

ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 86/2

4175 SLAB SB 166 1655

SUMMARY OF STATE LAWS (Cont'd.)

<u>ORIGINAL CODE</u> <u>Agency Type</u> <u>Type of Work</u>	<u>Public Contract Code</u> <u>(PCC) or other</u> <u>Code Sections</u>	<u>Force Account Limit**</u>	<u>Competitive</u> <u>Bidding Threshold***</u>
<b>8. WATER CODE (Cont'd.)</b>			
<u>Sacramento Co. Water Agency</u>	<u>W.C. App. §66-8.3</u>	\$ 3,000	Over \$3,000
<u>Santa Barbara Co. Water Agency</u>	<u>W.C. App. §51-8.3</u>	\$10,000	Over \$10,000
<b><u>FLOOD CONTROL AGENCIES</u></b>			
<u>City Flood Control</u>	<u>W.C. App. §8051</u>	Not Specified	All Contracts
<u>Alameda Co. Flood Cont. &amp; Wat. Cons. Dist.</u>	<u>W.C. App. §55-22</u>	\$25,000 <sup>24</sup>	Over \$25,000
<u>American River Flood Cont. Dist.</u>	<u>W.C. App. §37-20</u>	Not Specified	Over \$1,500
<u>Contra Costa Fl. Cont. &amp; Wat. Cons. Dist.</u>	<u>W.C. App. §63-22</u>	\$10,000 <sup>24</sup>	Over \$10,000
<u>Del Norte Co. Fl. Cont. Dist.</u>	<u>W.C. App. §72-24</u>	\$ 2,000 <sup>24</sup>	Over \$2,000
<u>Fresno Metrop. Fl. Control</u>	<u>W.C. App. §73-13</u>	No Provision <sup>15</sup>	Over \$5,000
<u>Humboldt Co.</u>	<u>W.C. App. §47-24</u>	\$ 5,000 <sup>24</sup>	Over \$5,000
<u>Los Angeles Co. Flood Cont. Dist.</u>	<u>W.C. App. §28-15</u>	\$10,000 <sup>24</sup>	Over \$25,000
<u>Merced Co Flood Cont. Dist.</u>	<u>W.C. App. §122-27</u>	\$ 6,500 <sup>24</sup>	Over \$6,500
<u>Monterey Co. Fl. Cont. &amp; Wat. Cons. Dist.</u>	<u>W.C. App. §52-23</u>	\$ 5,000 <sup>24</sup>	Over \$5,000
<u>Orange Co. Flood Control Dist.</u>	<u>W.C. App. §36-15</u>	\$10,000 <sup>24</sup>	Over \$10,000
<u>Riverside Co. Fl. Cont. &amp; Wat. Cons. Dist.</u>	<u>W.C. App. §48-29</u>	\$ 5,000 <sup>24</sup>	Over \$5,000
<u>San Benito Co. Cons. &amp; Fl. Cont. Dist.</u>	<u>W.C. App. §70-27</u>	\$ 5,000 <sup>24</sup>	Over \$5,000
<u>San Bernardino Co. Flood Control</u>	<u>W.C. App. §43-20</u>	No Provision <sup>24</sup>	Over \$25,000
<u>San Diego Co. Flood Control</u>	<u>W.C. App. §105-33</u>	Not Specified <sup>24</sup>	Over \$5,000 (excl. mat. & supplies)
<u>Marin Co. Fl. Cont. &amp; Wat. Cons. Dist.</u>	<u>W.C. App. §68-22</u>	\$ 5,000 <sup>24</sup>	Over \$5,000

\*\*Force account may be used without restriction to do work at or below the stated force-account limit. Above the limit force account may be used only under certain conditions. (See specific sections cited)

\*\*\*Competitive bidding generally requires that contracts over specified amount be let to the lowest responsible bidder following defined bidding procedures. See cited code sections for exceptions to this requirement.

FOOTNOTES: See end of chart.

SUMMARY OF STATE LAWS (Cont'd.)

<u>ORIGINAL CODE</u> <u>Agency Type</u> <u>Type of Work</u>	<u>Public Contract Code</u> <u>(PCC) or other</u> <u>Code Sections</u>	<u>Force Account Limit**</u>	<u>Competitive</u> <u>Bidding Threshold***</u>
<u>WATER CODE (Cont'd.)</u>			
<u>San Luis Obispo Co. Fl. Cont. &amp; Water Cons.</u>	<u>W.C. App. §49-23</u>	\$ 5,000 <sup>24</sup>	Over \$5,000
<u>San Mateo Co. Fl. Cont. Dist.</u>	<u>W.C. App. §87-25</u>	\$ 5,000 <sup>24</sup>	Over \$5,000
<u>Santa Barbara Co. Fl. Cont. &amp; Wat. Cons.</u> Construction (New) Maintenance & Alt.	<u>W.C. App. §74-23</u>	\$10,000 <sup>24</sup> \$ 3,500 <sup>24</sup>	Over \$10,000 Over \$3,500
<u>Santa Cruz Co. Fl. Cont. &amp; Wat. Cons. Dist.</u>	<u>W.C. App. §77-113 et seq.</u>	No Provision <sup>3,15</sup>	Over \$5,000
<u>Solano Co. Fl. Cont. &amp; Wat. Cons. Dist.</u>	<u>W.C. App. §64-8.3</u>	\$ 2,500	Over \$2,500
<u>Sonoma Co. Fl. Cont. &amp; Wat. Cons. Dist.</u>	<u>W.C. App. §53-10</u>	\$ 2,500	Over \$2,500
<u>Ventura Co. Fl. Cont. Dist.</u> Work Maintenance & Alt.	<u>W.C. App. §46-23</u>	\$10,000 <sup>24</sup> \$ 5,000 <sup>24</sup>	Over \$10,000 Over \$5,000

Prepared by  
Construction Industry Research Board  
October 1983

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\*\*Competitive bidding generally requires that contract over specified amount be let to the lowest responsible bidder following defined bidding procedures. See cited code sections for exceptions to this requirement.

FOOTNOTES: See Following Page.

## FOOTNOTES

- 1 Law specifically prohibits splitting work for the purpose of evading the requirement that the work be done by contract after competitive bidding.
- 2 Work in excess of the force account limit may be done, if authorized, up to the maximum shown if contracting is deemed not to be in the best interests of the state. No limit if after approval of plans, specifications and cost estimates, contracting deemed not in best interests of the state.
- 3 If it is determined that the work can be done for less, the legislative body may reject bids and have work above the force account limit done by day labor.
- 4 PCC section 20128 states "the board shall award the contract to the lowest responsible bidder..."
- 5 Applies to alteration or repairs on county buildings when plans are obsolete or nonexistent.
- 6 When work is deemed to be historic restoration projects may be authorized to be carried out directly by the Dept. of Parks & Recreation. Work in excess of the \$25,000 limit may be done by day labor if it is determined to be in the best interest of the state.
- 7 State laws covering counties with populations of 500,000 or more apply. (See PCC 20122)
- 8 State laws covering counties with population of less than 500,000 apply. (See PCC section 20150 et seq.)
- 9 State Contract Act applies. (See PCC 10100 et seq.)
- 10 In counties with appointed road commissioner, board may authorize road commissioner to do the work by day labor. (PCC 20395). Where engineer employed as road commissioner, State Contract Act may apply. (PCC 20396).
- 11 In counties with appointed road commissioner, board may authorize the road commissioner to do the work by day labor. (PCC 20409)
- 12 If contractor does not complete the work the legislative body may relet all or part of work or may complete work by direct purchase of labor and materials. (PCC 20428)
- 13 If person owning tracks doesn't do the work then bids required.
- 14 If city provides the service, it may perform the work.
- 15 There is no provision that permits force account.
- 16 By a 2/3 vote the legislative body may order the municipality to do the work without bids in accordance with specifications and plans. (PCC 20491, 20493)
- 17 City Council may at any time within 20 days after bid opening or, if no bids received, 20 days after time fixed for opening bids by 2/3 vote elect to have city do work itself according to plans and specifications. (PCC 20505)
- 18 Except that city council may order the work carried out by a contractor without competitive bidding if they determine there is only one contractor capable of doing the work. (PCC 20501)
- 19 There is no provision that permits force account work, however Section 20535 permits rejection of bid if deemed too high and performance of work by day labor.
- 20 No advertising for bids or awarding of contract based thereon shall be required when the proposed contract includes the furnishing of electric energy and the area is served by a public utility whose rates are subject to PUC regulation.
- 21 No limit for work that does not lend itself to the preparation of plans and specifications.
- 22 The board may either: 1) let the bid to the lowest responsible bidder, 2) reject bids and readvertise, or 3) proceed to construct the work under its own superintendence. (PCC 20585)
- 23 Except when board of supervisors or city council determine the work can be done more economically and satisfactorily by day labor. (PCC 20605)
- 24 In the event bid proposals rejected, or no bids received, or work consists of channel protection, dam protection, temporary work, or emergency then the board may have the work done by force account/day labor.

## II. Problems with the Bidding Process

### FORCE ACCOUNT VIOLATIONS

#### Compliance Checklist

1. Determine the force account limits for the agency in question. (See accompanying chart. Be aware, however, that the limits are changed frequently).
2. If there appears to be a possible violation of force account limits:
  - a. Get an estimate from a contractor on the cost of the job.
  - b. Go to the job site and gather the following information:
    1. Track the hours on the job. Monitor the worker's starting and stopping times.
    2. Talk to workers on the job and ascertain their employment status (i.e. regular employees, day labor, etc.)
    3. Note equipment being used on the job and whether it is owned by the agency or rented from an outside contractor.
    4. Make a detailed report on the work being done.
  - c. Get whatever information is available from the public agency, including plans and specifications, number of workers assigned to the job, estimated time to complete the work, wage rates and fringe benefits paid to employees, and invoices for materials and supplies.
3. If the evidence indicates that a violation of the force account limit is occurring, prepare a cease and desist letter to be sent to the agency.
4. Collect the following names and addresses, and send them copies of the protest letter:
  - a. The governing body of the agency;
  - b. The local counsel and/or district attorney;
  - c. The legislators representing the district in which the agency is operating.
5. If the agency does not cease work, either meet and confer with the agency or apply for a Temporary Restraining Order in the local Superior Court.

FORCE ACCOUNT VIOLATIONS

Overview

Federal agencies do not have statutory or regulatory limits placed upon the jobs they are permitted to do using their own employees. California agencies do have such limits. In California, jobs which exceed these limits (called "force account" limits) must be put up for bid and contracted out to the private sector. The precise amounts of the force account limits vary widely from agency to agency. They are usually expressed in terms of dollar amounts or person-hours. Prior to 1983 the force account limits for each type of government entity were found in a variety of California Codes. Now, nearly all force account limits can be found in the Public Contract Code.

Force account limits are violated when an agency has its own employees or temporary workers carry out jobs in excess of the stated limits. These are jobs which should be contracted out to the private sector through competitive bidding pursuant to state or local law.

Because of fiscal constraints and the need for frequent repair and maintenance of facilities, school districts and other local government agencies often violate their force account limits. When an agency violates, or prepares to violate force account limits, any interested party may apply to Superior Court for a Temporary Restraining Order and other injunctive relief. There is no administrative remedy.

\* \* \* \* \*

THIS CHAPTER CONTAINS:

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Compliance Checklist .....	II-B-2
Legal References .....	II-B-3
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Summary of California Force Account Laws .....	II-B-5
Uniform Cost Accounting .....	II-B-17

II. Problems with the Bidding Process

FORCE ACCOUNT VIOLATIONS

Legal References

Boulevard Districts: Force Account, Public Contract Code § 20555 - 56  
County Bridge or Subways:  
    Construction, Maintenance or Repair, Public Contract Code § 20402 - 20406  
    Road Commissioner authority to order work without bid, Public Contract Code § 20409  
County Drainage Districts: Force Account, Public Contract Code § 20621  
County Highways, Public Contract Code § 20390 - 98  
County Waterwork Districts: Force Account, Public Contract Code § 20602 - 06  
Harbors, Harbors & Navigation § 6272-6273  
Irrigation District: Force Account, Public Contract Code § 20560, et seq.  
Joint Highway Districts: Force Account, Public Contract Code § 20535  
Levee District, Public Contract Code § 20634  
→ Local Agency Public Construction Act:  
    Schools:  
        Force Account Limits, Public Contract Code § 20114  
        Maintenance Defined, Public Contract Code § 20115  
    Counties:  
        Force Account Limits, Public Contract Code § 20121  
        Over 500,000, Exception to Competitive Bidding Requirements, Public Contract Code § 20122  
    Cities:  
        Dollar Limits, Public Contract Code § 20162  
        Emergency work, Public Contract Code § 20168  
Municipal Improvement Act of 1913: Day Labor, Public Contract Code § 20494  
Municipal Lighting Maintenance District Act of 1927: Competitive Bidding, Public Contract Code § 20521  
Schools, Education Code § 81649  
Transit Districts:  
    Force Account, Public Contract Code § 20397  
    Fresno Metropolitan, Public Contract Code § 20370 - 73  
    Greater Bakersfield, Public Contract Code § 20310 - 13  
    Los Angeles County Transportation Commission, Public Contract Code § 20360-61  
    Marin County, Public Contract Code § 20260 - 61  
    N. San Diego County Transit Development Board, Public Contract Code § 20350 - 51  
    Orange County, Public Contract Code § 20240 - 41  
    Sacramento Regional, Public Contract Code § 20320 - 21  
    San Diego, Public Contract Code § 20270 - 73  
    San Mateo County, Public Contract Code § 20330 - 31  
    Santa Barbara, Public Contract Code § 20280 - 83  
    Santa Clara County, Public Contract Code § 20300  
    Stockton Metropolitan, Public Contract Code § 20251  
    Transit Development Boards, Public Contract Code § 20340  
    West Bay Rapid Transit Authority, Public Contract Code § 20380 - 81

## II. Problems with the Bidding Process

### FORCE ACCOUNT VIOLATIONS

#### Case Digest

##### State Court

✓ Killeen v. City of San Bruno, 56 Cal.App.3d 479, 128 Cal.Rptr. 760 (1976)


Force account limits in former Government Code Section 37902 (current Public Contract Code Section 20162) apply to the city's use of its own employees on public works project, even though no "contract" is involved. The city acted in excess of its authority when it bypassed competitive bidding requirements and force account restrictions.

