

ALASKA LEGISLATURE COMMITTEE FILES 1900-1900 00/2

4098 SJUD SB 341 (FILE 5)

928

Saturdays, Sundays, and other legal holidays excluded.

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

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

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

A85-0957:

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

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

A85-0910:

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

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

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

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

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

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

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

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

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

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

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

Commissioner Andrews rejected the petition:

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

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

*

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

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

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

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

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

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

Complaints to the office raise questions about appeals.

E. Exceptions and exclusions.

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

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

REAA professional services contracting practices were highlighted in F83-0392. Investigation disclosed that, notwithstanding a clear requirement in the procedures adopted by the school board, district administrators awarded a contract for a needs assessment study without prior approval of the board. At the conclusion of the investigation, the omission was reported to the board.

III

A. Prospective contractors not qualified to conduct business.

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

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

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

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

B. Contract extensions or continuations.

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

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

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

...

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

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

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

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

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

*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The problems arising as to one part of this section appear to have been partially alleviated by the inclusion, in the 1982 addition of the professional services contracting provisions, of a requirement that standard overhead rates be incorporated into proposals from an offering state agency. AS 36.98.035. It is far from clear that the provision is always honored, and the committee may wish to inform itself on the impact of the provision.

D. Release of information.

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

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

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

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

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

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

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

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

E. Ethics considerations in public contracting.

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

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

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

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

negotiated the contract in question and the successful contractor.

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

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

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

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

JBC:pjc

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STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

December 26, 1986

SUBJECT: Revision of Procurement Practices (W.O.
14-1361)

TO: Senator Jan Faiks, Chair Senate Select
Interim Committee on Procurement Practices
and Procedures

FROM: Tamara Brandt Cook *TBC*
Legislative Counsel
Division of Legal Services

After draft number three of the bill revising state procurement practices was made available to the public I received several suggestions for improvements. It is my understanding that the Senate Select Interim Committee on Procurement Practices and Procedures may consider this draft again before the legislative session begins, so I wanted to pass along these recommendations. I would be pleased to incorporate any changes the committee approves into the final version of the bill.

The following suggestions come from Mr. Bob Link of the Department of Administration:

1. Page 2, line 23: after "procurement" add "and management".
2. Page 10, line 12: paragraph (2) should read "10 percent of the first \$100,000 bid and five percent of the amount of the bid over \$100,000 if the bid exceeds \$100,000". As written, less security is required for slightly larger contracts than for small contracts.
3. Page 11, line 20: bidding information should be made public before the "notice of intent to award a contract" rather than before the award itself. This provision was included in the draft before Sec. 36.30.365 requiring a notice of intent to award a contract was added.

4. Page 16, line 5: add after "Offerors" "reasonably susceptible of being selected for award". This matches the provision regarding discussions with offerors.

5. Page 25, line 9: delete "the commissioner and". This would avoid the necessity of keeping two complete sets of contract files.

6. Page 48, line 20: after "property" insert "other than privately owned real property leased for the use of agencies". Since DOT is in charge of all construction, without this exception the Department of Administration would lack authority to make needed improvements on buildings they lease for office space.

Linda Walton, Assistant Attorney General has requested the following changes:

1. Page 21, lines 24-26: Delete "in addition to that provided for under the contract and before performing work or supplying materials not required under the contract" and insert "that exceeds the amount designated as the base amount in the contract and before performing additional work or supplying additional materials".

2. Page 22, line 11: Delete "this section" and insert "(a) of this section".

3. Add a new section on misrepresentations and fraudulent claims. Her draft of the proposed section is attached to this memo.

TBC:ml
me1/033

MISREPRESENTATIONS AND FRAUDULENT CLAIMS

(a) A person who makes or uses in support of a claim, a misrepresentation, or who practices or attempts to practice a fraud, at any stage of proceedings relating to a procurement or contract controversy under this chapter:

(1) forfeits all claims relating to that procurement or contract; and

(2) is liable to the (state)? (contracting agency?) for reimbursement of all sums paid on the claim, for all costs attributable to review of the claim, and for a civil penalty equal to the amount by which the claim is misrepresented.

(b) The procurement officer, commissioner or court shall make specific findings of misrepresentation, attempted fraud or fraud before declaring a forfeiture under section a(1).

(c) Suits to recover costs and penalties provided under a(2) must be commenced within six years after the discovery of the misrepresentation, fraud or attempted fraud.

(d) For purposes of this section, "misrepresentation" means a false or misleading statement of material fact, or conduct intended to deceive or mislead concerning material fact, whether or not it succeeds in deceiving or misleading.

