RFP to a complainant, provision of insufficient time to respond to an RFP ("quick deadlines"), and the sufficiency of the information provided about the RFP on which an interested party could depend. Applicable statute (AS 36.98.030) and regulation (2 AAC 17) require that the manner of solicitation by an agency must be consistent with law but, beyond that, the issuing agency has latitude to solicit. Our evaluation has usually been on the basis of the reasonableness of the agency's actions, and we have generally upheld agency decisions.

C. The agencies' evaluation of requests for proposals. Since 1982, the process by which the agencies conduct the evaluation of RFPs has stimulated complaints to the ombudsman. Elements of these complaints have included requests that this office

- determine and report the identity of the evaluators;
- pass upon the qualifications of the evaluators;
- determine whether selection criteria were properly applied;
- consider and evaluate the quality of the successful proposal; and
- criticize agencies for their use of "outside" evaluators (i.e. contractors to or third parties not employed by the agency).

We have generally looked to the record of evaluation--to the extent we are able to find one--to determine whether there has been substantial compliance by the agency.

While I cannot ask the legislature to consider additional provisions that would rigidly bind the way in which agencies complete their evaluations, it would surely be useful--and I would encourage the committee to consider--amending AS 36.98 specifically to require that the records of the evaluators be put in useful form and be retained. Since review of proposals is typically conducted and discussed by an ad hoc committee, I believe the legislature should be clear in indicating whether the state's Open Meeting Law should apply to these deliberations.

One rather apparent shortcoming, though not yet the subject of an investigation, is the tendency of agencies to minimize or eliminate "cost" as a significant evaluation variable. The committee may want to consider amending the evaluation provisions of AS 36.98.040 in some way to specify that contract "cost" may not be ignored or omitted as a substantial variable in the preparation and evaluation of RFPs.

D. The appeal process requirements discourage fair evaluation of grievances on their merits. A recent series of complaints calls into question 2 AAC 7.050's provision that an appeal must be filed within five days. The regulation parallels a statutory provision in the procurement statute.

Consistent with my philosophy of operation of the ombudsman's office, an agency should act on appeal to evaluate the merits of its own performance. For the reasons indicated in the preceding provision covering procurement, the committee should extend the appeal provision and should set the limitation by statute.

E. Exceptions and exclusions. I want to say again that the legislature's enactment of AS 36.98 has gone a long way to improve professional services contracting. Guided by the Department of Administration, the bulk of state agencies seem to have improved performance in this area.

The exception made in law for separate treatment by the Department of Transportation and Public Facilities should, in my judgment, based on that agency's handling of a vast number of professional services contracts, be reconsidered, and the department brought under the umbrella of the Department of Administration.

There has come to this office's attention one or two instances of alleged deficiencies in the award of professional services contracts by regional educational areas. The committee may want to act to have the commissioner of education assure that school districts generally have in place some rational means of assuring proper preparation, solicitation, evaluation, award, and appeal of these contracts.

## III

In this last category I discuss five general contract-related complaint subjects tangential to the principal categories. All appear to me to warrant legislative attention.

A. Prospective contractors not qualified to conduct business. An oft-repeated grievance by unsuccessful competitors is that the successful party was not qualified to do business in Alaska at the time the bid or proposal was submitted. Investigation can readily determine whether the successful party was qualified by virtue of having a business license and, as applicable, being incorporated or authorized to do business as a corporation.

State law does not require qualification until the time the contract is executed. As qualification is somewhat nominal, the committee may wish to require, by law, the determination that a bidder (or respondent to an RFP) is non-responsive if the individual or firm is not qualified to do business in the state at the time of submission of the bid or proposal. Thereafter, implementation would require all bidders or respondents to list their credential in their submissions.

B. Contract extensions or continuations. A growing number of complaints calls into question the constraints (or, more properly, the lack of constraints) on agencies which propose to extend or continue an existing contract. Renewal options are in derogation of competitive bidding or reissuance of an RFP. While their use is accepted as a matter of sound public contract administration, they are regulated not by statute or regulation, but usually arise out of option clauses in existing contracts (or require securing a "bid waiver" if no option exists). I am particularly struck by the number of contracts to which our attention is called in which the period for which an option may be renewed greatly exceeds the duration of the contract for the period for which originally executed.

The committee should consider whether specific provision by which an agency other than the contracting agency (or some other independent review process) examines and approves (or comments on) a proposed extension or continuation. Again, since the extension process is itself an exception to the norm, as with the recommendation I have made for all exceptions to competitive bids, extensions or continuations should be justified by the requesting agency and should be publicized in the Alaska Administrative Journal.

C. Nonprofit firms and government agencies competing with private sector business. This topic covers a mix of concerns which have been brought to our attention at one time or another. The complaints have a common source--private sector firms who believe, correctly or otherwise, that firms and individuals supported by the public sector--non-profit corporations or government entities themselves--enjoy a competitive advantage in the award of public contracts. The subject has arisen with

reference to both competitive bid and professional service contract awards.

Broadly speaking, there is some basis to suggest that these objections are credible, though little evidence to conclusively determine whether the state's interests are well served by the applicable statutory provisions on which they are based. I call it to your attention as a kind of complaint which probably deserves legislative attention though it may not now warrant any attempt at correction.

D. Disclosure of bid documents and bid submissions. A fair number of complaints to the office addresses the largely uncertain question of whether draft invitations to bid are public documents and whether bid submissions should, in whole or in part, be made public at the time of bid award.

The legislature should decide the matter, clearly indicating whether or not these are public documents and, if they are, at what point they should be made public. This may be no more than revising the penultimate sentence of AS 37.05.240(a) to apply generally to all competitive bid situations and making clear that, whatever is decided, the determination is generally applicable to all agency procurement efforts.

E. Ethics considerations. Because the award of professional services contracts depends on the agency's evaluation of solicitations, this office has received an unusual number of complaints alleging or suggesting existence of a conflict of interest (or apparent conflict of interest) between, on the one hand, persons preparing the requests or evaluating the materials submitted and, on the other, competitors of the complainant. Typical situations cited include instances of alleged collusion involving persons with relationship by blood or marriage, persons having common financial or associational interests, and individuals formerly employed by the agency now part of a firm responding to an RFP (or vice versa) in which intangible factors may weigh heavily. We can and do investigate to determine if the factual situation giving rise to the conflict or apparent conflict is as alleged and have critically examined evaluations and the evaluation process to determine whether there was an effect.

At this point, where the committee's attention is focussed on its two major subjects--public contracting and ethics--I respectfully urge addition of some body of law that essentially describes permitted or prohibited relationships that may have an effect on contract evaluation and award.

Senator Jan Faiks

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October 21, 1985

Thank you for the opportunity to respond. If I may assist further in your deliberations, please contact me.

Sincerely,

John B. Chenoweth  
Cmoudsman

JBC:pjc  
Enclosures

APPENDIX:

1. Methodology: Our review examined and considered 434 complaints filed with the ombudsman's office and closed between January, 1980, and September 30, 1985. The review grouped the procurement-related complaints received among the general categories outlined in the letter. The largest single category of these complaints--an estimated 60 - 65%--involved complaints generally relating to competitive bidding practices. In lesser numbers, the complaints filed with my office involved concerns relating to professional services contracting, exceptions to competitive bidding, appeals, and a variety of other grievances and concerns loosely identified under leasing and purchasing.

2. Trends and indicators: As you might expect, the bulk of the competitive bid-related complaints were filed against the executive branch agencies principally responsible for contract award--the Departments of Administration (78 complaints), Transportation & Public Facilities (68 complaints), and, surprisingly, Commerce & Economic Development (38 complaints). Apart from the executive branch agencies directly covered by AS 37.05.220 - 37.05.280, the University of Alaska accounted for an additional 28 complaints.

The professional services-related complaints were less numerous and more widely scattered (though the same four agencies listed immediately above topped the list). Most noteworthy, in my judgment, is the significant reduction of professional services related complaints since enactment of the 1982 provision (Ch. 144, SLA 1982, now AS 36.98). The tallies are:

1980	19 complaints closed
1981	13 complaints closed
1982	12 complaints closed
1983	15 complaints closed
1984	6 complaints closed
1985 to-date	<u>2</u> complaints closed
	67 complaints closed

This downward trend in professional services contracting complaints filed with this office at least suggests that the adoption of comprehensive legislation on that subject has answered many of the original objections of the complainants and provided an effective means of internal review of these problems.

For both categories, Court System (6 complaints), Legislative branch (4 complaints), and REAA-related (7 complaints) procurement grievances account for an insignificant portion of the total.

3. Some examples of specific complaints received:

I

Procurement (Competitive bidding and related techniques):

A. Competitive Bidding.

The so-called Uniform Purchasing Act was enacted in 1955. Apart from the 1982 effort to better describe authorized professional services contracting requirements (which, themselves, constituted an exception to the Uniform Purchasing Act), recent legislative amendments to the Act have not been significant. Through 30 years of use, the lead agency, the Department of Administration, has had ample opportunity to identify and develop procedures and definitions by which the Purchasing Act's provisions may be consistently applied. But the department's efforts to lay down a body of law that would apply to other agencies and which might provide explain to the public interested in contracting with the state has not been particularly helpful. Except for provisions covering bid rejection and appeals, the regulations relating to competitive bidding, 2 AAC 15, add little to the public's understanding of how the issuing agency and the Department of Administration may be expected to perform, and what standards may be applied to measure that performance.

Agency purchasing significantly depends upon a system of "delegations of purchasing authority" and agency "administrative manuals." See, in this regard, memo of January 10, 1983, of former Director of General Services and Supply George Elgee. This is consistent with AS 37.05.220 giving to the Department of Administration authority to prescribe purchasing and leasing arrangements and standards for use by themselves and by other agencies.

However, this system in essence requires that those who conduct the state's procurement business, those who have an interest in doing business with the state--and those who may have to check on how that business is entered into--try to gain an understanding of how more than a dozen agencies shall conduct their affairs. Moreover, it is far from certain to many how the University of Alaska system "fits" into Purchasing Act requirements, and there is, so far as we have been able to determine, nothing to cover contracting by the legislative and judicial branches.

The nadir of this system of interagency "authority delegations" is perhaps best illustrated by Ombudsman Complaint #61-0400, a complaint against the Division of Parks of the Department of Natural Resources.

October 21, 1985

The complainant called to seek an explanation as to how the division had avoided seeking a competitive bid in conjunction with gravelling operations. Investigation suggested that a delegation of authority (Administration to Transportation and Public Facilities) supporting a master contract for vehicle and equipment rental had been inappropriately applied to support the Natural Resource division's subsequent acquisition and use of a vehicle. One was left with the impression that Administration's delegations of authority to its sister agencies were fairly flexibly interpreted by those agencies to help themselves (and third agencies), and would be stretched so far as necessary or convenient to defeat the competitive elements of the procurement statute if that suited the purpose of the agency securing the delegation. Among the line agencies dependent upon the grace and favor of the Department of Administration to secure their procurement authorities, the Uniform Purchasing Act had become, if you please, state government's in-house version of the shell game.

Under such a loosely-organized and -operated system, I am truly surprised that we have not received more complaints.

The relatively small number of complaints is probably due, in the main, to the good efforts of the Division of General Services and Supply in trying to provide a measure of order to competitive procurement. The most useful commentary to current Alaska practices is that division's own Administrative Manual covering purchasing. I commend that volume to the committee's attention.

Complaints to my office generally relating to competitive bidding have spanned the range of procurement practices, running from purchase requisition, through conduct of the process, making of exceptions, and handling of appeals, to claims of unethical practices and improper influence in the planning and evaluation process. My letter highlights topics in which I think the competitive process is particularly weak or to which the committee may wish to give attention for other reasons indicated.

1. The first involves the sufficiency of the issuing agency's planning and evaluation procedures. Some complainants have come to the office--typically, after their bids have been rejected as "non-responsive"--claiming that the process followed was significantly flawed, to their detriment. Investigation by this office suggests that, in virtually all such cases, the "Invitation to Bid" was the critical document, and that the problem of concern to the complainant lay in the issuing agency's failure to provide sound specifications as to what was required. While the statutes and regulations are silent, the Division of General Services and Supply's own guidelines on the point are useful:

Specifications [of goods to be bid] are one of the most important elements of the purchasing process. Specifications communicate what is required or desired, and are the primary basis on which bids are

awarded. Specifications should be clearly understandable, open, and unrestrictive.