✓ Painting & Decorating Contractors of America v. Ellensburg, 96 Wash.2d 806, 638 P.2d 1220 (1982)

See listing under "Displacement of Trade Union Work."

\* \* \* \* \*

#### Articles and Publications

 California Jurisprudence 3rd, Public Works and Contracts § 3

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"Guidelines For Uniform Accounting System"

The following items should be included in any cost analysis for the Uniform Accounting Systems, but not necessarily in this order -

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**A. Labor**

1. Base salary
2. Fringe benefits:
  - a. Vacation allowance
  - b. Holiday
  - c. Sick leave - to include leave for death
  - d. Health plan coverage - dental & medical
  - e. Life insurance
  - f. Retirement
  - g. Social security
  - h. Payroll taxes and insurance - to cover unemployment Insurance and Workman's Compensation Insurance
  - i. Military leave
  - j. Jury duty

**B. Equipment**

1. Purchase price
2. Rate of depreciation
3. Cost of repair, including mechanic, shop
4. Operating cost
5. Insurance

**C. Overhead**

1. Administrative costs - Force account work entails to a certain degree the services of the City Manager or County Administrator as well as top management in the Public Works Department. Every attempt should be made to allocate an appropriate share of these costs to the project. This also applies to all other support departments that may be involved. Public Utilities should likewise pro rate these costs.
2. Office, yard and utility
3. Tools and supplies
4. Cost of personnel training
5. Non-productive time

## II. Problems with the Bidding Process

### FORCE ACCOUNT VIOLATIONS

#### Uniform Cost Accounting

Disputes over force account limits frequently involve discrepancies in estimates of the cost of the job.

During its 1983 legislative session the California Legislature passed AB 1666 (Public Contract Code § 21000, et seq.). This bill, known as the Uniform Cost Accounting Act, is designed to establish uniform cost accounting procedures and to provide for mediation of disputes arising from adherence to this procedure by public agencies. This statute sets up a 12-member Board of Commissioners made up of representatives of public agencies, the construction industry and building trades unions to mediate disputes arising under this Act.

Participation in the Uniform Cost Accounting System is voluntary for public agencies. However agencies who do participate will receive a \$15,000 force account limit, which represents an increase for most local governments.

The following pages contain a rough guide for Uniform Cost Accounting.

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Thank you to the Construction Awareness Project for permission to reprint.

D. Materials

E. The cost comparison should also include all direct loss of revenue to the agency by reason of the agency doing the work instead of having it performed by contract. Examples of this are taxes paid by the contractor and not paid by the agency, such as ...

# ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA



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## GOVERNMENTAL AGENCIES vs FREE ENTERPRISE DOING CONSTRUCTION WORK

	<u>ITEM</u>	<u>Governmental Agency</u>	<u>Private Contractor</u>
	Property Tax	Does Not Pay	Pays
	Sales Tax	Does Not Pay	Pays
	License Plates	Exempt	Pays
	Gasoline Tax	Exempt	Pays
	Engineering, use of plans & specifications	No	Yes
	Job is put out for bid	No	Yes
	Inspection of the work by engineers when under construction	No	Yes
	Use of performance & payment bonds	No	Yes

Introduced: 2/20/85  
Referred: Labor and Commerce,  
State Affairs and  
Finance

1 IN THE SENATE

BY FAHRENKAMP AND BENNETT

2

SENATE BILL NO. 166

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act relating to competitive bidding requirements  
7 for recipients of state grants; and providing for an  
8 effective date."

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

10 \* Section 1. PURPOSE. The legislature finds competitive bidding to be  
11 the best procedure to prevent favoritism and assure timely completion of  
12 the construction or repair of a public facility at the lowest price and of  
13 the highest quality. The purpose of this Act is to ensure that a recipient  
14 of a state grant or appropriation utilizes competitive bidding procedures  
15 in awarding a construction or repair contract financed with the state  
16 money.

17 \* Sec. 2. AS 37.05.315(a) is amended to read:

18 (a) When an amount is appropriated or allocated as a grant to a  
19 municipality, the Department of Administration shall promptly notify  
20 the municipality of the availability of the grant. When the Depart-  
21 ment of Administration receives an agreement executed by the munici-  
22 pality that [WHICH] provides that the municipality [(1)] will (1)  
23 spend the grant for the purposes specified in the appropriation or  
24 allocation; (2) [WILL] allow, on request, an audit by the state of the  
25 uses made of the grant; [AND] (3) assure [ASSURES] that, to the extent  
26 consistent with the purpose of the appropriation or allocation, the  
27 facilities and services provided with the grant will be available for  
28 the use of the general public; and (4) comply with AS 37.05.322, the  
29 Department of Administration shall pay the grant directly to the

1 municipality. The agreement executed by a municipality under this  
2 section shall be on a form furnished by the Department of Adminis-  
3 tration and shall be executed within 60 days after the effective date  
4 of the appropriation or allocation.

5 \* Sec. 3. AS 37.05.316 is amended to read:

6 Sec. 37.05.316. GRANTS TO NAMED RECIPIENTS. When an amount is  
7 appropriated or allocated to a department as a grant for a named  
8 recipient that [WHICH] is not a municipality, the department to which  
9 the appropriation or allocation is made shall promptly notify the  
10 named recipient of the availability of the grant and request the named  
11 recipient to submit a proposal to provide the goods or services speci-  
12 fied in the appropriation act, or both, for which the appropriation or  
13 allocation is made. At the same time, the department may issue a  
14 request for proposals from other qualified persons to provide the same  
15 goods or services, or both, in the same area. The department shall  
16 contract with the named recipient unless the Office of the Governor,  
17 with due regard for any local expertise or experience among those  
18 making proposals, determines that an award of the contract to a dif-  
19 ferent party would better serve the public interest. If the contract  
20 is awarded to another party than that named by the legislature, the  
21 basis of that action shall be stated in writing at the time the grant  
22 is issued and a copy of the written statement shall be sent to the  
23 Legislative Budget and Audit Committee. A contract shall be executed  
24 within 60 days after the effective date of the appropriation or allo-  
25 cation. The purchase of the goods or services, or both, shall be in  
26 accordance with AS 37.05.230(1)(B), and the recipient must agree in  
27 writing to comply with AS 37.05.322.

28 \* Sec. 4. AS 37.05.317(2) is amended to read:

29 (2) The Department of Community and Regional Affairs shall

1 determine if there is a qualified incorporated entity in the community  
2 area that will agree to receive the grant and administer it, subject  
3 to terms generally applicable to private grantees, and will agree in  
4 writing to comply with AS 37.05.322. If there is more than one such  
5 entity, the Department of Community and Regional Affairs shall select  
6 the most qualified and the grant shall be awarded to that incorporated  
7 entity for the purposes specified in the appropriation act. However,  
8 the Department of Community and Regional Affairs shall give preference  
9 to a nonprofit corporation organized by a community for receipt of the  
10 grant.

11 \* Sec. 5. AS 37.05 is amended by adding a new section to read:

12 Sec. 37.05.322. COMPETITIVE BIDDING REQUIREMENTS. (a) A recip-  
13 ient of a state grant for a project shall award a contract to be paid  
14 for with money from the grant on the basis of competitive bids. The  
15 recipient shall solicit bids by publishing notice calculated to reach  
16 prospective bidders in a newspaper with statewide circulation and in a  
17 newspaper serving the area within which the project is located.  
18 Notice shall be published for at least three consecutive week days and  
19 at least 21 days before bids are opened. Notices shall also be posted  
20 in public places in the area within which the project is located.  
21 Bids must be sealed when received and must be opened in public at the  
22 hour stated in the notice.

23 (b) The recipient shall award the contract to the lowest respon-  
24 sive and responsible bidder, or it may reject all bids. If a satis-  
25 factory bid is not received, the recipient may solicit new bids in  
26 accordance with (a) of this section.

27 (c) If the recipient is a municipality that has adopted a com-  
28 petitive bidding ordinance that substantially meets the requirements  
29 of this section. the municipality shall comply with the ordinance and

1 is exempt from the bidding requirements of this section.

2 (d) This section applies if the

3 (1) grant is for the repair or construction of a public  
4 facility or the improvement of real property;

5 (2) recipient contracts with another to provide services or  
6 materials using money from the grant for payment; and

7 (3) amount of the contract exceeds \$100,000.

8 \* Sec. 6. This Act takes effect July 1, 1985.



SKILL  
RESPONSIBILITY  
INTEGRITY

THE ALASKA CHAPTER  
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OF AMERICA, INC.**

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3301 SPENARD ROAD  
ANCHORAGE  
RICHARD M. PITTENGER  
MANAGER

September 24, 1984

M E M O R A N D U M

COMPETITIVE BIDDING VS. FORCE ACCOUNT

The Alaska Chapter Associated General Contractors of America represents over 800 companies in the State of Alaska. As an organization representing the construction industry we are concerned over the increased utilization by local governments of Force Account and/or the failure to utilize competitive bidding procedures in the award of a public works project. Utilization of Force Account and Sole Source award of public works projects share a common problem -- they fail to protect the public interest.

Presently, the State of Alaska is required to construct public facilities under bid contract. See AS 35.15.010, AS 37.05.230. Many political subdivisions of the state have similar requirements in their ordinances; however, many municipalities, unincorporated communities, and other recipients of state funds do not utilize any competitive bid procedure to safeguard the public interest in the construction or repair of a public facility.

The wise use of public funds for the construction or repair of a public facility requires a competitive bid system. The best way to ensure the statewide implementation of such a system is to require any recipient of state funds to utilize a competitive bid system if those state funds are used in whole or part to construct or repair a public facility.

Sole Source contracting is contrary to the public interest in many ways. The most notorious problem with sole source contracting are the potential for favoritism and kickbacks. Naturally the public usually suffers in the form of higher costs due to the lack of a competitive bidding process. AGC strongly believes all qualified contractors should have an equal opportunity to bid all public projects.

The lure of Force Account Construction is very strong for many administrators and uninformed citizens. At first glance the costs of doing something "yourself" may seem less. For example: a public entity does not pay taxes and does not need a profit. However, there are other "costs" that often go unnoticed in comparisons between the private and public sector, including productivity, unfunded pension liability, depreciation of equipment, and transfer of risk. When a fair and full evaluation of all costs and benefits is made there is little dispute that contracting out is quicker, cheaper, better and less risky than force account construction.

Productivity undoubtedly is one of the major differences between force account and contracting out. The competitive bid system fosters increased productivity:

- Through long experience, contractors become specialists in one or more particular fields of construction. They know their sources of supply; they know the capacity of their machines; and the capability of their personnel.
  
- When preparing a bid, a contractor's competitive incentive requires that considerable thought be given to the problem of devising the best and most economical manner of doing the work. A contractor's specialized knowledge and experience obtained in the market place have been sharpened and are instrumental in saving the taxpayer money on the project.
  
- No matter what the skill level, productivity will consistently be higher by a private contractor. This has proven to be true even on complex nuclear power plant construction. A labor department study has concluded that the Tennessee Valley Authority utilizes 25% to 30% more labor to construct its nuclear facilities when compared to facilities constructed by private contractors.<sup>1</sup>

Oftentimes labor cost comparisons between the private and public sector forget to take into account the unfunded pension liability that is accruing to the benefit of the public employees. Similarly, equipment costs are often omitted under the theory that the government entity owns the equipment anyway so there is no "cost" other than operating expenses. Clearly, these and similar items must be included in any cost comparisons.

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<sup>1</sup> Analysis of Tennessee Valley Authority Construction cost for Nuclear Plants & Industry Average; Construction Labor Demand System, U.S. Department of Labor; Washington D.C., July 1981.

In addition to the most efficient and economical means of producing public works construction, contracting out provides a variety of other benefits to the public in the form of risk shifting, which cannot be obtained under in-house performance. Some of these risks which are allocated when construction is done by contract are:

- The public only pays for what it receives; work actually performed is the basis of payment.
- The price is firm and guaranteed by the contract, and the public has no risk of cost increases. All of the variables of the market place, such as increases in material prices, wages and shortages are borne by the private contractor.
- Timely completion is assured by a liquidated damage provision.
- Faithful performance is backed by performance and payment bonds.
- Risk of damage during construction is borne by the contractor, not the public.
- The contractor must "defend and hold harmless" the public against claims and must provide the public with insurance coverage.
- Quality inspection is at "arm's length" by independent inspectors.
- The final work is warranted and defects must be corrected at no expense to the public.

