ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

3757 HSTA SB 341 - SB 356

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

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

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

[66]MPC §12-201.

[67]Id. §12-202-2(1).

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

[69]632 S.W.2d 465 (Ky. App. 1982).

[70]Id. at 467.

[71]Id.

[72]MPC §1-101(2).

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

Ombudsman

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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.

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.

I

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.

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

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 <u>all</u> 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;

B. 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(9)), "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.

B. 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 proposals; 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 17.050'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.

*

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

Sincerely,

John B. Chenoweth
Ombudsman

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	2 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 A81-0468, a complaint against the Division of Parks of the Department of Natural Resources.

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.

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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 37.05.230(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, A83-0831, 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 narrowly 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.

II

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 B 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 determiring 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:

A81-0839 and J82-0471: 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 8. 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 wnere or why you feel yours was the better proposal.

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

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 F83-0392. 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

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.

B. 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 norm. 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:

> -- F82-1[illegible]2 (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 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 36.98.035. 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 contractor 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.

JBC:pjc

RECORDS CERTIFICATION

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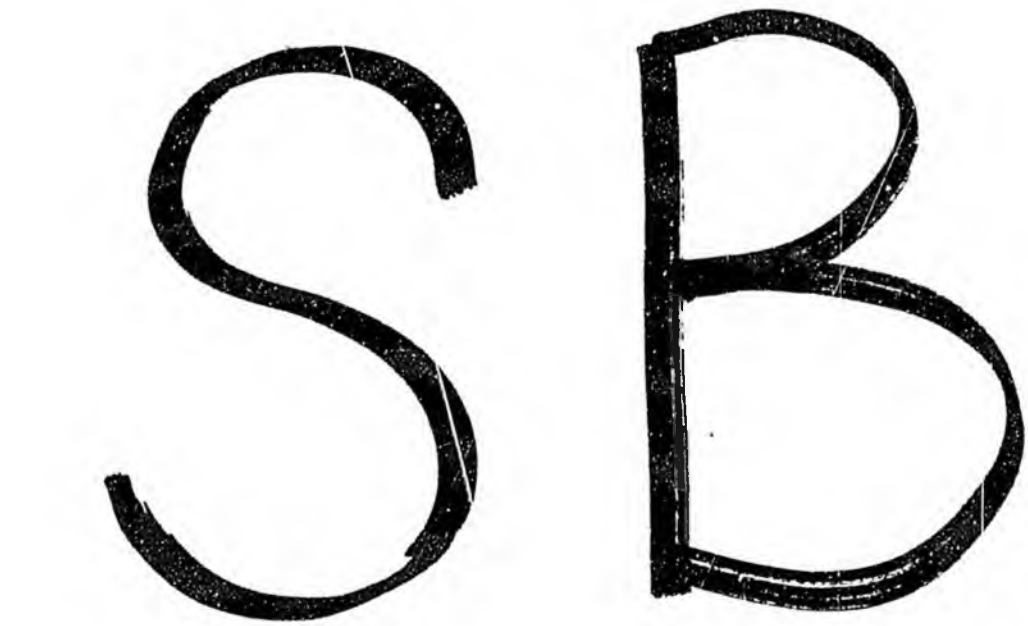
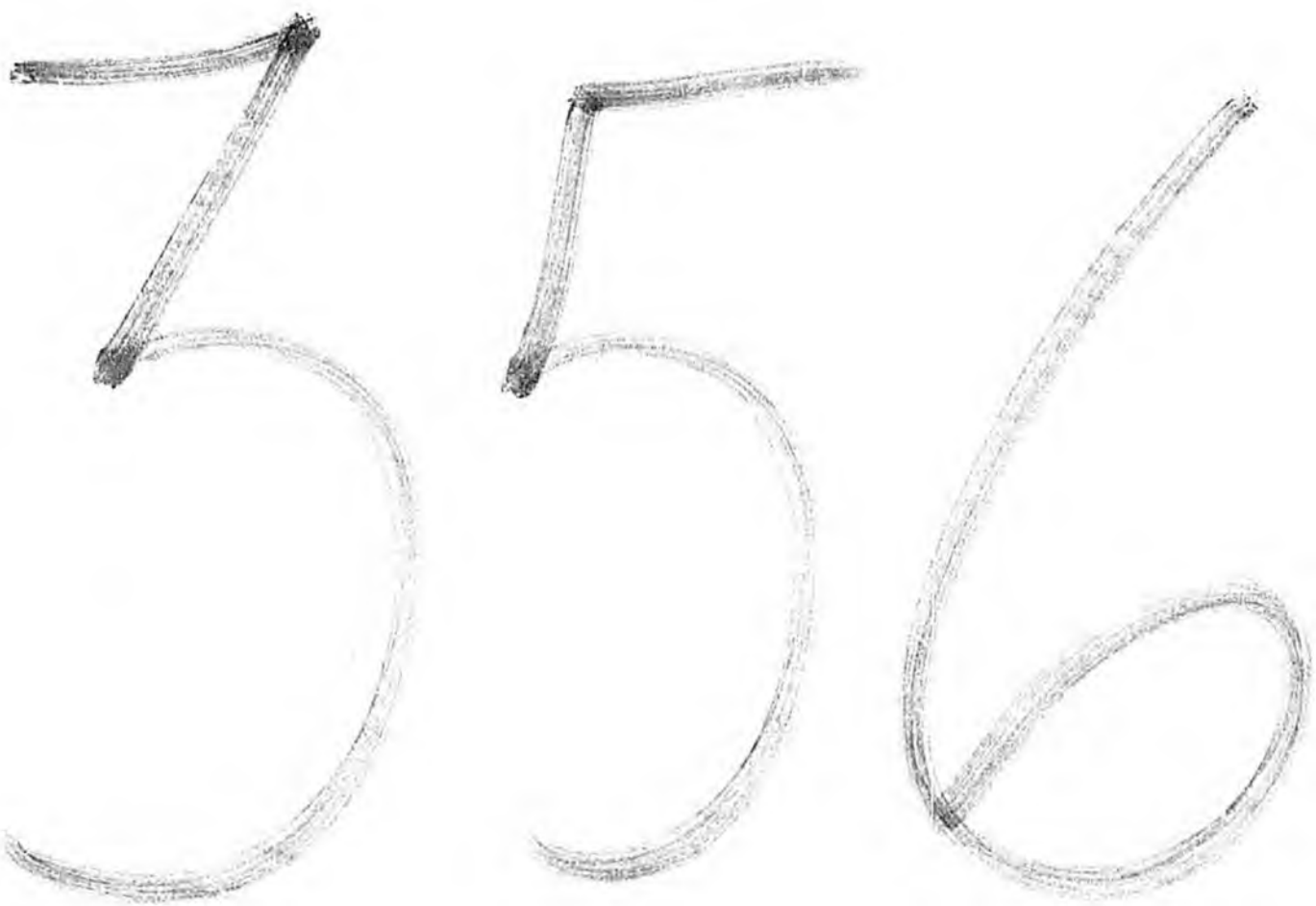
Signature of Camera Operator

9/11/89
Date

02-519 (REV 8/78)





April 25, 1986

ALASKA PUBLIC OFFICES COMMISSION

SB 356

LETTER OF INTENT

It is the intent of the Senate Finance Committee that candidates under this statute when contracting for public relations services give priority to Alaskan firms. If a candidate should choose a non Alaskan firm, a letter of explanation shall be provided to the Legislature. This includes contracts covering the creation and production of printed materials, such as type setting, photography and printing, creation of advertising materials, such as magazine advertisements and television commercials, as well as the media space and time for the appearance of these advertisements.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M May 7, 1986

SUBJECT: Election campaign financing; APOC
[CSSB 356(Finance) am]

TO: Representative Katie Hurley
Chair, House State Affairs Committee

FROM: Richard A. Bradley
Legislative Counsel

You have requested a sectional analysis of the above described bill.

As a preliminary matter, note that a sectional analysis or summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

A summary of the departures from AS 15.13 may be noted briefly.

SB 356 requires the registration of candidates and political action groups upon the occurrence of thresholds established in the bill.

The bill requires reports largely as they're required under existing law-- except that the report seven days after the election is not required.

The bill moves the contribution, loan and disclosure threshold to $250.

The law requires candidates to close out their campaigns after the election and to dispose of funds and debts at that time. A legislator on the ballot in the general election is required to close out the campaign account by December 31 of that year. Unpaid debts become personal debts; surplus

funds are disposed of (though the candidate or office holder may register for the next election and roll the funds forward).

The existing criminal penalty section is made more precise and converted entirely into civil penalties.

And SB 356 abandons the usage of "group" to describe what is otherwise known as a "political action committee" (PAC).

Section 1 of the bill adopts a new chapter AS 15.14. Note that sec. 13 of the bill repeals existing AS 15.13. The analysis will, for the remainder of the analysis of sec. 1, refer to sections by their AS 15.14 reference, i.e., Sec. 10 refers to AS 15.14.010.

Secs. 10 - 30 relate to the commission and its establishment.

Sec. 10 concerns "Applicability." It closely follows, except as indicated, AS 15.13.010.

Sec. 10(a) tracks a portion of AS 15.13.010(a) identically on applicability to state elections.

Sec. 10(b) closely tracks, though not identically, a portion of AS 15.13.010(a) as to its applicability to municipal elections. And note sec. 15 of the bill.

Sec. 10(c) is identical to a portion of AS 15.13.010(a).

Sec. 10(e) is new and provides that AS 15.14 does not apply to contributions or expenditures on state or municipal initiatives or referenda.

Sec. 20 establishes the "Alaska Public Offices Commission." It closely tracks AS 15.13.020.

Sec. 20(a) and (b) tracks AS 15.13.020(a). It addresses the establishment of the commission and provides for the same five members as before; see bill sec. 14.

Sec. 20(c) - (e) are new; they relate to the appointment of the commission members. The earlier versions of SB 356 had continued much of the "temporary law" that was found at AS 15.13.020(b) - (d) and (h)-- and had caused problems, I was advised. on the reappointment of members. I believe

that as rewritten, the language conforms the law to the understandings of what was intended.

Sec. 20(f) tracks AS 15.13.020(e). The section addresses prohibited conduct by commission members. It is unchanged.

Sec. 20(g) tracks AS 15.13.020(f). Compensation for members of the commission is increased from $50 to $100 per day.

Sec. 20(h) tracks AS 15.13.020(g). The section relates to the executive director and staff; the language is rationalized, without substantive change.

Sec. 20(i) tracks AS 15.13.020(i). The former confused language is rationalized.

Sec. 20(j) rationalizes a portion of AS 15.13.020(j). I believe no change occurs.

Sec. 20(k) tracks the latter portion of AS 15.13.020(j). The section relates to the availability of forms from the commission.

Sec. 20(m) tracks AS 15.13.020(k). the availability of reports to the public.

