

ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 86/Z

4094 SJUD SB 341 (FILE 3)

999



RECORDS CERTIFICATION



I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

11/7/89
Date

SB

341

(FILE 3)

BILL CONTACT/ACTION

DATE	CONTACT/ACTION
1/14	Bridy Eckholm - Leg Digest - wants to
	be notified of hearing - 586-3118
2/5	Evelyn Champion, opinions mail for NC
	MACHINERY CHIEF TESTIFY 2/11 WANTS MAIL
	OPS MAIL TO TESTIFY ALSO - 1010 11:45 QUIT AFTER
	MEETING 789-6191
2/12	Sharon Macklin wants to be
	notified mail changed 6-9518
2/13	NC MACHINERY IN ANCHORAGE CALLED
	WANTS MAIL ANDERSON TO TESTIFY
	IN ANCH ON 2/15
2/21	Diane Mottly Marie Iversen (Mach)
	ALL UP IN COMMITTEE (ZZSS)
2/24	Barbara Morse Quinn called - will
	testify 2/27/86 (ASHA)
3/5	notified of 3/6 meeting:
	JIM BURTON, LOREN PUSMUSSEN, MARY
	ECKHOLM, MIKE DEWINE, MARIE IVERSEN
	WENDY REDMAN. TRIED SHARON MACKLIN
	4 TIMES - BUSY
3/6	Dinner - said later - at what / ball at day
	when prepared

CRAIG TAYLOR EQUIPMENT COMPANY

733 E. Whitney Road
Anchorage, Alaska 99501-1694
(907) 276-5050



March 11, 1986

Senator Pat Rodey
Chairman, Senate Judiciary Committee
Pouch Y
Juneau, AK 99811

Dear Senator:

We are unalterably opposed to total cost bidding. We represent well over fifty light and heavy industrial and construction equipment manufacturers. We contribute sizeable investments in facilities, employment and taxes to and for the state of Alaska. We concur with the ideas expressed in the enclosed letter and urge you to rule out total cost bidding in proposed Bill No. 341 regarding state procurement. In the event that you do not think this is possible we urge you to adopt language such as the following:

A contract based on Total or Life Cycle costing may be awarded only when the Chief Procurement Officer or, for construction contracts or procurements for the state equipment fleet, the commissioner of transportation and public facilities determines in writing that it promotes overall economy for the purposes for which it was intended, that it encourages competition, that it is not unduly restrictive and that it is in the best interests of the state.

Thank you very much for your consideration in this matter.

John P. Brown V.P. Craig Taylor Equipment
Signature Title Company

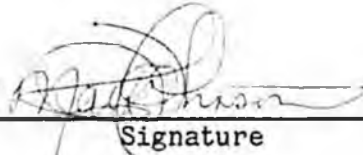
John P. Brown V.P. Craig Taylor Equipment, Inc.
Signature Title Company

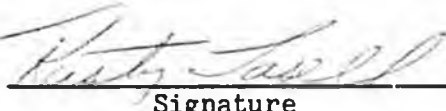
Mary Hollowell President Yukon Equipment, Inc.
Signature Title Company

Senator Pat Rodey

March 11, 1986

Page 2

	<i>Sales Manager</i>	<i>Construction Machinery Inc.</i>
Signature	Title	Company

	<i>President</i>	<i>Harold Cooper Corp</i>
Signature	Title	Company

Enclosures

cc: Senators Tim Kelly
Jan Faiks
Rick Halford
Robert Ziegler

CRAIG TAYLOR EQUIPMENT COMPANY

733 E. Whitney Road
Anchorage, Alaska 99501-1694
(907) 276-5050
Sales · Service · Rentals



November 18, 1985

Mr. Frank Turpin
Alaska Railroad
Pouch 7-2111
Anchorage, AK 99510-7069

Dear Frank:

The total cost bidding concept was developed quite some time ago by one manufacturer who felt, because of a perceived difference in quality, that he did not have to participate in deeper discounts for governmental bids. At that time there may have been other manufacturers who built machines just to meet minimum bid specifications and were therefore inherently cheaper. These machines that were being purchased through low bid by governmental agencies were not necessarily being purchased by the general contractors back then. But since the basic function of most governmental agencies is for repair and maintenance rather than new construction, there was a viable reason to purchase the less expensive machine.

With the advent of tighter specification writing added to the fact that general contractors were not purchasing the cheaper machines, those manufacturers have been either forced out of business or else forced to build a higher quality, market-accepted machine. Marginal manufacturers will probably always come and go, but with the sophistication of the State's bidding procedures already in place; ie. prequalification, tight bid specs, thorough warranty specs, nonperformance penalties, these manufacturers will always be weeded out.

A total cost bid is one in which all costs (purchase price, repairs, maintenance) for a given period of time, and the residual or salvage value at the end of that time, are guaranteed at the time of purchase. The bid is usually bonded to ensure the performance of the vendor. The only benefit to the customer of the total cost bid over a well prepared low bid package is that costs, although higher, are known for budgetary purposes. The vendor on the other hand, realizes higher profits, restricted competition, and higher product support revenues.

The drawbacks to the customer are several. He will end up paying tens of thousands of dollars more in a total cost bid especially when the time value of money between the date of sale and date of buy-back (as much as five years later) is considered. Add to this the price of the bid bond and then the fact that the bid, which is evaluated based on the guaranteed buy-back price, does not require the agency to sell the machine back. If the repurchase option is not exercised then a tremendous premium has been paid. It is estimated that only as few as five to ten percent of the machines sold under a total cost bid are repurchased. The agency's maintenance costs will increase due to the

rigid requirements for strict adherence to maintenance responsibilities written into most of these bids. While promoted as a valid protection for the dealer, much subjectivity could enter into the equipment evaluation at the end of the period, especially if the agency's maintenance records are not complete or are inaccurate. Considerable latitude exists for conflict between the agency and supplier with the very good possibility that the repurchase guarantee may be voided on maintenance technicalities. A by-product of the maintenance requirement is that the agency is locked into one supplier. There can be no substitute filters or oils, etc. used during the life of the contract.

The dealer is faced with several drawbacks also. He is faced with a contingent liability that he must live with for the life of the contract. This, of course, reduces the dealer's bonding capacity and borrowing capacity needed for a liquid financial position. He may end up with a machine that has to be remarketed. And he may have guessed wrong about inflation keeping the value of the buy-back high. Or he may have given an inflated price for the buy-back gambling that few agencies ever enforce the repurchase clause. Introducing the bidder's highly speculative resale valuation into the bid process affords the less scrupulous bidder an opportunity to manipulate the net value to his advantage although he may have no incentive or reasonable expectation of having to fulfill his promise to repurchase.

The biggest drawback in this type of bid for both buyer and seller is that there are too many loopholes, too many contingencies subject to negotiation. There is no way to objectively evaluate a total cost bid. These contingencies and loopholes create numerous opportunities for collusion or for deal making.

Isn't it odd that with all the various commodities the state of Alaska purchases; from pencil sharpeners, to office machines, to cars and trucks, to heavy equipment, to ferry boats, only one manufacturer is a proponent of total cost bidding? If there was any validity in the concept at all then its use would be widespread. But as it is, there are no federal agencies and only a very small minority of other governmental agencies that use this concept. It seems to me that the few who use this method have simply caved in to intense marketing pressure rather than going with their common sense. It is only old fashioned, out-moded thinking in this time of world-wide economic competition that would lead someone to believe that any one brand or product might be superior as to quality and characteristics. Once upon a time this might have been true. But in this day and age it is nothing but a fairy tale. Don't get caught up in this type of thinking and don't pay more for those products trying to live on past reputations.

Sincerely,



John P. Snow
Vice President

cc: Senator Jan Faiks
Commissioner Richard Knapp
Commissioner Loren Lounsbury
John Reynolds, ARR Purchasing
Darrell Methvin, State Equipment Fleet
Keith Nelson, State Equipment Fleet



Office of the Attorney General

STATE OF SOUTH DAKOTA

Mark V. Meierhenry

Attorney General

February 4, 1986

MEMORANDUM

TO: All States Attorneys

FROM: Mark V. Meierhenry, Attorney General

RE: TOTAL COST BIDDING

Enclosed please find an Official Opinion just issued from this office concerning total cost bidding. Our office has received a number of complaints from the Auditor General's Office and from private citizens concerning abuses in implementing a total cost bidding procedure by counties, cities and townships. In the Official Opinion I determined that the total cost bidding procedure as currently used by many counties, municipalities and townships was in violation of the competitive bidding procedures. This Opinion may affect not only future biddings by your county but also previous bids and contracts entered into for heavy equipment and other goods and services.

I would suggest that you review the opinion, your county's current bidding procedures, and discuss the matter with your Commissioners to avoid problems in the future.

If you have any questions, please feel free to contact this office.

MVM:JPH:bn

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

February 4, 1986

Mr. Maurice C. Christiansen
Auditor General
435 South Chappelle
Pierre, South Dakota 57501-3292

OFFICIAL OPINION NO. 86-01

Total cost bidding

Dear Mr. Christiansen:

You have requested an official opinion from this office in regard to the following factual situation:

FACTS:

The Auditor General's Office has encountered numerous situations during the past year where local governmental entities have been implementing a "total cost" bidding procedure for the purchase of heavy equipment. Using this total cost bidding procedure, the local government entity is requesting bids which are evaluated by netting at face value: (1) the initial purchase price of the equipment, plus; (2) the guaranteed maximum repair cost for a period specified by the government entity, less; (3) a guaranteed minimum repurchase price at the end of the specified time period.

With the above factual statement, the Auditor General's office has also enclosed several recent sets of bid specifications used by local government entities attempting to implement a total cost bidding procedure. Some of the specifications submitted did not require a performance bond or allowed a "corporate guarantee" in lieu of the performance bond, and establishes a procedure where only the face value of the bid items addressed above were to be considered.

Mr. Maurice C. Christiansen
OFFICIAL OPINION NO. 86-01
February 4, 1986
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Based upon the above facts, you have asked the following question:

QUESTION:

Does the total cost bidding procedure as currently being used by local governmental entities violate the competitive bidding provisions of SDCL Ch. 5-18 or SDCL Ch. 5-21?

Total cost bidding describes a bidding procedure whereby a public entity seeks bids from a potential seller, based upon the total costs of ownership, in addition to the initial purchase price. This is the sole cost basis for governmental purchases under traditional bidding procedures. One of my predecessors in AGR 1965-1966, page 211, using the term "guaranteed bidding," determined that the concept of total cost bidding did not violate the competitive bidding provisions of SDCL Ch. 5-18. I concur with my predecessor's determination that total cost bidding, if properly implemented by the public entity, does not violate the competitive provisions of SDCL Ch. 5-18 or Ch. 5-21. It is my opinion, however, upon review of "total cost bidding procedures" currently used by the local government entities, that the principles of competitive bidding are being violated.

The South Dakota Supreme Court in Gridley v. Engelhart, 322 N.W.2d 3, 7 (S.D. 1982), stated:

Bid specifications as they pertain to public contracts must be sufficiently definite and precise so as to afford a basis for bids and they must be free of restrictions the effect of which would stifle competition. Such specifications must be sufficiently detailed upon all essential elements so as to afford a basis for full and fair competitive bidding upon a common standard.

The flaw in the local governmental entities current total cost specifications is that these specifications totally ignore the time value of money which, in my opinion, is an essential element in total cost bidding. It does not take an expert financial analyst to determine that a dollar today is not the same as a dollar three or seven years in the future. The reason for this is that a dollar today can be invested so that it is worth more at a future date. A total cost bidding procedure that takes present dollars and future dollars and nets them at face value to determine the low bid compares dollars of different present value. This netting of face values has the effect of mixing apples and oranges which, in my opinion, makes it impossible for a local government entity, as well as potential bidders, to determine what is the "lowest responsible bid."

This netting of dollars at face value also could result in potential abuses where the actual value of the equipment at the date of purchase is no longer relevant.

For purposes of illustration, I present the following example: A local government entity is seeking the purchase of a flatbed truck. The local government entity uses a total cost bidding procedure and wants guaranteed repairs for five years with a guaranteed repurchase price. Suppliers "A," "B" and "C" have products that meet the county's general specifications for the flatbed truck and all are responsible bidders. Bids are received and opened with the following results:

	<u>Dollars Bid</u>		
	<u>A</u>	<u>B</u>	<u>C</u>
Initial price	\$20,000	\$25,000	\$35,000
Plus maximum repairs	<u>9,000</u>	<u>4,000</u>	<u>2,500</u>
Subtotal	\$29,000	\$29,000	\$37,500
Less repurchase guarantee	<u>10,000</u>	<u>18,000</u>	<u>30,000</u>
Total Cost	<u>\$19,000</u>	<u>\$11,000</u>	<u>\$ 7,500</u>

The local government entity could currently invest money in C.D.'s at an investment rate of 8%. If the value of money was included in the specifications and the bids were reviewed in present value terms the bid results would be as follows:

Initial price	\$20,000	\$25,000	\$35,000
Plus maximum repairs ¹	<u>7,187.4</u>	<u>3,194.4</u>	<u>1,996.5</u>
Subtotal	\$27,187.4	\$28,194.4	\$36,996.5
Less repurchase guarantee ²	<u>6,810.</u>	<u>12,258.</u>	<u>20,430.</u>
Total Cost	<u>\$20,377.4</u>	<u>\$15,936.4</u>	<u>\$16,566.5</u>

¹ 3.993--Present value of an annuity of \$1.00 per year for 5 years discounted at 8% and assumes repairs of equal amounts each year.