...  
[The division] must insure the specification that finally accompanies the bid is not restrictive and does not call for features or for a level of quality not needed for the item's intended use.

A fair reading and application of these principles might have avoided such complaints as F81-0811 and three others, a 1981 challenge to the now-defunct energy audit program, in which, among other assertions, the complainants presented valid allegations in which information pertinent to the bid process and criteria on which the bids were to be evaluated were not fully disclosed.

2. A second objection goes to a lack of time. Complainants have raised the question of the amount of time which a prospective bidder should have to evaluate a bid invitation, clarify questions, and prepare and submit a complete bid. In F80-0004, for example, the complainant alleged that, following a major alteration to a bid, the issuing agency did not extend the deadline for receipt of bids to provide sufficient time to revise the submission, and in F80-0904 and others, the complainants asserted they had been given insufficient time to prepare responses to requests for land clearing contracts. On the opposite side, in F79-0945, the complainant objected to an extension of time after competitors advised the issuing agency that they could not meet an existing submission deadline.

In the absence of any standard covering time allowed for bid preparation and submission extensions, with rare exceptions, complaints claiming lack of sufficient time are typically found "unsupported." The committee should consider language covering minimal offering periods or otherwise establish a "reasonable" time period for bidder's consideration of invitations to bid, and should consider the matter of extensions and notification of those extensions to interested parties.

3. The last topic covers, generally, communication of decisions made with respect to bids to the bidders.

Some number of complaints cover situations in which bidders are not advised as to the successful bid, thereby precluding possible appeal.

There is also the situation in which all competitive bids are rejected. Competitive bids may be rejected and the invitation to bid set aside. The statute (AS 37.05.240) is silent on notification of this decision--one that is typically made, or should be made, in the event that issuing agency contemplates negotiation of contract for which an invitation to bid was previously let. So, for example, complaints A81-0782, J81-0346, A82-0753, A83-1021, and J83-0340 all raised questions relating to improper cancellation of invitations to bid and, in some, questions of sufficiency of notice were raised.

Our complaints notwithstanding, those who have prepared and submitted bids only to have the issuing agency decline to award on the basis of competitive bid may have a claim against the state. AS 44.77.010(c). King v. ASHA, 633 P. 2d 256 (1981). Accordingly, the committee should give careful consideration of the state's obligation to inform competing contractors of the decision in these situations.

#### B. Exceptional procedures.

A number of complaints raised questions about an agency's use of "bid waiver," "brand name product," or "sole source contract." Complaints covering this topic are consistent, and the situations which have been directed to our attention suggest that this topic is one of significance.

1. Our experience strongly suggests, first, the need to build better checks against the writing of unnecessarily "tight" bid specs to cut off or reduce opportunity for competition. Some examples should serve to illustrate.

Companion complaints J80-0312 and J82-0289 examined the decision of the Department of Fish and Game to use specific brands of incubators purchased outside the competitive bidding process. Investigation of the first confirmed use of the sole source purchasing technique--requiring a specific brand (for which the agency had no data on which to base a justification and no evidence of evaluation) of hatchery incubator be installed by the contractor; the agency sought to avoid evaluation of the exception by running the request through as part of construction of the facility, that is, as an adjunct of a capital improvement. Just when we thought the agency understood its obligations under the purchasing provisions of the Fiscal Procedures Act, it tried again. At that point, our only "weapon"--one hardly adequate, in my view, to assure that the matter would not be encountered a third time--was to review and refine the purchasing authority delegations to the Department of Fish and Game of the two lead departments.

The issue in a pair of unrelated complaints, A80-0189 and F84-0490, involved the use of bid specifications that, in the case of the former, designated by brand name and, in the latter, unreasonably restricted competition (essentially allowing only one product to qualify) without being based on a valid technical reason. As to both, the agencies accepted and agreed to implement, at the level of their individual policies and procedures, standards to address specifications that would not wrongly limit or eliminate competition by relying on designated brand names or by imposing unreasonable restriction or specifications in a competitive bid.

In A83-01059, I challenged the University of Alaska's reliance on brand names (rather than performance criteria) for acquisition of a library security system. University officials defended, contending that use of or reliance on brand names is a well-established means of procurement.

2. Our experience suggests, too, the significance of a well documented bid file during an independent review of a purchasing decision. Unrelated investigations A84-0605, A80-0528 and A80-0189 well illustrate the contrast.

In the first, filed against the Division of Mental Health and Developmental Disabilities, investigation was able to show that, for guard services at API, the division had demonstrated that a sole source exception would well serve the interests of the state, had secured necessary approvals in advance, and had otherwise proceeded in a procedurally correct manner. We found the complaint "unsupported."

I also found "unsupported" the objections made to the Department of Transportation and Public Facilities' award of a street light service contract in A80-0528. The lights in question were situated in downtown Anchorage and interspersed with street lights on roads for which the Municipality had responsibility. The matter had been thoroughly researched and reviewed by attorneys, who had found a reasonable basis for the state's decision.

A80-0189, by contrast, involving purchases by the Department of Transportation and Public Facilities restricted to a particular brand of heavy-duty tractor, was based on an outdated preference for that particular brand that had not been independently reviewed or verified; past preference, in other words, governed the direction of then-current purchasing practice, until the purchase of one kind of vehicle became an ingrained habit. We criticized the agency and secured from them a commitment to draft a written policy covering limitations on bid specifications.

3. By law (AS 37.05.220(2)) an agency may negotiate a contract if it finds that it is in the best interests of the state. An "authority to negotiate" is a prerequisite.

ATNs and negotiated contracts have contributed their share of problems, notably those which are authorized after a public competitive bid advertisements in which all bids are rejected. We can usually examine and explain that.

What we can't explain, and what the committee should give attention to, is the absence of any statutory or regulatory framework suggesting when an ATN is proper and when it has been properly issued, and the scope and duration of the authority granted under the ATN. So, for example, there is the complaint occasionally presented raising a question as to whether an approved ATN retains a long-term validity and whether an agency was improperly depending on an approved ATN to meet one set of circumstances when those circumstances have demonstrably changed.

There is, I suggest, no more critical examination which the committee can give--no more essential steps that it can direct to improvement of state contracting procedures--than this matter of administratively-authorized exceptions to competitive bidding. This week, for example, I expect to conclude an investigation (A85-0941)

contesting the decision of a department to award a sole source contract, in which the Division Director Bob Link and Professional Services Contract Specialist Vincent Isturis are reported to have advised the investigator that the department cannot check requests for alternative procurement methods submitted by state agencies and must take each department's word that it has "demonstrated" that a sole source is appropriate.

In the absence of any effort to make an independent determination that "alternative procurement" is in order, how can the public be expected to have any confidence in the current procurement system? The committee should develop both clear standards and a public review process in this area.

C. Low bidder versus lowest responsible bidder.

This is not a complaint that we often receive. One example may well be the land clearing contract example (F80-0904 and others) mentioned above also raised questions concerning the eventual award of contracts to parties not submitting the low bids. In another, A83-0881, the Department of Administration's own Division of Telecommunication Services awarded a contract to other than the low bidder and neglected to advise bidders of their right to appeal, thereby cutting off challenges to the contract award. Our recommendations urged, among others, adoption of an appeal process and the development of related policies which would contribute to improved handling of bids.

Despite a relatively low volume of complaints, this is an area with potential abuse. Statute (AS 37.05.240(a)) and regulation (2 AAC 15.040 and 2 AAC 15.060) authorize award of a bid to a responsible bidder and withholding of a bid from one who is deemed non-responsible. One regulation, 2 AAC 15.040, authorizes the division to exercise discretion in the matter, but our experience, in the limited number of complaints that have raised a claim of unreasonable rejection, suggests that the reasons justifying the exercise discretion are not documented.

In my judgment, the committee should

-- set down the standards against which a bidder may be found non-responsible; if determination of standards is delegated to an agency, the standards should be set out in regulation; and

-- require determinations of non-responsibility to be fully documented; documentation should include a brief, albeit comprehensive, explanation of how the bidder or the bidder's submission does not comply with one or more of the identified standards.

### D. Appeals.

An appeal process for competitive bids and for alternative procurement is authorized by statute (AS 37.05.240(a)) and implemented by regulation (2 AAC 15.100). Unlike professional services contracting, described in II below, the five day limit for taking appeals in procurement-related matters is a creature of the statute.

The system in place effectively precludes, in my judgment, a review of an appeal on its merits. See discussion in II(D) below.

### E. Procurement processes applicable to state government agencies outside the executive branch.

This topic is intended to speak briefly to University, legislative and judicial branch procurement. As to the latter two, I have no suggestions but, by analogy to the professional services contract enactment (Ch. 144, SLA 1982), the legislature should consider--or may want the Legislative Council to consider and recommend--some range of procurement enactments covering the legislature's own acquisitions.

No single investigation prompts inclusion of this recommendation. The recommendation is empirically based: through the 5- year period considered, the University of Alaska was the source of a significant number (28) of complaints.

Despite the University's preparation and recent presentation to the committee of tidy summary books (implying that the procurement and decision review processes of the University are well established and well recognized), a review of the complaints received by this office suggests that there is a fair degree of confusion among administrators as to what rules do apply.

All of the objections noted hereinabove to contracts awarded under the Uniform Purchasing Act have probably, at one time or another, been filed against the University. So, for example:

-- In A80-0850, a complainant charged that University officials had failed to award a bid to the lowest bidder and had altered applicable bid specs on which the award was eventually made.

-- In F81-0630, the University awarded a telephone system contract to one vendor when use of a multi-step competitive bidding procedure, sometimes used by other executive branch agencies, would have accommodated a competitive procurement.

-- In F81-1049, the complainant charged the University with, among other things, unfair denial of a subcontract award in which contract specifications were narrow, drawn without opportunity for complainant's company to provide

evidence of "equal or better" equipment that might be substituted. Finding the complaint "unsupported," the office nevertheless asked University officials to commit themselves to an examination and development of a substitute system of procurement, emphasizing development and use of broader specifications uniformly applicable to all contracts which it proposed to let. University officials rejected the recommendation, indicating that Facilities and Planning staff were simply too busy to make major changes in a system which they believed was adequate.

-- In A82-0938, investigation supported complainant's assertion that University employees had circumvented competitive bid practices through use of subjectively evaluated bid specs.

-- The complainant in A84-0292 withdrew a complaint that the University was improperly relying on a "prehearing" to determine whether a formal hearing would be granted on complainant's appeal of denial of bid award, notwithstanding that absence of such a procedure in University procedures.

-- In the complaint identified as F84-0686, the complainant, who apparently did not understand the distinction between competitive bidding and professional services contracting, asked the office to review University contracting processes applicable to materials testing.

-- In F85-0545, a complaint which the complainant was advised to file as an appeal, the complainant challenged the University's award of a supply contract to an out-of-state firm notwithstanding the statutory bidder preference provision.

The confusion in University contractual processes is compounded for all of us--except, perhaps, the handful of University officials who work with the system on a daily basis--by the absence of any reference to procurement through competitive contracting except by the inclusion of the Uniform Purchasing Act by reference appearing in AS 14.40.340.

There is a need, in my judgment, for the legislature to give its attention to University contracting so that University officials and those who deal or want to deal with the University system as vendors may better understand both the legal basis for and the procedures applicable to the University's procurement system.

Professional services contracting:A. Applicability of "professional services" contracting.

On the whole, the distinction between professional services contracts and the procurement provisions applicable to goods and supplies is distinct. There have been very few complaints since 1982 in which the complaint suggests that the issuing agency has confused its choice of method.

Several open complaints raise the question as to whether agencies have improperly made or used exceptions to the professional services contracting process to secure certain professionals' services. In testimony at your recent Fairbanks hearing, University officials suggested the need for an exception for attorneys, physicians and dentists. The Department of Law has adopted and follows its own procedures for acquiring the services of "outside counsel" to secure special legal services. (See memo of January 2, 1985, from Administrative Services Division Director Richard Pegues to the Contract Review Committee). These exceptions appear to depend upon the agencies' interpretation of the "sole source" exception of AS 36.98.030(d)(1) and, as exceptions, are themselves subject to criticism for abuse. The committee would be well advised to consider the problems presented by University officials and the Department of Law--there may be others--but any exception drawn to meet their expressions of concern following the "sole source" exception of AS 36.98.030(d)(1) should require that the issuing agency document the basis of its decision.