Sec. 30 tracks on AS 15.13.030. It relates to the "Duties of the Commission."

Secs. 40 - 100 relates to "Registration and Reports."

Sec. 40 relates to "Registration by Candidates." The idea of "registration" for candidates is new, although the commission has, in the past, become aware of the existence of the candidate by the requirements of AS 15.25.030(b).

It requires a registration with the commission within 10 days after the triggers established in sec. 40(a). It requires an identification of the office sought and provides that information required by AS 15.14.160 ("Campaign Officers") shall be supplied.

Sec. 50 relates to registration by PACs. It is somewhat analogous to AS 15.13.050 and 15.13.130(3). It requires registration on triggers established in sec. 50(a) and (b). Sec. 50(c) establishes the period during which the registration is valid. Sec. 50(d) prohibits the use of a name a

preexisting PAC may be using. Controlled PACs are described in Sec. 50(e) - (f). Sec. 50(g) requires the PAC to designate the year of the election for which it is concerned and whether it anticipates a continued existence.

Sec. 60, "Reports by Candidates of Contributions, Loans, and Expenditures," stipulates the reports required of a candidate. It is based loosely on AS 15.13.040.

Sec. 60(a) provides complete descriptions of the information required from candidates on contributions in excess of $250, for loans in any amount, and also information on contributions, expenditures, loans by the candidate to the campaign, expenditures records, and fundraisers. The periods of reports are stated. Special contribution, loan, and expenditure reports are required.

Sec. 60(b) advises when reports are due; it is similar to existing law except that the report a week after the election is deleted.

Sec. 60(c) deals with the special reports required for contributions, loan, or expenditures over $250.

Sec. 60(d) deals with the year end report.

Sec. 70, "Reports by PAC of Contributions, Loans, and Expenditures," stipulates the reports required from a PAC. It also is derived from AS 15.13.040 and is a section quite similar to sec. 60, as to candidates.

Sec. 70(a) provides complete descriptions of the information required from PACs on contributions in excess of $250, for loans in any amount, and also information on contributions, expenditures, information on contribution to candidates or PACs, expenditures records, and fundraisers. The periods for reports are stated in sec. 70(b). Special contribution, loan, and expenditure reports are required in sec. 70(c). A year end report is required under sec. 70(d).

Sec. 80, "Statement by Person Making Contribution or Expenditure," regulates contributions and independent expenditures in excess of $250. Reporting requirements are established.

Sec. 90 provides a definition of "Independent Expenditure." The concept is only indirectly covered in AS 15.13 (though

regulations of the commission, I believe, address the matter). It distinguishes a contribution from an independent expenditure as well as providing when a contribution is considered to have been authorized by a candidate.

Sec. 100, "Certification of Reports," establishes a statutory formula for report certifications required under the chapter.

Secs. 110 - 155 relates to "Contributions and Expenditures."

Sec. 110 relates to "Contributions by a Person." Sec. 110(a) prohibits any cash contributions. Sec. 110(b) limits an individual to a $1,000 contribution to a single candidate. Sec. 110(c) limits the ability of a PAC to accept contributions in excess of $1,000 from an individual. Sec. 110(d) permits a person to contribute any amount to an issue oriented PAC and a political party-- except as limited by AS 15.14.150(e) - (f) and (a) of the section. Sec. 110(e) that an individual may not make a loan or a loan guarantee to a candidate or a PAC.

Sec. 120 relates to "Contributions by a Political Action Committee".

Sec. 120(a) prohibits a PAC from making a contribution in the form of a cash payment to a candidate or another PAC. Sec. 120(b) limits a PAC to a contribution or expenditure (except for independent expenditures) of more than $1,000 in the aggregate a year to a candidate or PAC. Sec. 120(c) permits any amount to an issue oriented PAC or a political party. Sec. 120(d) prohibits loans and loan guarantees to a candidate or PAC. Sec. 120(e) provides that PACs sharing a majority of officers are treated as a single PAC for the limitations described in (a) or (b).

Sec. 130 relates to "Limitations on Accepting Contributions." Sec. 130(a) prohibits cash contributions. Sec. 130(b) prohibits contributions in excess of $1,000 in the aggregate a year from a person or a PAC. Sec. 130(c) limits a PAC's ability to accept a contribution in excess of $1,000 a year from a person or PAC (unless it is an issue oriented PAC). Sec. 130(d) prohibits a contribution in the form of a loan or loan guarantee to a candidate or PAC. Sec. 130(e) relates to contributions from corporations and their shareholders.

Sec. 140 relates to "Expenditures." Sec. 140(a) provides that a political party may make a contribution or expenditure without limitations. Sec. 140(b) permits a candidate to make expenditures "on behalf of the candidate's own campaign" with limitations. And sec. 140(c) permits independent expenditures (compare sec. 90) without limitation.

Sec. 150 describes "Prohibited Contributions." Sec. 150(a) prohibits fictitious or anonymous contributions and contributions by one person in the name of another; it also provides that a contribution by a corporation is not a contribution by a shareholder of the corporation (and vice versa--unless the shareholder owns "the controlling majority of shares in that corporation"). I note that the latter provision is an uncertain standard since "control" of a corporation is not a uniform 50 percent of the shares plus one share.

Sec. 140(b) requires the anonymous contribution to be either returned, if possible, or donated to a charitable corporation. Sec. 140(c) prohibits the acceptance of contributions prohibited under this section; it grants the candidate or PAC ten days to return the contribution after the character of the contribution is known (or should be known).

Floor amendments by the Senate added subsecs. (d) - (g). Sec. 150(d) provides that a candidate may accept contributions only from an individual or a political party. Sec. 150(e) provides that except for the issue-oriented PAC, a PAC may accept contributions only from an individual. Sec. 150(f) provides that a political party may accept a contribution only from an individual. Sec. 150(f) now provides that a PAC may not make a contribution to a candidate, another PAC, or a political party. As I write, I note that the language prohibiting the PAC from contributing to a political party appears to contradict the Senate Journal; the Senate Secretary has suggested that the Journal and the enrolled bill are both correct.

Sec. 155 describes "Permitted Cash Contribution" at fundraisers. A fundraiser is required to serve food, have a contribution for admission not in excess of $25, and have more than 25 paying participants.

Secs. 160 - 210 relate to "Campaign Conduct and Administration."

Sec. 160 regulates "Campaign Officers." Sec. 160(a) provides that a candidate and a PAC may appoint a campaign chairman. A candidate and a PAC are each required to appoint a campaign treasurer; if the candidate fails to make the appointment of a campaign treasurer, the candidate is campaign treasurer. Deputies may be appointed at any time. An individual who is requested to solicit contributions shall be appointed as campaign treasurers, either by the candidate or PAC. Information required at appointments is specified in sec. 160(b). Sec. 160(c) provides that an individual may not act as campaign chairman. campaign treasurer, or as a deputy campaign treasurer until the appointment is of record with the commission. Sec. 160(d) provides that vacancies shall be filled. A candidate and a PAC may receive contribution and make expenditures only in person (as to the candidate) or through a designated campaign officer. Sec. 160(e) specifies details of acceptance of a contribution. Sec. 160(f) provides that the candidate is responsible for the performance of campaign officers. The campaign chairman is responsible for the officers of the PAC.

In my opinion, the third and fifth sentence of sec. 160(a) were intended to supersede the latter part of sec. 160(a)--the third sentence; the latter sentence is proposed for deletion.

Sec. 170 relates to "Use of Campaign Funds." Sec. 170(a) provides that campaign funds may be used only to influence the election of a candidate or the passage or defeat of a ballot issue; they may also be used to repay a loan made to the campaign of the candidate. Sec. 170(b) prohibits use of the campaign funds to repay a loan not reported in a timely fashion as a loan by the candidate. Sec. 170(c) requires "surplus campaign funds" to be disposed of under sec. 190.

Sec. 180 relates to the "Termination of Campaign Activity and Closing of Campaign Accounts." Sec. 180(a) provides the dates by which various campaigns must be closed; for legislators campaigning in the general election the date is "December 31" of the year of the election. Sec. 180(b) prohibits a candidate from accepting a contribution after the date for closing the campaign account. Sec. 180(c) prohibits an expenditure, except to dispose of campaign funds, after the closing date for the account for (1) goods or services provided to the campaign, (2) campaign debts, or (3) loans from the candidate.

Sec. 190 relates to "Surplus Campaign Funds." Sec. 190(a) provides the areas where the "surplus" funds may be disposed of. Sec. 190(b) requires the disposal be completed before the final report of expenditures is filed under sec. 70. A candidate who is a public official may use campaign funds for office purposes (under sec. 190(a)(5)).

Sec. 200 relates to "Solicitation of Contributions." Sec. 200(a) and (b) prohibits solicitation while on the premises of a state or municipal office. Sec. 200(c) prohibits acceptances of contributions violating (a) and (b). Sec. 200(d) exempts regularly scheduled meeting of public unions.

Sec. 210 relates to the "Identification of Communications." It largely duplicates existing law.

Secs. 220 - 360 relates to "Violations, Civil Penalties, and Procedures."

Sec. 220 establishes the "Campaign Financing Violations in the First Degree." The section tracks the various substantive prohibitions and establishes civil penalties. The violation in the "first degree" have a common element of intention, falsity, or misleading acts.

Sec. 230 establishes "Campaign Financing Violations in the Second Degree." As with sec. 220, this section tracks the various substantive provisions and establishes civil penalties. The second degree violations have a common element of inadvertence or simple failure to act.

Sec. 240, "Payment of Civil Penalty", provides that a civil penalty may not be paid with campaign funds.

Sec. 250, "Removal from Office," is similar to existing law.

Sec. 260, "Limitations of Actions," requires a proceeding involving a violation of sec. 220 to be commenced within four years from the date of the violation. It requires a violation of sec. 230 to be commenced within two years from the date of the violation. Sec. 260(c) provides that a violation occurs on the day after the report, etc. was due.

Sec. 270 relates to "Investigations."

Sec. 280 relates to "Accusations," the equivalent of the complaint.

Sec. 290 regulates the "Notice of Defense."

Sec. 300 permits "Hearings."

Sec. 310 provides for "Imposition of Penalty."

Sec. 320 permits a "Summary Disposition of Violations."

Sec. 330 provides for "Confidentiality" of the information the commission obtains.

Sec. 340 permits "Judicial Review."

Sec. 350 provides for the "Powers of the Commission" relative to the investigations.

Sec. 360 provides that the attorney general is "Legal Counsel" for the commission.

Sec. 900, "Definitions," defines "candidate", "contribution", "expenditure", "individual", "municipality", "person", "political action committee", and "political party". I note that each definition seems straightforward except that

(1) "person" has its usual meaning but does not include "an entity organized to influence an election";

(2) "political action committee" includes the definition of a "political party".