² .681--Present value of \$1.00 due at the end of 5 years discounted at 8%.

Mr. Maurice C. Christiansen
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Under a traditional bidding procedure where only the initial price is considered, the truck from Supplier "A" would have been purchased by the local government entity. Under a "total cost" bidding procedure using dollars at face value as currently used by the local governments, Supplier "C" would be awarded the bid although Supplier "C's" initial purchase price was the greatest, the total cost at face value was less than either Supplier "A" or "B." But, once the value of the dollar is added, Supplier "B" would now become the lowest responsible bidder. When one looks at all costs of the local government entity, Supplier "B" provides the best total value if the entity wishes to use the total cost approach.

It is, therefore, my opinion, that if a local government entity decides to use a total cost bidding procedure to comply with the competitive bidding provisions of SDCL Ch. 5-18, the local government entity must include in the bid specifications the current investment rate which the local government entity could invest funds. This ensures that the potential bidders and the local government entity have a uniform basis to compare the bid proposals submitted by the various potential suppliers.

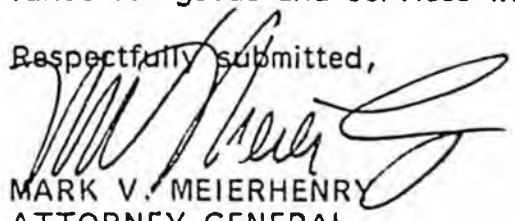
In addition, though it is not a violation of SDCL Ch. 5-18, it is my opinion that a prudent local government entity, in order to guarantee future performance of the total cost contract, should require a potential bidder to submit a performance bond in accordance with SDCL Ch. 5-21. When a supplier enters into a contract based upon a total cost bid, that supplier has a contingent liability to the local government entity for the costs of repairs for the term of the contract and the guaranteed repurchase price. Without a performance bond, the local government entity has no guarantee that the terms of the contract will be fully performed. Currently, some government entities are requiring a performance bond with their total cost bid while other local government entities are not requiring a performance bond or allowing that a "corporate guarantee" be submitted in lieu of performance bond. A corporate guarantee adds no additional security to future performance of the contract. Any corporation that enters into a contract with a local government entity for future services or products is getting that corporation's guarantee. Only a performance bond or submission of actual collateral or security to the local government entity will provide additional security in case the bidder is awarded a contract and is financially incapable of performing all of its terms.

Total cost bidding, if used properly, can reduce the amount of monies a local governmental entity needs to expend for the purchase and use of equipment. Unless properly implemented, however, the total cost bid

Mr. Maurice C. Christiansen
OFFICIAL OPINION NO. 86-01
February 4, 1986
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procedures may result in the county needlessly expending additional funds for goods and services without added benefits.

Respectfully submitted,



MARK V. MEIERHENRY
ATTORNEY GENERAL

MVM:JPH:db



Trinity Equipment Company

P.O. Box 8486
Randol Mill Road & Loop 820 Fort Worth, Texas 76112
Telephone (817) 451-8094



February 21, 1984

City of Fort Worth
1000 Throckmorton
Fort Worth, Texas 76101

Attn: Mr. Robert Herchert
City Manager

Subject: Purchasing Practices now employed by the City of
Fort Worth (i.e. Guaranteed Repurchase).

*Agreement to Spec. Writing
Services
Mr. T.C. Webster*

Dear Sir:

For the past several years the City of Fort Worth has employed a policy of purchasing heavy equipment utilizing a Guaranteed Repurchase clause to determine award of contracts for purchase of that equipment.

In the past we have participated in this procedure and have been the successful bidder on several occasions, however, our company has discontinued this type of bidding for various reasons.

Firstly, we will not bid the repurchase guaranty because at present we have guaranteed repurchase agreements to the City of Fort Worth in effect on twenty-four (24) pieces of equipment totaling some \$580,000.00. This appears on our company's financial statement as a contingent liability, reducing our borrowing capacity, our bonding capacity and various other capacities requiring a more liquid financial statement.

Secondly, we do not choose to bid the repurchase guaranty because we feel it is not an advantage to either the buyer or the seller. As written, your Repurchase Guaranty does not provide an option for the seller. The seller guarantees to repurchase, but the City does not guarantee to sell the equipment back to the seller. In addition, the City will pay a premium price for the equipment under this program since bonding is required and costs for the bond will most assuredly be added to the sale price of the machine. The bidder must consider the cost of the bond in determining his sale price. At the present time a performance bond costs us \$20.00 per thousand per year. On that basis a guaranteed repurchase bond in the amount of \$30,000.00 for five years would cost \$3,000.00 which would be added to the cost of the machine.



Pg. 2 - City of Fort Worth

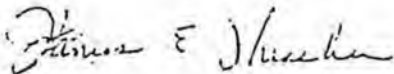
As an observation on the above, let me offer an example of purchases made prior to this bidding practice which may show the questionable value of Repurchase Guaranty. In 1973, we sold the City of Fort Worth eight (8) four-wheel drive end loaders for \$16,240.28 each. One of these units was offered as a trade-in on your invitation to bid opened February 2, 1984. One of our competitors offered the City \$13,500.00 for this loader. This is an 83% recovery of the original purchase price after ten (10) years of use by the city. On the bids just opened on February 2, 1984 for this same type of equipment, the best Repurchase Guaranty received by the City was only 75% of the purchase price after five (5) years of use, and the apparent successful bidder only guaranteed 71% of his original sale price.

In summary, in our opinion, not only is the City paying a premium price for their equipment, it is also giving an advantage to the larger equipment manufacturer by limiting participation by smaller dealers. In 1982 there were some fourteen (14) bidders on four-wheel drive end loaders in response to your invitation to bid. In 1983 only ten (10) bidders and this year only six (6) bidders responded (5 bid the Guaranteed Repurchase). If a survey were conducted, I believe you would find that the Guaranteed Repurchase clause would be the reason for the reduction in the number of bids received by the City.

We have enjoyed our association in a business relationship with the City of Fort Worth and believe our equipment has served the City well over the years. We regret that we cannot compete for your equipment needs under the current purchasing procedures.

Sincerely

TRINITY EQUIPMENT COMPANY



James E. Thrasher
City Salesman

JET/ph



Midwest Industrial Equipment Co.

Hwy. 2 West — Box 5010

Grand Forks, North Dakota 58201 — Phone 772-4842

May 29, 1984

Honorable Commissioners
Folk County, MN

Gentlemen:

Midwest Industrial Equipment Co. will not be bidding the re-purchase portion of the county's motor grader bid. We hope that this decision does not deny us the opportunity to be part of the competitive bidding process.

At John Deere we try to make the best equipment available today. We are willing to stand behind our equipment because we feel that the quality of the machines will help sell itself without having to add costly guarantees. Our name and reputation depend on it.

One of the reasons for not bidding the re-purchase section is the added cost to the county. Most counties can't afford to have a five year turnover of machines. Even if they could, a county machine is still in excellent condition after five years. Because of the county maintenance programs, county machines have a trade-in value that could be as high or higher, depending on inflation, than a five year old re-purchase price. If you have to pay X amount more for a machine at the purchase, you should get that amount, plus interest, when the machine is sold or traded.

Example: A machine costing \$10,000 more now should be worth, at 8% interest:

\$10,800.00	after 1st year
11,664.00	after 2nd year
12,597.12	after 3rd year
13,604.89	after 4th year
14,693.28	after 5th year

I know it's been said that the extra cost to the county is our excuse for not bidding the re-purchase. It's not an excuse. We feel we have a responsibility to our community. This years survey by Fortune Magazine backs this up. They ranked John Deere Corporation first in five of eight categories. One of our first place categories was community responsibility.

At John Deere we're not satisfied to keep up with the competition. We are the innovators of many modern equipment designs and functions that you see. The John Deere 770A motor grader is designed to offer our customers the most up to date, efficient, and reliable grader possible.



I sincerely hope that I am given the opportunity to explain the many qualities and benefits, to the county, of the John Deere 770A motor grader.

Sincerely,

Darrell Utzinger,
Sales Representative



SKAGIT COUNTY PUBLIC WORKS DEPARTMENT

County Administration Building, Room 203, 2nd & Kincaid Streets, Mount Vernon, Washington 98273

W. Eugene Sampley, P.E.
Director

John B. Ensley
Assistant Director

(206) 336-9400

Charles Tewalt
Superintendent
Operations Division

(206) 753-9531

February 27, 1985

Board of County Commissioners
Skagit County Admin Building
Mount Vernon, WA 98273

Re: Bid Award Recommendation:
Motor Grader

Gentlemen:

Two bidders submitted a total of four proposals to furnish one new latest model motor grader, as follows:

Millbrook Equipment Company	JOHN DEERE Model 770A	\$ 81,045.30
N C Machinery Co.	CATERPILLAR Model 140G	\$105,350.00
N C Machinery Co. (Alternate #1)	CATERPILLAR Model 140G	\$110,725.00
N C Machinery Co. (Alternate #2)	CATERPILLAR Model 130G	\$ 96,750.00

All units meet equipment features specifications except for the N C Machinery's CATERPILLAR Model 130G which does not meet the horsepower requirement.

Specifications called for this motor grader to be awarded to the lowest or best bid based on a life cycle cost method. Millbrook did not meet the requirement to submit guaranteed repair expenses and a guaranteed repurchase price. N C Machinery did not submit a valid bid deposit in the form of a surety bond, cash, cashier's check or certified check in the amount of 5% of the amount of their bid proposal.

Although the Board reserves the right to waive minor irregularities in the bidding, cost analyses shown in Attachment "A" support the contention that a life cycle cost approach will not be in the County's best interests on this bid award when the time value of money is considered.

I recommend that all bids be rejected. I further recommend that a new call for bids in which life cycle cost is not used be initiated.

Sincerely,

W. EUGENE SAMPLEY, P.E.
Public Works Director

ATTACHMENT "A"

MOTOR GRADER TIME VALUE OF MONEY ANALYSES

- Assumptions: 1) That the County has \$105,350 available to spend
- 2) That the average interest rate value of money over the next six years will be 10%
- OR
- 3) That the average interest rate value of money over the next six years will be 8.5%

	N C MACHINERY	MILLBROOK
Current out-of-pocket cost:	\$105,350	\$81,045
Less guaranteed trade-in amount:	(80,000)	
Less estimated trade-in amount:		(40,000)
Six-year cost of ownership without considering that trade-in money is not available for six years:	\$ 25,350	\$41,045

Current out-of pocket cost:	\$105,350	\$81,045
Less guaranteed trade-in amount of \$80,000 discounted for six years at 10%:	(45,158)	
Less estimated trade-in amount of \$40,000 discounted for six years at 10%:		(22,579)
Interest earned on \$24,305 "unspent" money available for investment for six years at 10%:		(14,583)
Comparative cost of ownership in 1985 dollars:	\$60,192	\$43,883

Current out-of pocket cost:	\$105,350	\$81,045
Less guaranteed trade-in amount of \$80,000 discounted for six years at 8.5%:	(49,036)	
Less estimated trade-in amount of \$40,000 discounted for six years at 8.5%:		(24,518)
Interest earned on \$24,305 "unspent" money available for investment for six years at 8.5%:		(12,396)
Comparative cost of ownership in 1985 dollars:	\$ 56,314	\$44,131



TRINITY

EQUIPMENT COMPANY



P.O. Box 8486
Randall Mill Rd. & Loop 820
Ft. Worth, Texas 76112
817/451-8094

17 April 1984

Tarrant County
Purchasing Department
100 West Weatherford Street
Fort Worth, Texas 76102

Attn: Roy Edwards

Dear Roy:

Per your letter concerning Repurchase bids, we have, as a matter of policy, discontinued bidding a guaranteed repurchase agreement on equipment for the following reasons:

1. We feel this practice is of benefit to neither the seller or the purchaser and results in added expense to the county and ultimately the tax payer.
2. It becomes a contingent liability on our financial statement reducing our bonding capacity, borrowing capacity, and other capacities needed for a liquid financial position.
3. Only one distributor promotes this program. That distributor is Caterpillar and the program was written by Caterpillar as a marketing tool for their benefit (not the benefit of the County). If John Deere were to come out with a program such as this, you can bet it would favor John Deere and not the County.
4. The program as written by Caterpillar has a number of so-called loopholes whereby the seller can void the repurchase agreement if certain conditions are not met.
5. Good business dictates policies. We would be foolish to offer to repurchase a piece of equipment for more than that equipment would be worth on the open market at a given time. In turn, the County would be foolish to exercise a repurchase agreement that would give them less than the equipment was worth. So you may have paid a premium price for which you receive no benefit if you do not exercise the repurchase agreement.

Pg. 2, Tarrant County Purchasing
Re. Repurchase agreements

6. No one knows or can foresee the future, yet under the Guaranteed Repurchase Clause you are asking us to bid on a piece of equipment NOW that will not be available for a number of years. Also, we must guarantee to repurchase but you do not guarantee to sell to us at the end of the agreement.
7. Why is a guaranteed repurchase asked for on heavy equipment only? Why not on automobiles, trucks, business machines, etc.? We feel the policy is discriminatory.