To take these risks away from the taxpayers and put them on a private contractor who, through his payment and performance bond, guarantees the job will be finished according to the terms of the contract, is worth a great deal in dollars. None of this protection of the public's interest exists when work is performed by a public agency with public equipment and personnel - all of the risks are on the taxpayer.

Everyone loses when a public entity undertakes in-house construction of a project and something goes wrong. The local citizens will not enjoy the benefits of that public improvement. All state residents suffer from dollars allocated to an incomplete project, and elected officials are placed in the awkward position of obtaining more money to "feed the alligator".

A classic but unfortunate example of misuse of public construction funds is the experience of the Village of St. Michael. The legislature appropriated \$1.6 million to St. Michael for a sewer and water system. Instead of contracting out the project, the city council decided to build the project itself. The mayor went off to Seattle on a "shopping trip" for supplies and when the barge arrived: "it looked like St. Michael, where there are no cars or pickups, would be getting a highway system, not water and sewer service.

Off came a bulldozer, two big trucks, a road grader and a front-end loader. Off came a crane. Off came three generators. Off came a strange boat with a semi-circular hull and steel bars over the prow that looked like teeth. Off came the parts for a bolt together water tank designed for the stable flatlands of the Midwest, not the tundra and permafrost of St. Michael. Off came a pile of timbers and supplies for a wood-working shop. And off came the bill for 800,000 pounds of freight: \$250,000.00. Not only wasn't there enough money left in the city treasury to pay the shipping, there also wasn't enough money to start the water project.<sup>-2</sup>

A requirement that all public works construction be contracted out through competitive bid would have prevented the St. Michael situation and many other abuses and misuses of public funds throughout the state.

The attached draft bill is similar to CS HB311 considered by the 1984 House Finance Committee. Alaska Chapter AGC supports the introduction and passage of this legislation. We believe it will assist in the creation of a fair competitive environment for the construction industry and result in better quality public projects being built at lower cost with less public risk.

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<sup>2</sup> Anchorage Daily News. March 11, 1984.



Official Business

# Alaska State Legislature

## Senate

### Committee on Labor & Commerce

Pouch V  
State Capitol  
Juneau, Alaska 99811

#### SB 166 Sectional Analysis:

Section 1) Purpose section

Section 2) Requires that grants to municipalities, thru the Department of Administration, comply with the competitive bidding procedures established in section 5 of the bill. Also makes technical changes in this section.

Section 3) Extends the competitive bidding requirements to grants to named recipients. Requires that a recipient of a grant must agree in writing to comply with the competitive bidding procedures.

Section 4) Extends the competitive bidding requirements to grants to unincorporated communities thru DCRA. Provides that a recipient of a grant agree in writing to comply with the competitive bidding procedures.

Section 5) Adds a new section, establishing Competitive Bidding Requirements. Provides that recipients of state grants award the contract on the basis of a competitive bid.

Recipient of the grant must solicit bids by publishing notice in a newspaper which has statewide circulation and in a newspaper serving the area where the project is located. Notice shall be published for at least 3 consecutive weekdays and at least 21 days before bids are opened. Notice shall be posted in a public place in the area in which the project is to be located. All bids must be sealed and opened in public at the hour stated in the notice.

Bids are to be awarded to the lowest "responsive" and "responsible" bidder. Recipient may also reject all bids and solicit new bids in accordance with the procedures established above.

Exempts a municipality which has adopted a competitive bid ordinance which meets the requirements of this section.

This section applies to grants for the repair or construction of a public facility, the improvement of real property, or contracts to provide services or materials using grant money for payment.

Exempts grants lower than \$100,000.

Section 6) July 1, 1985 effective date.

*Zharoff*

POSITION PAPER OF  
ALASKA CHAPTER  
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

SB 166  
AN ACT RELATING TO STATE GRANTS  
OR APPROPRIATIONS AND BIDDING REQUIREMENTS



The Alaska Chapter, Associated General Contractors of America, Inc., strongly supports the passage of the draft Committee Substitute for HB 331. HB 331 clarifies existing law to assure that recipients of State public funds utilize procedures aimed at preserving the free enterprise system.

The proposed amendment to As 37.05 is quite simple. It insures that recipients of public funds for the construction or repair of any public facility must advertise these projects and make an award to the lowest responsive bidder.

The competitive bid process is a universally accepted method of awarding contracts because:

1. It is the most economical bid process. Taxpayers will benefit from this healthy competition because their main interest is to save tax dollars, and to get the maximum return for every tax dollar invested.
2. It is fair for both the owner and contractors.
3. It avoids the unhealthy bias that occurs when contracts are awarded without going to bid.
4. It establishes definite costs before construction begins.
5. It prescribes a date for completion of the work.
6. It ensures quality workmanship and materials.
7. It provides centralized responsibility for the work.

The quality of workmanship and materials is guaranteed by the contract system. The materials which go into the project are prescribed in detail in the specifications and are subject to the approval of the owner. If, in the owner's opinion, the workmanship or the materials are not as specified, the owner can reject the work and order it redone at the contractor's expense.

Not only does the public receive higher quality construction projects when they are contracted out, but the public also receives more for its money. Through long experience, contractors become specialists in one or more particular fields of construction. They have their sources of supply; they know the capacity of their machines and the capability of their personnel. When preparing a bid, a contractor's competitive incentive requires that he give considerable thought to the problem of devising the best and most economical manner of doing the work. His specialized knowledge and experience obtained in the marketplace have been sharpened and are instrumental in saving the taxpayer money on the project.

The contract provides that the project be completed on a prescribed date. The contractor cannot receive final payment or the release of money that is retained while the work is progressing until the job has been completed and accepted -- all to the satisfaction of the owner. This factor, plus his own economic need, gives assurance to the public that the job will be completed on time and within contract price. Many times the contract (bid) price is lower than what the owner expects to pay.

In addition to providing the most efficient and economical means of producing public works construction, contracting out provides a variety of other benefits to the public in the form of risk shifting. Some of these risks which are allocated when construction is done by contract are:

- The public only pays for what it receives; work actually performed is the basis of payment.
- The price is firm and guaranteed by the contract, and the public has no risk of cost increases. All of the variables of the marketplace, such as increases in material prices, wages and shortages are borne by the private contractor.
- Timely completion is assured by a liquidated damage provision.
- Faithful performance is backed by performance and payment bonds.
- Risk of damage during construction is borne by the contractor.
- The contractor must "defend and hold harmless" the public against claims and must provide the public with insurance coverage.
- Quality inspection is at "arm's length" by independent inspectors.
- The final work is warranted and defects must be corrected at no expense to the public.

For the above mentioned reasons, we urge your support of this bill.

Michael  
Senator Sharoff  
C121

# Alaska Construction Law 3rd Edition

Robert J. Dickson

Michael W. Dundy

## AUTHORS

**MICHAEL W. DUNDY** is a partner in the law firm of Bogle & Gates, Anchorage. He received his law degree at Northwestern University School of Law, Chicago, Illinois. Mr. Dundy's practice has been in civil litigation with emphasis in construction, anti-trust, and employment discrimination. He is a member of the American Bar Association and the Litigation and Anti-Trust Sections of that organization. He is also a member of the ABA Forum Committee on the Construction Industry and chairman of the Program Utilization Committee of the Litigation Section of the ABA.

**ROBERT J. DICKSON** of Anchorage received his J.D. from the University of Illinois in 1972 and has practiced in Alaska since then. He specializes in civil litigation with emphasis on construction contract disputes, performance, payment bond sureties, and construction law. He is a member of the ABA Forum Committee on the Construction Industry and the ABA Section of Litigation.

**LAWRENCE T. FEENEY** is a director of the law firm of Faulkner, Banfield, Doogan and Holmes, P.C. with offices in Juneau and Anchorage. Mr. Feeney received his undergraduate degree from the University of California at Santa Barbara and his law degree from Old Hall, University of California Berkley. He has practiced in Alaska since 1973 with major emphasis on construction litigation, representing design professionals, contractors and owners. Mr. Feeney is a member of the Alaska and American Bar Associations, the ABA Forum Committee on Construction Industry and serves on the Construction Industry Panel of Arbitrators for the American Arbitration Association.

(7) The bids received did not provide competition which was adequate to insure reasonable prices.

*Federal*

FPR § 1-2.404-1(a) provides simply: "As a general rule, after opening, an invitation for bids should not be canceled and readvertised due solely to increased requirements for the items being procured."

If all bids are rejected, FPR § 1-2.404-3 requires the contracting officer to notify all bidders of that fact and state the reason for such rejection.

// 3. Non-Responsiveness

That the successful bidder's bid is non-responsive to the IFB is a common basis for a protest. This may also be a ground for an agency's rejection of the low bid. Both the ASPR and the FPR contain specific regulations concerning non-responsiveness as a basis for rejecting individual bids. ASPR § 2-301, 2-404.2; FPR § 1-2.404-2. For example, FPR § 1-2.404-2 provides in part:

(a) Any bid which fails to conform to the essential requirements of the invitation for bids, such as specifications, delivery schedule, or permissible alternates thereto, shall be rejected as non-responsive.

(c) Ordinarily, a bid shall be rejected where the bidder imposes conditions which would modify requirements of the invitation for bids or limit his liability to the government so as to give him an advantage over other bidders. For example, bids shall be rejected in which the bidder:

(1) Attempts to protect himself against future changes in conditions such as increased costs, if total price to the Government cannot be determined for bid evaluation.

(2) Fails to state a price and, in lieu thereof, states that price shall be "price in effect at time of delivery."

(3) States a price but qualifies such price as being subject to "price in effect at time of delivery."

(4) Where not authorized by the invitation, conditions or qualifies his bid by stipulating that the bid is to be considered only if, prior to date of award, bidder receives (or does not receive) award under a separate procurement.

(5) Limits rights of Government under any contract clause. However, a low bidder may be requested to delete objectionable conditions from

his bid if these conditions do not go to the substance, as distinguished from the form of the bid. A condition goes to the substance of a bid where it affects price, quantity, quality, or delivery of the items offered.

(c) Any bid may be rejected if the contracting officer determines in writing that it is unreasonable as to price.

(d) Bids received from any person or concern debarred or ineligible shall be rejected if the period of debarment or ineligibility has not expired (see Subpart 1-1.6).

(e) Low bids received from firms determined to be not responsible, pursuant to Subpart 1-1.12, shall be rejected (but if a bidder is a small business concern, see Subpart 1-1.7 with respect to certificates of competency).

(f) Where a bid guarantee is required and a bidder falls to furnish it in accordance with the requirements of the invitation for bids, the bid shall be rejected except as otherwise provided in § 1-10.103-4.

(g) The originals of all rejected bids, and any written findings with respect to such rejections,

shall be preserved with the papers relating to the procurement.

The Comptroller General has expressed the rule of responsiveness in these terms:

The test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof. Unless something on the face of the bid, or specifically made a part thereof, either limits, reduces or modifies the obligation to perform in accordance with the terms of the invitation, it is responsive.

49 Comp. Gen. 553, 556 (1970).

An important exception to this rule is that minor irregularities or informalities in a bid will not render it non-responsive. FPR 1-2.405, for example, defines the parameters of this rule:

A minor informality or irregularity is one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation of a bid from the exact requirement of

the invitation for bids, the correction or waiver of which would not be prejudicial to other bidders. The defect or variation in the bid is immaterial and inconsequential when its significance as to price, quantity, quality, or delivery is trivial or negligible when contrasted with the total cost or scope of the supplies or services being procured. The contracting officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive such deficiency, whichever is to the advantage of the Government. Examples of minor informalities or irregularities include:

(a) Failure of bidder to return the number of copies of signed bids required by the invitation for bids.

(b) Failure to furnish required information concerning the number of bidders' employees.

(c) Failure of bidder to sign its bid, but only if (1) the unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned bid document, such as the submission of a bid guarantee, or a letter signed by the bidder with the bid referring to

and clearly identifying the bid itself; or (2) the firm submitting a bid has formally adopted or authorized, before the date set for opening of bids, the execution of documents by typewritten, printed, or stamped signature and submits evidence of such authorization and the bid carries such a signature.

(d) Failure of a bidder to acknowledge receipt of an amendment to an invitation for bids, but only if;

(1) The bid received clearly indicates that the bidder received the amendment, such as where the amendment added another item to the invitation for bids and the bidder submitted a bid thereon; or

(2) The amendment involves only a matter of form or is one which has either no effect or merely a trivial or negligible effect on price, quantity, quality, or delivery of the item bid upon.

See, ASPR § 2-405; see generally, Shnitzer, "Submitting a Responsive Bid," Briefing Papers, No. 66-2, Federal Publications, Inc., April 1966, for extensive discussion of the subject and exceptions to the general rules; Gray,

"Responsiveness Versus Responsibility: Policy and Practice in Government Contracts," 9 Pub. Cont. L.J. 46 (1974).