Secs. 2 - 12 of the bill conform existing law outside AS 15.13 or AS 15.14 to the changes made in the enactment of AS 15.14.

Sec. 13 repeals AS 15.13 and AS 15.56.010(1) and (2); the latter sections provide:

> Sec. 15.56.010. CAMPAIGN MISCONDUCT IN THE FIRST DEGREE. (a) A person commits the crime of campaign misconduct in the first degree if he
>
> (1) knowingly circulates or has written, printed or circulated a letter, circular, or publication relating to an election, to a candidate at an election, or an election proposition or question without the name and address of the author appearing on its face;

(2) knowingly prints or publishes an advertisement, billboard, placard, poster, handbill, paid-for television or radio announcement or other communication intended to influence the election of a candidate or outcome of a ballot proposition or question without the words "paid for by" followed by the name and address of the candidate, group or individual paying for the advertising or communication and, if a candidate or group, with the name of the campaign chairman; or

* * *

Sec. 14 continues in office the existing members of the commission until the normal expiration of their terms.

Sec. 15 confirms an election held by a municipality under AS 15.13.010(a) as the election otherwise required under AS 15.14.010(b) as enacted in this Act (to exempt municipal officers from the Act).

Sec. 16 requires a close out of the election campaigns conducted this year under the provisions of the section and AS 15.14.

Sec. 17 provides that the Act applies to election campaign activities taking place after January 1, 1987.

Sec. 18 provides an effective date of January 1, 1987.

If I may be of further assistance, please advise.

RAB:mkr
m5/078

ALASKA PUBLIC OFFICES COMMISSION

Administrative Regulations

AS 15.13 - Campaign Disclosure,

Complaints and Hearings, General Provisions

January 4, 1986

In 1985, the Alaska Public Offices Commission added or amended seventeen administrative regulations, deleting seven. The new regulation on CONTRIBUTIONS, 2 AAC 50.313, replaces information previously found under NON-MONETARY CONTRIBUTIONS, TRANSPORTATION EXPENDITURES, PROFESSIONAL SERVICES, and LOANS. Language about GROUPS, 2 AAC 50.314, replaces REPORTING BY BUSINESS AND TRADE ASSOCIATIONS and REPORTING BY A BUSINESS ENTITY OR LABOR ORGANIZATION.

New concepts were introduced in three specific instances. DESIGNATED CAMPAIGN DEPOSITORY, 2 AAC 50.319, requires campaigns to label, identify, report, and limit activity to specific bank accounts, if their transactions exceed $5000. POST ELECTION CAMPAIGN FUNDRAISING, 2 AAC 50.410, establishes a requirement for commission review of post-election fundraising if campaign debts are not paid off in the calendar year after an election. ADVISORY OPINIONS, 2 AAC 50.905, establishes a procedure for opinion requests of proposed activity.

Several policy changes were made of varying impact. MUNICIPALITIES, 2 AAC 50.360, now permits municipal entities to report their ballot issue and bond information efforts on the same forms used by individuals. PERSONAL CONTRIBUTIONS BY A CANDIDATE, 2 AAC 50.316, in addition to clarifying the use of personal assets, funds from property sales, jointly owned goods by a candidate, now requires that candidates report their own non-monetary contributions, such as goods from a prior campaign. EARLY CAMPAIGNING, 2 AAC 50.380, now permits state candidates to begin campaigning once they have filed a "letter of intent" with the Commission (formerly, they had to first register with the Division of Elections). CONTRIBUTIONS IN THE NAME OF ANOTHER, 2 AAC 50.357, prohibits parent organizations from directing contributions through their subsidiaries, sub-chapters or local units; prohibits parents from contributing in the name of their children; and prohibits employers from contributing in the name of their employees. Prior to 1986 corporate parent-subsidiary contributions had been permitted if the relationship was disclosed when the contributions were reported.

Of special interest to campaigns which have had difficulty meeting filing deadlines is CIVIL PENALTY ASSESSMENTS 2 AAC 50.390: the minimum initial CPA has been raised to $10 per day for all reports, except the 7 Day Pre-election and the 24 Hour reports, where the minimum has been raised to $50 per day.

The remainer of the regulation changes were either limited in their impact or clarifications or formalization of prior policies. Please note the changes below: PROPER IDENTIFICATION, 2 AAC 50.369 - formalizes prior policy that envelopes do not have to be identified as "paid for by". OBJECTS TOO SMALL TO BE IDENTIFIED, 2 AAC 50.370, - formalizes that objects smaller than 3 & 1/2" x 5" need not be identified, and that all media advertizing must be identified. AVAILABILITY OF REPORTS FILED WITH THE COMMISSION 2 AAC 50.910 - formalizes policy that reports filed with the Commission may be obtained at cost (usually 10¢ per page). COMPLAINTS, PRELIMINARY INVESTIGATION, and HEARINGS, 2 AAC 50.450, .460 and .470 deal with procedures to be followed in the event that a complaint is filed, a preliminary investigation is made, and a hearing results.

ALASKA ADMINISTRATIVE CODE
Title 2. DEPARTMENT OF ADMINISTRATION
ALASKA PUBLIC OFFICES COMMISSION REGULATIONS

CHAPTER 50. CONFLICT OF INTEREST, CAMPAIGN DISCLOSURE AND REGULATION OF LOBBYING

Articles 2, 3. & 5.

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2 AAC 50.310. FILING. (a) All reports that are required to be filed under the provisions of AS 15.13 and this chapter must be received by the commission on or before the due date. Except for the 24 Hour Report, "received" means either

(1) hand-carried to the commission's central office or its branch office in the state capital; or

(2) postmarked. The date shown by the postmark is presumed to be the date it was deposited in the United States mail.

(b) The 24 Hour Report required by AS 15.13. 110(b) must be filed with the commission's central office either by a collect telegram or by actual physical delivery within the prescribed time. 24 hour Reports may not be mailed.

(c) All forms will be available at the commission's central and branch offices, at district offices during state election years, and at the participating municipalities. (Eff. 5/14/80, Register 74)

Authority: AS 15.13.020(j) and (k); AS 15.13.030(10)
AS 15.13.110(a) and (b)

2 AAC 50.313. DEFINITION OF "CONTRIBUTION." (a) In 2 AAC 50.310 — 2 AAC 50.405, except as otherwise provided in this section, "contribution" includes a payment, gift, subscription, loan, advance, transfer, deposit of money, services, or anything of value made by a person or group for the purpose of influencing an election for state or municipal office or influencing the passage or defeat of a ballot proposition or question; and includes a personal contribution as described in 2 AAC 50.316.

(b) In this section and in 2 AAC 50.321, "loan" includes a guarantee, endorsement, and any other form of security. The following apply to loans:

(1) A loan that exceeds the contribution limitations of AS 15.13.070 is unlawful, whether or not it is repaid.

(2) A loan is a contribution at the time it is made.

(3) Except for a personal contribution loan as described in 2 AAC 50.316(d), a loan is a contribution by each endorser or guarantor. Each endorser or guarantor is considered to have contributed that portion of the total amount for which he or she agreed to be liable in a written agreement. If the agreement does not state the portion of the loan for which each endorser or guarantor is liable, the loan is considered a loan by each endorser or guarantor in the same proportion that each endorser or guarantor bears to the total number of endorsers or guarantors.

(c) In this section, "money" includes currency of the United States or of any foreign nation, checks, money orders, or any negotiable instruments payable on demand.

(d) In this section, "anything of value" includes facilities, equipment, polling information, supplies, advertising services, membership lists, mailing lists, any item of real or personal property, and personal services of any kind, the cost or consideration for which is paid by a person other than the candidate or group for whom the services are rendered.

(e) The provision of goods or services without charge, or at a charge which is less than the usual and normal charge for the goods and services in the market, is a contribution. If goods or services are provided at less than the usual or normal charge in the market, the amount of the nonmonetary contribution is the difference between the usual and normal charge for the goods or services at the time of the contribution and the amount charged.

(f) The entire amount paid to attend or participate in a fundraiser or other political event, and the entire amount paid as the purchase price for a fundraising item sold by a group or candidate, is a contribution.

(g) The payment by a person of compensation for the personal services of another person to a group or candidate for any purpose, except for legal and accounting services necessary to complete reports, is a contribution. No contribution results in the following circumstances:

(1) when an employee paid on an hourly or salaried basis engages in political activity during what would otherwise be a regular work period, if the time spent is made up by the employee within a reasonable period of time;

(2) when an employee paid on a commission or piecework basis, or an employee paid only for work actually performed whose time is considered the employee's own, engages in political activity during normal working hours;

(3) if time used by the employee during normal working hours to engage in political activity is bona fide vacation or other earned leave time.

(h) The extension of credit by a person to a candidate or political group for a length of time beyond normal business practice is a contribution, unless the creditor has made a commercially reasonable attempt to collect the debt, or pursued its remedies in a manner similar in intensity to that employed by the creditor in pursuit of a non-political debtor, including lawsuits if filed in similar circumstances.

(i) A debt owed by a political group or candidate, which is forgiven or settled for less than the amount owed is a contribution. The commission will, in its discretion, consider the following factors before directing staff to commence a preliminary investigation:

(1) whether, at the time the debt was incurred, both the creditor and the candidate or political group expected full repayment within a reasonable period of time;

(2) whether the campaign has made a good faith effort to repay all outstanding debts;

(3) whether the creditor has taken steps it normally takes against debtors in the same financial condition as the campaign;

(4) whether the proposed settlement agreement between the creditor and the campaign is similar to previous settlements made by the creditor and other debtors;

(5) whether the campaign has treated equally all creditors since it became aware of the difficulty in repaying all debts;

(6) whether the proposed settlement agreement is similar to others proposed by the campaign.

(j) An expenditure made by a person in cooperation, consultation, or in concert with, or at the request or suggestion of a candidate, the candidate's campaign committee, campaign agents. or campaign consultants is a contribution to the candidate. The financing by a person of the issuance, republication, or distribution of a broadcast or of a written, graphic, or other form of campaign material provided by the candidate, the candidate's campaign committee, campaign agents, or campaign consultants is a contribution to the candidate. This includes an expenditure:

(1) based on information about the candidate's plans, projects, or needs provided by the candidate or the candidate's campaign agents;

(2) made by or through a person who is, or has been, authorized to raise or expend money for the candidate, who is, or has been, an agent of a candidate's campaign, or who has received any form of compensation or reimbursement from the candidate, members of the candidate's campaign committee, campaign agents, or campaign consultants;

(3) made by any person or group based on data from a candidate's pollster or campaign consultant or any other person who has received, or is receiving, compensation or reimbursement from the campaign;

(4) made by a political group for soliciting contributions to be paid or delivered directly to a candidate or the candidate's campaign agents.