As I have suggested with respect to issuance of contracts under the "alternative procedures" provisions in the procurement section (i 3 above), the legislature may want to require that contracts issued under any exception created for special classes of professionals be publicly reported by the issuing agency. Public reporting would serve the useful purpose of determining whether the agency is following a pattern of awarding contracts to a limited number of professionals.

A comparable situation exists as to use of architects, engineers, and construction managers' services for which the Department of Transportation and Public Facilities regularly issues contracts. Before proceeding in this area, the committee would be well advised to ascertain how that department has proceeded to engage the services of these professionals, the past record of securing these services under contract, and the amounts of these contracts. The record of activity by that department should be instructive on this issue.

B. The framing and offering of requests for proposals.

The discussion in the letter reflects our experience based on various complaints filed with the office. The following are typical:

A61-0839 and 082-0471. Unrelated complaints filed against different agencies in which the

complainants asserted that submission of responses to request for proposals within 10 days of their publication was unreasonable.

J82-0511: The complainant contended that an agency's decision to require a response to an RFP within one week was unreasonable.

F83-1105: In a complaint against the Department of Corrections, the complainant--a competitor for a halfway house contract--contended that the financial report of and other information about a contract facility's halfway house operations essential for his preparation for a response to an RFP was not available for review.

F83-1500: The complainants asserted an improper professional services contract award predicated in part on his assertion that the needs of the agency were not specifically described in the RFP.

J83-0683: In this complaint, filed against the Department of Transportation and Public Facilities arising out of award of a professional services contract in conjunction with the Governor's Mansion renovation, the complainant charged, among other things, that the department misused its authority to award a contract of \$25,000 or less directly.

A84-0920: The complainant asserted that the agency was inefficient in providing information relating to award of a contract based on an RFP.

C. The agencies' evaluations of requests for proposals.

The discussion in the letter under this section also reflects our experience with complainants' concerns. Some examples include:

A82-0158 and A82-0165: In this pair of related complaints, the complainants charged that the successful bid was not responsive to the published request for proposals and that the contract award was influenced by a person not employed by state government who had a conflict of interest with one of the persons submitting the proposal.

A82-1223: The complainant charged, among other things, that the selection review process was improper because the evaluators were not qualified to review the proposals received and because information critical to a proper appeal (release of information about the evaluators and their rating sheets) was not timely provided.

F82-1293: This complaint was predicated upon complainant's learning that one evaluator of a five member team misjudged all submissions because he had used an evaluation form different than the one used by the four others.

F83-0928: The complainants charged, among other things, that an RFP was inadequate and that the selection committee lacked the technical expertise adequate to the task of conducting an evaluation of proposals received. (The issuing agency subsequently declined to accept a response or award a contract.)

F85-0994: Among other concerns, the complainants charged error in the ranking and selection of proposals. (The complaint was discontinued when an appeal was filed.)

D. The appeal process requirements discourage fair evaluation of grievances on their merits.

A "review process" for professional services contracts is required by law. AS 36.98.070.

The handling of three recent complaints, Ombudsman Complaints A85-0910, A85-0951, and A85-0957 illustrate one element of the problem which typically arises with respect to professional services contracting but which may have applicability to procurement as well.

Briefly summarized, the three complaints giving rise to this petition are these:

A85-0951:

The contract award was made July 1. The complainant claims the notice of award was received by the aggrieved respondent on July 3. The notice of award made available to the investigator is dated July 1, and contains the subject of the request, date, ATN number, contracting officer, a short notice, the successful bidder, and the names and addresses of all other respondents.

There was no information about the basis for the award. The notice states:

. . . This abstract of responses is final notice of award of contract(s) if no amendment is subsequently issued by the State and if no appeal of the award(s) stated hereon is received from an aggrieved respondent during the five days following the date of this abstract.

Saturdays, Sundays, and other legal holidays excluded.

The complainant called the contracting office, learned some of the basis for the decision informally over the phone, and mailed his appeal, dated July 8. According to Commissioner Eleanor Andrews's letter of rejection, it was received by Administration on July 15. That letter stated:

2 AAC 17.050 provides that for an appeal to be considered, it must be received within five (5) working days following the notice of award. In this instance, your appeal had to be received by close of business on July 9, 1985.

For the reason that your appeal was not received in a timely fashion, I must reject your appeal as provided in 2 AAC 17.050(d).

A85-0957:

The notice of award, dated July 1, arrived by regular mail on Saturday, July 6. The complainant states that on Monday, July 8, the aggrieved respondent requested pertinent information from the Department of Corrections, the agency letting the contracting. This information was received from the department on July 10, and an appeal was hand-delivered to the Department of Administration on July 12.

The response from the commissioner's office reported that the appeal was dated July 11 and received July 12, and therefore rejected as untimely.

A85-0910:

The aggrieved respondent appealed the award of RFP 86-0031 on June 25; the department received the appeal within the prescribed five days of the award of the contract. Commissioner Andrews advised that you were rejecting the appeal for "lack of specificity," stating to the aggrieved party:

. . . You have not taken issue with the specific scores assigned to either proposal in any area of evaluation nor have you provided any specifics concerning where or why you feel yours was the better proposal.

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The strict application of 2 AAC 17.050 does not afford an aggrieved respondent a fair opportunity to be heard. It is apparent from looking at the three examples cited that five days is not sufficient time for an aggrieved respondent to:

- (1) receive pertinent information about the basis for the contract award (this information is usually sent to the respondent by mail);
- (2) prepare the required detailed reasons for appeal; and
- (3) submit the appeal in writing to the department.

Aggrieved bidders are placed in the position of having to either submit a late or an incomplete appeal.

Investigation culminated in my submitting a petition for the Amendment of 2 AAC 17.050 to Commissioner Andrews. My petition asked the department to delete the five day requirement for appeals of 2 AAC 17.050(a) and to insert new language as deemed appropriate by the department. The substituted language should either prescribe a more reasonable (longer) period of time by which the aggrieved respondent may appeal or, alternatively, provide for a two stage process whereby notice of the appeal must be given to the department prior to one deadline and additional time provided by which the aggrieved respondent may submit the required detailed reasons for the appeal.

In petitioning, I cited the three complaints, each of which alleged that the five day requirement of 2 AAC 17.050 was unfair. I believed that these three appeals may very well raise substantive issues about the selection processes used by the awarding department. In fact, the commissioner had so indicated in at least one of the rejections of the complainant's appeals. The effect of the strict application of the provisions of the regulation cited has precluded the department from addressing potentially important questions about the award of professional services contracts.

An appeal system should not be allowed to produce extensive delays in every contract award. However, the Alaska Legislature clearly contemplated appeal pursuant to AS 36.98.070. At least as to these three complainants, the effect of the five day rule has undercut the intended result that there be an opportunity for appeal, by rejecting appeals that are filed in good faith within a reasonable amount of time without opportunity to further consider their merits.

Because I perceived the current regulation as unfair to aggrieved respondents, and because it was apparent that substantive issues are not being considered by the department due to the overly restrictive language of 2 AAC 17.050, it would clearly be in the interest of both the State and future aggrieved respondents to amend the regulation.

I urged the department to act to initiate essential changes in the appeal process in order to improve the opportunity that process provides

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to permit a reasonable review of contract awards for professional services. I saw no other check within the executive branch to assure that awards are not made on improper grounds and urged prompt action on the request.

Commissioner Andrews rejected the petition:

This will acknowledge receipt of your letter of August 15, 1985, petitioning under AS 44.62.220 for a modification to 2 AAC 17.050.

I would agree that the appeal process for professional services contracts, and more specifically the five-day rule, should be reviewed for possible modification. I feel, however, that to go to public hearing now is premature. This department is currently advertising through an RFP for a study of State procurement practices. The final report of that study will not be available until December 15, 1985. A Senate committee is currently examining the State's procurement practices and Executive Branch ethics. We have been advised that the legislature intends to completely rewrite the procurement laws (which includes the appeal process). Although, as stated earlier, the procedure needs to be reviewed, to spend the two to three months necessary to change the regulations now and then have to do it again in a few months to be consistent with legislative changes and study recommendations, appears to be not in the State's best interest at this time. The current regulations have been in effect since 1982, and a few months delay to assure coordination with other interests considering changes to the law and regulation appears to me to be the preferred method of progress.

As it considers matters of appeals, the committee may want to give attention to the scope of review.

In material prepared for an April, 1984, seminar, former Ombudsman Frank Flavin directed attention to the lack of a viable appeals process. "The grievance procedures for [the Department of Transportation and Public Facilities] and [the Department of Administration]," Flavin noted,

are limited to a determination . . . whether the award of the contested contract was made in accordance with applicable statutes and prescribed procedures. . . . 17 AAC 07.050 and 2 AAC 17.050. Consequently, the review is procedural rather than substantive and precludes a total review of all facts which may establish an abuse of discretion.

[The departments] have limited themselves to a review as narrow as a judicial review instead of a full administrative hearing on all factors within 'administrative expertise.'

Flavin also noted that judicial relief in these situations was rather unlikely:

Review of professional services contracting will undoubtedly follow that for regular bidding and is consequently limited to questions of law. The court will not substitute its judgment for that of the administrative agency. Since professional services contracting by nature is more subjective than regular bidding, available judicial relief is extremely limited. [Citations omitted.]

Complaints to the office raise questions about appeals.

#### E. Exceptions and exclusions.

The separate status for administration and management of professional services contracting by the Department of Transportation and Public Facilities arises out of the definition of "commissioner" in AS 36.98.080(1). The committee should consider the award of contracts by the department's experience in awarding and managing contracts under the exception established in the 1982 statute.

The professional services contracting statutes incorporate the University of Alaska under AS 36.98 by virtue of the definition of "state agency" in AS 36.98.080(5). University officials have indicated they seek an exception from the filing requirement. If an exception is provided, the committee and legislature should assure that the university has in place a professional services contracting process fully sufficient to maintain the credibility of the professional services contracting process and of public confidence in that process.

REAA professional services contracting practices were highlighted in FBZ-0392. Investigation disclosed that, notwithstanding a clear requirement in the procedures adopted by the school board, district administrators awarded a contract for a needs assessment study without prior approval of the board. At the conclusion of the investigation, the omission was reported to the board.

### III

#### A. Prospective contractors not qualified to conduct business.

Current state law (AS 37.05.230(5)) pertinent to competitive bidding requires only that a person or firm hold a current Alaska business license to take advantage of the "Alaska bidder" preference. Otherwise, the determination of whether a bidder is a responsible bidder

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as regards the bidder's "compliance with state laws" (AS 37.05.-240(a)(3)) may be made by the issuing agency at the time of bid evaluation.

Although complaints in this category are not numerous, they recur with some regularity. Typically submitted by aggrieved or disgruntled bidders or respondents, the complaints appear to be prompted by a rather common expectation that persons and firms who respond to invitations to bid or requests for proposals should be qualified to engage in business in Alaska (i.e. licensed under AS 43.70 to do business in the state) at the time of submission of the bid or response.

This office's typical response to these complaints is to advise the complainant of the requirements of AS 37.05.230(a) and the interpretation and application of AS 43.70 and decline the complaint. See, in this regard, Ombudsman Complaints A81-0250 (complaint filed against the Business License Section of the Department of Revenue for failure to enforce requirements against prospective contractors), F81-1243 (University awarded renovation contract to firm which could not show evidence of a business license or a contractor's license), A82-0239 (challenging the award of a contract by the Division of Vocational Education, Department of Education, to a person who had no business license), and A83-0616 (questioning the Department of Transportation and Public Facilities' award of a contract to a bidder who did not hold a business license at the time of bid submission). The consistency with which the complaint is filed, however, suggests that the legislature may want to conform state law to what are apparently widely held, albeit mistaken, expectations regarding a person's or firm's qualification to respond to a bid invitation or RFP.

### 3. Contract extensions or continuations.

In the recent receipt of several open complaints, we have observed public displeasure in the tendency of some agencies to avoid or circumvent the contract award process for purchases under the Fiscal Procedures Act (including office space leases) and, to a lesser extent, professional services through the use of contract continuations and extensions. The subject deserves the committee's attention.