4. Non-responsibility

Another potential ground for protesting an award, or possibly protesting an anticipated failure to award the contract to the low bidder, is non-responsibility. In some instances the issues of non-responsibility and non-responsiveness have not been distinctly treated, even though whether a certain bid requirement is a matter of responsiveness or responsibility is sometimes an important distinction with respect to its impact on the outcome of the bidding. Gray, supra, at 46.

Basic procurement statutes and regulations require an affirmative demonstration of a contractor's responsibility prior to an award. See, Armed Services Procurement Act of 1947, as amended, 10 U.S.C. § 2305(c); ASPR § 1-902, 2-407.2; Federal Property and Administrative Services Act of 1949, as amended, 41 U.S.C. § 253(b) (1964); FPR § 1-1.12. FPR § 1-1.12, for instance, "prescribes policies concerning the responsibility of prospective contractors, minimum standards for responsible prospective contractors, requirements and procedures for the determination of responsibility, and policies regarding the determination of subcontractor responsibility." FPR § 1-1.1200. It is important to note some

of the most important provisions, which are parallel to the corresponding ASPR regulations.

Section 1-1.1202(c) requires that prospective contractors affirmatively demonstrate their responsibility and when necessary, the responsibility of their proposed subcontractors. Subsection (d) indicates that recent unsatisfactory performance with respect to either quality or timeliness of delivery is an example of a problem which the contracting officer must consider in making his determination. It should be noted that special rules apply if a small business concern is involved. See FPR § 1-1.708.

Generally, a contractor must have adequate financial resources, the ability to comply with the delivery and performance schedules, a satisfactory record of performance and integrity and business ethics, and, in the case of a small business concern, a certificate of competency and/or a determination of eligibility from the SBA. FPR § 1-1.1203-1.

Aside from the general standards, there are additional standards, special standards, and minimum standards. FPR § 1-1.1203-3 through 1-1.1203-4. See, Allen Campbell Co. v. Lloyd Wood Constr. Co., 446 F.2d 261 (5th Cir. 1971) (award enjoined because successful bidder for a contract under a small business set-aside was not in fact a small business).

The procedures for determining responsibility of prospective contractors are set forth in FPR § 1-1.1205. These provisions set forth when information will be obtained, the sources from which the contracting agency may obtain information to be used in determining the contractor's responsibility, pre-award surveys and the need for determining the responsibility of prospective subcontractors.

It should also be noted that by statute, the SBA is the final authority with respect to a prospective small business contractor's "capacity and credit." Small Business Act of 1953, as amended, 15 U.S.C. 637(b)(7) (1964). If a determination of non-responsibility is made, the entire matter must be referred to the SBA for its consideration. FPR § 1-1.708; ASPR § 1-750.4.

As indicated above, the issues of responsiveness and responsibility are sometimes confused. Gray, supra. The distinctions have been summarized as follows:

1. Responsiveness involves a legal question of conformity to the invitation, whereas bidder responsibility is a question of fact.
2. Responsiveness relates to matters which are necessary for the evaluation of bids and which, if incomplete or nonconforming, would result in an advantage over other bidders if correction or addition

was allowed. As opposed to this, matters of responsibility are requested exclusively for the benefit and convenience of the government so that presence or absence at bid opening is irrelevant to bid evaluation or competition and neither advantages nor prejudices any bidder.

3. Responsiveness involves some promise which is part of the offer on the prospective contract or which operates to define or limit the obligation to perform, while responsibility relates to the "know how" and wherewithal of performance.

Gray, supra, at 52.

e. Other Grounds

There are numerous other grounds upon which a protest might be based, including, but not limited to:

Untimeliness of the low bidder's bid.

William F. Wilke, Inc. v. Dept. of Army, 485 F.2d 180 (4th Cir. 1973) (second lowest bidder denied injunctive relief, but awarded damages for bid preparation costs).

Correction or adjustment of bid by Government after bid opening resulting in substitution of that bid for another contractor's acceptable lower bid.

Armstrong & Armstrong, Inc. v. United States, 514 F.2d 402 (9th Cir. 1975).

AS 44.33.295 provides a preference for contractors in an area designated as an area impacted by an economic disaster.

In King, supra, one of the improprieties alleged by the unsuccessful bidders, but not found by the Court, was that a preference was not properly applied. In other cases, preferences have been challenged as illegal, but have often been upheld. Equitable Shipyards, Inc. v. State of Washington, 93 Wn. 2d 465, 611 P.2d 465 (1980) (6% preference for Washington State shipbuilding firms upheld); Mardian Construction Co. v. Superior Court, 113 Ariz. 489, 557 P.2d 526 (1976) (5% preference to Arizona resident contractors upheld).

In some instances, however, preference statutes have been declared illegal. Rayco Construction Co., Inc. v. Vorsanger, 397 F.Supp. 1105 (E.D. Ark. 1975) (3% preference to bidders who had satisfactorily performed prior public contracts and for two successive years had paid state and county taxes on plant and equipment such as is ordinarily required for performance of contract for which the bid was submitted on other real or personal property of equivalent value located in the state).

Non-responsibility of Bidder.

Alaska's general competitive bidding statute, AS § 35.15.050, provides that the department shall award the contract to the "lowest responsible bidder". The term "lowest

responsible bidder" has been interpreted by courts to encompass more than simply financial ability to perform the work; it includes considerations of skill, integrity, judgment, experience, reputation, previous conduct on contracts and other factors bearing on the bidders successful performance. Housing Authority of City of Opelousas, La. v. Pittman Const. Co., 264 F.2d 695 (5th Cir. 1959); Federal Elec. Corp. v. Fasi, 527 P.2d 1284 (Hawaii 1974); Hallet v. City of Elgin, 254 Ill. 343, 98 N.E. 530 (1911); Sellitto v. Cedar Grove Tp., 42 A.2d 383 (N.J. Super. 1945); Reuting v. City of Titusville, 175 Pa. 512, 34 A. 916 (1896); Williams v. City of Topeka, 85 Kan. 857, 118 P. 864 (1911). See also, Lutz Appellate Printers, Inc. v. Commonwealth of Pennsylvania, 403 A. 2d 530 (Pa. 1979) (low bidder who was rejected as non-responsible sought to enjoin award to higher bidder).

The Alaska State Housing Authority regulations set forth specific criteria for awards by ASHA. 3 AAC 95.080 provides that an award will be made to the lowest responsible bidder taking into consideration the several factors listed therein.

#### Non-responsiveness of bid

The general rule that bids must be responsive also applies at the state and local level.

In King v. Alaska State Housing Authority, 512 P.2d 887 (Alaska 1973), the court expressed the general rule concerning responsiveness of bids in these terms:

"According to the prevailing view, proposals for public contracts must substantially comply with all requirements contained in the invitation for proposals. Thus, all terms of ASHA's invitation became by implication part of a valid proposal, in order that completion among redevelopers were made equal. Consistent with this well established principle, courts hold that while a 'material' variance from the invitation requires rejection of the proposal, a 'minor' variance does not require rejection of the proposal. A variance is said to be material 'if it gives the bidder a substantial advantage over other bidders, and thereby restricts or stifles competition.'" [footnotes omitted] 512 P.2d at 892.

In King, the successful bidder had failed to submit a timely deposit, which the plaintiffs alleged made his bid nonresponsive. The court held that in order to satisfy the burden of establishing that this failure automatically invalidated the successful bidder's proposal, the plaintiffs had to prove that the successful bidder had gained a

competitive advantage thereby. The court concluded that the variance in question was minor because ASHA's security interests in the deposit were substantially protected in that the successful bidder had filed the deposit before the court considered and accepted any proposal.

See also, Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971) (bids containing conditions, attachments and interlineations held nonresponsive).

Kuhn Construction Co. v. State, 366 A.2d 1209 (Del. Ch. 1976) (low bidder for marine construction contract held not to have complied with bidding statutes in failing to list subcontractors).

Grant Construction Co. of R.I. v. City of New Bedford, 301 N.E. 2d 463 (Mass. App. 1973) (unsuccessful bidder's challenge based on alleged non-responsiveness of low bid rejected; errors in unit prices and failure to acknowledge addendum not material deviation due to insignificance of costs covered by addendum).

Bader v. Sharp, 125 A.2d 499 (Del. 1955) (failure of low bidder to certify that supply commitments have been obtained could be dispensed with as minor variance).

Actions by Low Bidders Challenging Rejection of Bid.

Lutz Appellate Printers, Inc. v. Commonwealth of Pennsylvania, 403 A.2d 530 (Pa. 1979); M.A. Stephen Constr. Co.

v. Borough of Rumson, 118 N.J. Super. 523, 288 A.2d 873 (1972) (court rejected low bidder's claim for damages) but see, Cardell, Inc. v. Woodbridge Tp., 115 N.J. Super. 442, 280 A.2d 203 (App. Div. 1971) (low bidder whose bid was rejected was awarded damages estimated to be difference between contract price and cost of performance).

Leary v. City of Jackson, 247 Mich. 447, 226 N.W. 214 (1929) (court upheld award despite fact that other bid was lower in some respects).

Paul Sardella Constr. Co., Inc. v. Braintree Housing Authority, 329 N.E. 2d 762 (Mass. App. 1975) (first general bidder's bid was rejected when rescission by one of his subcontractor's bids due to mistake resulted in award to another general bidder; first general bidder's protest of revocation of his award and subsequent award to second general bidder was upheld; first general bidder entitled to costs of bid preparation).

Commercial Cleaning Corp. v. Sullivan, 47 N.J. 539, 222 A.2d 4 (1966) (low bidder not as experienced and was too small in operation to handle scope of work required; award to second lowest bidder upheld).

#### Rejection of All Bids

Butler v. Federal Way School District, 17 Wash. App. 288, 562 P.2d 271 (1977) (despite reservation of right to

reject all bids, court held it improper to reject lowest bid which was misplaced by school district and not opened until 15 minutes later than other bids and then to order re-bid; district's inadvertence did not constitute good cause to reject all bids).

#### Inadequate Time Between Invitation and Award

Waste Disposal, Inc. v. Mayor and Council of Roselle Park, 145 N.J. Super, 217, 367 A.2d 449 (unreasonably short time in which to prepare bids).

Commercial Cleaning Corp. v. Sullivan, 47 N.J. 539, 222 A.2d 4 (1966) (must allow sufficient time between advertisement for bids and deadline for submission of bids to give unsuccessful bidder opportunity to protest and be heard).

State ex rel. Nacek v. Cleveland Trinidad Paving Co., 35 Ohio App. 115, 171 N.E. 837 (19\_\_ ) (must allow adequate time to formulate bids).

#### Violation of Post-award Requirements

In re Matter of Bayonne Park, Etc., 168 N.J. Super. 33, 401 A.2d 705 (1979) (failure of successful bidder to return executed contract and bond within required 10-day period resulted in award being nullified).

#### Contracting Authority's Failure to Fairly Consider All Bids

Paul Sardella Constr. Co. v. Braintree Housing Authority, 329 N.E.2d 762 (Mass. App. 1975).

#### Defects in Bid Invitation/Specifications

# City of Kake

"HOME OF THE WORLD'S LARGEST TOTEM POLE"

P.O. BOX 500  
KAKE, AK 99830  
907-785-3804

MAR 5 1985

Feb. 28, 1985

Scott A. Burgess  
Executive Director  
Alaska Municipal League  
105 Municipal Way, Suite 301  
Juneau, Alaska 99801

Dear Mr. Burgess:

The Kake City Council is extremely concerned about the substantial adverse effects of SB-166, if it passes into law. We respectfully request your aid in fighting this ill-conceived legislation.

At best, the proposed bill is badly worded, starting with the "Purpose" which is blatantly incorrect and biased. At worst, it could severely limit all Alaskan municipalities in their ability to define, manage and construct capital improvements.

Over the past several months I was a member of the State Force Account Task Force, during which all aspects of municipal force account management were discussed. I have enclosed correspondence and meeting summaries relating to this Task Force effort. As you can see, the Task Force concluded that the existing system of State grant management was perfectly adequate to handle municipal capital grants. New legislation to require competitive bidding procedures would seem to totally undermine the Task Force's work and conclusions to date.

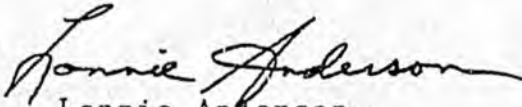
As written, the proposed SB-166 is very unclear. If its intent is to simply require all construction subcontracts in excess of \$100,000 to be competitively bid, that could be handled by the Task Force and a change within the already-existing State procedures. There is no need for legislation for this type of change, and it should be directed back to the Task Force to handle.

If the purpose of SB-166 is to ultimately limit the size of municipal capital grants that do not have to be competitively bid to less than \$100,000, then this legislation is simply not acceptable and not in the public interest. In either case, there does not appear to be any need for the legislation.

I would be more than willing to provide whatever additional information that we have regarding the successes and benefits of municipal-managed capital projects. We feel very strongly on this issue, and see no justification for this proposed legislation.

I am looking forward to hearing from you on this issue.