(k) In (j) of this section, "campaign agents" includes all officers, campaign managers, treasurers, deputy treasurers, campaign consultants, and persons who reasonably appear to have authority to make expenditures and solicit contributions for a candidate's campaign.

(l) In 2 AAC 50.310 — 2 AAC 50.405, "contribution" does not include the following payments, services, or other things of value:

(1) costs incurred in covering or carrying a news story by a broadcasting station, newspaper, or periodical of regular publication, unless the

facility is owned by or controlled by a political party, political group, or candidate; in that case, the cost of the news story is a contribution, unless the news story is a bona fide news account that is part of a general pattern of campaign-related news accounts which gives reasonably equal coverage to all opposing candidates in the circulation or listening area.

(2) a non-monetary contribution or in-kind donation of a single item with a usual and normal cost of $50.00 or less.

(3) a payment made by any individual for his or her own travel expenses, if such payments are voluntary and are made without any understanding that they will be directly or indirectly repaid.

(4) a payment is made by a business, corporation, trade association, labor organization, or other organization not organized primarily to influence elections to communicate directly with its members or employees, or their families, on any subject, if the communication is of the same format and nature used by the organization when it has communicated in the past on nonpolitical subjects, does not request members or their families to do anything other than exercise the right to vote, and does not solicit individual contributions to a clearly identified candidate or group chosen by the organization.

(5) a gift, subscription, loan, advance, or deposit of money or anything of value made with respect to a recount of a state or municipal election.

(m) A contribution made by a married individual is not attributed to that individual's spouse, unless otherwise specified in writing by the spouse at the time the contribution is made. (Eff. 1/4/86, Register 97)

Authority: AS 15.13.030(10) AS 15.13.070
AS 15.13.040 AS 15.13.130

2 AAC 50.314. DEFINITION OF "GROUP"; REPORTING BY BUSINESS. (a) In 2 AAC 50.310 — 2 AAC 50.405, "group" includes

(1) every combination of two or more persons who are elected, appointed, or otherwise chosen, or who cooperate for the purpose of raising, soliciting, collecting, or disbursing money or anything of value, or for directing or controlling those activities to secure or defeat the election to public office of an individual or candidate or to secure or defeat a ballot proposition;

(2) a political action committee, draft group, association, club, corporation, partnership, trade association, incorporated or unincorporated association, or labor organization organized to aid or promote the nomination, election, defeat, or recall, of any candidate for political office or to aid the passage or defeat of a ballot proposition;

(3) two or more persons who jointly make a contribution in the name of another as described in 2 AAC 50.357.

(b) A corporation, partnership, sole proprietorship, trade association, fraternal or charitable organization, incorporated or unincorporated association, firm, or business trust may report its contributions and expenditures as required by AS 15.13.040(d) and (e) as an individual* if

(1) all contributions and expenditures to influence the outcome of an election are made from the organization's general day-to-day operating account;

(2) the organization does not conduct a fundraising drive or assessment among its members or employees for the purpose of influencing an election;

(3) the organization does not exercise direction, control, or discretion over the choice of the recipient candidate or group, and the organization does not exercise direction, control, or discretion over the expenditure of money or other things of value collected, pooled, solicited, or otherwise paid by others for the purpose of influencing an election. (Eff. 1/4/86, Register 97)

Authority: AS 15.13.030(10) AS 15.13.130(3)
AS 15.13.040

2 AAC 50.315. CONTRIBUTION LIMITATION EXEMPTION. (a) Groups that nominated a candidate for governor who received at least three percent of the total vote cast at the 1982 general election for governor are considered to be exempt from the contribution limitation set out in AS 15.13.070(a).

(b) Until the effective date of a statutory definition of "political party" that replaces AS 15.60.010(20) as it exists on the effective date of this section (and was held invalid in Vogler v. Miller, 660 P.2d 1192 [Alaska 1983]), a group, other than a group described in (a) of this section, desiring an exemption from the contribution limitation set out in AS 15.13.070(a) must submit to the commission an application for exemption. In accordance with (c) of this section, the commission will review the application and, in its discretion and on a case-by-case basis, grant the exemption.

(c) Among the criteria which will be considered in deciding whether to grant an exemption are:

(1) an organized membership, composed of registered voters, which represents a political program;

*APOC Note: Groups report on "Campaign Disclosure Statements." Individuals report on "Statement of Contributions" Form 15-5 or on "Statement of Expenditures" Form 15-6.

(2) prior history as a political group under AS 15.13.050 including the receipt of substantial contributions and the disbursement of substantial expenditures made for the purpose of influencing the election of legislative candidates in more than one district; and

(3) the percentage of votes received by a statewide candidate nominated in the name of the group in the preceding general election.

(d) Groups satisfying the criteria of (a) of this section and groups granted exemptions under (b) of this section are subject to the requirement that political parties report contributions and expenditures as provided by AS 15.13. (Eff. 6/29/84; Register 90; am 1/4/86, Register 97)

Authority: AS 15.13.030(10) AS 15.13.070
AS 15.13.040

2 AAC 50.316. PERSONAL CONTRIBUTIONS BY A CANDIDATE. (a) A candidate may make unlimited personal contributions from assets which, under Alaska law, the candidate had legal right of access to or control over and to which the candidate had legal and rightful title at the time he or she became a candidate. These assets include salary and other earned income from bona fide employment; dividends; proceeds from the sale of investments; bequests to the candidate; income from trusts established before candidacy; income from trusts established by bequest after candidacy; and gifts of a personal nature which had been customarily received before candidacy.

(b) A candidate may use a portion of jointly owned assets as a personal contribution. The portion of the jointly owned assets that may be used is the candidate's share under the instruments of conveyance or ownership. With respect to spouses, if no specific share is indicated by an instrument of conveyance or ownership, the value of one-half of the property used is considered the personal funds of the candidate. In the case of property jointly owned by a non-spouse, if there is no instrument of conveyance or ownership, the portion of the asset belonging to the candidate is the pro rata share of the purchase price paid by the candidate, or, if no purchase was made, the amount determined by dividing the present value by the number of owners.

(c) A candidate's donation of goods remaining from a prior campaign is a personal contribution.

(d) A loan of money by a regulated banking institution to a candidate is a personal contribution if the loan is made in accordance with applicable banking laws and regulations; bears the usual and customary interest rate for the category of the loan involved; is evidenced by a written instrument; and is subject to a due date or amortization schedule. Loans under this section are reported as a candidate's personal contribution.

(e) The absolute sale of all legal and equitable interest of a candidate's real or personal property is not a contribution from the purchasers if the proceeds are received by a candidate in a legitimate arm's length transaction documented in writing. Sale proceeds used by a candidate in a campaign must be reported as personal contributions. (Eff. 1/4/86, Register 97)

Authority: AS 15.13.030(10) AS 15.13.070
AS 15.13.040 AS 15.13.130

2 AAC 50.319. DESIGNATED CAMPAIGN DEPOSITORY. (a) Each candidate and political group intending to raise or spend more than $5,000 in a calendar year shall designate on a registration statement or on the first campaign disclosure statement filed with the commission, one or more regulated banking institutions as its campaign depository or depositories. Each account title must indicate that it is a campaign account.

(b) All monetary contributions to, and expenditures by, a candidate or political group must be deposited to or made from a designated campaign depository.

(c) A candidate or political group required by (a) of this section, to designate a campaign depository may obtain and use credit cards in making travel-related campaign expenditures for transportation, lodging, meals, and other expenses in connection with traveling for campaign purposes. The credit card account name must indicate that it is a campaign account.

(d) Contributions that appear to be illegal must, within ten days after receipt, be returned to the contributor.

(e) A campaign treasurer shall make his or her best efforts to determine the legality of a contribution. If a contribution cannot be determined to be legal, a refund must be made within a reasonable time, and the treasurer shall note the refund by amending the current report or noting the change on the next required report. Alternatively, the contribution may be deposited into the campaign depository and reported. If it is deposited, the treasurer shall make and retain a written record noting the basis for the appearance of illegality. A statement noting that the legality of the contribution is in question must be included in the next required report. (Eff 1/4/86, Register 97)

Authority: AS 15.13.030 AS 15.13.060
AS 15.13.050 AS 15.13.070

2 AAC 50.320. GENERAL RECORDKEEPING REQUIREMENTS FOR CANDIDATES AND GROUPS. (a) Every candidate and group required to report contributions or expenditures under the provisions of AS 15.13 shall maintain detailed records of all contributions received and expenditures made in accordance with the uniform methods of bookkeeping set out in the commission's bookkeeping guide.

(b) A candidate or his treasurer, and the treasurer of a group, may issue a receipt, and shall record the receipt of every contribution received, unless otherwise exempted by this chapter, regardless of the dollar amount or value of the contribution. While the identity of a person who has contributed no more than $100 to a campaign is not required to be individually reported by the treasurer on a campaign disclosure report, the name of such a contributor, along with the amount and type of his contribution, must be recorded by the treasurer and maintained by the treasurer, for comparative purposes, in case that person makes additional contributions which total over $100.

(c) The identity of a person who has contributed over $100 in the aggregate per year to a candidate's or group's campaign must be reported in accordance with 2 AAC 50.321.

(d) Each bookkeeping record required under this section shall be maintained by the candidate or the treasurer of a group and may not be destroyed for a period of four years from the date of the contribution. The records shall be available for inspection by the commission upon request of the commission. (Eff. 5/14/80, Register 74)

Authority: AS 15.13.020(2) AS 15.13.040
AS 15.13.030(10) AS 15.13.120(e)

2 AAC 50.321. REPORTING CONTRIBUTIONS AND EXPENDITURES. (a) Each candidate or group filing reports under AS 15.13 must identify

(1) each monetary contribution, or aggregate of contributions from the same contributor, which totals in excess of $100 by reporting

(A) the date received;

(B) the check number;

(C) the name and address of the contributor;

(D) the principal occupation and employer of the contributor; and

(E) the amount;

(2) each non monetary contribution, or aggregate of non monetary contributions from the same contributor, valued at more than $100 a year, by reporting

(A) the date received;

(B) the name and address of the contributor;

(C) the principal occupation and employer of the contributor;

(D) a description of the contributions; and

(E) its estimated fair market value;

(3) each loan, or aggregate of loans from the same contributor which totals in excess of $100, by reporting

(A) the date received;

(B) the name and address of the lender, guarantor or cosigner;

(C) the principal occupation and employer of the lender, loan guarantor or cosigner;

(D) the interest rate; and

(E) the amount;

(4) each paid expenditure by reporting

(A) the date of the payment;

(B) the check number;

(C) the name and address of the payee;

(D) the purpose of the expenditure; and

(E) the amount;

(5) each accrued expenditure by reporting

(A) the date the expenditure was incurred;

(B) the name and address of the business or individual with whom the debt was incurred;

(C) the purpose of the accrued expenditure; and

(D) the amount.