Taken in total the above reasons, could you blame our organization for our policy of not bidding guaranteed repurchase? We have enjoyed our business relationship with the County and feel our equipment has given satisfactory service and good residual value. We can see no advantage to a guaranteed Repurchase clause in your bidding procedure.

Sincerely,

TRINITY EQUIPMENT COMPANY

James E. Thrasher
Assistant Manager

GUARANTEED BUY-BACK RESPONSE

There are many problems with the concept of guaranteed buy-back of Governmental equipment. It is very difficult to project resale value in five years time because of the many variables involved through such a program. These variables are no less evident if you require the bidder to speculate as to resale value by making his own projection. He is, in fact, in a worse position to judge that resale value as he will have no control over the use of the equipment by the Agency. As a result, the repurchase guarantee mechanism only serves to distort the bidding process, particularly in light of the fact that repurchase is a mere option the Governmental Agency may never exercise and, therefore, deserves little or no weight during bid evaluation.

The experience of many Agencies has been that a higher return is realized through disposal of equipment at public sale. Introducing the bidder's highly speculative resale valuation into the bid process affords the less scrupulous bidder an opportunity to manipulate the net value to his bid advantage although he may have no intention or reasonable expectation of having to fulfill his promise to repurchase. A performance bond to assure repurchase at the end of the life cycle would not protect the Agency from such intangibles as poor performance during the life of the equipment or the maintenance and downtime required for an inferior piece of equipment.

HOWARD COOPER CORPORATION

PARTS ORDERING INFORMATION

DRESSER & WABCO

ORDER DESCRIPTION	CODE	PENALTY	CUT OFF
STOCK ORDER		—	
EMERGENCY	03	—	2:00
CRITICAL	04	5%	
SHIP TOMORROW	13		AFTER 2:00
FPO	1 ORDER A WEEK	500.00 min.	5 day ship
	FREIGHT PREPAID		

LINK BELT	SHIPPED BY	PENALTY
RUSH ORDER	3 WORKING DAYS	5%
EMERGENCY ORDER	24 HOURS	10%

HOWARD COOPER CORPORATION

PARTS ORDERING INFORMATION

DRESSER & WABCO

ORDER DESCRIPTION	CODE	PENALTY	CUT OFF
STOCK ORDER		—	
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HOWARD COOPER CORPORATION

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STOCK ORDER		—	
EMERGENCY	03		2:00
CRITICAL	04	5%	
SHIP TOMORROW	13		AFTER 2:00
FPO	1 ORDER A WEEK	500.00 min.	5 day ship
	FREIGHT PREPAID		

LINK BELT	SHIPPED BY	PENALTY
RUSH ORDER	3 WORKING DAYS	5%
EMERGENCY ORDER	24 HOURS	10%

TOTAL COST BIDDING Disputed

28 October 1985 - Daily Oklahoman

By Randy Ellis

Controversy rages among state equipment dealers over a new bidding procedure promoted by Albert Equipment Co. of Tulsa.

The procedure is labeled "total cost bidding," and Albert Equipment Co. officials say it is "an idea whose time has come."

Other dealers disagree. They say it "inflates equipment prices" and "opens the door to all types of collusion."

Two northeastern Oklahoma counties opened bids for motor graders last week using the new procedure.

In both cases, Albert Equipment Co. was the only bidder and its bids were \$20,000 to \$35,000 higher than the state Central Purchasing Department paid for comparably equipped machinery bought through conventional bidding procedures.

For the extra \$20,000 to \$35,000, the counties get extended warranty coverage and guaranteed repurchase prices from the dealer.

Pawnee County commissioners are scheduled to vote Thursday on whether to accept Albert Equipment Co.'s bid, while Osage County commissioners face a similar vote Monday.

Albert Equipment Co., which sells the Caterpillar machinery line, has spent more than a year urging county commissioners and state officials to adopt total cost bidding.

The Tulsa Caterpillar dealer contends the new bidding method is superior to accepting the "lowest compliant bid" because it requires vendors to incorporate maintenance costs and resale value into bids.

Other vendors refused to bid under the new procedure, contending it is a Pandora's box.

"We think it has a lot of loopholes in it that over a period of time would promote collusion," said Buzz McDonald, sales manager for C.L. Boyd Co. Inc. "Anything that would promote collusion, we're against."

Total cost bidding is similar to conventional bidding in that it requires each vendor to submit a sealed bid containing a proposed sales price.

But, it differs from conventional bidding by

"There are a heck of a lot of temptations that come to pass with this bidding method. I'm not accusing any commissioner of being dishonest, but there are too many loopholes — too many places that could be subject to abuse."

-- John Johnson, state purchasing director

requiring vendors to also bid amounts that they will guarantee to pay for the repurchase of their equipment at the end of one, two or three years with normal wear and tear. The purchaser has the option of exercising the buy-back provision or keeping the equipment after each of the first three years.

The bid is awarded to the vendor which bids to buy its equipment back at the end of the first year at a price which is closest to the original sales price it has bid.

If a vendor had assurances from a county commissioner that the buy-back option would not be exercised, he could afford to inflate the sales price and then bid a buy-back price of just a few dollars less, McDonald said.

The colluding vendor would be the winning bidder, even though his sales price might be tens of thousands of dollars higher than the sales price bid by other contractors.

"It's just one way of getting around the competitive bidding process, said John Stotts, sales coordinator for Midwestern Equipment.

Lynn Sliger, sales manager for L.B. Smith, Inc., said Caterpillar officials created the total cost bidding program.

"They deliberately wrote everybody else out," Sliger said, adding that small companies don't have the resources to participate in the program. They would have to hire additional maintenance employees and vehicles to make sure counties were properly taking care of their equipment.

"I don't think anybody's going to bid it except Caterpillar dealers," he said. "After all, they're the ones that set it up. It's their program.

Jim Kromphardt, governmental sales consultant for Caterpillar Tractor Co., promoted the total cost bidding program in behalf of Albert Equipment Co. at a meeting of county commissioners last month.

"Pressure to buy based on the lowest

price is always present, but seldom will it result in the best long-term savings," he said.

Kromphardt argued that accepting the low bid on a road grader might save a buyer money now, but in the long run could cost more because a cheaper piece of equipment would require more repairs, have higher operating costs and lower resale value.

Dean Shaw, branch manager for Dresser Industries, Inc. of Oklahoma City, countered that Caterpillar Tractor Co. is just one of several companies that manufacture good equipment.

"We like to bid upfront where everything is spelled out," he said. "This particular method has too many contingencies subject to negotiations."

"Our firm will not bid it," he said.

A bill that would authorize total cost bidding statewide was introduced last session by state Rep. David Riggs, D-Sand Springs.

Riggs elected not to bring it up on the House floor after state Central Purchasing officials expressed reservations about its use. Riggs left open the possibility that he might reintroduce the bill next session.

John Johnson, director of purchasing for the state, said he has problems with total cost bidding because it makes it extremely difficult to objectively compare bids and opens the door for collusion.

"There are a heck of a lot of temptations that come to pass with this bidding method," Johnson said. "I'm not accusing any commissioner of being dishonest, but there are too many loopholes — too many places that could be subject to abuse."

Former Kingfisher County Commissioner Billy L. Lightle, one of more than 200 county commissioners and equipment and materials suppliers convicted in a federal kickback probe, concurred with Johnson's assessment of the dangers.

"This is a can of worms," he said in an

interview at the El Reno federal correctional institute.

Lightle said he didn't want to accuse anyone of bid rigging, but said total cost bidding would eliminate competition from small equipment companies and create numerous opportunities for collusion.

"There can be some deals made on it very easily," Lightle said.

Osage and Pawnee Counties were the first to begin testing the new bidding procedure.

In Osage County, commissioners opened bids Oct. 21 for three 135 horse power motor graders.

Albert Equipment Co. submitted bids of \$94,003, \$94,263 and \$94,313 for the three Caterpillar 12G graders. Nine other vendors submitted "no bids."

As part of its bid, Albert Equipment Co. submitted guaranteed repurchase prices of \$91,325 at the end of one year, \$88,325 at the end of two years and \$85,325 at the end of three years. The same repurchase prices were submitted for each graders.

Two days later, the state Central Purchasing Department opened conventional bids for four 150 horse power motor graders. Four companies submitted bids, which ranged from \$58,374 each to \$62,340 each. Bid forms were sent out to four Caterpillar dealers, but they did not respond.

In Pawnee County, experience with total cost bidding was similar.

Once again, Albert Equipment Co. was the only bidder. This time, it submitted a \$73,260 bid for a 125 horse power Caterpillar grader, and bid that it would guarantee to repurchase the grader for \$69,000 at the end of the first year, \$65,000 after the second year and

\$61,000 after the third year.

When the state opened conventional bids for three comparable 125 horse power graders this week, it received four bids — including a low bid of \$53,042 per grader. Again, the state sent out bid forms to Caterpillar dealers, but they were not returned.

Osage County Commissioner Fred Jordan indicated his county would probably buy at least one grader from Albert Equipment Co.

"I'm quite sure we're going to buy at least one or maybe three," Jordan said.

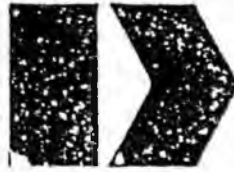
Jordan said he is a strong supporter of total cost bidding, despite the fact it would cost his county \$35,000 more for a 135-horse power grader than other counties are paying for 150 horse power graders.

For the extra \$35,000, the county receives guaranteed repurchase prices, an extended warranty of 5,000 hours or 36 months and a guarantee that the company will supply a substitute machine or pay \$100 a day if the machine is inoperable for more than 48 hours.

"They've got to believe in their equipment to do it," Jordan said.

Sylvia Riney, purchasing agent for Pawnee County, said she and the Pawnee County commissioners are still studying Albert Equipment Co.'s bid and trying to decide if total cost bidding is a good idea.

"It has its good points and its bad points," she said.



**DARR
EQUIPMENT CO.**

P.O. Box 20737 Dallas, Texas 75220-0737
(214) 721-2000



May 23, 1984

Mr. T.C. Webster
Technical Services Coordinator
Equipment Services Division
City of Fort Worth

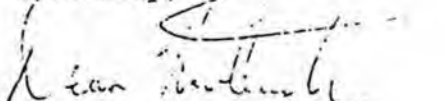
Mr. Webster:

In regards to actual values or trade-in prices that Darr Equipment Company offered on equipment number 624-0035 930, S/N 41K09092 for \$29,500.00 and equipment number 624-0033 930, S/N 41K08992 for \$23,500.00, we offer the following response.

Darr Equipment Company Repurchase Guarantee states that machines will be returned to Darr with only normal wear and tear on them. When we inspected these machines, there were some major mechanical deficiencies, and as a result, we put the assessed value somewhat lower than the guaranteed repurchase.

Should the City decide to repair or have Darr Equipment Company repair these deficiencies, then the original repurchase price would certainly be in order.

Sincerely,


Dean Hertenstein
Used Equipment Sales Manager

DH/kt



County board wrestles with road grader matter

Apr. 84
(Renville
County
Mn.)

By Geno Klecker
Government Reporter

Representatives from a heavy machinery firm in the Twin Cities told Renville County commissioners last week that they will be financially unable to honor a buy back agreement signed with the county five years ago. The agreement was part of a purchase contract in which the county highway department bought a new Champion motor grader from the firm, Borchert-Ingersoll.

Under terms of the agreement the Twin City firm would buy back the grader at the end of a five-year period at a set price of \$65,900.

The two company representatives told board members that if the firm would be held to the buy back agreement it could force the company to seek protection under the bankruptcy laws. Tight economic conditions have put a severe strain on the firm's operations, the two men said, and as a result the usual number of employees carried by the firm has been severely cut.

They admitted the firm had similar agreements with other counties but did not elaborate.

The men did, however, offer several alternatives for the commissioners' consideration. But county attorney Tom Simmons requested that details of the offers not be made public at this time in the event litigation resulted over the matter.

As a result of this matter, bids taken last month for a new motor grader were all rejected as the county had planned to use the buy back money toward purchase of the new machine.

Commissioners took no action but to study the alternative proposals before contacting the firm again.

"On deals like this I understand it is customary for the firm to furnish a performance bond," commissioner Lester Fredrickson observed. "But for some reason we don't have one. Does anyone know the reason why?"

No one answered Fredrickson's question.

"Somebody must have goofed," he added. "I wonder who?"

Simmons explained to the board that a bond would have acted like an insurance policy guaranteeing the county its money in the event the firm couldn't pay. It's not

required, he added, but is a good business practice.

State Representative Gaylin DenOuden told commissioners at their meeting last week that a bill clearing the way for the transfer of part of Birch Coulee park northeast of Morton had cleared both houses of the state legislature recently and would be signed by the governor soon.

In addition to the land transfer, the bill also provides for the payment of \$10,000 to the county to be used for park restoration and improvement, according to DenOuden.

The 80-acre park is owned by the Minnesota Historical Society and plans are to restore the higher, prairie portion of the park to its original appearance at the time of the battle back in the 1860's.

Society representatives met last fall with commissioners and made the offer of the 25 acres and the cash, if approved by the legislature. The commissioners were, at the time, somewhat cool to the idea but indicated to the society that they would probably accept the property as another county park, with the payment of \$10,000 for improvements.

The society already pays the county for maintenance of the entire park. No action will be taken until after another meeting with society representatives expected soon.