Sincerely yours,



Lonnie Anderson  
Mayor

cc: The Honorable Senator Eliason  
The Honorable Representative Goll  
The Honorable Senator Zharoff  
Members of the State Force Account Task Force

# MEMORANDUM

# State of Alaska


TO: Force Accounting Task Force

DATE: November 21, 1984

FILE NO: CMC 7-3

TELEPHONE NO: 465-2700

SUBJECT: Task Force Meeting

  
FROM: Jim Robison, Commissioner  
Department of Labor

There will be a meeting of the Force Accounting Task Force on Monday, December 3, at 1:30 p.m. in the Third Floor Conference Room (Room 303) at the Department of Labor, 1111 West Eighth Street in Juneau. Please let my office know if you will be unable to attend the meeting.

At the first Task Force meeting on November 5, it was suggested that State grant procedures could be modified to include local hire and competitive bidding requirements State-funded construction projects. A proposal was made to review State grant procedures to determine whether such modifications would be feasible and in the State's best interest. Accordingly, on November 19, a meeting was held involving grant officers and management representatives from various State agencies. The consensus of the group was that there is a need to establish uniform grant management guidelines, but that State agencies should not dictate or otherwise interfere with a grant recipient's ability to administer grant-funded construction projects and make decisions regarding employment and local hire on such projects.

It was also disclosed that the Office of Management and Budget has recently conducted a comprehensive review of grant programs and procedures in an effort to streamline the management of State grants. The grants projects steering committee carefully attempted to balance the need for grant project accountability on the one hand with the desire not to interfere with local administration of grant projects on the other. The grant management procedures under review by OMB apparently contain no discussion of use of force account methods to carry out public construction projects.

In summary, there was little enthusiasm on the part of State agencies that administer grants to modify grant agreements to insert local hire, competitive bidding, or other requirements.

Since the first Task Force meeting, I have also received a statement of position from the U.S. Department of Labor with respect to the so-called "force account" exemption from the federal Davis-Bacon prevailing wage requirements. A copy is attached for your review.

Attachment

## Distribution

Richard Knapp, Commissioner, DOT/PF  
Lmil Notti, Commissioner, DC&RA  
Jim Kelly, Special Assistant to the Governor  
Jim Wakefield  
Reesa King  
Lonnie Anderson  
Mano Frey

JR:BL/jt

U.S. Department of Labor

Employment Standards Administration  
Wage and Hour Division  
909 First Avenue, Room 3032  
Seattle, Washington 98174



November 13, 1984

Reply to the Attention of

Mr. Jim Robison  
Commissioner of Labor  
Alaska Department of Labor  
P.O. Box 1149  
Juneau, Alaska 99811

RECEIVED

NOV 16 1984

OFFICE OF THE COMMISSIONER

Comm.	<i>AL</i>
Deputy	<i>RL</i>
Sp. Asst.	<i>AL</i>
Info. Off.	
Adm. Asst.	
Int. Aff.	
Med. Dir.	
To:	<i>AL</i>
cc:	<i>AL</i>
cc:	
cc:	

Dear Mr. Robison:

This is in response to your recent request for a report on the position of the Wage and Hour Division on the application of the "force account" concept to Davis-Bacon Act and Davis-Bacon Related Act covered work.

As you know, the Davis-Bacon Act and Davis-Bacon Related Acts contain provisions that contractors and subcontractors pay Davis-Bacon Act prevailing wage rates to laborers and mechanics who are employed on federally financed construction projects which are in excess of \$2,000. One of the accepted principles governing the federal agencies which administer and enforce these laws is that states or political subdivisions of states are not, as prime contractors, bound by these prevailing wage requirements. On the other hand, subcontractors, to whom the states or their political subdivisions might let all or part of the work initially contracted for with the United States Government, would be bound to the same extent as other nongovernmental contractors.

Accordingly, if a federal agency or a state or political subdivision thereof decides not to contract out but rather it performs the work "in-house" with its own employees, then the Davis-Bacon Act prevailing wage requirements would not be deemed applicable to such employees since the work is considered as being "force account" work. This concept would continue to be applied even in those instances where the governmental agency hires a temporary workforce to perform such "force account" work.

In most cases, there is no need to question whether a particular organization is a federal, state, or other governmental agency. This is because there is a common understanding as to the meaning and application of these terms. However, there are specific limitations with respect to the application of the "force account" concept to quasi-governmental agencies. Therefore, we shall endeavor to illustrate by example those conditions which must be met by a such an agency in order to qualify under the "force account" exemption.

With respect to this exemption, an Indian tribe is similar to a municipal, state or federal agency. Consequently, the Davis-Bacon Act prevailing wage rates would not be applicable to work performed by tribal employees. Regarding the issue of discussion, that the work was performed by a non-profit corporation which was associated with the tribe, let us next consider

whether the employees of that corporation would be subject to the prevailing wage provisions.

A determination as to the corporation's standing would be dependent on the nature of the organization and ownership of the corporation. If in fact the corporation was a public, nonprofit corporation, serving as a governmental instrumentality of the tribe, and was solely owned by the tribe, then it is our opinion that its own employees would not be subject to the prevailing wage laws.

On the other hand, if the corporation was a private business enterprise, whether or not owned by the tribe or members of the tribe, or if it were incorporated as a profit making corporation, then it is our opinion that its employees would be subject to the prevailing wage laws. The application of the "force account" concept would not be appropriate in this case because the workers would not be employees of the governmental body or its instrumentalities and, as previously indicated, the exception is limited to such employees.

There are three notable exceptions to the "force account" exemption and that is with regard to work which is financed under the Public Works Employment Act of 1977, the U.S. Housing Act of 1937, as amended, or the Housing Act of 1949. These laws contain provisions which require the payment of Davis-Bacon Act prevailing wage rates to state or local government employees who perform work which is under their purview and therefore they are outside the exemption.

I trust this information will provide assistance to your agency. If you have any further questions, please contact me or Ed Woodruff of my staff.

Sincerely,



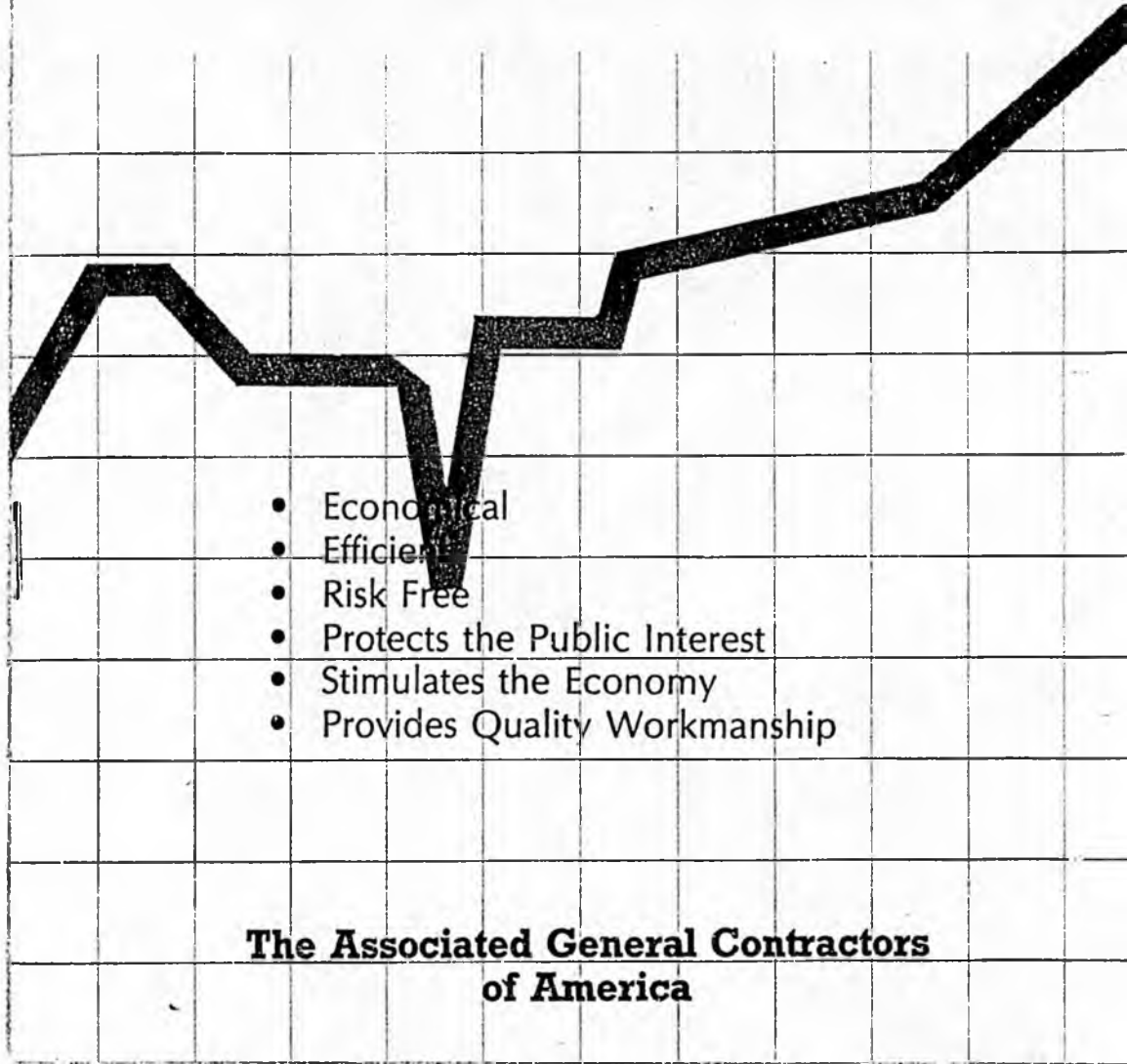
W.J. Olson

Assistant Regional Administrator

CC: Joe C. Garcia

# **MAXIMIZE PUBLIC FUNDS**

**with  
The Contract  
Method of  
Construction**



**The Associated General Contractors  
of America**

## **Taxpayers Can Receive More For Their Tax Dollar**

**A**t all levels of government, large amounts of tax dollars are spent on construction of public works using government employees and government equipment. This method of construction is known as force account.

A few federal agencies, most notably the Tennessee Valley Authority, continue to use force account construction. Numerous state and municipal governments also undertake similar force account programs.

Under force account, the public does not usually receive full value for its tax dollar. Independent studies have shown that it costs significantly more in real dollars for the government to complete work with its own forces than it does to contract the same work out to the private sector. On a more subjective note, polls have found that the public overwhelmingly believes that the private sector does better work at a lower cost than public agencies.

The contract method of construction maximizes public funds in the following ways:

## **A Widely Accepted Principle Is That The Greatest EFFICIENCY And The Lowest Cost Occur When There Is Real Competition**

**A**growing concern of the public, that of limited outlays for public spending, is best addressed when public construction is performed as efficiently and cost effectively as possible through the competitive bid process. The objective is to avoid the development of massive inventories of publicly owned equipment, which is often underutilized, and expansion in the numbers of public employees, many of whom are used inefficiently.

## **Spending Tax Dollars ECONOMICALLY and Wisely**

**T**axpayers are entitled to the lowest cost for construction of a project.

The contract method of construction has numerous advantages, one of the most important of which is the establishment of definite costs **before** construction begins.

Cost is an important consideration in both the private and public sector, but it has an even greater significance when the expenditure of public monies is involved. Actual cost includes much more than direct salaries. One must compare fringe benefits, sick pay, vacation time, administrative costs and also the question of project completion time. A realistic comparison of purchase and maintenance costs for publicly owned equipment must be also included. All of these cost factors are included in the private bidder's price; but these incurred costs are not usually identified as costs to the taxpayer when a government agency employs force account.

When preparing a bid, a contractor's competitive incentive requires that he give considerable thought to the problem of devising the most efficient and most economical manner of doing the work. His specialized knowledge and experience obtained in the marketplace are instrumental in saving the taxpayer money on the project. This incentive is not present in force account work.

### **Construction By Contract Is RISK FREE To The Public**

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**I**n addition to providing the most efficient and economical means of constructing public works, contracting out through competitive bidding provides a variety of other benefits to the public in the form of risk shifting, which cannot be obtained under force account. Some of these risks, which are assumed by the successful bidder when construction is done by contract, are:

- The public only pays for what it receives; work actually performed is the basis of payment.
- The price is firm and guaranteed by the contract, and the public has no risk of cost increases. All of the variables of the marketplace, such as increases in material prices, wages and shortages are borne by the private contractor.
- Timely completion is assured by a liquidated damage provision.
- Faithful performance is backed by performance and payment bonds.

- Risk of damage during construction is borne by the contractor, not the public.
- The contractor must "defend and hold harmless" the public against claims and must provide the public with insurance coverage.
- Quality inspection is at "arm's length" by independent inspectors.
- The final work is warranted and defects must be corrected at no expense to the public.

To take these risks away from the taxpayers and place them upon a private contractor who, through his payment and performance bond, guarantees the job will be finished according to the terms of the contract, is worth a great deal in dollars. None of this protection of the public's interest exists when work is performed by a public agency with public equipment and personnel — all of the risks are borne by the taxpayer.

### **The Contract Method PROTECTS THE PUBLIC INTEREST**

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**P**ublic agencies have a legitimate interest in contracting out. Agencies are concerned with the efficient delivery of services to the taxpayer. To obtain the most effective use of the tax dollar, to assure the public of **on-time, on-budget quality construction**, all needs for construction services should be **contracted out**.