(e) If a person in a matter relating to a procurement or a contract controversy or claim under this chapter makes a misrepresentation to the state through a trick, scheme, or device, that person is guilty of a class C felony.

DEC 13 1985



Liz

December 13, 1985

The Honorable Jan Faiks
Senator
Senate Select Interim Committee on
Procurement Practices and Procedures
1024 West Sixth Avenue
Anchorage, Alaska 99501

Dear Senator Faiks:

The staff of the Alaska State Housing Authority (ASHA) has read three drafts of the procurement bill on which your committee has been working. From the most recent teleconference on the bill, it appears that certain sections remain "in process" and are to be given final definition at a later date. We expect that the formal committee process of legislative review will allow further opportunities to comment on this important document and that it will be possible to have these comments incorporated into later drafts. Based on what we have reviewed thus far, the following information regarding this legislation's impact on ASHA is offered:

- (1) Sec.36.30.015(e) should be amended to state: "The boards of directors of the Alaska Railroad Corporation and the Alaska State Housing Authority shall adopt, etc."

As you may know, ASHA currently has in place procurement regulations particularly tailored to its business of constructing, managing and maintaining various types of housing units throughout Alaska. Given the fact that residential wage scales will differ from those applied to other types of public construction and that local building codes, zoning ordinances and construction permit procedures also vary from those used on other public projects, the need to delegate specific residential construction contract authority to ASHA becomes more apparent. Although this issue could be addressed administratively after the fact, it would be more straightforward for such delegation to receive direct legislative review and approval prior to passage of a new procurement law.



With regard to the procurement of supplies and services (non-professional) with which we maintain some 3500 housing units across the State, it is again important to understand our current practices. Developed in accordance with U.S. Department of Housing and Urban Development policies, 3 AAC 95.010, et. seq. is a sophisticated set of regulations with application particular only to housing management uses. ASHA cannot predict and plan for broken pipes, windows or doorways, to name a few of the purchases we make on an as needed and regular basis. Tenants cannot be expected to wait for ASHA to go through individual procurement processes when stoves or refrigerators go out or when a damaged unit is vacated and in need of repairs. With over 1,000 people on waiting lists for low income housing across the State, and with vacancy/unit turnaround goals monitored by the federal government, the additional imposition of a State level review would not change the way we currently operate, nor serve any productive public purpose. Such review will only delay a system that has worked effectively for over forty years, was rewritten in 1981, and is in no current need of modification.

ASHA's procedures on professional services contracting have been performed in recent years under AS 36.98.010, et. seq., except in those cases where to follow such procedures is demonstrated to jeopardize our receipt of federal funds (AS 18.55.110). The lack of delegable professional services authority under this section is particularly troublesome to ASHA. State boilerplate articles, under Appendix A of Professional Services Contract Form 02-093 (Rev 10/82) are frequently not specific nor detailed enough to protect the interests of the U.S. Department of Housing and Urban Development and the Authority on large scale professional service contracts. By far the majority of our contractual agreements contain explicitly detailed articles created by and for ASHA projects. These contracts cannot be reduced to the generalities of the standard State professional services statement without significant loss to ASHA of contractual protections developed by the Authority through experience, research and course of dealing. ASHA is not automatically covered by the Division of Risk Management, the Division of Labor Relations, nor the Office of the Attorney General for



contractual problems arising after the fact. The protection of our assets from various liabilities or contingencies remains foremost in our minds when entering into a contractual agreement. It is inappropriate, at best, for the State to weaken our abilities to specifically protect federal funds for no demonstrated public purpose. If the Commissioner of Administration is not able to delegate this authority, then ASHA should be added to the Railroad, University and Court System with clear exemptions from this section.

- (2) Sec.36.30.040(b)(8-13) regarding storerooms and inventories; classes of contractual services; price analysis; payments and performance bonds; cost principles in negotiations; and discrimination in contracting are areas where the U.S. Department of Housing and Urban Development directly monitors this housing authority. Any regulations adopted under this section which would apply to this agency will need to be reviewed and coordinated with the U.S. Department of Housing and Urban Development, Regional Counsel, for compliance with federal regulations.
- (3) Sec.36.30.070(1-4) Governed by federal regulations applicable to ASHA.
- (4) Sec.36.30.080(b) This language should be reviewed by bond counsel to any parties entering into lease-financing or lease-purchase agreements.
- (5) Sec.36.30.110 These items should be required after bid award but before notice to proceed. Gathering this information is an unnecessarily cumbersome task for unsuccessful bidders to perform and would inundate agency personnel with useless reviews of extraneous information.
- (6) Sec.36.30.120(b)(1-2) The 10% requirement of this section is higher than necessary and these unnecessary costs are eventually borne by the contracting agency within the cost of total project development. 5% is standard for construction purposes.