In other business, the board accepted and opened bids from five area insurance firms. The bids were sought as the result of recommendations made by an insurance consulting firm employed by the county to study insurance needs and costs.

Bids will be handed to the firm for tabulation and study, and action will be taken in the near future based on the consultant's recommendations.

The board also took action on three county drainage ditch projects.

-- Commissioner Pat Kubesh was appointed inspector as the result of a petition to clean a small portion of County Ditch 106A in Palmyra Township.

-- Set June 5 as the hearing date on a petition to improve a portion of County Ditch 113B in Troy Township.

-- Appointed an engineer to do a study on the need for a partial cleanout of County Ditch 63 in Bird Island and Kingman Townships.

AGENDA FOR DISCUSSION OF SB341

1. Review major changes to SB 341 since 3/5/86 draft.
2. Proposed amendments:
 - a.) Written justification for use of life cycle costing.
 - b.) Subcontractors - i) alter time in which general contractors must name subcontractors and, ii) provide that listing of a subcontractor does not create an implied contract.
3. Public testimony.

MAJOR CHANGES TO CS SB 341 SINCE 3/5/86 DRAFT

1. Sec 1. Purpose. Amendment suggested by the court system re: consistent procurement practices for all branches of state government.
2. Sec 36.30.030 Court system amendment re: nature of its procurement practices.
3. Sec 36.30.200 Amendment restricting the use of competitive sealed proposals in construction context.
4. Sec 36.30.270 Incorporates SB 204 concerning architectural, engineering and land surveying services into SB 341.
5. Sec 36.30.362 Requires written justification for contracts awarded to non-residents.
6. Sec 36.30.850(b)(12) Excludes Fish and Game non-point-to-point flights from the bill.
7. Sec 40. Amends AS 37.05.316 concerning grants to remove "contract" language.

AMENDMENT

#1

Offered in the SENATE

By the Judiciary Committee

TO: CSSB 341(Jud)

Page 14, line 4:

Add: "A contract based on total or life cycle costing may be awarded only when the chief procurement officer or, for construction contracts or procurements for the state equipment fleet, the commissioner of the department of transportation and public facilities, determines in writing at the time of contract solicitation that the contract promotes overall economy for the purposes intended, encourages competition, is not unduly restrictive, and is in the best interests of the state."

A M E N D M E N T

TO: Proposed CS for SB 341 (Jud)
Dated: March 5, 1986

Page 10, line 17 & 18

Sec. 36.30.115. SUBCONTRACTORS. (a) Within 72 [24] hours after the opening of bids, the apparent low [EACH] bidder shall submit a list of subcontractors the bidder proposes to use in the performance of the contract.

Page 11, line 7, a new section to read:

(c) The listing of a subcontractor by a prime contractor is not an expressed or implied acceptance of a subcontractor's bid by a prime contractor.

Renumber following sections accordingly.

STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

OFFICE OF THE COMMISSIONER

Bill Sheffield, GOVERNOR

POUCH 2
JUNEAU, ALASKA 99811
PHONE: (907) 465-3900

March 3, 1986

Ms. Resa Jerrel
Associated General Contractors
134 No. Franklin Street
Juneau, Alaska 99801

Dear Ms. Jerrel:

Let me begin by saying thank you for working with my staff and others to find a good, workable procurement process for the State of Alaska. It is in all of our best interests to find workable solutions which serves our State and the various groups, both contractors and subcontractors.

As we agreed, in Senate Bill No. 341, State Procurement, the Department offered an amendment to Section 36.30.110, Invitation to Bid, which would require prime contractors to list their subcontractors immediately following the bid opening. We construe "immediately" to mean 72 hours. This amendment would greatly simplify our bid openings and encourage more bidders to participate.

The requirement of listing subcontractors within 72 hours, and we mean 72 hours, should help the problem of bid shopping for subcontractable work. The proper place for the time requirement is in the regulations and we will see that the 72 hour requirement is literally included.

We are also working on other issues important to the subcontracting community, which are outside the scope of the procurement bill, such as prompt payment. These will be addressed in our Standard Specifications.

We thank you again for your cooperative efforts and looking forward to working with you to see this bill through the legislative process.

Sincerely,



R. J. Knapp
Commissioner

cc: Sponsor
Committee Members

It is best to clarify the language in the law instead of having to spend time and money to have the court system clarify what the legislature intended. The California statute on page 375 list a court decision:

In the absence of an agreement to the contrary listing of a subcontractor in a prime bid on a public improvement project is not an implied acceptance of the subcontractor's bid by the general contractor, but is in response to statutory command and cannot reasonably be construed as an expressed acceptance. Southern Cal. Acoustice Co. v Holder (C.V.), Inc. 1969

The above type of litigation can be prevented by the inclusion of the following language:

The listing of a subcontractor by a prime contractor is not an expressed or implied acceptance of a subcontractor's bid by a prime contractor.

Received on scanner from
LIZ in envelope for SB341
packets 3/11 1CB 12:30

CRAIG TAYLOR EQUIPMENT COMPANY

733 E. Whitney Road
Anchorage, Alaska 98501-1894
(907) 276-5050



SB 341
COMMITTEE
FILE

March 11, 1986

Senator Pat Rodey
Chairman, Senate Judiciary Committee
Pouch Y
Juneau, AK 99811

Dear Senator:

We are unalterably opposed to total cost bidding. We represent well over fifty light and heavy industrial and construction equipment manufacturers. We contribute sizeable investments in facilities, employment and taxes to and for the state of Alaska. We concur with the ideas expressed in the enclosed letter and urge you to rule out total cost bidding in proposed Bill No. 341 regarding state procurement. In the event that you do not think this is possible we urge you to adopt language such as the following:

A contract based on Total or Life Cycle costing may be awarded only when the Chief Procurement Officer or, for construction contracts or procurements for the state equipment fleet, the commissioner of transportation and public facilities determines in writing that it promotes overall economy for the purposes for which it was intended, that it encourages competition, that it is not unduly restrictive and that it is in the best interests of the state.

Thank you very much for your consideration in this matter.

John P. Snow V.P. Craig Taylor Equipment
Signature Title Company

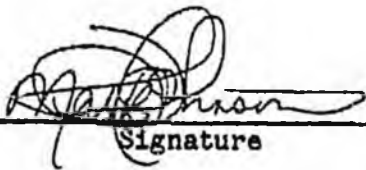
Steve Anderson V.P. Rodey Equip Inc.
Signature Title Company


Mary Hollowell President Yukon Equipment, Inc.
Signature Title Company

Senator Pat Rodey

March 11, 1986

Page 2


Signature Title Sales Manager Company Construction Machinery, Inc.


Signature Title Product Mgr. Company General Cooper Corp

Enclosures

cc: Senators Tim Kelly
Jan Faiks
Rick Halford
Robert Ziegler

CRAIG TAYLOR EQUIPMENT COMPANY

733 E. Whitney Road
Anchorage, Alaska 99501-1694
(907) 276-5050
Sales · Service · Rentals

November 18, 1985



Mr. Frank Turpin
Alaska Railroad
Pouch 7-2111
Anchorage, AK 99510-7069

Dear Frank:

The total cost bidding concept was developed quite some time ago by one manufacturer who felt, because of a perceived difference in quality, that he did not have to participate in deeper discounts for governmental bids. At that time there may have been other manufacturers who built machines just to meet minimum bid specifications and were therefore inherently cheaper. These machines that were being purchased through low bid by governmental agencies were not necessarily being purchased by the general contractors back then. But since the basic function of most governmental agencies is for repair and maintenance rather than new construction, there was a viable reason to purchase the less expensive machine.

With the advent of tighter specification writing added to the fact that general contractors were not purchasing the cheaper machines, those manufacturers have been either forced out of business or else forced to build a higher quality, market-accepted machine. Marginal manufacturers will probably always come and go, but with the sophistication of the State's bidding procedures already in place; ie. prequalification, tight bid specs, thorough warranty specs, nonperformance penalties, these manufacturers will always be weeded out.

A total cost bid is one in which all costs (purchase price, repairs, maintenance) for a given period of time, and the residual or salvage value at the end of that time, are guaranteed at the time of purchase. The bid is usually bonded to ensure the performance of the vendor. The only benefit to the customer of the total cost bid over a well prepared low bid package is that costs, although higher, are known for budgetary purposes. The vendor on the other hand, realizes higher profits, restricted competition, and higher product support revenues.

The drawbacks to the customer are several. He will end up paying tens of thousands of dollars more in a total cost bid especially when the time value of money between the date of sale and date of buy-back (as much as five years later) is considered. Add to this the price of the bid bond and then the fact that the bid, which is evaluated based on the guaranteed buy-back price, does not require the agency to sell the machine back. If the repurchase option is not exercised then a tremendous premium has been paid. It is estimated that only as few as five to ten percent of the machines sold under a total cost bid are repurchased. The agency's maintenance costs will increase due to the

rigid requirements for strict adherence to maintenance responsibilities written into most of these bids. While promoted as a valid protection for the dealer, much subjectivity could enter into the equipment evaluation at the end of the period, especially if the agency's maintenance records are not complete or are inaccurate. Considerable latitude exists for conflict between the agency and supplier with the very good possibility that the repurchase guarantee may be voided on maintenance technicalities. A by-product of the maintenance requirement is that the agency is locked into one supplier. There can be no substitute filters or oils, etc. used during the life of the contract.

The dealer is faced with several drawbacks also. He is faced with a contingent liability that he must live with for the life of the contract. This, of course, reduces the dealer's bonding capacity and borrowing capacity needed for a liquid financial position. He may end up with a machine that has to be remarketed. And he may have guessed wrong about inflation keeping the value of the buy-back high. Or he may have given an inflated price for the buy-back gambling that few agencies ever enforce the repurchase clause. Introducing the bidder's highly speculative resale valuation into the bid process affords the less scrupulous bidder an opportunity to manipulate the net value to his advantage although he may have no incentive or reasonable expectation of having to fulfill his promise to repurchase.

The biggest drawback in this type of bid for both buyer and seller is that there are too many loopholes, too many contingencies subject to negotiation. There is no way to objectively evaluate a total cost bid. These contingencies and loopholes create numerous opportunities for collusion or for deal making.

Isn't it odd that with all the various commodities the state of Alaska purchases; from pencil sharpeners, to office machines, to cars and trucks, to heavy equipment, to ferry boats, only one manufacturer is a proponent of total cost bidding? If there was any validity in the concept at all then its use would be widespread. But as it is, there are no federal agencies and only a very small minority of other governmental agencies that use this concept. It seems to me that the few who use this method have simply caved in to intense marketing pressure rather than going with their common sense. It is only old fashioned, out-moded thinking in this time of world-wide economic competition that would lead someone to believe that any one brand or product might be superior as to quality and characteristics. Once upon a time this might have been true. But in this day and age it is nothing but a fairy tale. Don't get caught up in this type of thinking and don't pay more for those products trying to live on past reputations.

Sincerely,



John P. Snow
Vice President

cc: Senator Jan Faiks
Commissioner Richard Knapp
Commissioner Loren Lounsbury
John Reynolds, ARR Purchasing
Darrell Methvin, State Equipment Fleet
Keith Nelson, State Equipment Fleet



Office of the Attorney General

STATE OF SOUTH DAKOTA

Mark V. Meierhenry

Attorney General

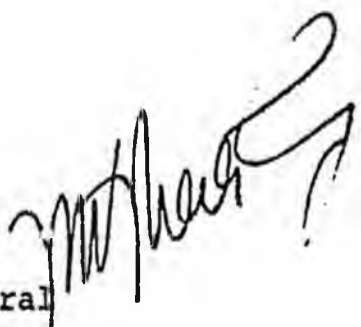
February 4, 1986

MEMORANDUM

TO: All States Attorneys

FROM: Mark V. Meierhenry, Attorney General

RE: TOTAL COST BIDDING



Enclosed please find an Official Opinion just issued from this office concerning total cost bidding. Our office has received a number of complaints from the Auditor General's Office and from private citizens concerning abuses in implementing a total cost bidding procedure by counties, cities and townships. In the Official Opinion I determined that the total cost bidding procedure as currently used by many counties, municipalities and townships was in violation of the competitive bidding procedures. This Opinion may affect not only future biddings by your county but also previous bids and contracts entered into for heavy equipment and other goods and services.

I would suggest that you review the opinion, your county's current bidding procedures, and discuss the matter with your Commissioners to avoid problems in the future.

If you have any questions, please feel free to contact this office.

MVM:JPH:bn

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

February 4, 1986

Mr. Maurice C. Christiansen
Auditor General
435 South Chappelle
Pierre, South Dakota 57501-3292

OFFICIAL OPINION NO. 86-01

Total cost bidding

Dear Mr. Christiansen:

You have requested an official opinion from this office in regard to the following factual situation:

FACTS:

The Auditor General's Office has encountered numerous situations during the past year where local governmental entities have been implementing a "total cost" bidding procedure for the purchase of heavy equipment. Using this total cost bidding procedure, the local government entity is requesting bids which are evaluated by netting at face value: (1) the initial purchase price of the equipment, plus; (2) the guaranteed maximum repair cost for a period specified by the government entity, less; (3) a guaranteed minimum repurchase price at the end of the specified time period.