Speaking to extensions, the Department of Administration's own purchasing regulations advised:

Where contract terms include a renewal option, that option may be exercised without re-bidding or a bid waiver. (A bid waiver is necessary to negotiate a renewal if no options exist.) The existence of a renewal option does not imply we must renew, it is simply an option which can be exercised if it is in the best interests of the State. The conditions of exercising the option are limited to the option clause. [Emphasis added.]

...

In its review of procurement practices, the committee should consider the trend or tendency of agencies to

(1) add a provision, often no more than as a matter of boilerplate (in a range of agency-initiated documents--including, but not limited to, grants awarded and managed under other provisions of the Fiscal Procedures Act) to authorize contract extension or continuation options;

(2) include contract extension or continuation option provisions that authorize contract extension for periods as long or longer than the period of performance for the original contract on which the extension is based; and

(3) extend or continue existing contracts under a contract renewal without evaluating whether extension or continuation is "in the best interests of the State."

Since extension or continuation under an existing contract is an alternative to contract award through competitive bid or examination and award on the basis of RFPs, the committee should, in my judgment, establish some general rules as to when and how an agency may opt to extend or continue a contract.

On a related matter: AS 36.98.010(1) establishes that the provisions of AS 36.98 apply only to contracts of more than \$25,000, and AS 37.05.230 sets its own exceptions for small contracts. In complaints filed with this office examining the renovation of the Governor's Mansion and in Ombudsman Complaint J85-0202, complainants' allegations included the observation that the limitations were routinely, and improperly, being circumvented through the device of contract amendment or contract extension. Indeed, the evidence supported this. In the instance of the Mansion contract, the Department of Transportation and Public Facilities--following what, as I understand, has become routine practice, issued a \$25,000 contract, then proceeded to continue and extend it. In J85-0202, an emergency contract for septic collection disposals let by the Department of Corrections under authority of AS 37.05.230(3), the "emergency" was continued and the contract reoffered at least three additional times, each without benefit of competitive bid.

It is up to the committee and the legislature, of course, to determine whether the dollar limitations now in law for these small contract exceptions should be revised or amended. More significantly, the committee should be exceedingly careful about any exceptions to the general rules it identifies simply because, unless some safeguard against abuse is included, the issuing agencies will, I can assure you, devise ways to apply the exceptions to avoid the use of the law. The easiest safeguard may be to specify that an agency may not extend a

contract beyond the specified ceiling--\$25,000 for professional services contracts--or that the agency may use the exception to contract with a party in excess of the specified ceiling during any fiscal year. However handled, the committee should understand the potential difficulties posed by any such statutory exception which it may enact.

C. Nonprofit firms and government agencies unfairly compete with private sector business.

This is another category in which the public's expectations are at variance with the law.

As it considers this point, the committee should understand that:

(1) agencies are specifically authorized to contract for professional services with other state agencies, a federal agency, or a political subdivision of the state--this term is not defined--free of the requirement that RFP's be solicited (AS 36.98.040(d)(3)); and

(2) agencies are also authorized to purchase, in derogation of competitive bid provisions of the Fiscal Procedures Act, through the General Services Administration (AS 37.05.270).

We have regularly received complaints of "unfair competition" on the part of state agencies, the bulk of the complaints being filed against the University of Alaska. Among examples:

-- F82-1442 (the University of Alaska enjoys competitive advantage in competing against private businesses for available public sector contracts);

-- F83-1392 (Community college system inappropriately and unfairly compete with private contractors for available professional services contractors);

-- A83-0734 (a unit of the University system, the Arctic Environmental Information and Data Center, unfairly competes with the private sector for media production contracts); and

-- A85-0449 (the University's Institute of Social and Economic Research enjoys a preference and, in the particular circumstances described by the complainant, did not submit the proposal with the lowest cost).

Not all complaints in this category have involved challenges to involvement of the University. Concluding investigation of J84-0771, for example, I found "unsupported" complainant's assertion of error against the Department of Community and Regional Affairs for approving a competitive bid waiver for a municipality's provision of day care services. There was sufficient evidence that, under the unusual facts

of the situation, the issuance of a waiver in response to an "emergency" was appropriate. I also found "unsupported" the complainant's assertion in J84-0649 that the Department of Transportation and Public Facilities erroneously substituted work under an interagency agreement for issuance of a professional services agreement, thus favoring use of and reliance on in-house expertise over private sector talent: state law indicates a preference for reimbursable services agreements.

Complaints have been filed, too, relating to decisions not to make use of this preference. So, in F83-0513, the challenge was raised against the decision of the Energy and Power Development Office of the Department of Commerce and Economic Development to use a nonprofit corporation to manage programs which, in the complainant's judgment, should have been passed through to the local government.

Perhaps the oddest in this group of odd-lot complaints was a 1984 grievance, J84-0865, in which the Division of General Services and Supply refused to go to competitive bid for acquisition of outboard motors. It relied instead on a "bid waiver" process which itself depended on a long-extended "contract award" of General Services Administration, the procurer of goods and services for the federal government. In other words, the division had omitted competitive bidding for motors citing a contract award by the federal purchasing agency, though the contacts between the state and federal procurement agencies over acquisition of outboard motors appeared extremely nebulous. The old statute (AS 37.05.270, enacted in 1955) appears to countenance this exception and we, regrettably, found the complaint "unsupported." The division, in turn, indicated that it would probably no longer cite an outdated federal agency contract award, but would go to competitive bid.

The problems arising as to one part of this section appear to have been partially alleviated by the inclusion, in the 1982 addition of the professional services contracting provisions, of a requirement that standard overhead rates be incorporated into proposals from an offering state agency. AS 36.38.035. It is far from clear that the provision is always honored, and the committee may wish to inform itself on the impact of the provision.

#### D. Release of information.

Some examples of the confusion that attends the matter of disclosure of competitive bid and proposal submission documentation:

A81-0884: At the behest of a bidder who had not been able to obtain information about disposition of a competitive bid, the office interceded to obtain from the agency information as to the winner of that bid.

A81-1196: A complainant, who had submitted a proposal in response to an RFP and who was not awarded the contract, encountered difficulty in

obtaining access to the rating sheets and a copy of the successful proposal in order to review the contract award preparatory to an appeal.

F81-0649: The complainant had been unsuccessful in securing a copy of the winning proposal, the agency erroneously citing the proposers' proprietary information.

A83-0826: Citing the need to consult with its attorney, the agency delayed disclosure of information to the complainant that the complainant believed was need to file an appeal from an adverse professional services contract award.

A83-0881: In this, information indicating the reasons for contract award were withheld from the complainant, a competitor, until after contract award, thereby cutting of complainant's opportunity to appeal the decision.

A84-0526: The complainant was unable to secure information as to the basis for award of a contract to a competing firm in preference to his own.

#### E. Ethics considerations in public contracting.

Conflicts of interest can occur when a present or prospective contract has interests, current or planned, that directly or indirectly relate to work to be performed under contract. These interests may affect the contractor's ability to perform effectively and impartially under the contract or result in the contractor's enjoying an unfair advantage when competing for the contract or other contracts.

The public--and particularly that segment of the public that competes for the state's contract business--is alert and sensitive to real or perceived conflicts of interest in the evaluation of bids and proposals, in the award of contracts, and in the management of awarded contracts, and in the evaluation of services performed under contract. Among matters which have been directed to our attention:

J79-0213: Investigation of this complaint confirmed the complainant's assertion of a conflict of interest between the Department of Administration and its contractor in a matter relating to data processing: the spouse of the an agency employee was employed by the firm to which the contract was awarded.

A81-1152: This complaint considered, among other elements, and found no support for complainant's assertion that there may have been a financial tie between a state employee who

negotiated the contract in question and the successful contractor.

F81-1314 and others: Investigation of this complaint indicated that, while two members of a department's proposal evaluation committee were former employees of the firm to which the contract was awarded, there was no overt evidence of favoritism in the award. Among other recommendations, the agency was alerted to the appearance of impropriety involved with such an arrangement.

A83-0592: On referral from a complainant, the office evaluated the assertion that the award of a contract was made to a firm employing a former department official at the expense of award to a firm which employed and used the services of another department official.

J83-0043: The complainant reported a situation in which the law firm that employed or included a recently-resigned former state official received a contract for legal services work.

J83-0855: In the award of a professional services contract for inspection services on a sole source basis, the complainant suggested that the agency may have selected an individual who was employed by or retained by the prime contractor on the public works project which he was directed to inspect. Investigation found no evidence of conflict, but noted that the department needed to include a conflict provision in its negotiated contracts.

J8C:pjc

# Anchorage Daily News



Winner, 1976 Pulitzer Prize Gold Medal for Public Service

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## A breakthrough for common sense

Alaska will spend less for goods and services next year, but state government will remain a plenty big spender. That's why the procurement reform bill that passed the Alaska Senate last week is so important.

Currently, no standard set of procedures governs state business. Bidding and purchasing practices vary widely from department to department. This often leaves those doing business with the state frustrated and confused by the government's idiosyncratic demands. It also provokes occasional charges that the state system is unfair and open to favoritism — like the favoritism charges that led to impeachment proceedings against Gov. Sheffield last summer and prompted the Senate to establish a special committee on procurement.

The committee, chaired by Sen. Jan Faiks of Anchorage, developed the procurement reform recommendations that became the basis for the legislation passed last week. With a few exceptions, bidding and buying procedures will become uniform under the direction of a state procurement officer.

Competitive bidding will be required for all contracts unless an agency can demonstrate that it faces an emergency. This means an end to most of the sole source contracting that state agencies and their favored contractors have used too often. (Unfortunately, one of the exceptions is the legislature itself, home of some of the juiciest sole source contracts.)

Procurement reform will not be without expense. New staff to monitor the state's procurement activities, for example, will cost about \$350,000 a year. But it should prove an investment in prudent management.

Wise spending and uniform business practices are hardly radical ideas. Sen. Faiks and her Senate colleagues have invoked some basic common sense, even if they did exempt the legislature. Now it's up to the House to finish the job before this legislative session ends.

HOUSE  
COMMITTEE REPORT

(7)

JUDICIARY

Date referred: 4/4/86

FURTHER REFERR

FINANCE

DATE: 4/30/86

The STATE AFFAIRS 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 House CS for CSSB341(SA)  same title
- new title

and recommends no recommendation

further referral to the \_\_\_\_\_ Committee

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

SIGNING DO PASS:

Katie Hurley

[Signature]

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

SIGNING OTHER RECOMMENDATIONS:

Mike Savone - no rec

John Jenkins No Rec

[Signature] - oo

NOT PASS

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Katie Hurley

Chairman

## SB 40 cont'd

SENATE JOINT RESOLUTION NO. 40 is on the calendar.

## SB 387

The Rules Committee considered SENATE BILL NO. 387 (taxation of watercraft motor fuel) and a majority of the committee recommended calendar April 3. The report was signed by Senator Kelly, Chairman and concurred in by Senators Faiks, Josephson and Coghill.

SENATE BILL NO. 387 is on the calendar.

## SB 464

The Rules Committee considered SENATE BILL NO. 464 (duties of the Commission on Judicial Conduct) and a majority of the committee recommended calendar April 3. The report was signed by Senator Kelly, Chairman and concurred in by Senators Bennett, Faiks and Coghill.

SENATE BILL NO. 464 is on the calendar.

The presence of Senator Vic Fischer was noted.

## CONSIDERATION OF THE CALENDAR

## SECOND READING OF SENATE BILLS

## SB 341

SENATE BILL NO. 341 (state procurement practices and procedures; old) was read the second time.

Senator Rodey moved and asked unanimous consent for the adoption of the Judiciary Committee Substitute offered on page 2107. Without objection, CS FOR SENATE BILL NO. 341 (JUD) was adopted.

CS FOR SENATE BILL NO. 341 (JUD) was read the second time.

Senator Faiks moved for the adoption of Finance Committee Amendment No. 1 offered on page 2191. Senator Josephson objected.

## SB 341 cont'd

The question being: "Shall Amendment No. 1 be adopted?" The roll was taken with the following result:

## CS SB 341 JUD AM 1

Yeas:	15	Aboud, Bennett, Coghill, Eliason, Ferguson, Fischer Paul, Fischer Vic, Halford, Kelly, Kerttula, Ray, Roddy, Sturgulewski, Zharoff, Ziegler
Nays:	5	DeVries, Edventamp, Faiks, Josephson, Sackett

and so, Amendment No. 1 was adopted.