(b) When reporting monetary and non-monetary contributions or loans, a cumulative total must be kept by each candidate or group of the contributions (including loans) made to it, regardless of the total, and reported pursuant to (a) of this section when

(1) monetary contributions by the same contributor bring the total to over $100; or

(2) nonmonetary contributions by the same contributor bring the estimated total value to over $100; or

(3) loans by the same lendor, guarantor, or cosigner bring the total to over $100; or

(4) a combination of monetary or nonmonetary contributions or loans by the same contributor brings the total to over $100. (Eff. 7/22/78, Register 67)

Authority: AS 15.13.030(10) AS 15.13.130(2) and (4)
AS 15.13.040(a) and (b)

2 AAC 50.322. RECORDKEEPING REQUIREMENTS FOR AUCTIONS AND GARAGE SALES. Repealed 5/14/80.

2 AAC 50.323. RECORDKEEPING REQUIREMENTS FOR CONTRIBUTIONS RECEIVED FROM THE SALE OF CAMPAIGN MATERIAL. Repealed 5/14/80.

2 AAC 50.324. SHARED CAMPAIGN REPORTING. Except for expenditures by the candidates for governor and lieutenant governor of the same political party who have been nominated to run in the general election, the following provisions apply to all candidates and groups, other than a political party, subject to the provisions of AS 15.13 and this chapter:

(1) The use, by one candidate, of the money, goods or services raised or generated by his campaign, to influence the election of another candidate, is considered a contribution and cannot exceed the $1000 limitation set by AS 15.13.070(a); nothing in AS 15.13 or this chapter, however, limits an individual's right to make any expenditure whatsoever to influence the election of a candidate, so long as that expenditure is not made at the suggestion of that candidate, directly or indirectly paid for by that candidate, or otherwise controlled by that candidate.

(2) An expenditure made by one group, other than a political party, on behalf of another group which is controlled by a candidate is considered a contribution and may not exceed the $1000 limitation set by AS 15.13.070(a).

(3) A candidate may not join his campaign committee with that of one or more candidates in order that they may file a single report of their joint campaign, nor may a group join with one or more groups in order that they may file a single report of their joint efforts.

(4) Candidates or groups prohibited from forming a joint campaign under (3) of this section may share in campaign efforts, under (5) of this section, so long as they keep separate campaign accounts and file separate statements of their contributions and expenditures under AS 15.13 and 2 AAC 50.

(5) Two or more candidates, or two or more groups, may share in campaign efforts so long as the cost of, and receipts from, shared efforts are allocated equally to each participating candidate or group's campaign.

(6) So long as the costs of, and receipts from, shared efforts are allocated equally to each participant of a shared campaign, neither the costs or receipts are considered as a contribution from one participant to any of the other participants.

(7) Each candidate or group filing reports pursuant to AS 15.13 and 2 AAC 50 must complete an APOC Form 15-SA, the "Shared Campaign Activities" form, which represents his or its proportionate share of the receipts and expenditures of a shared campaign effort.

(8) A proportionate share of the amount of an expenditure benefiting one or more candidates, or one or more groups, of a shared campaign effort, but paid for in full by one of the candidates, or by one of the groups, will be considered a contribution by

(A) the paying candidate to the other candidates; or

(B) the paying group to the other groups.

(9) Media communications regarding a shared campaign activity are considered properly identified so long as the identification includes the words "paid for by" and the name of each candidate or group sharing in the cost of the communications. The address and treasurer* of each participating candidate or group need not be listed. However, if a communication is paid for in its entirety by only one of the participants then, in accordance with 2 AAC 50.369, full and proper identification is required. (Eff. 7/22/78, Register 67; am 5/14/80, Register 74; am 6/29/84, Register 90)

Authority: AS 15.13.030(10) AS 15.13.070(a)
AS 15.13.040(a) and (b) AS 15.13.090

2 AAC 50.325. RECORDKEEPING REQUIREMENTS FOR NONMONETARY CONTRIBUTIONS. Repealed 1/4/86.

2 AAC 50.326. RECORDKEEPING REQUIREMENTS AND EXEMPTIONS WHEN REPORTING A FUND-RAISER. (a) A candidate or his treasurer, and the treasurer of a group, shall report all the contribution and expenditure activity related to a campaign fund-raiser in a format designated by the commission, and in accordance with this section. Fund-raisers sponsored in conjunction with several candidates or groups are viewed as shared fund-raising activities and, while subject to the provisions of this section, must be reported separately on APOC Form 15-3SA and in accordance with 2 AAC 50.324.

* has been changed to chairman in the statute.

(b) When reporting a fund-raiser, a candidate or his treasurer, and the treasurer of a group, shall state the total number of contributing participants, the date and place where the event was held, if applicable, a description of the type of fund-raising activity, and the total costs of, and receipts from, the event.

(c) For the purposes of this section, "fund-raiser" includes, but is not limited to, a garage sale; a raffle or drawing; an auction; a spaghetti feed or pot-luck dinner; the sale of campaign material, such as posters, buttons, stickers, clothing, key chains and ashtrays; or a sponsored concert.

(d) The requirement in AS 15.13.040 and 2 AAC 50.320 that a candidate or his treasurer, or the treasurer of a group, must record the name of every person making a contribution, regardless of the amount of that contribution, does not apply to events which meet the following criteria:

(1) fund-raisers, similar in nature to spaghetti feeds, bingo games, dances, or concerts, where

(A) there are 25 or more paying participants; and

(B) except as described in (f) of this section, the cash amount received from any one person does not exceed $50;

(2) fund-raisers, such as a raffle, lottery or a drawing, where

(A) 25 or more tickets are sold; and

(B) except as described in (f) of this section, the price of a ticket or the amount received from any one person purchasing chances does not exceed $50;

(3) fund-raisers, the income from which is based on the sale of campaign material, where, except as described in (g)

(A) the price of an item being sold does not exceed $10; or

(B) the amount received from any one person purchasing items does not exceed $50;

(4) fund-raisers, such as garage sales and auctions, where, except as described in (g)

(A) the fair market value of an item donated for sale or auction does not exceed $50; or

(B) the amount received from any one person purchasing items at the garage sale or auction does not exceed $50.

(e) When reporting receipts from a fund-raiser which meets the recording exemption set out in (d) of this section, the candidate or his treasurer, or

the treasurer of a group, need only report the total amount of contributions received from or generated by the fundraiser, along with the total number of paying participants, tickets sold, or items purchased, as applicable.

(f) If a person contributes in excess of the exempted amounts stated in (d)(1)(B) or (d)(2)(B) of this section, then the name of that person, and the amount and type of that contribution, must be recorded as set out in 2 AAC 50.320.

(g) If the cost of or value of an item exceeds the exempted amount, or if a person contributes or pays in excess of the exempted amounts stated in (d)(3) or (4), then the name of that contributor or buyer must be recorded as set out in 2 AAC 50.320.

(h) A contribution made by a person to attend or otherwise participate in a "fund-raiser," as defined in (c) of this section, whether or not exempted from full recording under this section, may not be received by or on behalf of a candidate in violation of AS 15.13.070(a). (Eff. 5/14/80, Register 74; am 5/24/81, Register 78; am 6/29/84, Register 90)

Authority: AS 15.13.030(10)
AS 15.13.040

2 AAC 50.330 REPORTING CAMPAIGN EXPENDITURES FOR TRANSPORTATION. Repealed 1/4/86.

2 AAC 50.332. REPORTING ZERO CONTRIBUTION OR EXPENDITURE ACTIVITY. (a) Each candidate or group required to file a full report of all contributions received and expenditures made in accordance with AS 15.13 and this chapter shall report in accordance with the reporting schedule set out in AS 15.13.110(a), regardless of the amount of their reportable contributions or expenditures. In the absence of any contribution or expenditure activity whatsoever during a reporting period, each candidate or group not already exempt from reporting under (b) or (c) of this section shall submit by the appropriate due date the "Short Form" on Schedule A of the Campaign Disclosure Statement certifying that no contributions have been received or expenditures made.

(b) A candidate who does not intend to receive or accept contributions, or make expenditures during his campaign for municipal or state public office, including any personal campaign contributions or expenditures, may file APOC Form 15-0, the "Campaign Reporting Exemption Form." A candidate who files the exemption form is not required to submit any other reports to the commission concerning his campaign. The reporting exemption is revoked if a candidate accepts contributions or spends money to influence his election. A candidate whose exemption is revoked must immediately register his change of status on APOC Form 15-1 and, in accordance with AS 15.13.110, must disclose his campaign contribution and expenditure activity beginning with the first campaign disclosure report due following his change in status. Failure to report campaign

contribution or expenditure activity after the reporting exemption is revoked subjects the candidate to both civil and criminal penalties for noncompliance with the reporting requirements of AS 15.13 and 2 AAC 50.

(c) The treasurer of a political party subdivision or political action committee previously registered with the commission which does not intend to receive or accept contributions, or make expenditures, during a municipal campaign may, in accordance with the requirements set forth in (b) of this section, file APOC Form 15-0. (Eff. 7/22/78, Reg. 67; am 5/14/80, Reg. 74)

Authority: AS 15.13.030(10) AS 15.13.110
AS 15.13.040(a) and (b)

2 AAC 50.333. REPORTABLE DATE OF A CONTRIBUTION. A contribution is considered received, and reportable as such, on the day in which that contribution is in the possession of a candidate, or a treasurer or deputy treasurer of a candidate or group, in accordance with AS 15.13.070(e) and this chapter. (Eff. 7/22/78, Reg. 67)

Authority: AS 15.13.030(10)
AS 15.13.070(e)

2 AAC 50.334. PERSONS WHO MAY ACCEPT CONTRIBUTIONS. (a) A candidate's campaign committee, or a group, may authorize a person who is not registered as a deputy treasurer to accept or solicit campaign contributions on its behalf for any single event. Campaign committees or groups are not in violation of AS 15.13.070(e) if contributions collected by the authorized person are turned over to a candidate, treasurer, or deputy treasurer of the intended committee or group within 72 hours.

(b) An individual who is, or will be, fund-raising on a regular basis throughout a political campaign must be registered as a deputy treasurer in accordance with AS 15.13.060(e).

(c) Individuals that have not been "authorized" to accept campaign contributions by either a candidate or his treasurer, or the treasurer of a group, are prohibited from collecting campaign contributions on behalf of a candidate's campaign committee or a group. (Eff. 4/28/79, Register 70; am 5/14/80, Register 74)

Authority: AS 15.13.030(10) AS 15.13.070(e)
AS 15.13.060 AS 15.13.130(2)

2 AAC 50.340. EXPENDITURES TO ADVERTISING AGENCIES OR CAMPAIGN MANAGEMENT SERVICES. Whenever a required report includes an expenditure to an advertising agency, or to an individual or business which provides campaign

consultation or management services, the report shall be accompanied by a statement* detailing all services rendered, including the identity of each business from which campaign goods or services were purchased or subcontracted, or media advertising placed, and their costs. (Eff. 5/16/76, Register 58; am 5/14/80, Register 74).