### **Construction By Contract STIMULATES THE ECONOMY**

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**P**rivate industry is ready and willing to provide the public sector with the services it needs, and will do so at a competitive price. Taxpayers will benefit from this healthy competition, and will get the maximum return for every tax dollar invested. When government decides to produce its own goods and services, it not only prevents the private sector from earning dollars, but it also denies itself revenue from the taxes private enterprises must pay.

Studies have concluded that if construction is accomplished through contract rather than being done by force account, there will be a significant return to the public sector through taxes and tax recycling. A study in New Jersey has concluded that approximately 10 to 14 percent of the successful bid price is returned to the public sector. An Oregon study con-

cluded that taxpayers receive a net return of more than 20 percent of the contract cost when contract construction is chosen over force account construction.

**TAXES ARE PAID BACK INTO THE ECONOMY  
USING THE  
CONSTRUCTION BY CONTRACT METHOD**

Public Agency

1. F.I.C.A.
2. State Unemployment Tax

Private Contractor  
(may vary by state)

- F.I.C.A.  
State Unemployment Tax  
Federal Unemployment Tax  
Sales Tax  
Federal Diesel & Gasoline Tax  
Federal Use Tax  
State Use Tax  
State License Fees  
Corporate Income Tax  
Property Tax  
Tax on Tires  
Tax on Parts

**The QUALITY OF WORKMANSHIP And Materials Is  
Guaranteed By The Contract System**

**T**he materials which go into a project are prescribed in detail in the specifications and are subject to the approval of the government agency. If the workmanship or the materials are not as specified, the entity can reject the work and order it redone at the contractor's expense.

It is also a common practice to require that the contractor maintain the project in good condition for a period of time after completion. It is, therefore, to the contractor's economic interest — and to the furtherance of his reputation — that the quality of his work measure up to the prescribed standards.

Not only does the public receive higher quality construction projects when they are contracted out, but the public also receives more for its money.

### **How Can You Save?**

**C**ontracting out can save your governmental unit money. The undertaking of thorough and comprehensive cost comparisons for construction projects can set your government on the road toward these savings. Examples of these comprehensive cost comparisons can be obtained from the local AGC chapter or contacting national AGC. Use of these comparisons will illustrate the total cost to the government. You should also ask these sources for case examples of how other governmental entities saved the public money through contracting out.

**FOR MORE INFORMATION ON THE CONTRACT METHOD OF CONSTRUCTION CONTACT THE LOCAL CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA IN YOUR STATE.**

Nov. 14, 1984

Jim Kelly  
Special Assistant  
to the Governor  
Office of the Governor  
-Pouch A  
Juneau, Ak. 99811

Dear Mr. Kelly:

I am deeply concerned that the first meeting of the State's "Force Accounting Task Force" was held without any representative from a municipality being present.

Wide-ranging effects on municipalities could easily result by actions or policies from the Task Force. It is absolutely essential, therefore, that municipality concerns be well represented before any actions are taken by this Task Force.

Clearly, force account methods can be a highly effective management means for constructing municipal capital improvements. This is particularly true for rural communities such as Kake, where the few State dollars available must be put to their best possible use and be made to stretch to their maximum. In our case, this has only been possible through the use of City-managed force account construction. It has allowed the community to maintain control over each project from start to finish. It also has provided the only means we know that can and will make effective use of the local labor force. We would be more than happy to show you our results, which demonstrate the high quality and use to which State funds have been put.

However, we have had extremely bad experiences from past capital projects that were defined and built by outsiders who had little understanding, obligation or commitment to the community's needs. The result was a lot of money spent for less-than-optimum facilities, local labor given little to no opportunity to participate, and finished products in which no-one took pride. In effect, the community was not given opportunity to control its future, to train its local labor in marketable skills, or even to control the specific

project. We hope those days are long gone, and firmly believe that the State cannot afford to continue using that approach when there are viable options.

In reviewing Commissioner Robison's summary of the Task Force's first meeting, there appeared to be two action items agreed upon. I would like to comment on both items:

A. Local Hire Encouragement on State-Funded Projects.

The best encouragement that can be made for local hire, is to allow as many capitol improvement projects as possible to be managed by force account methods. You can write all of the requirements for local hire you want into bid-construct projects, but when a contractor comes into a village our workers are invariably overlooked or forced out for any number of technicalities that can be used by the contractors. Contractors simply will not take the time to train even partially unskilled workers, if it in any way eats into their profit margin.

B. Modification of Grant Agreement Conditions for Constructing Capitol Improvements by Municipalities.

If other communities feel as I do, the grant agreements we are working with now are generally acceptable. I have no problem with some modifications to encourage local hire. However, nothing can be allowed to jeopardize this or any other community's basic right to manage and control their capitol improvements.

If we, or any other community has the desire and the ability to design and construct a capitol improvement, we should be allowed to do so. Anything less will not be in the community's or the State's best interests.


Even though Kake has made extensive use of its local labor in its City-managed construction, we have not hesitated to bring in contractors and specialized labor wherever needed to properly construct the project. Both outside contractors and labor unions have therefore aided and participated to a major extent in the Kake projects, and we will continue to use their services on future projects. In this manner, we feel that everyone is benefiting in the most efficient way possible. However, the last thing we wish is to be restricted in using our own initiative to help ourselves.

I hope that these comments will clarify some of the deeply felt concerns that the Kake community has on defining and managing its own capitol improvements. I am confident these feelings are shared by many other communities as well, and I trust that from here on the municipalities will be definitely included in any further task force work.

I am looking forward to being informed of the time and place of the next meeting, and will make every effort to be there. In the meantime, I request that the applicable State departments provide me with an opportunity to review all proposed changes in State grant agreements and bid specifications, well before any changes are made final.

I am looking forward to working closely with you on this effort.

Sincerely yours,.

  
Lonnie Anderson  
Mayor

cc: The Honorable Senator Eliason  
The Honorable Representative Goll

## MEMORANDUM

State of Alaska

TO: The Honorable Bill Sheffield  
Governor

DATE: November 6, 1984

FILE NO:

TELEPHONE NO: 465-2700

SUBJECT: Force Accounting  
Task ForceFROM: *Robert W. Jordan*  
for Jim Robison  
Commissioner  
Department of Labor

A meeting of the Force Accounting Task Force was held at the Department of Labor on Monday, November 5. Present at the meeting were: Jim Wakefield of the AFL-CIO Central Labor Council; Resa King of the Associated General Contractors; Commissioner Emil Notti; Commissioner Dick Knapp; Deputy Commissioner Bob Landau; and myself. The meeting was organized by Special Assistant Jim Kelly who, unfortunately, was delayed due to a staff meeting in the Governor's Office.

The discussion centered on the question of how to ensure the use of local hire on State-funded rural construction projects while still permitting the projects to be competitively bid by the private sector. The Associated General Contractors and organized labor feel that the use of force accounting methods to build public facilities not only undermines prevailing wage standards but also effectively excludes union contractors from competitively bidding on rural projects. Both Mr. Wakefield and Ms. King indicated that they are not averse to the use of local hire on rural construction projects as long as contractors are not excluded from competitively bidding for such projects. They suggested that the goals of local hire and competitive bidding could both be accommodated by inserting appropriate local hire requirements in State grant agreements and bid specifications for State-funded rural construction projects. Commissioners Notti and Knapp both endorsed this type of approach and further remarked that it could be implemented quickly without waiting for exhaustive study.

Accordingly, the consensus reached at the meeting was that State agencies administering grants to local villages and communities for public works construction should amend their grant agreements to include local hire requirements as well as any other stipulations necessary to enhance the use of local labor on the project. It was agreed that each State agency awarding grant funds for construction work should designate a representative on the task force to help put together model grant agreement language. Commissioner Robison volunteered to coordinate this effort and set up a meeting of agency representatives as soon as possible. It was also suggested that a representative from the Department of Law be included to provide legal review of the proposed local hire stipulations.

# City of Angoon

P. O. Box 189

Angoon, Alaska 99820

Telephone  
(907) 788-3653

March 8, 1985

To: All Legislators

The Angoon City Council strongly objects to the proposed SB-166 dealing with the abolition of force account construction on projects over \$100,000.

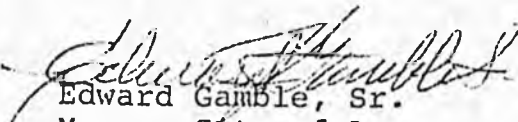
Angoon has been faced with unemployment rates exceeding 50% over the past few years. In order to alleviate the financial burden these high unemployment rates would place on the State of Alaska, Angoon has in the past successfully used force account construction. In remote rural areas the State's appropriations have become one of the largest sources of revenue for the local labor force. If force account construction is prohibited in places like Angoon, the State will need to install a financial assistance program to help the local worker who most likely will not be hired by a general contractor from Seattle or elsewhere.

An additional benefit of force account construction in remote rural areas is the pride the community has in projects built with local workers. The City of Angoon has observed reduced vandalism on projects built by force account construction only because of the feelings of community ownership that are generated by force account construction.

Angoon is capable of quality construction for most types of work, however, there are limitations to the skills available in small rural communities. When Angoon reaches a part of construction which requires a specialty contractor, it is put out to the competitive bidding process. Working hand-in-hand with specialty contractors Angoon has constructed many desperately needed community projects.

Angoon believes that in this time of declining State appropriations that they should be allowed to determine which method of construction will result in the most project for the dollar. Requiring small communities to bid all projects over \$100,000 will drastically limit their ability to get the most out of the State dollars appropriated to them. Consequently the Angoon City Council strongly urges you to reject SB-166.

Sincerely,

  
Edward Gamble, Sr.  
Mayor, City of Angoon

SB 166

# City of Aniak

P.O. Box 43

Aniak, Alaska 99557

Phone (907) 675-4481

February 15, 1985

MAR 8 1985

Governor Bill Sheffield  
3rd Floor - Capital Building  
Pouch A  
Juneau, Alaska 99811

Subject: Force Account Construction

Dear Governor Sheffield:

During the week of February 11, I traveled to Juneau with other City representatives to present and discuss the capital improvement needs of our community. It was during this time that I became aware of discussions concerning construction in the bush, and more particularly municipalities constructing capital improvements themselves using "force account" measures instead of statewide or Seattle based contractors. We in Aniak are proud of our construction record and the added benefit force accounting has provided. Below is a brief disussion of our program which I am offering for your consideration and the State Legislature's. This discussion provides an accurate record of force accounting in a bush community.

## Performance

Attached is a report prepared by our City Manager Pam Westjohn for the Department of Administration that summarizes our municipal grants. We received \$5,850,000 from municipal grants, Village Safewater, the Department of Transportation through Transfer of Responsibility Agreements, and Community and Regional Affairs with Rural Development Assistance Grants.

We responded by: 1) constructing a 9,400 square foot Multi-purpose Community Building that houses a community hall, a daycare center, laundromat, library and museum; 2) completing a community sewer system by laying 15,000 lineal feet of ductile iron pipe and cast iron service connections, installing two lift stations and constructing 10 acres of sewage lagoons; 3) constructing three road projects over two miles for Morgan's Road, the High School Access Road and the Aniak Slough Sanitation Access Road; 4) constructing a 60' by 40' maintenance shop; 5) constructing a 30' by 30' office used originally as a temporary daycare center; and 6) constructing a Fire Hall. Prior to 1981,

the City of Aniak also constructed 3,600 lineal feet of road to serve HUD Housing through the Local Service Roads and Trails Program. We have also developed an effective gravel hauling and stockpiling operation.

#### Local Employment

The City uses 100% local hire. It may even be said that our hiring practices are bias toward native Eskimos and Indians of the mid-Kuskokwim River. They are given preference. During the three years of construction since 1981, we have three outsiders - our City Engineer and construction manager and two mechanics. We also hired educational contractors to demonstrate the laying of hardwood flooring, installation of ceiling tiles, and heating duct and plumbing installation. Local specialty contractors were used when appropriate. All hiring was performed by a local contractor. Our construction program affected and assisted at least 30 families.

The City hired 111 people at a payroll of \$580,000 during 1984. In 1983, the City hired 130 people at a payroll of \$607,000. By comparison, the new Aniak High School was constructed by a Seattle based contractor and hired, to the best of my knowledge, 3 local people.

#### Pay Scale

The City pays beginning construction hands \$8.00 per hour. Foremen and long-term employees have advanced to \$10.00 per hour. Salaried employees include the Public Works Director and City Carpenter. The flexibility that the City has in hiring allows workers to work on construction projects and also maintain a subsistence way of life.

#### Local Economy

When using force account methods, the money expended on wages, freight, and smaller materials orders stays in Aniak and is expended on local services, local purchases, and housing construction that assists local contractors. There is a direct impact upon the economy and many spin-offs. The only major expenditures outside the town are for barged construction materials from Seattle. When a contractor is used from outside Aniak, almost all the money leaves Aniak for personal bank accounts in Fairbanks, Anchorage and Seattle, and the local impact is almost negligible. Many of the outside contractors even provide their own lodging and meals.