- (8) Sec.36.30.200 This article almost precludes the state from using design/built options given the restrictions on competitive sealed proposals. Competitive sealed proposals become relegated to a second class type of solicitation and limit creativity of thought for development of new concepts in construction within budgeted fund limits.
- (9) Sec.36.30.310 This section is more broadly written than that in current ASHA regulations. This agency would have a lower level of comfort operating under a statute prescribing an open-ended or subjective interpretation of instances affecting "public health, welfare or safety." Also, there is no consideration given to an analysis of time or urgency in determining an "emergency" exists.
- (10) Sec.36.30.370 May conflict with U.S. Department of Housing and Urban Development regulations.
- (11) Sec.36.30.380 May conflict with U.S. Department of Housing and Urban Development regulations.
- (12) Sec.36.30.890 ASHA is not covered sufficiently by this section to avoid conflict with federal government practices and procedures. Federal due process allows public notice on regulations to come after the fact and, in the interim, to administer programs through interpretations of handbooks or other non-regulatory documents. Although not statute or regulation, this method of program delivery marks a federal preference to model programs after field trial experience is known. The State share of discretionary HUD funds oftentimes depends on ASHA's compliance with federal practices and procedures which aren't necessarily in statutory or regulation form. We would not be sufficiently exempted by this Section to avoid conflict with federal policies and procedures.

These initial comments are generated strictly from an in-house review by our staff. Neither our Board of Directors nor any officials from the U.S. Department of Housing and Urban Development have reviewed the most recent version of this legislation. It is likely they will have additional comments to offer.



The concept of centralized procurement is valuable and efficient for those agencies that may be inexperienced in the complexities of obtaining goods and services and/or have minimal written regulations or policies to structure their procurement activities. The Alaska State Housing Authority falls into neither category. With strict federal oversight and monitoring, federal funds are expended for a valuable public purpose. Financial information on expenditures is well documented and regularly reviewed. Complex volumes of federal procurement instructions are interpreted for ASHA by local HUD officials. Bidding and contracting activities are defined in detail by ASHA regulations.

The procedures of the State Procurement Code are exemplary in nature and should be modeled by all public organizations (including ASHA) operating on state and local levels. However, the delays and generic treatment this agency would experience in having this law superimposed on its existing systems would create confusion and inefficiencies for both the public and the agencies involved. Aside from generating new "paper pushing" positions and having to revamp many existing procedures after implementation, there is virtually no new effect to ASHA's present practices that would be realized from including ASHA in this legislation. Business will continue, only more slowly and at a greater cost to the programs involved.

Thank you for your consideration of these remarks. We shall be following with interest this legislation and look to an enhancement of ASHA's regulations to make them substantially equivalent to this bill in its final version. Should you or any members of the committee wish further information on this matter and its effect on our agency, please let me know.

Sincerely,

ALASKA STATE HOUSING AUTHORITY

A handwritten signature in cursive script that reads "Barbara Morse-Quinn".

Barbara Morse-Quinn
Executive Director

BMQ/jlr
enclosure

cc: Susan Olsen, HUD, Chief Counsel
ASHA Board of Directors
ASHA Department Heads
Marsha Hubbard, DOA
Steve Hildebrand, DCED

A M E N D M E N T

Offered in the SENATE

TO: Proposed CS for SB 341

Page 9, line 19:

After (b), delete the first sentence and insert the following:

Immediately following the opening of bids, the bidders shall list subcontractors to be used in the performance of the contract.

Page 9, between lines 26 and 27, insert the following:

(c) A bidder may replace a subcontractor set out in the list required by (b) of the section only if the subcontractor:

- (1) fails to satisfy the provisions of AS 08.18;
- (2) files for bankruptcy;
- (3) fails to execute a subcontract;
- (4) fails to obtain bonding;
- (5) fails to obtain insurance;
- (6) fails to perform the subcontract; or
- (7) is determined by the department to not be a responsible bidder.

(d) The commissioner may implement this section by regulation.

for Sue Urig

Loren Rasmussen - (h) 789-9956
(w) 465-2960

DRAFT

Proposed Technical Amendments to Senate Bill No. 341
Sec. 36.30.010.
Page 2
Lines 21,22,23,24,25.

PROPOSED AMENDMENT

(a) The commissioner shall appoint to the partially exempt service the chief procurement officer of the state who is responsible for the procurement and management of supplies, services, and professional services for agencies in the executive branch.