With the above factual statement, the Auditor General's office has also enclosed several recent sets of bid specifications used by local government entities attempting to implement a total cost bidding procedure. Some of the specifications submitted did not require a performance bond or allowed a "corporate guarantee" in lieu of the performance bond, and establishes a procedure where only the face value of the bid items addressed above were to be considered.

Based upon the above facts, you have asked the following question:

- QUESTION:

Does the total cost bidding procedure as currently being used by local governmental entities violate the competitive bidding provisions of SDCL Ch. 5-18 or SDCL Ch. 5-21?

Total cost bidding describes a bidding procedure whereby a public entity seeks bids from a potential seller, based upon the total costs of ownership, in addition to the initial purchase price. This is the sole cost basis for governmental purchases under traditional bidding procedures. One of my predecessors in AGR 1965-1966, page 211, using the term "guaranteed bidding," determined that the concept of total cost bidding did not violate the competitive bidding provisions of SDCL Ch. 5-18. I concur with my predecessor's determination that total cost bidding, if properly implemented by the public entity, does not violate the competitive provisions of SDCL Ch. 5-18 or Ch. 5-21. It is my opinion, however, upon review of "total cost bidding procedures" currently used by the local government entities, that the principles of competitive bidding are being violated.

The South Dakota Supreme Court in Gridley v. Engelhart, 322 N.W.2d 3, 7 (S.D. 1982), stated:

Bid specifications as they pertain to public contracts must be sufficiently definite and precise so as to afford a basis for bids and they must be free of restrictions the effect of which would stifle competition. Such specifications must be sufficiently detailed upon all essential elements so as to afford a basis for full and fair competitive bidding upon a common standard.

The flaw in the local governmental entities current total cost specifications is that these specifications totally ignore the time value of money which, in my opinion, is an essential element in total cost bidding. It does not take an expert financial analyst to determine that a dollar today is not the same as a dollar three or seven years in the future. The reason for this is that a dollar today can be invested so that it is worth more at a future date. A total cost bidding procedure that takes present dollars and future dollars and nets them at face value to determine the low bid compares dollars of different present value. This netting of face values has the effect of mixing apples and oranges which, in my opinion, makes it impossible for a local government entity, as well as potential bidders, to determine what is the "lowest responsible bid."

This netting of dollars at face value also could result in potential abuses where the actual value of the equipment at the date of purchase is no longer relevant.

For purposes of illustration, I present the following example: A local government entity is seeking the purchase of a flatbed truck. The local government entity uses a total cost bidding procedure and wants guaranteed repairs for five years with a guaranteed repurchase price. Suppliers "A," "B" and "C" have products that meet the county's general specifications for the flatbed truck and all are responsible bidders. Bids are received and opened with the following results:

	<u>Dollars Bid</u>		
	<u>A</u>	<u>B</u>	<u>C</u>
Initial price	\$20,000	\$25,000	\$35,000
Plus maximum repairs	<u>9,000</u>	<u>4,000</u>	<u>2,500</u>
Subtotal	\$29,000	\$29,000	\$37,500
Less repurchase guarantee	<u>10,000</u>	<u>18,000</u>	<u>30,000</u>
Total Cost	<u>\$19,000</u>	<u>\$11,000</u>	<u>\$ 7,500</u>

The local government entity could currently invest money in C.D.'s at an investment rate of 8%. If the value of money was included in the specifications and the bids were reviewed in present value terms the bid results would be as follows:

Initial price	\$20,000	\$25,000	\$35,000
Plus maximum repairs ¹	<u>7,187.4</u>	<u>3,194.4</u>	<u>1,996.5</u>
Subtotal	\$27,187.4	\$28,194.4	\$36,996.5
Less repurchase guarantee ²	<u>6,810.</u>	<u>12,258.</u>	<u>20,430.</u>
Total Cost	<u>\$20,377.4</u>	<u>\$15,936.4</u>	<u>\$16,566.5</u>

¹ 3.993--Present value of an annuity of \$1.00 per year for 5 years discounted at 8% and assumes repairs of equal amounts each year.

² .681--Present value of \$1.00 due at the end of 5 years discounted at 8%.

Mr. Maurice C. Christiansen
OFFICIAL OPINION NO. 86-01
February 4, 1986
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Under a traditional bidding procedure where only the initial price is considered, the truck from Supplier "A" would have been purchased by the local government entity. Under a "total cost" bidding procedure using dollars at face value as currently used by the local governments, Supplier "C" would be awarded the bid although Supplier "C's" initial purchase price was the greatest, the total cost at face value was less than either Supplier "A" or "B." But, once the value of the dollar is added, Supplier "B" would now become the lowest responsible bidder. When one looks at all costs of the local government entity, Supplier "B" provides the best total value if the entity wishes to use the total cost approach.

It is, therefore, my opinion, that if a local government entity decides to use a total cost bidding procedure to comply with the competitive bidding provisions of SDCL Ch. 5-18, the local government entity must include in the bid specifications the current investment rate which the local government entity could invest funds. This ensures that the potential bidders and the local government entity have a uniform basis to compare the bid proposals submitted by the various potential suppliers.

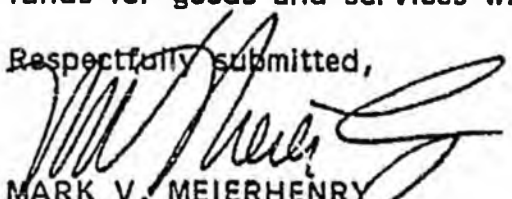
In addition, though it is not a violation of SDCL Ch. 5-18, it is my opinion that a prudent local government entity, in order to guarantee future performance of the total cost contract, should require a potential bidder to submit a performance bond in accordance with SDCL Ch. 5-21. When a supplier enters into a contract based upon a total cost bid, that supplier has a contingent liability to the local government entity for the costs of repairs for the term of the contract and the guaranteed repurchase price. Without a performance bond, the local government entity has no guarantee that the terms of the contract will be fully performed. Currently, some government entities are requiring a performance bond with their total cost bid while other local government entities are not requiring a performance bond or allowing that a "corporate guarantee" be submitted in lieu of performance bond. A corporate guarantee adds no additional security to future performance of the contract. Any corporation that enters into a contract with a local government entity for future services or products is getting that corporation's guarantee. Only a performance bond or submission of actual collateral or security to the local government entity will provide additional security in case the bidder is awarded a contract and is financially incapable of performing all of its terms.

Total cost bidding, if used properly, can reduce the amount of monies a local governmental entity needs to expend for the purchase and use of equipment. Unless properly implemented, however, the total cost bid

Mr. Maurice C. Christiansen
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procedures may result in the county needlessly expending additional funds for goods and services without added benefits.

Respectfully submitted,



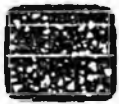
MARK V. MEIERHENRY
ATTORNEY GENERAL

MVM:JPH:db



TRINITY

EQUIPMENT COMPANY



P.O. Box 8486
Randall Mill Rd & Loop 820
Ft. Worth, Texas 76112
817/451-6094

17 April 1984

Tarrant County
Purchasing Department
100 West Weatherford Street
Fort Worth, Texas 76102

Attn: Roy Edwards

Dear Roy:

Per your letter concerning Repurchase bids, we have, as a matter of policy, discontinued bidding a guaranteed repurchase agreement on equipment for the following reasons:

1. We feel this practice is of benefit to neither the seller or the purchaser and results in added expense to the county and ultimately the tax payer.
2. It becomes a contingent liability on our financial statement reducing our bonding capacity, borrowing capacity, and other capacities needed for a liquid financial position.
3. Only one distributor promotes this program. That distributor is Caterpillar and the program was written by Caterpillar as a marketing tool for their benefit (not the benefit of the County). If John Deere were to come out with a program such as this, you can bet it would favor John Deere and not the County.
4. The program as written by Caterpillar has a number of so-called loopholes whereby the seller can void the repurchase agreement if certain conditions are not met.
5. Good business dictates policies. We would be foolish to offer to repurchase a piece of equipment for more than that equipment would be worth on the open market at a given time. In turn, the County would be foolish to exercise a repurchase agreement that would give them less than the equipment was worth. So you may have paid a premium price for which you receive no benefit if you do not exercise the repurchase agreement.

Pg. 2, Tarrant County Purchasing
Re. Repurchase agreements

6. No one knows or can foresee the future, yet under the Guaranteed Repurchase Clause you are asking us to bid on a piece of equipment NOW that will not be available for a number of years. Also, we must guarantee to repurchase but you do not guarantee to sell to us at the end of the agreement.
7. Why is a guaranteed repurchase asked for on heavy equipment only? Why not on automobiles, trucks, business machines, etc.? We feel the policy is discriminatory.

Taken in total the above reasons, could you blame our organization for our policy of not bidding guaranteed repurchase? We have enjoyed our business relationship with the County and feel our equipment has given satisfactory service and good residual value. We can see no advantage to a guaranteed Repurchase clause in your bidding procedure.

Sincerely,

TRINITY EQUIPMENT COMPANY

James E. Thrasher
Assistant Manager



Trinity Equipment Company

P.O. Box 8486
Randol Mill Road & Loop 820 Fort Worth, Texas 76112
Telephone (817) 451-8094



February 21, 1984

City of Fort Worth
1000 Throckmorton
Fort Worth, Texas 76101

Attn: Mr. Robert Herchert
City Manager

Subject: Purchasing Practices now employed by the City of
Fort Worth (i.e. Guaranteed Repurchase).

Dear Sir:

For the past several years the City of Fort Worth has employed a policy of purchasing heavy equipment utilizing a Guaranteed Repurchase clause to determine award of contracts for purchase of that equipment.

In the past we have participated in this procedure and have been the successful bidder on several occasions, however, our company has discontinued this type of bidding for various reasons.

Firstly, we will not bid the repurchase guaranty because at present we have guaranteed repurchase agreements to the City of Fort Worth in effect on twenty-four (24) pieces of equipment totaling some \$580,000.00. This appears on our company's financial statement as a contingent liability, reducing our borrowing capacity, our bonding capacity and various other capacities requiring a more liquid financial statement.

Secondly, we do not choose to bid the repurchase guaranty because we feel it is not an advantage to either the buyer or the seller. As written, your Repurchase Guaranty does not provide an option for the seller. The seller guarantees to repurchase, but the City does not guarantee to sell the equipment back to the seller. In addition, the City will pay a premium price for the equipment under this program since bonding is required and costs for the bond will most assuredly be added to the sale price of the machine. The bidder must consider the cost of the bond in determining his sale price. At the present time a performance bond costs us \$20.00 per thousand per year. On that basis a guaranteed repurchase bond in the amount of \$30,000.00 for five years would cost \$3,000.00 which would be added to the cost of the machine.

*Equipment spec. writing
Services -
Mr. T.C. Webster*



Pg. 2 - City of Fort Worth

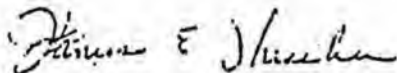
As an observation on the above, let me offer an example of purchases made prior to this bidding practice which may show the questionable value of Repurchase Guaranty. In 1973, we sold the City of Fort Worth eight (8) four-wheel drive end loaders for \$16,240.28 each. One of these units was offered as a trade-in on your invitation to bid opened February 2, 1984. One of our competitors offered the City \$13,500.00 for this loader. This is an 83% recovery of the original purchase price after ten (10) years of use by the city. On the bids just opened on February 2, 1984 for this same type of equipment, the best Repurchase Guaranty received by the City was only 75% of the purchase price after five (5) years of use, and the apparent successful bidder only guaranteed 71% of his original sale price.

In summary, in our opinion, not only is the City paying a premium price for their equipment, it is also giving an advantage to the larger equipment manufacturer by limiting participation by smaller dealers. In 1982 there were some fourteen (14) bidders on four-wheel drive end loaders in response to your invitation to bid. In 1983 only ten (10) bidders and this year only six (6) bidders responded (5 bid the Guaranteed Repurchase). If a survey were conducted, I believe you would find that the Guaranteed Repurchase clause would be the reason for the reduction in the number of bids received by the City.

We have enjoyed our association in a business relationship with the City of Fort Worth and believe our equipment has served the City well over the years. We regret that we cannot compete for your equipment needs under the current purchasing procedures.

Sincerely

TRINITY EQUIPMENT COMPANY



James E. Thrasher
City Salesman

JET/ph



Midwest Industrial Equipment Co.

Hwy. 2 West — Box 5010

Grand Forks, North Dakota 58201 -- Phone 772-4842

May 29, 1984

Honorable Commissioners
Folk County, MN

Gentlemen:

Midwest Industrial Equipment Co. will not be bidding the re-purchase portion of the county's motor grader bid. We hope that this decision does not deny us the opportunity to be part of the competitive bidding process.

At John Deere we try to make the best equipment available today. We are willing to stand behind our equipment because we feel that the quality of the machines will help sell itself without having to add costly guarantees. Our name and reputation depend on it.

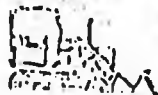
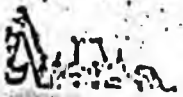
One of the reasons for not bidding the re-purchase section is the added cost to the county. Most counties can't afford to have a five year turnover of machines. Even if they could, a county machine is still in excellent condition after five years. Because of the county maintenance programs, county machines have a trade-in value that could be as high or higher, depending on inflation, than a five year old re-purchase price. If you have to pay X amount more for a machine at the purchase, you should get that amount, plus interest, when the machine is sold or traded.