### Equipment and Tools

A major benefit of force accounting is the investment in heavy equipment and tools that remain in the community and can be used again and again for future projects. Investing in and maintaining equipment is the key to a successful and low budget local construction program. After the equipment is in place, future grants need only have money for labor, fuel and parts. In comparison, a contractor must bid repeated costs for modification and winter standby time which adds a premium to construction costs. Force accounting removes that premium. Because Aniak's force account system is already in place, a recent bid estimate by the Corp of Engineers for dike construction put a differential in cost between City crews and a contracted bid at 3.5 million compared to 5 million. In reality, when a major earthwork job is bid in the bush, responding bidders usually involve one or two contractors who are already active or familiar with the area. The construction money is therefore not readily available to all statewide contractors, but to a few preferred companies.

In addition to our carpentry tools, mechanic tools, and trucks, we have purchased and shipped to Aniak the following heavy equipment for our projects and will be used for our flood control projects:

- Komatsu D-155A Crawler Tractor
- Cat D-6 and D-3 Crawler Tractors
- Terex S-23 Scraper and 18 Yard Dump Truck
- Terex Loader - 6 Yard Bucket
- Cat 966 Loader
- Cat 215 Excavator and Case 580 Backhoe
- 4 - International Dump Trucks (5 and 10 yards)
- Eager Beaver Low Boy Trailer

### Training

All members of our community are eligible for hire. Training is available on the heavy equipment as well as through safety films. Three former City employees are now working in Fairbanks. The majority of our workers are young men and women, including people from other villages on the River. Our goal is not to sustain high employment in Aniak, but to train workers for the statewide job market. In Aniak, we hope to sustain a small public works crew to provide community needs and services.

Contractors cannot afford to hire untrained personnel at Davis-Bacon \$28.00/hour rates and expect to win bids or maintain schedules. The success of force accounting is based upon the freedom to pay applicable wages and allow training of local

workers. This in turn helps hold down budgets that are already inflated due to logistics. Amending the Little Davis Bacon Act for rural Alaska may allow contractors to hire local people. Force accounting allows remote communities to hire paid volunteers and people who want a chance to learn about equipment and machinery. These people may then earn a wage and help their communities.

#### Self-Reliance

Force accounting gave our city the capital and incentive to develop maintenance capabilities. We headquarter our operations out of our new maintenance shop and provide road grading, snow plowing, ice road construction, sewer cleaning and thawing, landfill maintenance, fuel delivery and building maintenance. Our equipment has also been used in neighboring villages for small projects. The project foreman in most cases developed from the crews and are now in charge of maintenance. Because the facilities were constructed by users, maintenance is more efficient, better understood and the facilities are well cared for. The new community hall is not being abused and is well policed.

#### Planning Methology-Estimating

When force accounting with a municipality, management, estimating and planning are the key to a successful program. The right equipment must be purchased and a maintenance program established for the immediate jobs and long-term plans. Each piece of machinery must be considered for the number of different tasks it can perform and the cost of maintenance. Budgets must be broken down into materials, labor, insurance, fuel and equipment hours. Our crews have been broken into: 1) public works maintenance/earthwork crew, 2) sewer construction and maintenance and, 3) building crew for planning purposes. Advantage must be taken of the summer barge schedules to keep cost to a minimum.

Force accounting removes mobilization costs, Davis-Bacon wages and profit from total costs. In comparison, construction periods are longer because of training and low work skills and habits. But once crew speeds are up to standard, there can be considerable savings. Our methods of construction have also allowed flexibility because of inclement weather and change orders from design or changing soil conditions.

The City of Aniak always constructs and designs with maintenance costs in mind. For example, deep buried ductile iron pipe for the sewer and 12" walls for heating reductions in the

Governor Bill Sheffield  
February 15, 1985  
Page -5-

buildings were used. For small communities the best way to construct a project is by contractor bid. Not every small community in Alaska should force account their construction. Force accounting is only feasible when the jobs are large enough to pay for equipment investments, and the communities can provide the required labor force. City management must be capable of guaranteeing schedules and avoid a lack of performance and cost overruns. Project control has been provided by Village Safewater, the Department of Transportation, and Community and Regional Affairs.

We in Aniak are capable of force accounting and have been quite successful. Some towns, such as McGrath, still prefer to contract out all work. St. Mary's and Galena on the Yukon River use a combination of force accounting and contracting to accomplish projects and hire local people. Aniak separates projects from tasks with materials suppliers and a separate contractor for equipment support. Each method is designed to best fit the local situation in that particular community. The U.S. Public Health Service has been constructing water and sewer improvements in bush villages using force account methods for over 25 years. It would be a mistake to pass legislation that removes the force account option and requires the mandatory use of contractors.

Very truly yours,



LaMont E. Albertson  
Mayor

cc: Members, Alaska State Legislature  
Commissioners

TEF/blb

# City of Aniak

P.O. Box 43

Aniak, Alaska 99557

Phone (907) 675-4481

January 22, 1985

STATE OF ALASKA  
Municipal Grants Program  
Department of Administration  
Pouch C, M/S 0208  
Juneau, Alaska 99811

Attn: → Shirley Peters  
Accounting Technician

Dear Shirley:

Please find attached the "final" report for the Aniak Municipal Grants received over the past four years. A general project description of the use of the funds is as follows:

1. Fire Trucks: Grant #5-206, Fire Truck, \$100,000.00, was used to purchase a new combination pumper tanker-fire truck from Becker Fire Equipment Company for \$78,834.00, and a used 1,200 gallon water truck from Gary's Truck Sales for \$6,000.00 and flown to Aniak by Maury Carlson in November 1981 for \$13,600.00. The balance was used for expediting by Jeff Wacktz in Anchorage and City administration.
2. City Subdivision Electric Lines: Grant #7-212, Housing Lines, \$30,000.00, was used to construct 1,600 feet of overhead residential electric lines by Aniak Light and Power for the Aniak Residential Subdivision #1. The grant was previously closed in a letter to you dated April 25, 1984 from John H. Hale, former City Manager. The project was completed in October of 1981.
3. White Alice and Morgan's Road: Grants #8-251, Morgan's Road Construction for \$100,000.00; #8-250, High School Access Road for \$100,000.00; #8-441, Morgan's Road Phase II for \$140,000.00; #8-795, Morgan's Road Construction for \$85,000.00; and #8-718, Road Improvements for \$50,000.00 were used to construct a new 860 foot high school access road - also known as White Alice Road - to the new secondary school and vocational school; provide a new intersection, a 2,500 LF realignment and gravel fill with culverts for Morgan's Road; and provide widening to Airport Boulevard and a gravel overlay to townsite roads. The grants were expended obtaining equipment, transportation charges and maintenance, fuel, labor, engineering, obtaining and developing gravel sites, surveying and city administration.

4. Flood Dike and Drainage Improvements: Grant #8-439, Emergency Dike Extension for \$200,000.00 was used to purchase equipment; improve drainage along roadways for floodwater conveyance, repair the dike from normal deterioration that has occurred over the past 15 years and stockpiling material for emergency flood response. Design plans and easement acquisition for the dike extensions down Morgan's Road and the townsite were also performed. This grant was coordinated with a feasibility study through the Department of Transportation. Preparedness for emergency flood work and response was completed in October of 1983.
5. Septic Tanks and Drainfields: Grant #7-527, Septic Tanks and Drainfields for \$175,000.00 was used for a 900 foot 8" ductile iron community sewer line, 5,000 gallon septic and drainfield for the Multi-purpose Community Building and Skin Tanning and Food Canning Facility as described in a letter dated August 3, 1982 from John Hale, former City Manager. The grant was originally for on-site sewers for public housing. However, the legislation was not passed until the following year and the housing project had been completed. Additionally, the grant was used to assist five individuals to install on-site sewers with deep trench drainfields as part of the Village Safewater Program, one in the original housing project. The work was completed in September of 1984.
6. City Maintenance Shop: Grant #7-778 Maintenance Shop and Equipment for \$200,000.00 was used to construct a 60 foot by 40 foot maintenance shop located at the intersection of Airport Boulevard and Morgan's Road on Airport Lease Lot 30 Block 20. The facility is constructed with a 12 inch double 2" x 4" wall. It was first utilized for maintenance on heavy equipment in June of 1984, and officially occupied in October of 1984. Tools for diesel maintenance and in-house air and fuel systems were also purchased.
7. Multi-purpose Community Building: Grants #7-406 Day Care Center for \$250,000.00 and #7-85-023 Multi-purpose Community Building for \$500,000.00 was used to match other funds from Federal Housing and Urban Development grants with the Traditional Council, Municipal Aid, a

January 22, 1985

Library Construction Grant, and State Rural Development Assistance to build one facility housing a community hall, day care, laundromat, library and museum. The facility is 9,400 square feet and utilizes 10" walls and R=60 roof. The Community Hall was first utilized October 30, 1984. The Day Care was opened October 20, 1984.

8. Village Safewater Community Sewer: Grant #4-710 Community Sewer System for \$500,000.00 was used to match a 1.2 million Village Safewater grant from State Environmental Conservation to sewer the Aniak Townsite. Two lift stations, a lagoon and three miles of pipe have been installed to date for 36 service connections. The remaining townsite from 4th Street to 6th Avenue will be sewered during June and July of 1985. Sewage first flowed in May of 1984. \$328,000.00 remains in account to complete the project.

The following is a summary of grants received over the past four years:

CITY OF ANIAK MUNICIPAL GRANTS

1981

(Accepted August 24, 1981)

Grant Number

5-206	Fire Truck	\$100,000.00
7-212	Housing Lines	30,000.00
8-250	High School Access Road	100,000.00
8-251	Morgan's Road	100,000.00

1982

(Accepted August 3, 1982)

7-406	Day Care Center	\$250,000.00
7-527	Septic Tanks & Drainfields	175,000.00
8-439	Emergency Dike Extension	200,000.00
8-441	Morgan's Road Phase II	140,000.00

Shirley Peters  
Municipal Grants Program

- 4 -

January 22, 1985

1983  
(Accepted September 14, 1983)

4-710	Community Sewer System	\$500,000.00
7-778	Maintenance Shop & Equipment	200,000.00
8-718	Road Improvements	50,000.00
8-795	Morgan's Road Construction	85,000.00

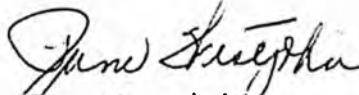
1984  
(Accepted May 10, 1984)

7-85-023	Multi-purpose Building	\$500,000.00
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All grants have been received and spent in their entirety except 4-710, the Community Sewer System Grant. The final reports will follow.

Please call if more information is required. Thank you for your continued support and assistance.

Sincerely,

  
Pam Westjohn  
City Manager

# MEMORANDUM


State of Alaska  
Department of Transportation & Public Facilities

TO: Michael Thill, Committee Aide  
Office of Fred F. Zharoff  
Alaska State Senate

DATE: March 7, 1985

FILE NO:

TELEPHONE NO: 465-4070

FROM: Daniel F. Malick, Director   
Headquarters Plans and Programs

SUBJECT: Legislative  
Request

Attached to this memo is a printout listing capital projects completed within the last three fiscal years which have utilized non-federal dollars for its funding. In your use of this data, I would like you to keep in mind a couple of points:

- ° There are various definitions for a "project" within the department's financial management system. The most common definition for a project would be an inclusive effort commencing with the design and completing with the construction. However not all projects on this list fall so neatly within this definition. Any averages or "factors" that you might calculate from this list should consider the apples-to-oranges type comparisons you may be making between the various projects listed.
- ° The list does not include any indication of the year of appropriation. Since these projects all have been completed within the last three fiscal years, many of them may be utilizing funding from three to five years in the past. Thus, inflation factors for construction may become a relevant consideration in calculating averages.

If we can be of any further assistance to you in interpreting these numbers, please feel free to contact me directly.

Attachment

cc: Susan Fleischhauer, Legislative Liaison, DOT&PF

tv

B 2 8 1986

STATE OF ALASKA 1986 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date : 1/13/86

**REQUEST**

Bill/Resolution No. : SB 166  
 Title : An Act..competitive bidding requirements..state grants  
 Sponsor : Fahrenkamp & Bennett  
 Requestor : SLW  
 Date of Request : March 15, 1985

**FISCAL DETAIL**

Agency Affected : Community & Regional Affairs  
 BRU : Local Government Assistance  
 Components : Training & Development

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

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

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

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

**FUNDING : (Thousands of Dollars)**

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

**POSITIONS :**

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

**ANALYSIS :** Attach a separate page if necessary

Prepared by : Michael Cushing *MC* Research Analyst  
 Division : Municipal & Regional Assistance

Phone : 465-4750  
 Date : 1/13/86

Approved by Commissioner : *Kevin Nott*  
 Agency : Community & Regional Affairs

Date : 1/17/86

Distribution (by Agency preparing fiscal note) :

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

pg. 4

# Alaska Statutes

## Title 36. Public Contracts.

### Chapter

- 05. Wages and Hours of Labor (§§ 36.05.010 — 36.05.120)
- 10. Employment Preference (§§ 36.10.010 — 36.10.125)
- 15. Forest Products Preference (§§ 36.15.010 — 36.15.020)
- 20. Purchases and Supplies (§ 36.20.010)
- 25. Contractors' Bonds (§§ 36.25.010 — 36.25.025)
- 90. Miscellaneous Provisions (§ 36.90.001)
- 95. General Provisions (§ 36.95.010)
- 98. Professional Services Contracts (§§ 36.98.010 — 36.98.080)

### Chapter 05. Wages and Hours of Labor.

#### Section

- 10. Wage rates on public construction
- 20. Basis for determining wage
- 30. Authority
- 35. Notification of contract awards
- 40. Filing schedule of employees, wages paid and other information
- 50. [Repealed]
- 60. Penalty for violation of this chapter
- 70. Wage rates for laborers and mechanics on public contracts

#### Section

- 80. Failure to pay agreed wages
- 90. Payment of wages from withheld payments and listing contractors who violate contracts
- 100. Effect of AS 36.05.070 — 36.05.110 on other laws
- 110. Contracts entered into without advertising
- 120. [Repealed]

### NOTES TO DECISIONS

This chapter was modeled after the federal Davis-Bacon Act, 40 U.S.C. § 276a et seq. *Fowler v. City of Anchorage*, Sup. Ct. Op. No. 1699 (File No. 3586), 583 P.2d 817 (1978).