*Staff will request this information when clarification of a report is needed.

Authority: AS 15.13.030(10)
AS 15.13.040(f)

2 AAC 50.342. REGISTRATION OF GROUPS SUPPORTING OR OPPOSING BALLOT ISSUES. Each group, before making an expenditure in support of or in opposition to a ballot proposition, shall register with the commission on forms provided by the commission. (Eff. 5/14/80, Register 74)

Authority: AS 15.13.010(b)
AS 15.13.030(10)
AS 15.13.040(b)
AS 15.13.050

2 AAC 50.350. CONTRIBUTION OF PROFESSIONAL SERVICES. Repealed 1/4/86.

2 AAC 50.351. INDEPENDENT EXPENDITURES. (a) An independent expenditure is a disbursement of funds which is made expressly to support or oppose an individual's candidacy or a ballot issue. An independent expenditure is not made with the cooperation, consent, in consultation with, or at the request or suggestion of, a candidate, a candidate's campaign committee, or a group, and must be reported in accordance with AS 15.13.040(d)(2) and (e) by the maker of the expenditure.

(b) An expenditure made at the request of, in consultation with, or at the suggestion of a candidate, a candidate's campaign committee, or a group supporting or opposing a ballot issue, is considered an in-kind contribution by the person making the expenditure, and must be reported in accordance with AS 15.13.040(a) by the candidate or group benefiting from the contribution, and by the "contributor" in accordance with AS 15.13.040 (d)(1) and (e).

(c) There is no limit on the amount or frequency of independent expenditures.

(d) The report of an expenditure to influence the outcome of a ballot issue required to be filed under AS 15.13.040(d)(2) will be closed to the public only if the commission determines, in response to a written request, that the individual who makes the expenditure would likely be subject to undue harassment, threats, or economic reprisals as the result of public disclosure. After publication, the person granted an exemption shall provide the commission with

a copy of the communication in order to enable the commission to verify which communications were sponsored by that person. (Eff. 5/14/80, Register 74; am 6/29/84, Register 90)

Authority: AS 15.13.030(10) AS 15.13.090
AS 15.13.040

2 AAC 50.355. LOANS. Repealed 1/4/86.

2 AAC 50.357. CONTRIBUTIONS IN THE NAME OF ANOTHER. (a) No contribution may be made, directly or indirectly, in a person other than in the legal name of the original source of the contribution.

(b) No person, employer, principal, supervisor, or contractor may lend, pay, advance, or reimburse employees, agents, or other persons for contributions to a candidate or group in the employee's, agent's, or other person's name, or in a name other than the original source of the contribution.

(c) A contribution made at the direction of another person, including a parent organization, subsidiary, division, department, branch, or local unit, is a contribution in the name of another. Contributions by two or more organizations to the same recipient are in the name of another if the organizations

(1) share the majority of members of their board of directors;

(2) share two or more corporate or organizational officers;

(3) are owned or controlled by the same shareholders or members;

(4) are in a parent-subsidiary relationship.

(d) If a minor makes a contribution of money or any thing of value given to the child by a parent for that purpose, the parent has made a contribution in the name of another. (Eff. 1/4/86, Register 97)

Authority: AS 15.13.030(10) AS 15.13.070
AS 15.13.040 AS 15.13.130

2 AAC 50.360. MUNICIPALITIES. (a) If a municipality seeks to influence the outcome of an election, using budgeted municipal funds, it shall report as an individual under AS 15.13.040(d) and (e).

(b) All communications which are paid for by a municipality and which are related to an election are considered to be intended to influence the outcome of an election unless they are only notices of the election or unless they are required by statute, charter, or ordinance.

(c) The municipality shall file with the commission a list of candidates and their mailing addresses within seven days following the deadline for filing for municipal office.

(d) If a municipality seeks to influence the outcome of an election using funds contributed to it for that purpose, it shall register and report as a group under AS 15.13.040(b) and (c) and AS 15.13.050. (Eff. 5/16/76, Register 58; am 1/4/86, Register 97)

Authority: AS 15.13.010 AS 15.13.040 AS 15.13.090
AS 15.13.030(10) AS 15.13.050

2 AAC 50.361. REPORTING BY SPECIAL INTEREST GROUPS. Repealed 10/18/81.

2 AAC 50.362. DRAFT GROUPS. (a) A draft group must report its contribution and expenditure activity as a group, under the requirements of AS 15.13 and this chapter.

(b) A draft group

(1) may make expenditures in order to raise, through contributions to the group, the money necessary to

(A) defray its own administrative costs; and

(B) attempt to draft persons to become candidates, including the expenditure of money to

(i) extoll the qualities of persons the group is attempting to draft; and

(ii) inform the general public both of the group's position on issues, as well as the qualities of leadership it seeks in potential candidates; and

(2) may not

(A) engage in any political activity other than an activity described in (b)(1) and (c) of this section;

(B) accept contributions in excess of $1000 from any person or group;

(C) except for personal travel expenses, opinion surveys, or polls, make any expenditure that might benefit a person who the group has successfully drafted for office and who has made it known that he or she will be seeking election to public office; however, the group may continue in its attempts to draft other persons for elective office; and

(D) except as provided in (c) of this section, make contributions to, contribute previously produced material to, or expend funds on behalf of, any person who has declared that he or she is seeking office or who has filed a declaration of candidacy or nominating petition or become a candidate by any other means.

(c) A draft group that expends more than 50 percent of its funds in an effort to draft one individual or, in the case of gubernatorial and lieutenant gubernatorial candidates, a team of individuals, to campaign for public office is, for the purposes of AS 15.13.130(3) and this chapter, considered a controlled group. If the person or team subject to the draft formally declares for public office, then the amount contributed to the draft group must be added to any contributions made the same year to the drafted candidate's or team's own campaign committee, in order to determine whether a contributor has made the maximum allowable contribution as outlined in AS 15.13.070(a). As a controlled group, the draft group may contribute the maximum allowed by law to the candidate or team of candidates. (Eff. 7/22/78, Register 67; am 5/14/80, Register 74; am 6/29/84, Register 90)

Authority: AS 15.13.010 AS 15.13.040(b) AS 15.13.100
AS 15.13.030(10) AS 15.13.070(a) AS 15.13.130(2), (3) and (4)

2 AAC 50.363. SUBCOMMITTEES OF A CANDIDATE'S CAMPAIGN COMMITTEE OR OF A CONTROLLED GROUP. A subcommittee may be created within a candidate's campaign committee or within a controlled group. These subcommittees are not considered separate groups and shall not maintain separate bank accounts and records or file separate reports. The name of the candidate or controlled group must be a part of the name of the subcommittee. The name of the subcommittee shall not be used when identi fying political advertising under AS 15.13.090 and 2 AAC 50.369. (Eff. 7/22/78, Register 67; am 5/14/80, Register 74)

Authority: AS 15.13.030(10) AS 15.13.040(a)
AS 15.13.050 AS 15.13.090

2 AAC 50.369. PROPER IDENTIFICATION OF POLITICAL COMMUNICATIONS. (a) Except as provided in (d) of this section, "proper identification" of a communication intended to influence the election of a candidate or the outcome of a ballot issue means that the communication is clearly identified with the words "paid for by," followed by the name and full address of the candidate, group, or individual actually paying for the advertising. The name of the campaign chairman must also be identified. If the candidate and the chairman are the same person, the name need not be repeated.

(b) Standard English abbreviations may be used in the written identification.

(c) "Clearly identified," as used in AS 15.13.090, means that

(1) in all printed communications, the proper identification must be visible, separate from the text of the advertisement itself, and large enough to be read by a person with average vision without the aid of corrective lenses;

(2) in all audio-visual communications, the proper identification must either

(A) be visual, and of sufficient size and duration to be read in full by the viewer; or

(B) be spoken, and played at the same audio level as the text of the communication itself; or

(C) be both visual and spoken, in accordance with (A) and (B) of this paragraph;

(3) in all audio communications, the proper identification must be spoken at the same audio level as the text of the communication itself.

(d) If the commission determines, under 2 AAC 50.351(d), that an expenditure report will not be made public, the political communication intended to influence the outcome of a ballot proposition or question is properly identified if, in place of the "paid for by" phrase, the communication includes, in the manner required by (c) of this section, the commission waiver identification number assigned by the Commission to that communication.

(e) In this section and in AS 15.13.090, "communications" include all material related to campaign fund-raisers, campaign letterhead, thank you notes, and press releases but does not include envelopes paid for by the campaign which are used solely to convey the campaign's properly identified communications. (Eff. 4/28/79, Register 70; am 10/18/81, Register 80; am 6/29/84, Register 90; am 1/4/86, Register 97)

Authority: AS 15.13.030(10)
AS 15.13.090

2 AAC 50.370. OBJECTS TOO SMALL TO CONTAIN THE PROPER IDENTIFICATION. If the size of an object used for a campaign advertisement is such that it is impractical to print the identification of the candidate, group, or person paying for the advertisement on the object, the advertisement must instead be identified in a regular expenditure report to the commission. Objects considered too small for full identification include pencils, pens, buttons, and other objects that are smaller than 3 1/2" x 5" in size. All media advertisements must be identified, regardless of size. (Eff. 5/16/76, Register 58; am 5/14/80, Register 74; am 1/4/86, Register 97)

Authority: AS 15.13.030(10)
AS 15.13.090

2 AAC 50.375. COMMUNICATIONS BY INCUMBENT ELECTED OFFICIALS. (a) A communication by an incumbent state elected official, who is also a declared candidate for elective office, with his constituency via a newsletter or other printed matter, or a paid radio or television spot, does not constitute a reportable campaign expense unless it specifically and expressly advocates the election or defeat of a candidate (including himself), or the passage or defeat of a ballot issue.

(b) A communication by an incumbent municipal elected officer who is also a declared candidate for elective office, with his constituency via a newsletter or other printed matter, or a paid radio or television spot, does not constitute a reportable campaign expense unless it specifically and expressly advocates the election or defeat of a candidate (including himself), or the passage or defeat of a ballot issue.

(c) The commission will, in its discretion, review a communication by an incumbent elected official when a question concerning whether or not the communication is a reportable campaign expense arises. (Eff. 7/22/78, Register 67)

Authority: AS 15.13.010 AS 15.13.045 AS 15.13.130(4)
AS 15.13.030(10) AS 15.13.090

2 AAC 50.380. EARLY CAMPAIGNING. (a) An individual wishing to campaign for municipal elective office shall comply with AS 15.13.100 by providing written notification to the commission of his or her candidacy only if the filing period has not yet opened. An individual wishing to campaign for state elective office shall comply with AS 15.13.100 by filing a declaration of candidacy with the lieutenant governor or a letter of intent with the commission.