Example: A machine costing \$10,000 more now should be worth, at 8% interest:

\$10,800.00	after 1st year
11,664.00	after 2nd year
12,597.12	after 3rd year
13,604.89	after 4th year
14,693.28	after 5th year

I know it's been said that the extra cost to the county is our excuse for not bidding the re-purchase. It's not an excuse. We feel we have a responsibility to our community. This years survey by Fortune Magazine backs this up. They ranked John Deere Corporation first in five of eight categories. One of our first place categories was community responsibility.

At John Deere we're not satisfied to keep up with the competition. We are the innovators of many modern equipment designs and functions that you see. The John Deere 770A motor grader is designed to offer our customers the most up to date, efficient, and reliable grader possible.



SKAGIT COUNTY PUBLIC WORKS DEPARTMENT

County Administration Building, Room 203, 2nd & Kincaid Streets, Mount Vernon, Washington 98273

W. Eugene Sampley, P.E.
Director

John B. Ensley
Assistant Director

(206) 336-94(X)

Charles Tewalt
Superintendent
Operations Division

(206) 755-9531

February 27, 1985

Board of County Commissioners
Skagit County Admin Building
Mount Vernon, WA 98273

Re: Bid Award Recommendation:
Motor Grader

Gentlemen:

Two bidders submitted a total of four proposals to furnish one new latest model motor grader, as follows:

Millbrook Equipment Company	JOHN DEERE Model 770A	\$ 81,045.30
N C Machinery Co.	CATERPILLAR Model 140G	\$105,350.00
N C Machinery Co. (Alternate #1)	CATERPILLAR Model 140G	\$110,725.00
N C Machinery Co. (Alternate #2)	CATERPILLAR Model 130G	\$ 96,750.00

All units meet equipment features specifications except for the N C Machinery's CATERPILLAR Model 130G which does not meet the horsepower requirement.

Specifications called for this motor grader to be awarded to the lowest or best bid based on a life cycle cost method. Millbrook did not meet the requirement to submit guaranteed repair expenses and a guaranteed repurchase price. N C Machinery did not submit a valid bid deposit in the form of a surety bond, cash, cashier's check or certified check in the amount of 5% of the amount of their bid proposal.

Although the Board reserves the right to waive minor irregularities in the bidding, cost analyses shown in Attachment "A" support the contention that a life cycle cost approach will not be in the County's best interests on this bid award when the time value of money is considered.

I recommend that all bids be rejected. I further recommend that a new call for bids in which life cycle cost is not used be initiated.

Sincerely,

W. EUGENE SAMPLEY, P.E.
Public Works Director

ATTACHMENT "A"

MOTOR GRADER TIME VALUE OF MONEY ANALYSES

- Assumptions: 1) That the County has \$105,350 available to spend
- 2) That the average interest rate value of money over the next six years will be 10%
- OR
- 3) That the average interest rate value of money over the next six years will be 8.5%

	N C MACHINERY	MILLBROOK
Current out-of-pocket cost:	\$105,350	\$81,045
Less guaranteed trade-in amount:	(80,000)	
Less estimated trade-in amount:		(40,000)
Six-year cost of ownership without considering that trade-in money is not available for six years:	\$ 25,350	\$41,045

Current out-of pocket cost:	\$105,350	\$81,045
Less guaranteed trade-in amount of \$80,000 discounted for six years at 10%:	(45,158)	
Less estimated trade-in amount of \$40,000 discounted for six years at 10%:		(22,579)
Interest earned on \$24,305 "unspent" money available for investment for six years at 10%:		(14,583)
Comparative cost of ownership in 1985 dollars:	\$60,192	\$43,883

Current out-of pocket cost:	\$105,350	\$81,045
Less guaranteed trade-in amount of \$80,000 discounted for six years at 8.5%:	(49,036)	
Less estimated trade-in amount of \$40,000 discounted for six years at 8.5%:		(24,518)
Interest earned on \$24,305 "unspent" money available for investment for six years at 8.5%:		(12,396)
Comparative cost of ownership in 1985 dollars:	\$ 56,314	\$44,131

GUARANTEED BUY-BACK RESPONSE

There are many problems with the concept of guaranteed buy-back of Governmental equipment. It is very difficult to project resale value in five years time because of the many variables involved through such a program. These variables are no less evident if you require the bidder to speculate as to resale value by making his own projection. He is, in fact, in a worse position to judge that resale value as he will have no control over the use of the equipment by the Agency. As a result, the repurchase guarantee mechanism only serves to distort the bidding process, particularly in light of the fact that repurchase is a mere option the Governmental Agency may never exercise and, therefore, deserves little or no weight during bid evaluation.

The experience of many Agencies has been that a higher return is realized through disposal of equipment at public sale. Introducing the bidder's highly speculative resale valuation into the bid process affords the less scrupulous bidder an opportunity to manipulate the net value to his bid advantage although he may have no intention or reasonable expectation of having to fulfill his promise to repurchase. A performance bond to assure repurchase at the end of the life cycle would not protect the Agency from such intangibles as poor performance during the life of the equipment or the maintenance and downtime required for an inferior piece of equipment.

HOWARD COOPER CORPORATION

PARTS ORDERING INFORMATION

DRESSER & WABCO

ORDER DESCRIPTION	CODE	PENALTY	CUT OFF
STOCK ORDER		—	
EMERGENCY	03	—	2:00
CRITICAL	04	5%	
SHIP TOMORROW	13		AFTER 2:00
FPO	1 ORDER A WEEK	500.00 min.	5 day ship
	FREIGHT PREPAID		

LINK BELT	SHIPPED BY	PENALTY
RUSH ORDER	3 WORKING DAYS	5%
EMERGENCY ORDER	24 HOURS	10%

HOWARD COOPER CORPORATION

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EMERGENCY ORDER	24 HOURS	10%

Total Cost Bidding Disputed

28 October 1985 - Daily Oklahoman

By Randy Ellis

Controversy rages among state equipment dealers over a new bidding procedure promoted by Albert Equipment Co. of Tulsa.

The procedure is labeled "total cost bidding," and Albert Equipment Co. officials say it is "an idea whose time has come."

Other dealers disagree. They say it "inflates equipment prices" and "opens the door to all types of collusion."

Two northeastern Oklahoma counties opened bids for motor graders last week using the new procedure.

In both cases, Albert Equipment Co. was the only bidder and its bids were \$20,000 to \$35,000 higher than the state Central Purchasing Department paid for comparably equipped machinery bought through conventional bidding procedures.

For the extra \$20,000 to \$35,000, the counties get extended warranty coverage and guaranteed repurchase prices from the dealer.

Pawnee County commissioners are scheduled to vote Thursday on whether to accept Albert Equipment Co.'s bid, while Osage County commissioners face a similar vote Monday.

Albert Equipment Co., which sells the Caterpillar machinery line, has spent more than a year urging county commissioners and state officials to adopt total cost bidding.

The Tulsa Caterpillar dealer contends the new bidding method is superior to accepting the "lowest compliant bid" because it requires vendors to incorporate maintenance costs and resale value into bids.

Other vendors refused to bid under the new procedure, contending it is a Pandora's box.

"We think it has a lot of loopholes in it that over a period of time would promote collusion," said Buzz McDonald, sales manager for C.L. Boyd Co. Inc. "Anything that would promote collusion, we're against."

Total cost bidding is similar to conventional bidding in that it requires each vendor to submit a sealed bid containing a proposed sales price.

But, it differs from conventional bidding by

"There are a heck of a lot of temptations that come to pass with this bidding method. I'm not accusing any commissioner of being dishonest, but there are too many loopholes — too many places that could be subject to abuse."

— John Johnson, state purchasing director

requiring vendors to also bid amounts that they will guarantee to pay for the repurchase of their equipment at the end of one, two or three years; with normal wear and tear. The purchaser has the option of exercising the buy-back provision or keeping the equipment after each of the first three years.

The bid is awarded to the vendor which bids to buy its equipment back at the end of the first year at a price which is closest to the original sales price it has bid.

If a vendor had assurances from a county commissioner that the buy-back option would not be exercised, he could afford to inflate the sales price and then bid a buy-back price of just a few dollars less, McDonald said.

The colluding vendor would be the winning bidder, even though his sales price might be tens of thousands of dollars higher than the sales price bid by other contractors.

"It's just one way of getting around the competitive bidding process," said John Slotts, sales coordinator for Midwestern Equipment.

Lynn Sliger, sales manager for L.B. Smith, Inc., said Caterpillar officials created the total cost bidding program.

"They deliberately wrote everybody else out," Sliger said, adding that small companies don't have the resources to participate in the program. They would have to hire additional maintenance employees and vehicles to make sure counties were properly taking care of their equipment.

"I don't think anybody's going to bid it except Caterpillar dealers," he said. "After all, they're the ones that set it up. It's their program."

Jim Kromphardt, governmental sales consultant for Caterpillar Tractor Co., promoted the total cost bidding program in behalf of Albert Equipment Co. at a meeting of county commissioners last month.

"Pressure to buy based on the lowest

price is always present, but seldom will it result in the best long-term savings," he said.

Kromphardt argued that accepting the low bid on a road grader might save a buyer money now, but in the long run could cost more because a cheaper piece of equipment would require more repairs, have higher operating costs and lower resale value.

Dean Shaw, branch manager for Dresser Industries, Inc. of Oklahoma City, countered that Caterpillar Tractor Co. is just one of several companies that manufacture good equipment.

"We like to bid upfront where everything is spelled out," he said. "This particular method has too many contingencies subject to negotiations."

"Our firm will not bid it," he said.

A bill that would authorize total cost bidding statewide was introduced last session by state Rep. David Riggs, D-Sand Springs.

Riggs elected not to bring it up on the House floor after state Central Purchasing officials expressed reservations about its use. Riggs left open the possibility that he might reintroduce the bill next session.

John Johnson, director of purchasing for the state, said he has problems with total cost bidding because it makes it extremely difficult to objectively compare bids and opens the door for collusion.

"There are a heck of a lot of temptations that come to pass with this bidding method," Johnson said. "I'm not accusing any commissioner of being dishonest, but there are too many loopholes — too many places that could be subject to abuse."

Former Kingfisher County Commissioner Billy L. Lightle, one of more than 200 county commissioners and equipment and materials suppliers convicted in a federal kickback probe, concurred with Johnson's assessment of the dangers.

"This is a can of worms," he said in an

interview at the El Reno federal correctional institute.

Lightle said he didn't want to accuse anyone of bid rigging, but said total cost bidding would eliminate competition from small equipment companies and create numerous opportunities for collusion.

"There can be some deals made on it very easily," Lightle said.

Osage and Pawnee Counties were the first to begin testing the new bidding procedure.

In Osage County, commissioners opened bids Oct. 21 for three 135 horse power motor graders.

Albert Equipment Co. submitted bids of \$94,003, \$94,263 and \$94,313 for the three Caterpillar 12G graders. Nine other vendors submitted "no bids."

As part of its bid, Albert Equipment Co. submitted guaranteed repurchase prices of \$91,325 at the end of one year, \$88,325 at the end of two years and \$85,325 at the end of three years. The same repurchase prices were submitted for each grader.

Two days later, the state Central Purchasing Department opened conventional bids for four 150 horse power motor graders. Four companies submitted bids, which ranged from \$58,374 each to \$62,340 each. Bid forms were sent out to four Caterpillar dealers, but they did not respond.

In Pawnee County, experience with total cost bidding was similar.

Once again, Albert Equipment Co. was the only bidder. This time, it submitted a \$73,260 bid for a 125 horse power Caterpillar grader, and bid that it would guarantee to repurchase the grader for \$69,000 at the end of the first year, \$65,000 after the second year and

\$61,000 after the third year.

When the state opened conventional bids for three comparable 125 horse power graders this week, it received four bids — including a low bid of \$53,042 per grader. Again, the state sent out bid forms to Caterpillar dealers, but they were not returned.

Osage County Commissioner Fred Jordan indicated his county would probably buy at least one grader from Albert Equipment Co.

"I'm quite sure we're going to buy at least one or maybe three," Jordan said.

Jordan said he is a strong supporter of total cost bidding, despite the fact it would cost his county \$35,000 more for a 135-horse power grader than other counties are paying for 150 horse power graders.

For the extra \$35,000, the county receives guaranteed repurchase prices, an extended warranty of 5,000 hours or 36 months and a guarantee that the company will supply a substitute machine or pay \$100 a day if the machine is inoperable for more than 48 hours.

"They've got to believe in their equipment to do it," Jordan said.

Sylvia Riney, purchasing agent for Pawnee County, said she and the Pawnee County commissioners are still studying Albert Equipment Co.'s bid and trying to decide if total cost bidding is a good idea.

"It has its good points and its bad points," she said.



**DARR
EQUIPMENT CO.**

P.O. Box 20737 Dallas, Texas 75220-0737
(214) 721-2000



May 23, 1984

Mr. T.C. Webster
Technical Services Coordinator
Equipment Services Division
City of Fort Worth

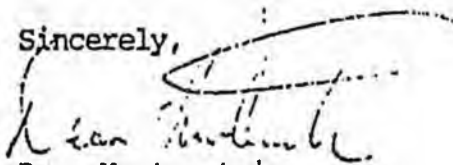
Mr. Webster:

In regards to actual values or trade-in prices that Darr Equipment Company offered on equipment number 624-0035 930, S/N 41K09092 for \$29,500.00 and equipment number 624-0033 930, S/N 41K08992 for \$23,500.00, we offer the following response.