Senator Faiks moved and asked unanimous consent for the adoption of Finance Committee Amendment No. 2 offered on page 2192. Without objection, Amendment No. 2 was adopted.

Senator Roddy offered Amendment No. 3:

Page 10, line 18: delete "Within 48 hours after the opening of bids" insert "no later than the time of opening of bids"

Page 17, line 13: delete "within 48 hours after" insert "no later than"

Senator Roddy moved Amendment No. 3, then withdrew his motion.

Senator Roddy moved and asked unanimous consent that Amendment No. 3 be withdrawn. Without objection, Amendment No. 3 was withdrawn.

Senator Halford moved and asked unanimous consent that the Senate rescind its action in adopting Amendment No. 2. Without objection, the Senate rescinded its action in adopting Amendment No. 2.

Amendment No. 2 was before the Senate.

Senator Roddy offered an amendment No. 1 to Amendment No. 2:

On first line of Amendment No. 2: delete "Within 48 hours after the opening of bids" insert "no later than the time of opening of bids"

(Technical amendment on page 10, line 19 change "bidder proposes" to "bidders propose")

April 3, 1986

SB 341 cont'd

Senator Rody moved the amendment to Amendment No. 2 be adopted.

The question being: "Shall amendment No. 1 to Amendment No. 2 be adopted?" The roll was taken with the following result:

CSB 341 JUD AM AM1 TO AM2

Yeas: 15 Abood, Bennett, DeVries, Eliason, Ehrenkamp, Falls, Ferguson, Fischer Vic, Halford, Josephson, Kerttula, Kay, Rody, Sackett, Tharoff

Nays: 5 Coghill, Fischer Paul, Kelly, Sturgulowski, Ziepler

and so, amendment No. 1 to Amendment No. 2 was adopted.

Senator Rody offered an addition to Amendment No. 2:

Add to Amendment No. 2  
Page 17, line 13: Delete "within 48 hours after"  
insert "no later than"

Senator Rody moved amendment No. 2 to Amendment No. 2:

The question being: "Shall amendment No. 2 to Amendment No. 2 be adopted?" The roll was taken with the following result:

CSB 341 JUD AM AM2 TO AM2

Yeas: 16 Abood, Bennett, DeVries, Eliason, Ehrenkamp, Falls, Ferguson, Fischer Vic, Halford, Josephson, Kerttula, Kay, Rody, Sackett, Sturgulowski, Tharoff

Nays: 0 Coghill, Fischer Paul, Kelly, Ziepler

and so, amendment No. 2 to Amendment No. 2 was adopted.

The question now being: "Shall Amendment No. 2, as amended be adopted?" The roll was taken with the following result:

SB 341 cont'd

CSB 341 JUD AM AM2

Yeas: 16 Abood, Bennett, DeVries, Eliason, Ehrenkamp, Falls, Ferguson, Fischer Vic, Halford, Josephson, Kerttula, Kay, Rody, Sackett, Sturgulowski, Tharoff

Nays: 0 Coghill, Fischer Paul, Kelly, Ziepler

and so, Amendment No. 2, as amended was adopted.

Senator Ferguson offered Amendment No. 3:

Page 55, Delete lines 14-20, insert:

(10) "grant" means property furnished by the state, whether real or personal, designated by law, including an appropriation Act, as a grant;

Senator Ferguson moved Amendment No. 3 and asked unanimous consent. Without objection, Amendment No. 3 was adopted.

Senator Halford moved and asked unanimous consent that CS FOR SENATE BILL NO. 341 (JUD) as amended be considered engrossed, advanced to third reading and placed on final passage. Without objection, it was so ordered.

CS FOR SENATE BILL NO. 341 (JUD) as amended read the third time.

The question being: "Shall CS FOR SENATE BILL NO. 341 (JUD) on (state procurement practices and procedures; etc) pass the Senate?" The roll was taken with the following result:

CSB 341 JUD AM 300

Yeas: 20 Abood, Bennett, Coghill, DeVries, Eliason, Ehrenkamp, Falls, Ferguson, Fischer Paul, Fischer Vic, Halford, Josephson, Kelly, Kerttula, Kay, Rody, Sackett, Sturgulowski, Tharoff, Ziepler

Nays: 0

and so, CS FOR SENATE BILL NO. 341 (JUD) as passed the Senate.

## SB 361 cont'd

Senator Hallford moved and asked unanimous consent that the vote on the passage of the bill be considered the vote on the effective date clauses. Without objection, it was so ordered.

CS FOR SENATE BILL NO. 351 (JUD) was referred to the Secretary for engrossment.

## SB 387

SENATE BILL NO. 387 (taxation of watercraft motor fuel) was read the second time.

Senator Fails moved and asked unanimous consent for the adoption of the Finance Committee Substitute offered on page 2117. Without objection, CS FOR SENATE BILL NO. 387 (FIR) was adopted.

CS FOR SENATE BILL NO. 387 (FIR) was read the second time.

Senator Hallford moved and asked unanimous consent that CS FOR SENATE BILL NO. 387 (FIR) be considered engrossed, advanced to third reading and placed on final passage. Without objection, it was so ordered.

CS FOR SENATE BILL NO. 387 (FIR) was read the third time.

The question being: "Shall CS FOR SENATE BILL NO. 387 (FIR) (taxation of watercraft motor fuel) pass the Senate?" The roll was taken with the following result:

## CS SB 387 FIR 3RD

Yeas:	11	Abood, Bennett, Coghill, DeVries, Fahrenkamp, Fails, Fischer Paul, Josephson, Kay, Lodey, Storgulewski, Zharoff, Ziegler
Nays:	0	Flinson, Ferguson, Fischer Vic, Hallford, Kelly, Ferrula
Absent:	1	Sackett

and so, CS FOR SENATE BILL NO. 387 (FIR) passed the Senate.

Senator Flinson gave notice of reconsideration.

## SB 464

SENATE BILL NO. 464 (duties of the Commission on Judicial Conduct) was read the second time.

Senator Hallford moved and asked unanimous consent that SENATE BILL NO. 464 be considered engrossed, advanced to third reading and placed on final passage. Without objection, it was so ordered.

SENATE BILL NO. 464 was read the third time.

The question being: "Shall SENATE BILL NO. 464 (duties of the Commission on Judicial Conduct) pass the Senate?" The roll was taken with the following result:

## SB 464 3RD

Yeas:	19	Abood, Bennett, Coghill, DeVries, Elrason, Fahrenkamp, Fails, Ferguson, Fischer Paul, Fischer Vic, Hallford, Josephson, Kelly, Ferrula, Kay, Lodey, Storgulewski, Zharoff, Ziegler
Nays:	0	
Absent:	1	Sackett

and so, SENATE BILL NO. 464 passed the Senate and was referred to the Secretary for engrossment.

## SECOND READING OF SENATE JOINT RESOLUTIONS

## SJR 50

SENATE JOINT RESOLUTION NO. 50 (Proposing amendments to the Constitution of the State of Alaska relating to amendment of regulations by the Legislature) was read the second time.

A new zero fiscal note was received from the State Treasurer.

Senator Hallford moved and asked unanimous consent that SENATE JOINT RESOLUTION NO. 50 be considered engrossed, advanced to third reading and placed on final passage. Without objection, it was so ordered.

SENATE JOINT RESOLUTION NO. 50 was read the third time.



*Alaska Society of Professional Engineers*

FAIRBANKS CHAPTER  
P. O. BOX 61170  
FAIRBANKS, ALASKA 99706

MAY 5 1986

April 28, 1986

Senator Bettye Fahrenkamp  
Pouch V  
Juneau, AK 99811

Ref: SB 341

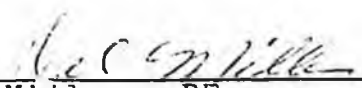
Dear Senator Fahrenkamp:

The Alaska Society of Professional Engineers does not take a strong position on SB 341: we are not really convinced that contracting procedures now in place require a major overhaul. However, if you feel that you must pass this bill, we do have some suggestions on portions of the bill which specifically concern the engineering profession that appear to have been "borrowed" from SB 204, the "Mini-Brooks Bill." Specific changes to SB 341 that we would request are as follows:

- 1) On page 12, line 9: delete the words "professional services."
- 2) On page 21, line 2: in the phrase "as a factor," strike "a" and replace with "an added...."
- 3) On Page 21, line 6: replace the word "sufficiently" with "thoroughly."
- 4) On Page 21, line 10: replace the words "at least one person who is" with the words "persons who are."
- 5) On Page 21, line 13: insert the words "in no event shall price be used for more than 20% of the evaluation criteria."

We believe that the above changes will help to define the few circumstances under which price would be used as a criteria for evaluating proposals.

Sincerely yours,

  
\_\_\_\_\_  
Del Miller, PE  
Chair, Political Action Committee  
Alaska Society of Professional Engineers  
Fairbanks Chapter

DM/skk

KENNETH D. JENSEN  
R. EVERETT HARRIS  
JEFFREY H. ROTH  
  
SCOTT H. FINLEY  
TIMOTHY C. VERRETT  
KENNETH W. LEGACKI

LAW OFFICES  
**JENSEN, HARRIS & ROTH**  
A PROFESSIONAL CORPORATION  
310 K STREET, SUITE 406  
ANCHORAGE, ALASKA 99501

TELEPHONE  
(907) 277-3533  
(907) 276-6850  
  
TELECOPIER  
(907) 279-0335

April 29, 1986

Honorable M. Mike Miller  
Chairman  
House Judiciary Committee  
P.O. Box 1494  
Juneau, Alaska 99802

Re: Committee Substitute for Senate Bill No. 341  
(Procurement Code)

Dear Representative Miller:

I regret that I have been "at sleep at the switch" respecting the progress of the above-referenced legislation. I had intended to express my views early in the session when the Bill was first introduced in the Senate but frankly let it slip my mind. I understand that the Senate passed version of the Bill is to be referred to the House Judiciary Committee for additional hearings before the end of the session. Hence I write you with copies to the other members of your Committee.

Again because of my own neglect I have prepared the attached analysis in great haste. It is not intended to be a comprehensive evaluation of all of the sections of the legislation but does, I think, cover some particularly troublesome areas.

At the outset I express my support for the adoption of a procurement code patterned after the "Model Procurement Code for State and Local Governments" published by the Section of Public Contract Law of the American Bar Association. It is from this code that I suspect the organization if not the substance of the Alaska Bill was derived.

Recognizing the need for adoption of uniform procurement practices in Alaska -- and the perception held by some that there exists an emergency to pass such legislation before the end of this session -- I feel that the legislation in its present form would cause more problems than it attempts to cure. Unfortunately the problems are so many in number and so

Honorable M. Mike Miller  
April 29, 1986  
Page Two

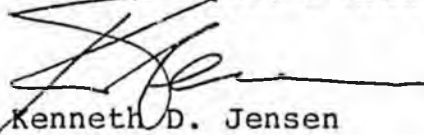
substantial as to make it highly unlikely that a "fix" could be affected by amendments. For that reason I would urge that the Bill not be reported from the House Judiciary Committee this session of the Legislature and that the interim between this session and the next be used to develop needed refinements.

Because of the shortness of time available to me I will not thoroughly address the administrative adjudication provisions of the legislation. I am in agreement with the views previously expressed to the legislature by the Alaska Chapter of the Associated General Contractors of America. AGC correctly noted that the present version of the legislation would invest in the Commissioner of Administration or the Commissioner of the Department of Transportation/Public Facilities the multiple roles of prosecutor, judge and jury. This is a radical departure from the philosophy of the model procurement code which contemplates that the administrative proceedings (intended to remove construction disputes from the expensive judicial arena) be administered by autonomous and independent hearing officers and tribunals. I concur with the views expressed by AGC in this regard and would add that it seems highly improbable to me that an Alaska court would find the result of such proceedings consistent with requirements of procedural due process.

I would very much appreciate your lodging this letter together with the attached abbreviated analysis in the record of hearings before your Committee. I have provided each member a copy for personal reference.