(b) A letter of intent filed under (a) of this section is valid only for the next election or until it is withdrawn by the individual, whichever occurs first. A letter of intent must include a statement certifying that the individual will comply with the requirements of AS 15.13 although he or she has not satisfied the filing requirements as a candidate. A letter of intent need not include the specific seat for which the individual may file. (Eff. 5/16/76, Register 58; am 5/14/80, Register 74; am 1/4/86, Register 97)

Authority: AS 15.13.030(10)
AS 15.13.100

2 AAC 50.385. REPORTING BY ORGANIZATIONS AND BUSINESS OR TRADE ASSOCIATIONS. Repealed 1/4/86.

2 AAC 50.390. CIVIL PENALTY ASSESSMENTS FOR THE LATE FILING OF A CAMPAIGN DISCLOSURE REPORT. (a) A report required to be filed within the time required by AS 15.13.110(a) and (b) is delinquent if not received, in accordance with 2 AAC 50.310, on or before the due date.

(b) The report continues to be delinquent and subject to a civil penalty until received.

(c) Commission staff will send notice to each candidate or group of his or its delinquency under AS 15.13.110(a) within five working days after the due date of the report.

(d) Upon receipt of a delinquent campaign disclosure report of contributions received by a candidate or a group, commission staff will

(1) calculate the initial civil penalty, for each day of delinquency, as follows:

(A) $10 a day for each 30 day report or 10 day report;

(B) $10 a day for each year-end report received after January 16;

(C) $50 a day for each 7 day report; and

(D) $50 a day up to a maximum of $300 for each 24 Hour Report;

(2) send notice of the civil penalty assessed against the candidate or group within five working days after receipt of a delinquent report, or in the case of non-receipt of a report required by AS 15.13.110(b), within 15 working days after receiving the information, and include

(A) a statement of the amount of the assessment; and

(B) an affidavit appeal form.

(e) A candidate or group subject to a civil penalty assessment may

(1) submit, within 30 days after receipt of the assessment notice described in (d)(2) of this section, an affidavit stating reasons for the late filing to show why a civil penalty should not be assessed; an affidavit

(A) is a statement in writing made under oath and upon penalty of perjury; and

(B) must be sworn to before a notary public, municipal clerk, court clerk, postmaster, or any other person authorized to administer oaths or, if none of the preceeding alternatives is available, may be signed by the official without benefit of the oath so long as the official states, in writing, that the affidavit is signed under penalty of perjury; or

(2) pay, within 30 days after receipt of the assessment notice described in (d)(2) of this section, the civil penalty assessed.

(f) If a candidate or group subject to a civil penalty assessment for the late filing of a campaign disclosure report refuses, or fails, within the time

required, to submit an affidavit or make payment, then commission staff will refer the matter to the attorney general for appropriate action. The commission will not hear an appeal if an affidavit is not filed within the time required.

(g) An affidavit timely filed with the commission will be considered at the next regular meeting of the commission. If a candidate or group's appeal is

(1) denied by the commission, commission staff will notify the candidate or group of its decision within 15 days, and require that the civil penalty originally assessed be paid within 30 days after the date of the letter containing notification of the commission's decision; or

(2) accepted by the commission, commission staff will notify the candidate or group of its decision within 15 days, informing him or it that the civil penalty assessment has been waived and that the matter is considered closed; or

(3) accepted, in part, by the commission, commission staff will notify the candidate or group of its decision within 15 days, and require that the reduced civil penalty assessment be paid within 30 days after the date of the letter containing notification of the commission's decision.

(h) A candidate or group may appeal the commission's decision to deny or partially accept reasons for lateness to the superior court within 30 days after his receipt of the notice under Rule 45 of the Appellate Rules of the Alaska Court System. If no appeal is made within 30 days and no payment is made, the matter will be referred to the attorney general for appropriate action.

(i) If, upon review of a report required by AS 15.13.110(a), (b), or (e), the commission's staff finds substantial or continuous noncompliance with AS 15.13 or any provision of this chapter or with requests by staff for information required to be reported under this chapter, the matter must be brought to the commission for review. The commission will, in its discretion, reduce or waive any initial civil penalty, uphold any initial civil penalty, increase the amount of any initial civil penalty to an amount not exceeding the maximum amount established in AS 15.13.125, or instruct its staff to begin preliminary investigation into the matter. Where no initial civil penalty has been assessed, the commission will, in its discretion, assess a civil penalty up to the maximum amount established in AS 15.13.125 if the candidate or group in question does not comply. (Eff. 7/22/78, Register 67; am 5/14/80, Register 74; am 5/24/81, Register 78; am 10/18/81, Register 80; am 6/29/84, Register 90; am 1/4/86, Register 97)

Authority: AS 15.13.010 AS 15.13.125
AS 15.13.030(10)

2 AAC 50.395. REPORTING BY A BUSINESS ENTITY OR LABOR ORGANIZATION.
Repealed 1/4/86.

2 AAC 50.397. REPORTING BY PERSONS OUTSIDE THE STATE. Persons residing outside the State of Alaska are subject to the same reporting requirements, restrictions, and responsibilities under AS 15.13 as those placed upon persons residing within the state. (Eff. 4/28/79, Register 70)

Authority: AS 15.13.030(10)

2 AAC 50.400. DISBURSEMENT OF A SURPLUS BALANCE IN A CAMPAIGN ACCOUNT. (a) The disbursement of a surplus balance of a candidate or group's campaign account must be reported to the commission within 10 days after final disposition of the balance.

(b) A candidate disbursing the surplus balance in his campaign acount may

(1) give the money to charity;

(2) repay his contributors;

(3) repay himself, if he made contributions to his own campaign;

(4) take, as income, any money which exceeds the amount which he personally contributed to his campaign;

(5) leave the money in a campaign account until the next time he campaigns for elective office; however, any interest realized from a surplus in a campaign account must remain in the account and be reported on the first report required of him when he is again a candidate for elective office;

(6) contribute the money to another candidate or a group controlled by a candidate, not to exceed the $1000 limitation, or to a political party or group supporting a ballot proposition or question; or

(7) transfer the money to his office allowance fund.

(c) A group disbursing the surplus balance in its campaign account may

(1) give the money to charity; or

(2) repay its contributors; or

(3) leave the money in a campaign account until the following election, if the group plans to remain active; however, any interest realized from a surplus in a campaign account must remain in the account and be reported on the first report required of the group when it is again active in an election; or

(4) contribute the money to a candidate or a group controlled by a candidate, subject to the $1,000 limitation and other prohibitions under AS 15.13 and 2 AAC 50, or to a political party or group supporting a ballot proposition or question.

(d) Any candidate or group wishing to disburse the surplus balance in a campaign account in a manner not described in (b) or (c) of this section may request commission review and approval of the manner in which he or it wishes to disburse the surplus. (Eff. 7/22/78, Register 67; am 10/18/81, Register 80)

Authority: AS 15.13.030(10)

2 AAC 50.401. POST-ELECTION FUNDRAISING BY CANDIDATES AND CONTROLLED GROUPS. (a) A candidate or a candidate's controlled group may make post-election expenditures for the purpose of raising money to discharge a debt from a prior campaign, in accordance with (c) of this section.

(b) Absent a debt arising from a prior campaign, a candidate may not spend money for the purpose of seeking public office unless the individual is in compliance with AS 15.13.100, the early campaigning provisions of 2 AAC 50.380, or an advisory opinion issued under (c) of this section and 2 AAC 50.905.

(c) A candidate who is in debt from a prior campaign and who has not complied with either AS 15.13.100 or 2 AAC 50.380 by December 31st of the year after the election, shall request an advisory opinion under 2 AAC 50.905 concerning the applicability of AS 15.13.100 to further expenditures to pay off the debt. Absent an advisory opinion request, the commission staff may commence a preliminary investigation to review the applicability of AS 15.13.100 to expenditures by the candidate.

(d) A debt arising from a prior campaign includes

(1) a candidate's personal contributions made before the date of the prior election;

(2) campaign debts to others that were reported on a 10 day post-election campaign disclosure statement;

(3) post-election expenditures made for the purpose of discharging a debt arising from a prior campaign; and

(4) the costs reasonably associated with winding up the affairs of the prior campaign, including social events held immediately after the election for the benefit of campaign workers or volunteers, communications of acknowledgement, and legal and accounting fees reasonably incurred to comply with AS 15.13 and 2 AAC 50.310 — 2 AAC 50.405. (Eff. 1/4/86, Register 97)

Authority: AS 15.13.030(10) AS 15.13.070 AS 15.13.110
AS 15.13.040 AS 15.13.100 AS 15.13.130

2 AAC 50.405. DEFINITIONS For 2 AAC 50.310 — 2 AAC 50.405 and AS 15.13. In 2 AAC 50.310 — 2 AAC 50.405 and in AS 15.13

(1) "business entity" means a sole proprietorship, partnership, corporation or professional corporation, company, firm, business trust, or any other business entity or a combination of these;

(2) "draft group" means a group of two or more persons organized for the purpose of drafting one or more individuals to run for elective office by becoming a candidate as defined in AS 15.13.130(1);

(3) "labor organization" means a local, national, or international union, or labor council, or any other labor organization recognized under state or federal laws;

(4) "contribution" — Repealed 1/4/86. (Eff. 7/22/78, Register 67; am 6/29/84, Register 90; am 1/4/86, Register 97)

Authority: AS 15.13.030(10)
AS 15.13.130

2 AAC 50.450. COMPLAINTS. (a) A complaint filed with the commission must be in writing and must contain the following:

(1) the full name and mailing address of the person making the complaint;

(2) the name of the person or group alleged to be in violation;

(3) allegations of specific facts which, if true, would constitute

(A) a violation of AS 15.13 or of a provision of 2 AAC 50.310 - 2 AAC 50.405;

(B) a violation of AS 24.45 or of a provision of 2 AAC 50.505 - 2 AAC 50.545;

(C) a violation of AS 39.50 or of a provision of 2 AAC 50.010 - 2 AAC 50.200;

(4) the basis of the complainant's knowledge of the alleged facts, differentiating between statements made upon personal knowledge and those made upon other sources of information and belief;

(5) any documentation, relevant to the facts alleged, which is available to the complainant.

(b) The complaint shall be signed by the complainant and the signature shall be verified by a notary public, municipal clerk, court clerk, postmaster, or any person authorized to administer oaths. Notarial service will be provided by the commission without cost.

(c) Upon receipt of a complaint properly filed and sworn, the commission staff shall promptly

(1) acknowledge receipt to the complainant; and

(2) determine whether the complaint sets out facts which, if true, would constitute a violation of law.