REASON: To clarify the intent of the bill because elsewhere it makes the chief procurement officer for the management of supplies during their life cycle, including the responsibility for property management, inventory and disposal.

Sec. 36.30.015
Page 3
Lines 21,22,23.

PROPOSED AMENDMENT

(a) The Department of Transportation and Public Facilities may contract for construction and [PROCUREMENTS FOR] for the procurement of equipment to be added to the state equipment fleet.

REASON: To clarify the intent of the bill, that is, to permit the Department of Transportation to procure cars, trucks, graders, etc., for the state equipment fleet, not to grant them the authority to make all procurements for the state equipment fleet.

Sec. 36.30.015
Page 3
Lines 25,26,27.

PROPOSED AMENDMENT

The commissioner of transportation and public facilities may delegate to another agency the authority to contract for construction [.] and for the procurement of equipment to be added to the state equipment fleet.

REASON: To clarify the intent of the bill. Without the proposed amendment, the bill says that the commissioner of transportation and public facilities may only delegate the authority to contract for construction and implies that none of the other authority vested in that position may be delegated.

DRAFT

Sec. 36.30.015
Page 4
Lines 5,6,7.

PROPOSED AMENDMENT

(b) The commissioner may delegate to an agency the authority contract for and manage [SUPPLIES] ~~services, professional services and supplies~~, except property of the state equipment fleet. [SERVICES, AND PROFESSIONAL SERVICES.]

REASON: To clarify the intent of the bill.

Sec. 36.30.120
Page 10
Lines 8,9,10,11,12,13.

PROPOSED AMENDMENT

Bid security must be in an amount equal to at least

(1) 10 percent of the amount of the bid if the bid does not exceed \$100,000; [OR] and

(2) five percent of the amount of [THE] a bid ~~exceeding \$100,000~~ if the bid exceeds \$100,000.

REASON: To clarify the intent of the bill, that is, that the bid security required for a contract greater than \$100,000 is more than the bid security required for a contract of less than \$100,000.

Sec. 36.30.140
Page 11
Lines 21,22.

PROPOSED AMENDMENT

The bids are not open for public inspection until after a [CONTRACT IS AWARDED.] ~~notice of intent to award a contract has been issued.~~

REASON: This proposed amendment will permit bidders to inspect all of the bid responses at the time a notice of intent to award a contract is issued and to file a protest then, rather than after the contract has been awarded.

DRAFT

Sec. 36.30.240
Page 16
Lines 5,6,7,8,9.

PROPOSED AMENDMENT

Offerors reasonably susceptible of being selected for award shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before the award of the contract for the purpose of obtaining best and final offers.

REASON: To clarify the intent of the bill, that is, that the contracting agency may accord specific offerors an opportunity to discuss and revise their competitive sealed proposals and submit their best and final offer but that this may be done only with offerors whose proposals initially met the intent of the competitive sealed proposal and were reasonably susceptible of being selected for award.

Sec. 36.30.380
Page 20
Lines 10,11,12,13,14.

PROPOSED AMENDMENT

Except for a contract awarded through competitive sealed bidding [AND] or a firm fixed-price contract, a contract may not be used unless it has been determined in writing by the procurement officer that the proposed contractor's accounting system...

REASON: To clarify the intent of the bill. That contracts established by competitive bid or other contracts with a fixed-price need not have the approval of the contractors accounting system. These are contracts established by bid which do not have a firm fixed price.

DRAFT

Sec. 36.30.510
Page 25
Lines 8,9,10.

PROPOSED AMENDMENT

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.

REASON: The proposed amendment would eliminate the need for duplicate sets of contract files to be kept.

Sec. 36.30.990
Page 48
Lines 17,18,19,20.

PROPOSED AMENDMENT

(6) "construction" means the process of building, altering, repairing, maintaining, improving, or demolishing a public highway, structure, building, or other public improvement of any kind to public real property:

REASON: To clarify the intent of the bill. To avoid confusion between public property and private property open to the public.

THE END

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REASON: To clarify the intent of the bill. To avoid confusion between public property and private property open to the public.

THE END

TO: KEVIN BRUCE
FROM: ELIZABETH
SUBJECT: PROCUREMENT BILL
DATE: JANUARY 21, 1986

Kevin, attached is an index of all letters received on the procurement bill to date. I have also enclosed the Ombudsman's report, testimony of the Associated General Contractors of America, and a letter from the Painters Local Union No. 1140. I contacted the Purchasing Management Association of Alaska for a final statement, however, they decided to send individual comments.

If you would like me to send you any of the letters, memos, etc., please let me know. Most reflect individual concerns, not position papers by groups.