Darr Equipment Company Repurchase Guarantee states that machines will be returned to Darr with only normal wear and tear on them. When we inspected these machines, there were some major mechanical deficiencies, and as a result, we put the assessed value somewhat lower than the guaranteed repurchase.

Should the City decide to repair or have Darr Equipment Company repair these deficiencies, then the original repurchase price would certainly be in order.

Sincerely,


Dean Hertenstein
Used Equipment Sales Manager

DH/kt



County board wrestles with road grader matter

Apr. 84
(Renville
County
Mn.)

By Gene Klecker
Government Reporter

Representatives from a heavy machinery firm in the Twin Cities told Renville County commissioners last week that they will be financially unable to honor a buy back agreement signed with the county five years ago. The agreement was part of a purchase contract in which the county highway department bought a new Champion motor grader from the firm, Borchert-Ingersoll.

Under terms of the agreement the Twin City firm would buy back the grader at the end of a five-year period at a set price of \$65,900.

The two company representatives told board members that if the firm would be held to the buy back agreement it could force the company to seek protection under the bankruptcy laws. Tight economic conditions have put a severe strain on the firm's operations, the two men said, and as a result the usual number of employees carried by the firm has been severely cut.

They admitted the firm had similar agreements with other counties but did not elaborate.

The men did, however, offer several alternatives for the county's consideration. But county attorney Tom Simmons requested that details of the offers not be made public at this time in the event litigation resulted over the matter.

As a result of this matter, bids taken last month for a new motor grader were all rejected as the county had planned to use the buy back money toward purchase of the new machine.

Commissioners took no action but plan to study the alternative proposals before contacting the firm again.

"On deals like this I understand it is customary for the firm to furnish a performance bond," commissioner Lester Fredrickson observed. "But for some reason we don't have one. Does anyone know the reason why?"

No one answered Fredrickson's question.

"Somebody must have goofed," he added. "I wonder who?"

Simmons explained to the board that a bond would have acted like an insurance policy guaranteeing the county its money in the event the firm couldn't pay. It's not

required, he added, but is a good business practice.

State Representative Gaylin DenOuden told commissioners at their meeting last week that a bill clearing the way for the transfer of part of Birch Coulee park northeast of Morton had cleared both houses of the state legislature recently and would be signed by the governor soon.

In addition to the land transfer, the bill also provides for the payment of \$10,000 to the county to be used for park restoration and improvement, according to DenOuden.

The 80-acre park is owned by the Minnesota Historical Society and plans are to restore the higher, prairie portion of the park to its original appearance at the time of the battle back in the 1860's.

Society representatives met last fall with commissioners and made the offer of the 25 acres and the cash, if approved by the legislature. The commissioners were, at the time, somewhat cool to the idea but indicated to the society that they would probably accept the property as another county park, with the payment of \$10,000 for improvements.

The society already pays the county for maintenance of the entire park. No action will be taken until after another meeting with society representatives expected soon.

In other business, the board accepted and opened bids from five area insurance firms. The bids were sought as the result of recommendations made by an insurance consulting firm employed by the county to study insurance needs and costs.

Bids will be handed to the firm for tabulation and study, and action will be taken in the near future based on the consultant's recommendations.

The board also took action on three county drainage ditch projects.

-- Commissioner Pat Kubesh was appointed inspector as the result of a petition to clean a small portion of County Ditch 106A in Palmyra Township.

-- Set June 5 as the hearing date on a petition to improve a portion of County Ditch 113B in Troy Township.

-- Appointed an engineer to do a study on the need for a partial cleanout of County Ditch 63 in Bird Island and Kingman Townships.

SB341



ALASKA CHAPTER
THE AMERICAN INSTITUTE OF ARCHITECTS
P.O. BOX 10-3563 • ANCHORAGE, ALASKA 99510

December 16, 1985

Ray Gillespie
Governors Office
Pouch A
Juneau, Alaska 99811

Dear Mr. Gillespie:

As requested by Sharon Macklin, our Legislative Affairs Consultants, we are ~~excising~~ draft legislation that the A/E profession requests be included in the State of Alaska Model Procurement Code presently being considered.

This draft is an excerpt from Senate Bill 204 as submitted during the Fourteenth Legislature and consists of language that results from compromises between our profession and the State of Alaska, Department of Administration and the Department of Transportation and Public Facilities.

Thank you for the opportunity to provide input on this issue.

Sincerely Yours,

Barley H. Hightower, AIA
President, Alaska Chapter/AIA

~~EE~~ th

cc: Richard Ritter

COMPLIANCE OF CONTRACTS WITH PROFESSIONAL REGISTRATION REQUIREMENTS. The state or a political subdivision of the state may not award for architectural, engineering, or land surveying services to:

- an individual who is not registered, in accordance with State Statute, to perform the architectural, engineering, or land surveying services required by the contract;
- a partnership that is not qualified, in accordance with State Statute, to provide the architectural, engineering, or land surveying services required by the contract; or
- a corporation that is not authorized, in accordance with State Statute, to offer the architectural, engineering, or land surveying services required by the contract.

~~ARCHITECTURAL~~, ENGINEERING, AND LAND SURVEYING CONTRACTS

- (a.) State Agencies shall negotiate a contract with the most qualified and suitable firm or person of demonstrated competence for architectural, engineering, or land surveying services. The state agency shall award a contract for those services at fair and reasonable compensation as determined by the state agency, after consideration of the estimated value of the services to be rendered, and the scope, complexity, and professional nature of the services.
- (b.) If negotiations with the most qualified and suitable firm or person under (a.) of this section are not successful, the state agency shall negotiate a contract with other qualified persons or firms of demonstrated competence, in order of public ranking. The state agency may reject all or part of a proposal.
- (c.) The requirements of this section does not apply to contracts awarded in a situation of public necessity if the person responsible for execution of the contract on behalf of the state agency certifies in writing that a situation of public necessity exists.
- (d.) Notwithstanding the other provisions of this section, a state agency may include price as a factor in selecting architectural, engineering, and land surveying services when, in the judgment of the state agency, the scope, nature, and amount of services required are sufficiently defined to reasonably enable firms and individuals making proposals to compete with a substantially equal understanding and interpretation of the services required. In order to include price as a factor in selection, the state agency shall involve in the evaluation of the proposals at least one person who is registered in the state to perform the architectural, engineering, or land surveying services that are the primary services to be provided by the contract.

- (e) The consideration of price under (d) of this section as a factor in the selection of architectural, engineering, and land surveying services may not exceed 20 percent of the scoring formula used in evaluating proposals. The state agency shall base the evaluation of price on a previously established schedule that objectively correlates price with points scored.
- (f) This section does not apply to a contract that incorporates both design and construction services.

Alaska State Legislature

CO-CHAIRMAN
FINANCE COMMITTEE

907-465-3740



IAN FAIKS
POUCHY
CAPITOL BUILDING
JUNEAU, ALASKA 99811

Senate

December 18, 1985

Senator Pat Rodey
1024 West 6th Avenue
Anchorage, Alaska 99501

Dear Senator Rodey:

After numerous public hearings this interim, the Senate Select Interim Committee on Procurement Practices and Procedures has now completed work on draft legislation that would rewrite the State's procurement laws. I have enclosed a copy of the draft bill which will be introduced at the start of the upcoming legislative session. In addition, I have also enclosed a sectional analysis that I have found to be quite useful in understanding all aspects of this legislation.

The Senate Select Interim Committee on Procurement Practices and Procedures is still working on a draft ethics code for the executive branch. It is our intention to meet one more time in order to recommend proposed legislation. Although no date or time has yet been finalized, that meeting will take place during the week preceding the start of the session in Juneau.

Should you have any questions or comments about either of these proposed bills, please do not hesitate to give me a call in Anchorage at 274-6611.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ian Faiks".

Ian Faiks
Senator

JF:jz

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : SB 341
 Title : An Act Relating to State
Procurement Practices

 Sponsor : Senate Interm Committee
 Requestor : Governor
 Date of Request : 1/23/86

FISCAL DETAIL

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

 Components : Administrative Services

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		31.0	32.5	34.1	35.8	37.6
TRAVEL		2.5	1.5	1.5	1.5	1.5
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		33.5	34.0	35.6	37.3	39.1

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

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

FUNDING : (Thousands of Dollars)

GENERAL FUND		33.5	34.0	35.6	37.3	39.1
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME		1	1	1	1	1
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

See Attached Sheet

Prepared by : Christopher Rutz/Contracts Officer
 Division : Management

Phone : 465-2424
 Date : 1/30/86

Approved by Commissioner : [Signature]
 Agency : Natural Resources

Date : 1/30/86

Distribution (by Agency preparing fiscal note) :

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

Attachment to Department of Natural Resources Fiscal Note for SB341

Personel Service

Cost are computed for a range 10 supply technician, based in Juneau, with a 5% COLA increase per year. This position would support the contracting and supply staff and enable the Department to fulfill as outlined in the bill as well as provide procurement training for department employees.

Travel

These cost are estimated at four trips to Anchorage/Fairbanks to provide training the year the bill is to be implemented and three trips the following years in order to maintain a active procurement training program and provide for participation in contract protests, writing, and bid openings, when necessary.

STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No. Senate Bill 341
 Title: State Procurement Code

 Sponsor: The Rules Committee
 Requestor: _____
 Date of Request: _____

FISCAL DETAIL

Agency Affected: Env. Conservation
 BRU: Administration

 Components: Administrative Services

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		37.9	39.4	41.0	42.6	44.4
TRAVEL		5.0	5.2	5.4	5.6	5.9
CONTRACTUAL		5.0	5.2	5.4	5.6	5.9
SUPPLIES						
EQUIPMENT		1.5	--	--	--	--
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		49.5	49.8	51.8	53.8	56.2
CAPITAL		--	--	--	--	--
REVENUE		--	--	--	--	--

FUNDING : (Thousands of Dollars)

GENERAL FUND		49.5	49.8	51.8	53.8	56.2
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME		1	1	1	1	1
PART-TIME		--				
TEMPORARY		--				

ANALYSIS : Attach a separate page if necessary

This bill codifies many procedures and practices presently addressed in the Administrative Manual, a variety of memo's and procedures and ad hoc decisions. Practices, particularly for professional services contracts,

Prepared by: W.A. Publicover Phone: 465-2676
 Division: Administrative Services Date: 1-30-86

Approved by Commissioner: Bill Koss Date: 1-31-86
 Agency: Environmental Conservation

Distribution (by Agency preparing fiscal note):

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. Senate Bill 341

vary from department to department. This bill and implementing regulations will increase fairness and accountability through uniform requirements for all areas of procurement.

Environmental Conservation regularly has over 40 open contracts worth over \$2 million. Presently, we have an Accounting Technician II who works part time on these contracts. He provides technical advice on contract preparation, tracks the contracts through the approval process, processes payments and chairs the contract closing committee. In the past we have had problems with inadequate RFPs, public notices and similar technical flaws. The bill will establish much tighter standards for the technical quality of competitive sealed proposals and will greatly increase the Department's accountability. In particular, the new law will require:

- evidence of Alaska Business Licenses from offerors and subcontractors
- public notice 21 days before opening proposals
- that all contractors on the bidders list must be notified by mail
- that register of offerors must be kept
- determination of responsibility
- notice of intent to award 10 days before the award
- retention of records including each proposal
- that agency procurement officers decide on protested awards and contract controversy

These new responsibilities will increase our workload beyond the present half-time position. New requirements mandate a single source to assist in drafting RFPs and contracts and to act as agency expert in the procedural aspects of professional services contracts.