(d) If the staff determines that a complaint does not set out facts which, if true, would constitute a violation of the law, it shall promptly inform the complainant, inform the respondent, and close the file. Following a determination under this subsection,

(1) the staff, upon request of the respondent, shall furnish a copy of all of the information in its file on the complaint to the respondent;

(2) the complainant may request that the commission review the staff's determination; the review will be conducted in closed session; following the review, the commission will, by majority vote

(A) uphold the staff's determination and close the matter; or

(B) determine that the complaint is sufficient on its face, and it will be handled under (e) of this section.

(e) If the staff or the commission under (d)(2)(B) of this section determines that a complaint sets out facts which, if true, would constitute a violation of the law, the staff will

(1) notify the complainant;

(2) notify the respondent, [illegible] a copy of the complaint, any accompanying documents, and a copy of [illegible]mission's investigative and hearing procedures;

(3) inform the commission that a complaint has been filed, providing a copy of the complaint and any accompanying documents; and

(4) beg[illegible] preliminary investigation.

(f) A person against whom a complaint is filed may file an answer. The answer must

(1) specifically admit or deny all material allegations of the complaint;

(2) state any defenses expected to be raised by the respondent;

(3) include any relevant documentation in the possession of the respondent; and

(4) be a signed and sworn statement. (Eff. 5/16/76, Register 58; am 12/29/77, Register 64; am 6/29/84, Register 90; am 1/4/86, Register 97)

Authority: AS 15.13.030(8) AS 15.13.045 AS 24.45.021(b)
AS 15.13.030(10) AS 15.13.120(d) AS 24.45.131
AS 39.50.050(b)

2 AAC 50.460. PRELIMINARY INVESTIGATION. (a) The commission staff shall undertake a preliminary investigation if

(1) a properly filed and sworn complaint has been found to be sufficient; or

(2) information has been obtained by the commission or staff in the normal course of business which, if true, would constitute a violation of the law.

(b) When the staff initiates an investigation based on (a)(2) of this section, it shall set out in writing the facts, information, and law involved, along with documentation, and process this material in accordance with 2 AAC 50.450(e).

(c) In conducting a preliminary investigation, the staff may use any of the methods set out in AS 15.13.045. It may also

(1) request written and sworn statements from any party, witness, or other person which are relevant to the investigation; and

(2) use the services of the Alaska State Troopers or private investigators to secure factual information pertinent to the investigation.

(d) Upon completion of a preliminary investigation, the staff shall provide a written summary of the investigation to the commission at the next regularly scheduled meeting, or at a special meeting. The summary must include a staff recommendation for dismissal, for continued investigation, that the matter be addressed in a hearing, or that civil penalties be assessed subject to appeal as provided in 2 AAC 50.110(e), 2 AAC 50.135(f), 2 AAC 50.390(e), or 2 AAC 50.507(e). Notice of the meeting and a copy of the summary must be provided to the respondent and complainant in advance of the meeting. The decision of the commission with respect to the findings of the preliminary investigation will be sent by certified mail to the complainant and respondent. (Eff. 5/16/76, Register 58; am 12/29/77, Register 64; am 6/29/84, Register 90; am 1/4/86, Register 97)

Authority: AS 15.13.030(8); AS 15.13.030(10); AS 15.13.045(a); AS 15.13.120(d)
AS 18.65.090; AS 24.45.021(b); AS 24.45.131; AS 39.50.050(b)

2 AAC 50.470. HEARINGS. (a) If the commission decides that a hearing will be held, notice of hearing will be sent to the respondent by personal service or by certified mail, return receipt requested. If the respondent cannot be found after diligent effort, service will be made by publishing notice of the hearing in a newspaper of general circulation once a week for four weeks, the final notice appearing at least 30 days before the hearing.

(b) Notice of a hearing must be provided to all parties at least 30 days before a hearing. The time and place of the hearing will be set with due regard and consideration for the convenience of the parties, and the commission will consider a party's request for a change in the time or place of a hearing. The commission will, in its discretion, for any good cause and upon proper notice, change the time and place of a hearing.

(c) Repealed 1/4/86.

(d) The commission staff is responsible for presenting the facts, verified by investigation, which it has determined appear to constitute a violation of the law. In the course of the hearing, the staff will be given no special consideration, but will be considered as a party to the hearing.

(e) The only parties to the hearing will be the staff, representing the complainant or itself, and the respondent.

(f) A party has the right to present evidence and be represented by an attorney. Entities may be represented by an official within the entity, an authorized agent, counsel, or a combination of these.

(g) The rules of evidence are the same as in AS 44.62.460. In addition

(1) documentary evidence may be presented in the form of copies if the original is not readily available; upon request, the parties will be given the opportunity to compare the copy to the original;

(2) in the discretion of the hearing officer, nonparties may present a sworn statement; if such a statement is presented, all parties will be given an opportunity to challenge, cross-examine, or rebut;

(3) depositions or affidavits may be presented if a witness in unable to testify at a hearing.

(h) Repealed 1/4/86.

(i) Depositions must be taken according to AS 44.62.440(a).

(j) Before the hearing, upon request during regular business hours, the respondent will have access to read or copy at cost any information contained in the case file held by the staff, with the exception of internal memos and documents privileged under the attorney-client privilege.

(k) At the discretion of the hearing officer, all or part of the hearing may be conducted by telephone, audio or video teleconferencing, or other electronic means, provided the parties have an opportunity to participate in the hearing while it is taking place.

(l) The hearing will be recorded by tape recording or stenographic means at the commission's expense. The recording will be maintained with the public file of the proceedings. The commission will not prepare a transcript unless such a requirement is imposed by law. If the hearing is open, and at the commission's discretion, any person may pay for additional recordings or for a transcript from the commission's recording. If a transcript is prepared by the commission, the respondent may have access to it for the purpose of duplication.

(m) A hearing will be open to the public except when the respondent requests a closed hearing and the hearing officer finds that it should be closed under AS 44.62.310. If the hearing is open but is conducted by telephone, audio or video teleconferencing, or other electronic means, the public notice will designate at least one public access place.

(n) Repealed 1/4/86.

(o) Repealed 1/4/86.

(p) Repealed 1/4/86.

(q) If the commission decides to forward a case to the attorney general's office for prosecution, the staff shall prepare and send to the attorney general's office a record comprised of

(1) a copy of the commission's hearing decision, including its findings of fact and conclusions of law;

(2) a verbatim transcript of the proceedings before the commission; and

(3) copies of all documentary evidence, memoranda, exhibits, correspondence, and other tangible evidence contained in the public file of the proceeding.

(r) The commission will, in its discretion, reconsider its decision in accordance with AS 44.62.540. A request for reconsideration must be filed within 10 days after the vote under (q) of this section has been taken, and must state specific grounds upon which reconsideration is requested. A decision will be reconsidered only if

(1) there was a substantial procedural error in the original proceeding;

(2) the commission acted without jurisdiction in the original proceeding;

(3) the original vote was based on fraud, misrepresentation, material mistake of fact or law; or

(4) new evidence has come to light.

(s) Contempt before the commission will be handled under AS 44.62.590.

(t) A commission member is disqualified from participation in a hearing if the member has a substantial financial relationship with the complainant or with the alleged violator. A commission member is disqualified from participation in a hearing if the member feels, and states on the public record, that he or she is unable to consider the complaint in an unbiased manner and reach a fair and impartial decision.

(u) A commission member has a conflict of interest if the member, a person in the member's immediate family, the member's employer, business, or business associate has a financial relationship with the complainant or the alleged violator or with an immediate family member, business, or business associate of the complainant or alleged violator. The commission member shall state publicly the nature of the conflict and a majority of the remaining members present may authorize the member to participate. Other relationships with the principals of the hearing, which may cause an appearance of impropriety or conflict, must be publicly disclosed by a member, and the member's participation is subject to approval by the majority of the remaining members present. In conflict cases, approval to participate will depend upon whether

(1) the financial relationship or interest is relatively insignificant; and

(2) the interest held by the member or the member's family, business, or business associate is similar to that possessed by a large class of persons; or

(3) the nonfinancial relationship is such that a reasonable person would believe the member capable of fair and impartial judgment. (Eff. 6/29/84, Register 90; am 1/4/86, Register 97)

Authority: AS 15.13.030(8); AS 15.13.030(10); AS 15.13.045; AS 15.13.120(d)
AS 24.45.021(b); AS 24.45.131; AS 39.50.050(b)

2 AAC 50.905. ADVISORY OPINIONS. (a) A person or group may request an advisory opinion concerning AS 15.13, AS 39.50, AS 24.45, or this chapter.

(b) Each advisory opinion request must describe a specific transaction or activity that the requesting person or group is presently engaged in, or intends to undertake in the future. Advisory opinion requests must include a complete description of all relevant facts. Requests posing a hypothetical situation, or regarding the activities of third parties, will not be considered by the commission staff.

(c) The commission staff shall review all requests for advisory opinions submitted under this section. If the staff determines a request is incomplete or does not qualify for consideration under (a) and (b) of this section, it shall notify the requesting person or group and specify the deficiencies in the request.

(d) Advisory opinion requests and advisory opinions are public records.

(e) The commission staff shall issue a proposed advisory opinion approving or disapproving of the activity, and may make other recommendations to the commission.

(f) The commission will review the proposed advisory opinion and will, in its discretion, review written or oral comments by any person, or any other relevant evidence. The commission will approve, disapprove, or modify the proposed advisory opinion. The commission will approve an advisory opinion by the affirmative vote of at least four members, or else the advisory opinion will be considered disapproved.

(g) An advisory opinion rendered by the Commission may be relied upon to the extent that commission staff may not commence a preliminary investigation under 2 AAC 50.390(i), 2 AAC 50.460, or 2 AAC 50.507(i) of

(1) any person involved in the specific transaction or activity with respect to which an advisory opinion approving of the activity was rendered.

(2) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which an advisory opinion was rendered.

(h) The commission will, in its discretion, reconsider an advisory opinion at any time upon the motion of a commissioner who voted with the majority that originally approved the opinion, and if the commission adopts the motion to reconsider by the affirmative vote of at least four members. Adoption of a motion to reconsider vacates the advisory opinion to which it relates. Actions taken in good faith reliance by the requesting party before they receive written notice of reconsideration may not be the subject of a preliminary investigation under 2 AAC 50.390(i), 2 AAC 50.460, or 2 AAC 50.507(i). (Eff. 1/4/86, Register 97)

Authority: A.S. 15.13.030

2 AAC 50.910. AVAILABILITY OF REPORTS FILED WITH THE COMMISSION. Except as provided under 2 AAC 50.351(d), copies of any report required to be filed with the commission may be obtained at cost. (Eff. 5/16/76, Register 58; am 1/4/86, Register 97)

Authority: AS 15.13.030(10); AS 15.13.040(f); AS 15.13.110(c); AS 39.50.020(b); AS 39.50.050(c)