Sincerely yours,

~~JENSEN, HARRIS & ROTH~~



Kenneth D. Jensen

KDJ/spd  
Enc:

PROPOSED AMENDMENTS TO CSSB 341 - PROCUREMENT

P. 20, line 24 -

add "an added" between "as" & "factor". Delete "a"

P. 20, line 28 -

delete the word "sufficiently", add the word "thoroughly"

Page 21, line 4 -

delete "at least one person who is" and add "a majority of persons who are", delete the last word on line 4, "the"

Page 21, line 5 & 6

delete the rest of the sentence after the word "services" and put a period after "services".

Page 21, line 7

insert a new section (d), and reletter existing (d) to (e) and reletter existing (e) and (f) accordingly to (f) and (g).

(d) The consideration of price under ~~(c)~~ of this section as a factor in the selection of architectural, engineering, and land surveying services may not exceed 20 percent of the scoring formula used in evaluating proposals. The state agency shall base the evaluation of price on a previously established schedule that objectively correlates price with points scored.

STATE OF ALASKA  
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

HOUSE OF STATE CAPITO  
JUNEAU ALASKA 99811  
907 465 3800

MEMORANDUM

April 21, 1986

TO: THE HONORABLE KATIE HURLEY  
CHAIRMAN, HOUSE STATE AFFAIRS COMMITTEE

FROM: Warren W. Endicott, Executive Director *WWE*

SUBJECT: Amend CSSB 341(Jud)am

This is to request amendment of CSSB 341(Jud)am, "The State procurement code" as it pertains to the Legislature.

Because of time constraints in the legislative branch and cost savings by not always using the State contract award, it is requested that the language in AS 36.30.020 be amended as follows:

"Sec. 36.30.020. LEGISLATURE. The Legislative Council shall adopt procedures to govern the procurement of supplies, services, professional services, and construction by the legislature, legislators, and legislative agencies and committees. The procedures must be based on the competitive principles established under this chapter and must be adapted to the special needs of the legislative branch as determined by the Legislative Council [substantially equivalent to the procedures prescribed in this chapter]."

WWE:mmm

A M E N D M E N T S

CSSB 341 (Jud) am

#1

Page 10, line 20 through Page 12, line 1:

Delete all material

#2

Page 15, line 26-28:

Delete:

"(4) is incorporated under the laws of the state, is a sole proprietorship, and the proprietor is a resident of the state or is a partnership, and all partners are residents of the state; and"

#3

Page 16, line 8:

Add a new subsection (d)

"(d) The provisions of (b) of this section do not apply to construction contracts for highways and public works if the construction contract exceeds \$5,000."

#4

Page 51, line 20:

Delete:

"(1) grants;"

Renumber following sections accordingly.

#6

Page 54, Line 20:

After the word "for" Delete:

"the University of Alaska,"

#7

Page 54, Line 21.

After the word "Authority" Delete:

"and the Alaska Railroad Corporation;"

Amendment CSSB 341

P. 52, after line 6, add a new item (13) to read:

(13) acquisitions or contracts by utilities who operate and maintain state facilities under contract with the Alaska Power Authority.



# Alaska State Legislature

Representative Mike Davis

Pouch V  
Juneau, Alaska 99811  
(907) 465-4930/4941

Interim Office:  
P.O. Box 81435  
Fairbanks, Alaska 99708

TO: Senator Pat Rodey, Chairman, Judiciary Committee  
FROM: Rep. Mike Davis  
DATE: March 6, 1986  
RE: SB 341-An Act relating to state procurement practices and procedures; and providing for an effective date.

Attached please find a letter originally addressed to Senator Jan Faiks who at the time was working on the draft for what would become SB 341, the procurement bill. The letter is from a constituent of mine who also forwarded a copy to my office.

The issue that Mr. Miller brought up, that the lowest bidder may not be the best qualified to perform a very specialized and potentially dangerous service, is a valid one. I think it unfortunate that this was not addressed when the bill was initially drafted.

I hope that you will consider Mr. Miller's comments when the Senate Judiciary Committee takes up this bill. I would encourage you to consult with some of the knowledgeable professionals in the Alaska Department of Fish and Game. I am certain they will concur that there is a need for flexibility in the procurement of this type of service.

# CARIBOU AIR SERVICE

DENNIS C. MILLER

P.O. Box 2648

Fairbanks, AK 99707 (907) 479-2189



Senator Jan Faiks  
1024 W. 6th Ave Suite 305  
Anchorage, AK 99501

December 16, 1985

Dear Senator Faiks,

On October 30, 1985, I spoke to Jens Zehbe about a serious reservation I have about the draft state procurement practices bill. I wanted to share these concerns with you, and to document them via memos written within the Alaska Department of Fish and Game.

I spoke to Jens about the critical need to provide an exception within the procurement bill for Alaska Department of Fish and Game technicians and biologists when they are procuring specialized aircraft charter services for fish and wildlife survey work. Being forced to fly with the lowest bidder is an untenable and potentially life endangering situation.

It is my understanding that ADF&G biologists have the highest fatality rate of any group of state employees. This is a result of aircraft accidents while performing sometimes hazardous survey work. The enclosed memos speak effectively to that point, and I urge that you personally take the time to read each of them carefully. We are not talking here about state offices buying office machines, or about a paving contract - human lives are literally at stake, In the draft procurement bill I can find no exception or allowance for this reality.

I am a professional pilot. Caribou Air Service was formed three years ago, with myself as the only pilot. More than 90% of my business is flying highly specialized fish and wildlife survey work for state and federal agencies. I have been fortunate enough to be one of the very few pilots (less than five) in the Interior with whom ADF&G biologists feel comfortable flying. As a pilot, I can certainly confirm that much of the wildlife survey flying I do is indeed potentially life endangering. I know if I were the passenger on many survey flights I would refuse to participate unless I could fly with one of those few pilots in the Interior I knew specialized in such work.

As some of the enclosed memos point out, in most instances forcing biologists to fly with the lowest bidder would in reality cost the state more money, to say nothing of the safety factors involved. An example: Last week I flew a moose survey where we located 30 radio collared moose. Because of my years of radio tracking experience I was able to fly directly to each animal.



The flight took 6.5 hours or \$806.00 at my current rate of \$124.00/hr. Lets assume the biologist was forced to fly with a low bidder at \$120.00/hr. I can guarantee you, and any biologist will confirm, that an inexperienced survey pilot would take at least 2 minutes longer per moose, resulting in a flight of 7.5 hours at \$120.00/hr, or \$900.00 total. The current draft procurement bill would have cost the state an additional \$94.00 and potentially put the biologist's life in jeopardy. On a spawning salmon survey, missing one bend in a stream would seriously compromise the data being collected, and would mean an additional 1-2 minutes to re-fly the bend, and there are hundreds of bends on one typical flight.

As for myself and Caribou Air Service, I am making a living (albeit a meager one) providing highly specialized wildlife survey work. I plan to continue to be available for this work for the foreseeable future. I cannot afford, however, to be forced into a "rate war" to make sure I am the lowest bidder to comply with a state procurement code that doesn't provide for the facts and emotions stated herein and in the enclosed memos.

Those very few of us who specialize in wildlife survey flying are in business for ourselves. When a biologist calls for a flight he knows who he will get for a pilot. There is no pilot turnover when you are in business for yourself, by yourself. As you may be aware, there is an extremely high rate of pilot turnover in the air taxi business in general, certainly a contributing factor to the high accident rate in Alaska. Forcing ADF&G biologists to expose themselves to inexperienced pilots because of a low bid restriction is ill advised at best, life threatening at worst.

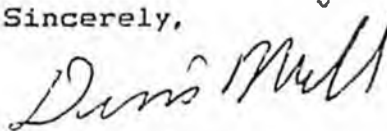
It is imperative that there be an exception for aerial survey work in the state procurement bill. As stated above and in the enclosed memos, it is easy to document and confirm that money is actually saved by flying with experienced survey pilots, even if their hourly rates may be a few dollars higher. We must be allowed to stay in business to provide critical, highly specialized wildlife survey flying. Furthermore, ADF&G biologists must be allowed to choose their own pilots, unrestricted by a procurement code that in reality can endanger their lives and at the same time cost the state more money.

This past year you spent a considerable amount of time on the impeachment proceedings. A man's career was at stake. Now you are dealing with an issue where human lives are potentially at stake. An exception must be made in the procurement bill allowing ADF&G biologists to choose their own pilots for critical survey work.

I am sure you are inundated with memos in the course of your work. I urge you to take whatever time is necessary to read the enclosed, however. You may contribute to saving a state employee's life.

If I can provide any more information, please contact me.

Sincerely,

A handwritten signature in cursive script that reads "Dennis Miller". The signature is written in dark ink and is positioned above the typed name.

Dennis Miller

cc: Representative Mike Davis  
Don Collingsworth, Commissioner, ADF&G  
Dick Bishop, Regional Supervisor, ADF&G

Honorable John Sund  
Alaska House of Representatives  
Re: HCS CSSB 341(SA), procurement

May 8, 1986  
Page #2

The intent is to make these provisions consistent with SB 204. If that bill is scheduled for passage, sec. 270 should be deleted.

(4) Grants. Secs. 36.30.850(b)(1), 36.30.990(10).

The procurement code does not apply to grants. However, the definition of "grant" has been controversial. By floor amendment, the Senate adopted a new definition of "grant" which reads as follows:

(10) "grant" means property furnished by the state, whether real or personal, designated by law, including an appropriation Act, as a grant;

House State Affairs adopted the following definition:

(10) "grant" means the furnishing of financial or other assistance by an agency to a person for a public purpose authorized by law; it does not include an award whose primary purpose is to procure goods or services for the direct administration or operation of state government;

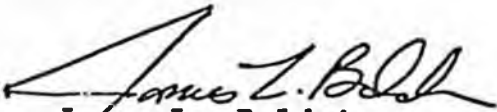
This office prefers the state affairs amendment.

(B) (5) Investment transactions. A new matter has arisen which involves a substantial amount of money and purchasing decisions which are required by the economy rather than the day-to-day needs of state government.

The permanent fund corporation requests the following amendment to sec. 36.30.850(b): "purchases of income producing assets for the state treasury or a public corporation of the state." This would exempt certain investments from the procurement code. Competition usually is not appropriate for these purchases because the value of financial instruments is dictated by the financial markets.

Sincerely yours,

HAROLD M. BROWN  
ATTORNEY GENERAL

By   
James L. Baldwin  
Assistant Attorney General

*Dave Rose  
stocks/bonds  
not brokerage contracts  
JLB/pjg*

SB341- Procurement  
Changes in proposed Judiciary CS  
Prepared by Rep. Sund's office

---

Page 2, beginning line 27: adds language that allows the decisions required by the bill to be made by the officers of the University, rather than the Board of Regents, which meets only four times per year.

---

Page 10, line 1 after "when rates are fixed by law or ordinance" add "and no competitive alternative exists;"

---

Requested by GCI, it allows for a situation which occurs with utilities, where rates might be fixed, but competition still exists, because of tiered rate structures.

---

Page 10, line 22 change from "the apparent low bidder" to "the two apparent low bidders"

---

Insures that if problems preclude the use of the lowest bidder, the second lowest bidder will not have an opportunity to bid shop.

---

Page 17, line 14 change "design and construction" to "design/build"

---

Requested by DOT/PF, who feel that "construction" has a broader definition than "build" to a contractor.

---

Page 23, beginning line 3 insert a new subsection (d) to read: Procurement requirements may not be artificially divided, fragmented, aggregated or structured so as to constitute a purchase under this section or to circumvent the source selection procedures required by AS 36.30.270.

---

Takes the language beginning on page 23, line 28 under Small Procurements and uses it here, plus the word "aggregated".

---

Page 24, on lines 9 and 12, replace "Department of Law" with "Attorney General"

---

Clarification requested by the University of Alaska.

---

Page 52, beginning line 21 insert a new subsection (13) to read: purchases of income producing assets for the state treasury or a public corporation of the state.

---

Requested by the Permanent Fund Corporation, it will exclude purchases of such things as stocks and bonds by the Permanent Fund Corporation, AHFC and the state treasury.

---

Page 56, beginning line 6, delete subsection (10) and replace with a new subsection (10) to read: "grant" means property furnished by the state, whether real or personal, designated by law, including an appropriation Act, as a grant;

---

Page 91, changes the dates of the various provisions to 6 months later than the State Affairs version and delays a report on implementation so that the report is more relevant for legislative purposes.