Let me know what you need. Thanks.

Telcon w/ Cook, Hickman, Baldwin, Lauren
(DOT/PE)

➔ Univ of Alaska - leave as it is

Admin comments

- .010 - add "management"
- .015 - delete last 2 lines
- .015 (b) - move exception d.

1090 of 1st 100, 590 of anything else -
p. 10

24.23.010 - policy decision - take out 12-month
period; dept of law memo showing
problems
- law/admin will defend

44.62.175

subs - let com. decide

Rodey - local hire p. 13 @ 15-17
if delete jd p. 13 for U.A. issues

Alaska State Legislature



SENATOR
ARLISS STURGULEWSKI

Chairman, Senate Resources Committee
Vice-Chairman, Senate Health, Education and Social Services Committee
Member, Senate Community and Regional Affairs Committee

2957 SHELDON JACKSON STREET
ANCHORAGE, ALASKA 99508


While in Juneau
POUCH V
JUNEAU, ALASKA 99811
(907) 465-3818

Senate

MEMORANDUM

January 21, 1986

TO: Senator Pat Rodey

FROM: Senator Arliss Sturgulewski 

RE: SB 341 "An Act relating to state procurement practices and procedures; and providing for an effective date."

Pat, this memo will confirm our earlier discussion regarding SB 204 "An Act relating to contracts for architectural, engineering, and land surveying services; and providing for an effective date" which was introduced by myself and co-sponsored by you. I feel it is entirely appropriate to fold SB 204 into SB 341 as it obviously is an important part of overall state procurement practices. I will be happy to work with you personally on this issue.

Although Senator Faiks plans to schedule SB 204 for a hearing next week, I still feel it is important to include SB 204 in SB 341. I would welcome your testimony on SB 204. The exact date of the hearing is uncertain at this time but I will advise you as soon as I know the date and time of the meeting.

315204



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

Sharon
6-9518

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 enclosing 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,

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

HHH/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.

AGENDA

2/11/86

SB 341 - State Procurement Code

1. Overview of findings of the interim committee on procurement and summary of major provisions of the resultant procurement bill - Senator Faiks.
2. Section by section analysis of bill provisions.
Jim Baldwin, Dept. of Law
Bob Link, Dept. of Administration
Lauren Rassmussen, Dept. of Transportation
Tam Cook, Legal Services
Liz Hickerson, Staff Attorney for Senators Faiks & Halford
Suzanne LaPierre, Senate Judiciary Counsel
3. Review of outstanding policy issues:
Liz Hickerson
Suzanne LaPierre
4. Public Testimony

STATE OF ALASKA
THE LEGISLATURE

POUCH 1 STATE CAPITOL
JUNEAU, ALASKA 99801
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M

January 20, 1986

SUBJECT: State Procurement Practices (SB 341)

TO: Senator Pat Rodey, Chair
Judiciary Committee

FROM: Tamara Brandt Cook *TBC*
Acting Director
Division of Legal Services

SB 341 dealing with state procurement practices has been referred to your committee. Mr. Art Peterson with the Department of Law has pointed out a potential problem in the bill. Under Section 63 regulations to implement the bill are required to be adopted by January 1, 1987 and to become effective on the same day. Sec. 36.30.870 of the bill requires that regulations be adopted in accordance with the Administrative Procedure Act. That Act contains various time periods for submission and review of regulations. (AS 44.62.060; AS 44.62.180) If regulations are not adopted until the day they are to become effective, the time requirements under the APA cannot be complied with.

The problem can be resolved by deleting the language, that could be construed as authorizing adoption of regulations to be delayed until January 1, 1987 and providing only that they take effect on that date. This achieves the original purpose behind Section 63, that of insuring that regulations are in effect to implement the bill on the date the bill becomes effective, yet avoids the administrative and legal difficulties that will face the Department of Law if agencies delay the adoption of regulations under the impression that the delay has been sanctioned by law.

Please let me know if you would like this change incorporated into a committee substitute.

TBC:mkr
M2:051

cc: Art Peterson
Department of Law

A M E N D M E N T

Offered in the HOUSE

By Pignalberi

TO: SB 341

Page 26, line 14:

Delete "and"

Page 26, line 16:

Delete "." and insert ";

Page 26, after line 16 insert the following new paragraphs:

"(4) a list of procurements made under this chapter from out-of-state sources during the previous two fiscal years together with the total number of procurement contracts entered into during that period with out-of-state contractors and the total value of these contracts; and

(5) a list of procurements made under this chapter from state sources during the previous two fiscal years together with the total number of procurement contracts entered into during that period with state contractors and the total value of these contracts."