Position Title Administrative Assistant II			No. of Positions 1	Range/Step 14	Barg. Unit GGU	Gov.	Approv.	Disapp.
Time Status Full	Staff Months 12	RP Number	Location Juneau		Election District 4	Leg.		
Type of Expenditure			Justification					
Amount			The new State Procurement Code will place tighter controls on contracts for professional services. The Department typically has over 40 active contracts valued at over \$2 million. While our professional staff defines the project scope and technical details, the procedural aspects of contracting are dispersed among the divisions. This allows inconsistencies, dilutes accountability, and hampers effective communications with the Department of Administration.					
1	2	3						
Salary	28.4							
Benefits	9.5							
Premium Pay	--							
Other	--							
Total Personal Services		37.9						
Travel		5.0						
Contractual		5.0						
Commodities								
Equipment		1.5						
Other								
Total Cost		49.4						
Receipt Code			The Administrative Assistant will be the Department's expert on competitive sealed proposals. The position would be the focus for procedural aspects of RFPs, selection, and contract administration. The position will develop and standardize wording, provide a single point link to Department of Administration, advise on alternate procurement methods, maintain a contract tracking system, process payments, chair the contract closing committee, conduct training sessions or arrange for training, monitor the contract approval process, assist in handling protests, arrange official files and record retention schedules and maintain departmental contract procedures. The costs for this position are:					
Funding Source								
Federal Receipts 1002								
G. F. Match 1003								
General Funds 1004			49.4					
I-A Receipts 1005								
Program Receipts 1028								
CIP Receipts 1061								
Other								
For B&M Use Only			100 salary & benefits 37.9 300 postage for 5.0					
Key Number			200 travel to regional 5.0 public notice:					
			offices to train 400 Calculator, 1.5					
			field staff workstation					

**Request For
New Position**

Agency Environmental Conservation
 BRU _____
 Component _____

Page 3 of 3
 Revised Date _____

FY 87

OVERVIEW OF SENATE JUDICIARY COMMITTEE
MAJOR CHANGES TO SB 341

1. Section 36.30.005(c) The University of Alaska is subject to the requirements of SB 341, but it has the authority to issue its own regulations implementing the chapter in conformance with state APA requirements.
2. Section 36.30.010 The term of the Chief procurement officer is four years as opposed to automatically expiring with the governor's term.
3. Section 36.30.015 The department of administration may not delegate the authority to dispose of surplus supplies to any agency.
4. Section 36.30.030 This provision has been modified to provide that the administrative director of courts shall adopt procedures governing the procurement of supplies, services, professional services and construction by the judicial branch. The procedures shall be based upon the competitive principles established under SB 341, but must be adapted to the special needs of the judicial branch as determined by the administrator of courts.
5. Section 36.30.040(b) This section addresses the areas in which the commissioner shall adopt regulations. It has been expanded to include the authority to adopt regulations concerning (1) conditions under which an agency may use the services of an employment program as defined under section 35.30.100(c) and (2) a bidder's or offeror's duties under 36.30.115 and 36.30.210 with respect to subcontractors.
6. Section 36.30.050(d) A provision is added which requires that lists maintained by the commissioner shall be used in providing notice of intent to make a small procurement to Alaska bidders as defined under 36.30.170(c).
7. Section 36.30.100(b)(3)&(c) The provision has been amended to provide that competitive sealed bidding procedures need not be utilized for the purchase of products or services manufactured or provided by an "employment program" which is defined to include a non-profit program designed to increase employment opportunities for individuals with physical or mental disabilities that constitute substantial handicaps to employment.
8. Section 36.30.115 This is a new section dealing with the responsibilities and duties of a contractor with respect to the subcontractors he proposes

to use in performance of a contract. It provides that within 48 hours after the opening of bids, each bidder will submit a list of the subcontractors proposed to be used in the performance of a contract and further provides those conditions under which a bidder may replace a listed subcontractor. Paragraph (e) of this section provides that a bidder who violates the section may either have his contract cancelled or, after notice and a hearing, be assessed a penalty in an amount not exceeding 10% of the value of the subcontract at issue.

9. Section 36.30.120(b) The paragraph provides that bid security must be a bond provided by a surety company in an amount equal to at least 10% of the amount of the bid if the bid does not exceed \$100,000 or 10% of the first \$100,000 and 5% of the amount of the bid over \$100,000 if the bid exceeds \$100,000, up to a maximum of \$200,000 in security.

10. Section 36.30.130 The section is amended to provide that notice of an invitation to bid shall be published in the Alaska Administrative Journal. Paragraph (b) of the section further provides that if the state fails to substantially comply with the notice requirements of the section, the state is liable for the damages caused by that failure.

11. Section 36.30.150(b) This new paragraph provides that a contract based on total or life cycle costs may be awarded only when the chief procurement officer or the commissioner of transportation and public facilities, if appropriate, determines in writing at the time of contract solicitation that the contract promotes overall economy for the purposes intended, encourages competition, is not unduly restrictive, and is in the best interests of the state.

12. Section 36.30.170 Paragraph (b) of this section provides that a contract based on solicited bids shall be awarded to the lowest responsive and responsible "Alaska bidder" if the bid is not more than 5% higher than the lowest non-resident bidder's. The paragraph further delineates the qualifications a person must possess in order to be an "Alaska bidder." Paragraph (c) of the section provides that an Alaska bidder who also qualifies as an "employment program," as defined under 36.30.100(c), shall be awarded a contract based on solicited bids if it is the lowest responsive and responsible bidder with a bid that is not more than 10% higher than the lowest bid of a non-resident. Original paragraph (d) of this section, excluding construction contracts in excess of \$5,000 from the Alaska bidder preference, has been deleted.

13. Section 36.30.200 Paragraph (a) is modified to provide that construction may only be procured by competitive sealed proposals under conditions specified in new paragraph (c) of this section. Paragraph (c) provides that when the chief procurement officer determines that it is advantageous to the state, a procurement officer may issue a request for proposals requesting the submission of offers to provide construction in accordance with a design provided by the offeror. The paragraph further provides that the request for proposals shall require that each proposal submitted contain a single price that includes the design and construction.

14. Section 36.30.210 This section is modified to provide that an offeror must list the subcontractors he proposes to use in the performance of the contract within 48 hours after the date by which the proposals must be received. In addition, paragraph (d) of the section provides that the duties of bidders under section 36.30.115(b) - (e) with respect to subcontractors apply to competitive sealed proposals.

15. Section 36.30.230 This section provides that the register of proposals, and the proposals themselves, are open for public inspection after the notice of intent to award a contract is issued under section 36.30.365.

16. Section 36.30.240 This section is amended to provide that discussions with responsible offerors submitting proposals determined to be reasonably susceptible of being selected for award are excluded from application of the Alaska Open Meetings Law as specified in AS 44.62.310.

17. Section 36.30.250 In new paragraph (b), the procurement officer is directed to take into account, in accordance with regulations of the commissioner, whether the offeror qualifies as an Alaska bidder under section 36.30.170(b) or is offering the services of an employment program as defined in section 36.30.100(c), in determining whether a proposal is advantageous to the state.

18. Section 36.30.270 This is a new section which incorporates the substance of the provisions of SB 204 relating to architectural, engineering and land surveying contracts. The major difference between this section and SB 204 is that section 270 applies only to procurement practices of executive agencies, specifically excluding those practices as undertaken by the court system or the legislature.

19. Section 36.30.320 Paragraph (b) provides that a contract for professional services not exceeding \$25,000 may be made under regulations adopted by the commissioner

for small procurements. Under paragraph (e) of this section, notice of small procurements shall be provided to Alaska bidders designated by the commissioner under section 36.30.050(d).

20. Section 36.30.340 This section now applies to all contracts governed by the procurement code rather than solely to those negotiated under the competitive sealed bid method.

21. Section 36.30.362 This is a new section requiring the procurement officer to issue a written statement explaining his actions should he award a contract to a person who does not reside or maintain a place of business in Alaska, if the supplies, services, professional services or construction which is the subject of the contract could have been obtained from in-state sources.

22. Section 36.30.510 This section requires that a contract file open for inspection by the public shall be kept by the commissioner and the contracting agency for each contract awarded under the competitive sealed proposal procedure. A file kept by the commissioner shall contain a summary of the information in the file of the contracting agency.

23. Section 36.30.540 Paragraphs (4) and (5) of this section provide that the commissioner's biennial report to the legislature concerning agency procurements shall include a list of all procurements made from both out-of-state and in-state sources, with the exception of small procurements as specified in section 36.30.320.

24. Section 36.30.850(b) This section now includes an exemption for contracts of the department of fish and game for non-point-to-point flights requiring specialized flying and piloting skills.

25. Section 36.30.930 The civil penalty for violation of the chapter now applies to a person who contracts for a purchase of supplies, equipment for the state fleet, services, professional services or construction in a manner the person knows to be contrary to the requirements of this chapter or the regulations adopted under this chapter. The person is liable for all costs and damages to the state arising out of the violation.

26. Section 36.30.990 This section deals with definitions of terms as used in the bill. Under paragraph (1), "agency" is now defined to exclude the University of Alaska, a regional native housing authority created under AS 18.55.996 and a regional electrical authority created under AS 18.57.020. Under paragraph (10), the term "grant" is defined to include the furnishing by the state of

assistance to a person to support a program authorized by law, but it does not include an award whose primary purpose is to procure an end-product for a state agency, whether in the form of supplies, services, professional services or construction.

27. Section 10. Under this section, AS 18.55.100 is amended by providing a new subsection which, among other things, specifies that to the extent AS 36.30 conflicts with the responsibilities of ASHA under AS 18.55.110, the provisions of AS 18.55.110 shall prevail.

28 Section 40. Under this section, AS 37.05.316 is amended to delete reference to the term "contract" in favor of the word "grant."

PROPOSED PROCUREMENT LEGISLATION
SECTIONAL ANALYSIS
DRAFT #3

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

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

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

Article 1. Organization of State Procurement.

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

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

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

*not correct
now*

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

Sec. 36.30.020. The Legislature must adopt procedures substantially equivalent to the procurement code.

Sec. 36.30.030. The Court System must adopt procedures substantially equivalent to the procurement code.

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

Sec. 36.30.050. A list of persons who desire to provide supplies, services or construction items to the state will be established and maintained by the commissioner. Evidence of a valid Alaska business license and a statement of the contractor's qualifications must be submitted to be included on the list. Construction contractors must also submit a valid certificate of registration. The list must be used by the state agencies, Legislative Council, the Court System, and the Alaska Railroad Corporation.

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

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

Sec. 36.30.080. The department shall lease necessary space, and contract for the lease of space for the use of the state or an agency. A lease or contract for a lease may not be for a period of occupancy greater than 40 years. The department may enter into lease-financing agreements, which are subject to annual appropriation. If the department intends to enter into a lease or lease financing agreement with an annual rent anticipated to exceed \$1,000,000, notice must be provided the legislature for approval.

Article 2. Competitive Sealed Bidding.

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

Sec. ~~36.30.110.~~ When competitive sealed bidding is used, an invitation to bid is issued which must include the date

by which the bid must be received, purchase description, and all contractual terms and conditions. Subcontractors must be listed. Evidence of a valid Alaska business license for all bidders and subcontractors must be submitted when responding to the ITB. A bidder for construction contracts must also submit evidence of the bidder's registration under AS 08.18 and evidence of registration for each listed subcontractor.

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

Sec. 36.30.130. Public notice of the ITB must be provided 21 days before the date for the opening of the bid, unless otherwise determined in writing by the chief procurement officer, or the commissioner of transportation and public facilities for construction or state equipment bids. Notice must be mailed to all active prospective contractors on the bid list, and other forms of notice are allowable when practicable.

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

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

Sec. 36.30.160. Bids received after the bid due date indicated on the ITB may not be accepted unless the delay was due to an error of a state employee directly responsible for opening the bids.

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

Sec. 36.30.170. Awards to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set out in the ITB shall be promptly made. The Alaska bidder preference is retained.

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

contracts received by law?

Article 3. Competitive Sealed Proposals.

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

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Sec. 36.30.210. Request for proposals must contain the same information required for ITBs. The same notice provisions for ITBs apply for RFPs.

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

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

Sec. 36.30.240. Discussions with responsible offerors may be conducted for the purpose of clarification to assure full understanding of and responsiveness to the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals. Revisions may be permitted after submission and before the award for the purpose of obtaining best and final offers.

Sec. 36.30.250. A contract under competitive sealed proposals shall be awarded to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the state taking into consideration price and the evaluation factors set out in the RFP.

Sec. 36.30.260. A contract awarded under competitive sealed proposals must contain: the amount of the contract; the date for supplies to be delivered or the term for services to be performed; a description of the

services or supplies contracted for; and a certification that sufficient funds are available for the amount of the contract.

Sec. 36.30.270. Contracts are subject to review by the Department of Law.

Article 4. Other Procurement Methods.

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

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

Sec. 36.30.320. Small procurements which do not exceed an aggregate amount of \$5,000 shall be made with competition that is practicable under the circumstances. A contract for professional services that does not exceed \$25,000 may be made in accordance with regulations adopted by the commissioner.

Article 5. Contract Formation and Modification.

Sec. 36.30.350. Solicitations may be cancelled or any bids or proposals may be rejected, in whole or in part, or the date for opening bids or proposals may be delayed as may be specified in the solicitation, when it is in the best interest of the state.

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

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

Sec. 36.30.370. Any type of contract that will promote the best interests of the state may be used, except that

the use of a cost-plus-a-percentage-of cost contract is prohibited.

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

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

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

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

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

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

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

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

Sec. 36.30.470. If the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget or the total contract budget, the procurement officer may not execute the contract modification, change order, or

adjustment in contract price unless sufficient funds are available, or the scope of the project or contract is adjusted to permit the degree of completion that is feasible within the total project budget or total contract budget as it existed before the contract modification, change order, or adjustment in contract price.

Sec. 36.30.480. Cost principle regulations shall be adopted.

Article 6. Procurement Records and Reports.

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

Sec. 36.30.510. A contract file open for public inspection must be kept by the commissioner and the contracting agency for each contract awarded under competitive sealed proposals.

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

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

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

Article 7. Legal and Contractual Remedies.

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

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

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

Sec. 36.30.575. If a protest is filed before a contract is awarded, the award may be made unless the procurement

officer of the contracting agency determines in writing that: a reasonable probability exists that the protest will be sustained; or stay of the award is not contrary to the best interests of the state.

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

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

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

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

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

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

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

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

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

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

Sec. 36.30.625. An appeal from a decision of the procurement officer on a contract controversy may be filed by the contractor with the commissioner of administration or transportation and public facilities. The appeal shall be filed within 5 days after the decision is received by the contractor.

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

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

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

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

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

Sec. 36.30.650. A person suspended is entitled to a hearing if the person files a written request for a

hearing within 7 days after receipt of the notice of suspension.

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

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

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

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

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

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

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

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