Cook ✓  
5/9/86

Original sponsor: Rules Committee  
By Request

1 IN THE SENATE BY THE JUDICIARY COMMITTEE  
2 HOUSE CS FOR CS FOR SENATE BILL NO. 341 (Judiciary)  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 FOURTEENTH LEGISLATURE - SECOND SESSION  
5 A BILL

6 For an Act entitled: "An Act relating to state procurement practices and  
7 procedures; and providing for an effective date."

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

9 \* Section 1. PURPOSE. This Act shall be construed and applied to  
10 promote its underlying purposes and policies. The underlying purposes and  
11 policies of this Act are to

12 (1) simplify, clarify, and modernize the law governing pro-  
13 curement by the state;

14 (2) establish consistent procurement principles for all branches  
15 of state government;

16 (3) provide for increased public confidence in the procedures  
17 followed in state procurement;

18 (4) ensure the fair and equitable treatment of all persons who  
19 deal with the procurement system of the state;

20 (5) provide increased economy in state procurement activities  
21 and maximize to the fullest extent practicable the purchasing value of  
22 state funds;

23 (6) foster effective broad-based competition within the free  
24 enterprise system;

25 (7) provide safeguards for the maintenance of a procurement  
26 system of quality and integrity;

27 (8) permit the continued development of state procurement prac-  
28 tices and policies; and

29 (9) eliminate and prevent discrimination in state contracting

1 because of race, religion, color, national origin, sex, age, marital sta-  
2 tus, pregnancy, parenthood, handicap, or political affiliation.

3 Sec. 2. AS 36 is amended by adding a new chapter to read:

4 CHAPTER 30. STATE PROCUREMENT CODE.

5 ARTICLE 1. ORGANIZATION OF STATE PROCUREMENT.

6 Sec. 36.30.005. CENTRALIZATION OF PROCUREMENT AUTHORITY. (a)

7 Except as otherwise provided, all rights, powers, duties, and author-  
8 ity relating to the procurement of supplies, services, and profes-  
9 sional services, and the control over supplies, services, and profes-  
10 sional services vested in or exercised by an agency on January 1,  
11 1987, are transferred to the commissioner of administration and to the  
12 chief procurement officer. Authority granted under this subsection  
13 shall be exercised in accordance with this chapter.

14 (b) Except as otherwise provided, all rights, powers, duties,  
15 and authority relating to the procurement of construction and procure-  
16 ments of equipment or services for the state equipment fleet and the  
17 control over construction of state facilities and the state equipment  
18 fleet vested in or exercised by an agency on January 1, 1987, are  
19 transferred to the commissioner of transportation and public  
20 facilities, subject to regulations adopted by the commissioner of  
21 administration. Notwithstanding AS 44.71.010, authority relating to  
22 disposals from the state equipment fleet is vested in the the  
23 commissioner of transportation and public facilities, subject to  
24 regulations adopted by the commissioner of administration. Authority  
25 granted under this subsection shall be exercised in accordance with  
26 this chapter.

27 (c) Notwithstanding other provisions of law, all rights, powers,  
28 duties, and authority relating to the procurement of supplies, servi-  
29 ces, professional services, and construction and the disposal of

1 supplies for the University of Alaska are transferred to the Board of  
2 Regents. To the maximum extent possible, authority granted under this  
3 subsection shall be exercised in accordance with this chapter. The  
4 Board of Regents shall adopt regulations under this subsection that  
5 are substantially equivalent to the regulations adopted by the commis-  
6 sioner of administration to implement this chapter. For the purposes  
7 of this subsection, unless the context otherwise requires, in this  
8 chapter

9 (1) "agency" means a subunit of the University of Alaska;

10 (2) "attorney general" means the president of the  
11 University of Alaska;

12 (3) "chief procurement officer" means a person designated  
13 by the president of the University of Alaska whose qualifications are  
14 substantially equivalent to those provided in AS 36.30.010(a);

15 (4) "commissioner," "commissioner of administration," or  
16 "commissioner of transportation and public facilities" means the Board  
17 of Regents or the president of the University of Alaska if so  
18 designated by the Board of Regents by regulations adopted under this  
19 subsection;

20 (5) "department" means the University of Alaska.

21 Sec. 36.30.010. CHIEF PROCUREMENT OFFICER. (a) The commis-  
22 sioner shall appoint to the partially exempt service the chief pro-  
23 curement officer of the state. The chief procurement officer must  
24 have at least five years of prior experience in public procurement,  
25 including large scale procurement of supplies, services, or profes-  
26 sional services, and must be a person with demonstrated executive and  
27 organizational ability. The chief procurement officer may be removed  
28 by the commissioner only for cause. The term of office of the chief  
29 procurement officer is four years.

1 (b) Except as otherwise specifically provided in this chapter,  
2 the chief procurement officer shall

3 (1) procure or supervise the procurement of all supplies,  
4 services, and professional services needed by an agency;

5 (2) exercise general supervision and control over all  
6 inventories of supplies belonging to an agency and prescribe the  
7 manner in which supplies shall be purchased, delivered, stored, and  
8 distributed;

9 (3) prescribe the time, manner, authentication, and form of  
10 making requisitions for supplies and services;

11 (4) sell, trade, transfer between agencies, or otherwise  
12 dispose of surplus, obsolete, or unused supplies and make proper  
13 adjustments in the accounts of agencies concerned;

14 (5) establish and maintain programs for the inspection,  
15 testing, and acceptance of supplies and services and the testing of  
16 samples submitted with bids;

17 (6) prescribe standard forms for bids and contracts; and

18 (7) provide for other matters that may be necessary to  
19 carry out the provisions of this chapter and the regulations adopted  
20 under this chapter.

21 Sec. 36.30.015. EXECUTIVE BRANCH AGENCIES. (a) The commis-  
22 sioner of transportation and public facilities may delegate to another  
23 agency the authority to contract for construction. Before delegating  
24 authority to an agency under this subsection, the commissioner of  
25 transportation and public facilities shall make a written determina-  
26 tion that the agency is capable of implementing the delegated author-  
27 ity. Notwithstanding delegation of authority under this subsection,  
28 contracts for construction are governed by this chapter and regula-  
29 tions adopted by the commissioner of administration under this

1 chapter.

2 (b) The commissioner of administration may delegate to an agency  
3 the authority to contract for and manage services, professional servi-  
4 ces, and supplies. Notwithstanding delegation of authority under this  
5 subsection, an agency's exercise of the authority is governed by this  
6 chapter and regulations adopted by the commissioner under this chap-  
7 ter. Before delegating authority to an agency under this subsection,  
8 the commissioner shall make a written determination that the agency is  
9 capable of implementing the delegated authority.

10 (c) The commissioner of administration may not delegate the  
11 authority to dispose of supplies or the authority to adopt regulations  
12 under this chapter.

13 (d) An agency may not contract for the services of legal counsel  
14 without the approval of the attorney general.

15 (e) The boards of directors of the Alaska Railroad Corporation  
16 and the Alaska State Housing Authority shall adopt procedures to  
17 govern the procurement of supplies, services, professional services,  
18 and construction by the corporation. The procedures must be  
19 substantially equivalent to the procedures prescribed in this chapter  
20 and in regulations adopted under this chapter.

21 Sec. 36.30.020. LEGISLATURE. The Legislative Council shall  
22 adopt and publish procedures to govern the procurement of supplies,  
23 services, professional services, and construction by the legislative  
24 branch. The procedures must be based on the competitive principles  
25 consistent with this chapter and must be adapted to the special needs  
26 of the legislative branch as determined by the Legislative Council.

27 Sec. 36.30.030. COURT SYSTEM. The administrative director of  
28 courts shall adopt and publish procedures to govern the procurement of  
29 supplies, services, professional services, and construction by the

1 judicial branch. The procedures must be based on the competitive  
2 principles consistent with this chapter and must be adapted to the  
3 special needs of the judicial branch as determined by the administra-  
4 tor of courts.

5 Sec. 36.30.040. PROCUREMENT REGULATIONS. (a) The commissioner  
6 shall adopt regulations governing the procurement, management, and  
7 control of supplies, services, professional services and construction  
8 by agencies. The commissioner may audit and monitor the implementa-  
9 tion of the regulations and the requirements of this chapter with  
10 respect to using agencies.

11 (b) The commissioner shall adopt regulations pertaining to the  
12 following:

13 (1) suspension, debarment, and reinstatement of prospective  
14 bidders and contractors;

15 (2) bid protests;

16 (3) conditions and procedures for the procurement of per-  
17 ishables and items for resale;

18 (4) conditions and procedures for the use of source selec-  
19 tion methods authorized by this chapter, including sole source pro-  
20 curements, emergency procurements, and small procurements;

21 (5) the opening or rejection of bids and offers, and waiver  
22 of informalities in bids and offers;

23 (6) confidentiality of technical data and trade secrets  
24 submitted by actual or prospective bidders or offerors;

25 (7) partial, successive, and multiple awards;

26 (8) storeroom and inventories, including determination of  
27 appropriate stock levels and the management of agency supplies;

28 (9) transfer, sale or other disposal of supplies;

29 (10) definitions and classes of contractual services and

1 procedures for acquiring them;

2 (11) providing for conducting price analysis;

3 (12) use of payment and performance bonds in connection with  
4 contracts for supplies, services, and construction;

5 (13) guidelines for use of cost principles in negotiations,  
6 adjustments, and settlements;

7 (14) conditions under which an agency may use the services  
8 of an employment program as defined under AS 36.30.100(c);

9 (15) a bidder's or offeror's duties under AS 36.30.115 and  
10 36.30.210; and

11 (16) the elimination and prevention of discrimination in  
12 state contracting because of race, religion, color, national origin,  
13 sex, age, marital status, pregnancy, parenthood, handicap, or politi-  
14 cal affiliation.

15 Sec. 36.30.050. LISTS OF CONTRACTORS. (a) The commissioner  
16 shall establish and maintain lists of persons who desire to provide  
17 supplies, services, professional services, or construction services to  
18 the state.

19 (b) A person who desires to be on a list shall submit to the  
20 commissioner evidence of a valid Alaska business license together with  
21 a biennial fee established by regulation in an amount reasonably  
22 calculated to pay the costs of administering this section. A con-  
23 struction contractor shall also submit a valid certificate of regis-  
24 tration issued under AS 08.18. The commissioner, by regulation, may  
25 require submission of additional information.

26 (c) The lists may be used by the chief procurement officer or an  
27 agency when issuing invitations to bid or requests for proposals under  
28 this chapter. The lists may be used by the Legislative Council, the  
29 court system, the Alaska State Housing Authority, and the Alaska

1 Railroad Corporation.

2 (d) The lists shall be used in providing notice of intent to  
3 make a small procurement to Alaska bidders as defined under AS 36.30.-  
4 170(c). A procurement officer who intends to make a procurement under  
5 AS 36.30.320 shall request names from the appropriate list and the  
6 department shall furnish names of Alaska bidders on a rotating basis  
7 from the list in response to each request.

8 Sec. 36.30.060. SPECIFICATIONS. (a) The commissioner shall  
9 adopt regulations governing the preparation, revision, and content of  
10 specifications for supplies, services, professional services, and  
11 construction required by an agency. The commissioner shall monitor  
12 the use of these specifications.

13 (b) Specifications for construction of highways must conform as  
14 closely as practicable to those adopted by the American Association of  
15 State Highway and Transportation Officials.

16 (c) The commissioner may obtain expert advice and assistance  
17 from personnel of using agencies in the development of specifications.  
18 Specifications must promote overall economy for the purposes intended  
19 and encourage competition in satisfying the state's needs, and may not  
20 be unduly restrictive. The requirements of this subsection regarding  
21 the purposes and nonrestrictiveness of specifications apply to all  
22 specifications, including those prepared by architects, engineers,  
23 designers, and other professionals.

24 (d) In this section, "specification" means a description of the  
25 physical or functional characteristics, or of the nature of a supply,  
26 service, professional service, or construction project; it may include  
27 requirements for licensing, inspecting, testing, and delivery.

28 Sec. 36.30.070. SUPPLY MANAGEMENT. The commissioner shall adopt  
29 regulations governing the

- 1 (1) management of supplies during their entire life cycle;  
2 (2) sale, lease, or disposal of surplus supplies by public  
3 auction, competitive sealed bidding, or other appropriate method;  
4 (3) purchase of surplus supplies by an employee of the  
5 using or disposing agency; and  
6 (4) transfer of excess supplies.

7 Sec. 36.30.080. LEASES. (a) The department shall lease space  
8 for the use of the state or an agency wherever it is necessary and  
9 feasible, subject to compliance with the requirements of this chapter.  
10 A lease may not provide for a period of occupancy greater than 40  
11 years. An agency requiring office, warehouse, or other space shall  
12 lease the space through the department.

13 (b) The department may enter into lease-financing agreements,  
14 including lease-purchase agreements and agreements related to the  
15 issuance of certificates of participation. A lease-financing agree-  
16 ment must provide that lease payments are subject to annual appropria-  
17 tion.

18 (c) If the department intends to enter into a lease or lease-  
19 financing agreement with an annual rent to the state anticipated to  
20 exceed \$1,000,000, the department shall provide notice to the legisla-  
21 ture. The notice must include the anticipated annual lease obligation  
22 amount and the anticipated total construction, acquisition, or other  
23 costs of the project. The department may not enter into an agreement  
24 under this subsection unless the project has been approved by the  
25 legislature by law. An appropriation for the project does not consti-  
26 tute approval of the project for purposes of this subsection.

27 ARTICLE 2. COMPETITIVE SEALED BIDDING.

28 Sec. 36.30.100. GENERAL POLICY. (a) Except as otherwise pro-  
29 vided in this chapter, or unless specifically exempted by law, an

1 agency contract shall be awarded by competitive sealed bidding.

2 (b) Competitive sealed bidding is not required

3 (1) when the commissioner determines in writing that food,  
4 clothing, or medical supplies, or materials for use in laboratory or  
5 medical studies may be purchased otherwise to the best advantage of  
6 the state;

7 (2) when rates are fixed by law or ordinance [and no  
8 competitive alternative exists;

9 (3) for the purchase of products or services manufactured  
10 or provided by an employment program;

11 (4) for the purchase of products or services provided by  
12 the correctional industries program established under AS 33.32;

13 (5) for professional services; or

14 (6) for concessions operated on state property.

15 (c) In this section "employment program" means a nonprofit  
16 program to increase employment opportunities for individuals with  
17 physical or mental disabilities that constitute substantial handicaps  
18 to employment.

19 Sec. 36.30.110. INVITATION TO BID. (a) When competitive sealed  
20 bidding is used, the procurement officer shall issue an invitation to  
21 bid. It must include a time, place and date by which the bid must be  
22 received, purchase description, and a description of all contractual  
23 terms and conditions applicable to the procurement.

24 (b) When responding to the invitation to bid, the bidder shall  
25 supply evidence of the bidder's valid Alaska business license. A  
26 bidder for a construction contract shall also submit evidence of the  
27 bidder's registration under AS 08.18.

28 Sec. 36.30.115. SUBCONTRACTORS. (a) Within 24 hours after  
29 opening of bids, the two apparent low bidders shall submit a list of

1 the subcontractors the bidders propose to use in the performance of  
2 the contract. The list shall include the name and location of the  
3 place of business for each subcontractor and evidence of the subcon-  
4 tractor's valid Alaska business license. A bidder for a construction  
5 contract shall also submit evidence of each subcontractor's registra-  
6 tion under AS 08.18.

7 (b) A bidder may replace a listed subcontractor if the subcon-  
8 tractor

- 9 (1) fails to comply with AS 08.18;  
10 (2) files for bankruptcy or becomes insolvent;  
11 (3) fails to execute a contract with the bidder involving  
12 performance of the work for which the subcontractor was listed;  
13 (4) fails to obtain bonding;  
14 (5) fails to obtain insurance acceptable to the state;  
15 (6) fails to perform the contract with the bidder involving  
16 work for which the subcontractor was listed;  
17 (7) must be substituted in order for the prime contractor  
18 to satisfy required federal affirmative action requirements;  
19 (8) refuses to agree or abide with the bidder's labor  
20 agreement; or  
21 (9) is determined by the procurement officer not to be a  
22 responsible bidder.

23 (c) If a bidder fails to list a subcontractor or lists more than  
24 one subcontractor for the same portion of work and the value of that  
25 work is in excess of half of one percent of the total bid, the bidder  
26 shall be considered to have agreed to perform that portion of work  
27 without the use of a subcontractor and to have represented the bidder  
28 to be qualified to perform that work.

29 (d) A bidder who attempts to circumvent the requirements of this

1 section by listing as a subcontractor another contractor who, in turn,  
2 sublets the majority of the work required under the contract violates  
3 this section.

4 (e) If a contract is awarded to a bidder who violates this  
5 section, the purchasing officer may

6 (1) cancel the contract; or

7 (2) after notice and a hearing, assess a penalty on the  
8 bidder in an amount that does not exceed 10 percent of the value of  
9 the subcontract at issue.

10 Sec. 36.30.120. BID SECURITY. (a) Bid security shall be re-  
11 quired for all competitive sealed bidding for construction contracts  
12 when the price is estimated by the procurement officer to exceed an  
13 amount established by regulation of the commissioner. Bid security on  
14 construction contracts under the amount set by the commissioner may be  
15 required when the circumstances warrant. Bid security may be required  
16 for competitive sealed bidding for contracts for supplies, services,  
17 or professional services in accordance with regulations of the commis-  
18 sioner when needed for the protection of the state.

19 (b) Bid security must be a bond provided by a surety company  
20 authorized to do business in the state or otherwise supplied in a form  
21 satisfactory to the commissioner. Bid security must be in an amount  
22 equal to at least

23 (1) 10 percent of the amount of the bid if the bid does not  
24 exceed \$100,000; or

25 (2) 10 percent of the first \$100,000 and five percent of  
26 the amount of the bid over \$100,000 if the bid exceeds \$100,000 up to  
27 a maximum of \$200,000 in security.

28 (c) When the invitation to bid requires security, the procure-  
29 ment officer shall reject a bid that does not comply with the bid

1 security requirement unless, in accordance with regulations, the  
2 officer determines that the bid fails to comply in a nonsubstantial  
3 manner with the security requirements.

4 Sec. 36.30.130. PUBLIC NOTICE OF INVITATION TO BID. (a) The  
5 procurement officer shall give adequate public notice of the invita-  
6 tion to bid at least 21 days before the date for the opening of bids.  
7 If a determination is made in writing that a shorter notice period is  
8 necessary for a particular bid, the 21-day period may be shortened.  
9 The determination shall be made by the chief procurement officer for  
10 bids for supplies, services, or professional services. The determina-  
11 tion shall be made by the commissioner of transportation and public  
12 facilities for bids for construction or acquisition of property for  
13 the state equipment fleet. Notice shall be published in the Alaska  
14 Administrative Journal. The time and manner of notice must be in  
15 accordance with regulations adopted by the commissioner of adminis-  
16 tration. When practicable, notice may include

17 (1) publication in a newspaper calculated to reach prospec-  
18 tive bidders;

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

21 (3) notices mailed to all active prospective contractors on  
22 the appropriate list maintained under AS 36.30.050.

23 (b) Failure to comply with the notice requirements of this  
24 section does not invalidate a bid or the award of a contract. If the  
25 state fails to substantially comply with the requirements of (a) of  
26 this section, the state is liable for damages caused by that failure.

27 Sec. 36.30.140. BID OPENING. (a) The procurement officer shall  
28 open bids publicly in the presence of one or more witnesses at the  
29 time and place designated in the invitation to bid. The amount of

1 each bid and other relevant information that is specified by regula-  
2 tion of the commissioner, together with the name of each bidder, shall  
3 be recorded.

4 (b) The information recorded under (a) of this section is open  
5 to public inspection as soon as practicable before the notice of  
6 intent to award a contract is given under AS 36.30.365. The bids are  
7 not open for public inspection until after the notice of intent to  
8 award a contract is given. To the extent the bidder designates and  
9 the procurement officer concurs, trade secrets and other proprietary  
10 data contained in a bid document are confidential.

11 Sec. 36.30.150. BID ACCEPTANCE AND BID EVALUATION. (a) Bids  
12 shall be unconditionally accepted without alteration or correction,  
13 except as authorized in AS 36.30.160. The procurement officer shall  
14 evaluate bids based on the requirements set out in the invitation to  
15 bid, which may include criteria to determine acceptability such as  
16 inspection, testing, quality, delivery, and suitability for a parti-  
17 cular purpose. The criteria that will affect the bid price and be  
18 considered in evaluation for award must be objectively measurable,  
19 such as discounts, transportation costs, and total or life cycle  
20 costs. The invitation to bid must set out the evaluation criteria to  
21 be used. Criteria may not be used in bid evaluation if they are not  
22 set out in the invitation to bid.

23 (b) A contract based on total or life cycle costs may be awarded  
24 only when the chief procurement officer or, for construction contracts  
25 or procurements for the state equipment fleet, the commissioner of  
26 transportation and public facilities, determines in writing at the  
27 time of contract solicitation that the contract promotes overall  
28 economy for the purposes intended, encourages competition, is not  
29 unduly restrictive, and is in the best interests of the state.

1           Sec. 36.30.160. LATE BIDS; CORRECTION OR WITHDRAWAL OF BIDS;  
2 CANCELLATION OF AWARDS. (a) Bids received after the bid due date and  
3 time indicated on the invitation to bid may not be accepted unless the  
4 delay was due to an error of the contracting agency.

5           (b) Correction or withdrawal of inadvertently erroneous bids  
6 before or after bid opening, or cancellation of awards or contracts  
7 based on bid mistakes may be permitted in accordance with regulations  
8 adopted by the commissioner. After bid opening, changes in bid prices  
9 or other provisions of bids prejudicial to the interest of the state  
10 or fair competition may not be permitted. Except as otherwise provid-  
11 ed by regulation, a decision to permit the correction or withdrawal of  
12 a bid, or to cancel an award or contract based on a bid mistake, shall  
13 be supported by a written determination made by the procurement offi-  
14 cer. If a bidder is permitted to withdraw a bid before award, an  
15 action may not be maintained against the bidder or the bid security.

16           Sec. 36.30.170. CONTRACT AWARD AFTER BIDS. (a) Except as  
17 provided in (b) of this section, the procurement officer shall award a  
18 contract based on the solicited bids with reasonable promptness by  
19 written notice to the lowest responsible and responsive bidder whose  
20 bid conforms in all material respects to the requirements and criteria  
21 set out in the invitation to bid.

22           (b) The procurement officer shall award a contract based on  
23 solicited bids to the lowest responsible and responsive Alaska bidder  
24 if the bid is not more than five percent higher than the lowest non-  
25 resident bidder's. In this subsection, "Alaska bidder" means a person  
26 who

27           (1) holds a current Alaska business license;

28           (2) submits a bid for goods, services, or construction  
29 under the name as appearing on the person's current Alaska business

1 license;

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

5 (4) is incorporated or qualified to do business under the  
6 laws of the state, is a sole proprietorship, and the proprietor is a  
7 resident of the state or is a partnership, and all partners are resi-  
8 dents of the state; and

9 (5) if a joint venture, is composed entirely of ventures  
10 that qualify under (1) - (4) of this subsection.

11 (c) If a bidder qualifies under (b) of this section as an Alaska  
12 bidder, is offering services through an employment program as defined  
13 under AS 36.30.100(c), and is the lowest responsible and responsive  
14 bidder with a bid that is not more than 10 percent higher than the  
15 lowest bid of a nonresident, the procurement officer shall award the  
16 contract to that bidder.

17 Sec. 36.30.190. MULTI-STEP SEALED BIDDING. When it is con-  
18 sidered impractical to initially prepare a definitive purchase de-  
19 scription to support an award based on price, the procurement officer  
20 may issue an invitation to bid requesting the submission of unpriced  
21 technical offers to be followed by an invitation to bid limited to the  
22 bidders whose offers are determined to be technically qualified under  
23 the criteria set out in the first solicitation.

24 ARTICLE 3. COMPETITIVE SEALED PROPOSALS.

25 Sec. 36.30.200. CONDITIONS FOR USE. (a) Except as otherwise  
26 provided in this chapter, or unless specifically exempted by law, an  
27 agency contract shall be awarded by competitive sealed proposals if it  
28 is not awarded by competitive sealed bidding. Construction may only  
29 be procured by competitive sealed proposals if the conditions under