The fundamental purpose of Little Davis-Bacon is to assure that employees

engaged in public construction receive at least the prevailing wage; the focus of the act is to the benefit of the employees, not to the contracting principals. *City of Sitka v. Construction & Gen. Laborers Local 942*, Sup. Ct. Op. No. 2495 (File Nos. 5774, 5811), 644 P.2d 227 (1982).

Collateral references. — 64 Am. Jur. 2d, *Public Works and Contracts*, §§ 99-104; 65 Am. Jur. 2d, *Public Works and Contracts*, §§ 204-215, 225-229, 232, 233.

72 C J.S., Supplement, *Public Contracts*, §§ 31-39; 81A C.J.S., *States*, §§ 177-183.

Constitutionality of statute or ordinance relating to rate of wages of persons employed on public work. 50 ALR 1480; 132 ALR 1297.

Power of municipality to fix specific scale of wages or hours for employees of contractors or subcontractors for munic-

ipal contracts. 81 ALR 349; 129 ALR 763.

Applicability of state statutes or municipal regulations to contracts for performance of work on land owned or leased by the federal government. 91 ALR 779; 115 ALR 371; 127 ALR 827.

Construction and application of statute or ordinance relating to wages of persons employed on public work. 93 ALR 1249.

Civil service laws, rules, or regulations as applicable to persons employed by one under contract with municipal corporation or other governmental body to do certain work for it or its residents. 134 ALR 1149.

Right of employee of public contractor to maintain action against latter based upon statutory obligation as to rate of wages or upon provisions in that regard in the contract between contractor and the public. 144 ALR 1035.

Validity of statute, ordinance, or charter provision requiring that workmen on pub-

lic works be paid the prevailing or current rate of wages. 18 ALR3d 944.

Construction and operation of "equal opportunities clause" requiring pledge against racial discrimination in hiring under construction contract. 44 ALR3d 1283.

**Sec. 36.05.010. Wage rates on public construction.** A contractor or subcontractor who performs work on public construction in the state, as defined by AS 36.95.010(3), shall pay not less than the current prevailing rate of wages for work of a similar nature in the region in which the work is done. The current prevailing rate of wages for each pay period is that contained in the latest determination of prevailing rate of wages issued by the Department of Labor before the end of the pay period. (§ 14-2-1 ACLA 1949; am § 1 ch 142 SLA 1972; am § 1 ch 89 SLA 1976)

**Cross references.** — As to wage rates for laborers and mechanics on public contracts, see AS 36.05.070.

#### NOTES TO DECISIONS

**City's duty to publish applicable minimum wage schedules as part of bid specifications.** — See notes under heading "Duty to publish minimum wage schedules." *Fowler v. City of Anchorage*, Sup. Ct. Op. No. 1699 (File No. 3586), 583 P.2d 817 (1978). AS 36.05.070.

Quoted in *City of Sitka v. Construction & Gen. Laborers Local 942*, Sup. Ct. Op. No. 2495 (File Nos. 5774, 5811), 644 P.2d 227 (1982).

**Sec. 36.05.020. Basis for determining wage.** A subcontract which is performed on public construction may be reduced to a basis of day labor for the purpose of determining whether or not the subcontractor or contractors have paid at not less than the prevailing scale of wage. (§ 14-2-2 ACLA 1949)

**Sec. 36.05.030. Authority.** (a) The Department of Labor has the authority to determine the prevailing wage, and whether or not this chapter is being violated. The department may when necessary for the enforcement of this chapter

- (1) conduct investigations and hold hearings concerning wages;
- (2) compel the attendance of witnesses and the production of books, papers and documents;
- (3) promulgate regulations.

(b) If a person violates this chapter the attorney general shall, when requested by the Department of Labor, enforce these provisions. (§ 14-2-3 ACLA 1949; am § 2 ch 142 SLA 1972)

## NOTES TO DECISIONS

Applied in *Fowler v. City of Anchorage*,  
Sup. Ct. Op. No. 1699 (File No. 3586), 583  
P.2d 817 (1978).

Quoted in *City of Sitka v. Construction*

& *Gen. Laborers Local 942*, Sup. Ct. Op. No.  
2495 (File Nos. 5774, 5811), 644 P.2d 227  
(1982).

**Sec. 36.05.035. Notification of contract awards.** Upon awarding a public construction contract, the state or a political subdivision of the state shall

(1) immediately notify the commissioner of labor of the amount of the contract, the effective date of the contract, the identity of the contractor and all subcontractors, the site or sites of construction and provide a project description; and

(2) verify that the bonding requirements of AS 36.25 have been met and that the requirements of AS 08.18 have been met. (§ 3 ch 142 SLA 1972)

## NOTES TO DECISIONS

Since 1972 state has burden of verifying public construction contract bonds. — For cases arising after 1972, there is no doubt about who has the duty to check the validity of public construction contract bonds, since in 1972 this section was enacted, placing the burden of verifying such bonds on the state or its political subdivision. *Arctic Contractors v.*

*State*, Sup. Ct. Op. No. 1420 (File Nos. 2595, 2657), 564 P.2d 30 (1977).

For case involving a dispute arising out of a 1962 construction project holding that the state had the burden of verifying payment and performance bonds, see *Arctic Contractors v. State*, Sup. Ct. Op. No. 1420 (File Nos. 2595, 2657), 564 P.2d 30 (1977).

**Sec. 36.05.040. Filing schedule of employees, wages paid and other information.** All contractors or subcontractors who perform work on a public construction contract for the state or for a political subdivision of the state shall, before the Friday of each week, file with the Department of Labor a sworn affidavit for the previous week, setting out in detail the number of men employed, wages paid, job classification of each employee, hours worked each day and week, and other information which the Department of Labor requires. (§ 14-2-4 ACLA 1949; am § 4 ch 142 SLA 1972)

**Sec. 36.05.050. Hours to constitute day's work.**

Repealed by § 1 ch 3 SLA 1973.

Editor's notes. — The repealed section derived from § 14-2-5 ACLA 1949; § 5, ch. 142, SLA 1972.

**Sec. 36.05.060. Penalty for violation of this chapter.** A contractor who violates this chapter, is guilty of a misdemeanor, and upon conviction is punishable by a fine of not less than \$100 nor more

than \$1,000, or by imprisonment for not less than 10 days nor more than 90 days, or by both. Each day a violation exists constitutes a separate offense. (§ 14-2-6 ACLA 1949; am § 6 ch 142 SLA 1972)

**Sec. 36.05.070. Wage rates for laborers and mechanics on public contracts.** (a) The advertised specifications for a public construction contract exceeding \$2,000 to which the state or a political subdivision of the state is a party which requires or involves the employment of mechanics, laborers, or field surveyors shall contain a provision stating the minimum wages to be paid various classes of laborers, mechanics, or field surveyors and that the rate of wages shall be adjusted to the wage rate for each pay period applicable under AS 36.05.010.

(b) Repealed by § 17 ch 142 SLA 1972.

(c) A contract for public works in the state or a political subdivision shall contain provisions that

(1) the contractor or his subcontractors shall pay all employees unconditionally and not less than once a week;

(2) wages may not be less than those stated in the advertised specifications, regardless of the contractual relationship between the contractor or subcontractors and laborers, mechanics, or field surveyors;

(3) the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work;

(4) the state or a political subdivision shall withhold so much of the accrued payments as is necessary to pay to laborers, mechanics, or field surveyors employed by the contractor or subcontractors the difference between

(A) the rates of wages required by the contract to be paid laborers, mechanics, or field surveyors on the work, and

(B) the rates of wages in fact received by laborers, mechanics or field surveyors. (§ 1 ch 52 SLA 1959; am §§ 7, 8, 17 ch 142 SLA 1972; am § 2 ch 89 SLA 1976)

**Cross references.** — As to wage rates on public construction, see AS 36.05.010.

**Opinions of attorney general.** — This section, AS 36.05.080 — 36.05.110, and former AS 36.05.120 were copied almost word for word from the federal act on the same subject, the Davis-Bacon Act (40 USC 276a et seq.), 1961 Op. Att'y Gen., No. 17.

"Construction" has no reference to a contract for professional architectural or

engineering services. 1961 Op. Att'y Gen., No. 17.

Contracts between the state or any of its political subdivisions for professional architectural services or preliminary engineering services for work preliminary to the actual construction of public works projects do not come within the scope of this section, AS 36.05.080 — 36.05.110, and former AS 36.05.120. 1961 Op. Att'y Gen., No. 17.

## NOTES TO DECISIONS

**Similarity to Davis-Bacon Act.**— The wording of this section is based upon the federal Davis-Bacon Act, 40 U.S.C. § 276a(a). *Fowler v. City of Anchorage*, Sup. Ct. Op. No. 1699 (File No. 3586), 583 P.2d 817 (1978).

**Construction of section involves balancing of hardships.**— At least part of the intent of this section is to inform bidders of the minimum wage rates. On the other hand, the proper construction of this section, as it relates to the duties of the government entity, involves a balancing of hardships. There does not seem to be any special expertise needed or difficulty involved in requiring the contractor to determine the applicable minimum wage schedules. *Fowler v. City of Anchorage*, Sup. Ct. Op. No. 1699 (File No. 3586), 583 P.2d 817 (1978).

The city has a statutory duty to publish as part of its bid specifications the applicable minimum wage schedules. *Fowler v. City of Anchorage*, Sup. Ct. Op. No. 1699 (File No. 3586), 583 P.2d 817 (1978).

The language of subsection (a) that "the advertised specifications . . . shall contain a provision" stating the minimum wages to be paid is mandatory, not directory. *Fowler v. City of Anchorage*, Sup. Ct. Op. No. 1699 (File No. 3586), 583 P.2d 817 (1978).

When such duty is met. — A city as the

contracting government entity meets the requirement of subsection (a) by appending to its invitation to bid the most recent schedule of prevailing wages as published by the Department of Labor. *Fowler v. City of Anchorage*, Sup. Ct. Op. No. 1699 (File No. 3586), 583 P.2d 817 (1978).

Where neither the city or the contractor had knowledge of a change in the wage rates prior to the bidding on the contract and the wage rates attached to the invitation to bid were correct when the invitation was published, even though three days after publication the rate schedule was revised, the city was not negligent in failing to amend its specifications when it discovered the change, after the contract was let but before the work had commenced and reliance by the contractor on any wage representations in the contract was unreasonable. *Fowler v. City of Anchorage*, Sup. Ct. Op. No. 1699 (File No. 3586), 583 P.2d 817 (1978).

**Minimum wages are prevailing wages.**— The minimum wages to be paid, although not specified in this section, are the prevailing wages. *Fowler v. City of Anchorage*, Sup. Ct. Op. No. 1699 (File No. 3586), 583 P.2d 817 (1978).

Quoted in *City of Sitka v. Construction & Gen. Laborers Local 942*, Sup. Ct. Op. No. 2495 (File Nos. 5774, 5811), 644 P.2d 227 (1982).

**Sec. 36.05.080. Failure to pay agreed wages.** Every contract within the scope of AS 36.05.070 shall contain a provision that if it is found that a laborer, mechanic, or field surveyor employed by the contractor or subcontractor has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid, the state or its political subdivision may, by written notice to the contractor, terminate the contractor's right to proceed with the work or the part of the work for which there is a failure to pay the required wages and to prosecute the work to completion by contract or otherwise, and the contractor and his sureties are liable to the state or its political subdivision for excess costs for completing the work. (§ 2 ch 52 SLA 1959)

**Editor's notes.** — This section was redrafted by the revisor of statutes to remove personal pronouns in conformity with AS 01.05.031(c) and § 4, Chapter 58, SLA 1982.

**Sec. 36.05.090. Payment of wages from withheld payments and listing contractors who violate contracts.** (a) The state disbursing officer in the case of a state contract and the local fiscal

officer in the case of a political subdivision contract shall pay directly to laborers, mechanics or field surveyors from accrued payments withheld under the terms of the contract the wages due laborers, mechanics or field surveyors under AS 36.05.070.

(b) The state disbursing officer or the local fiscal officer shall distribute to all departments of the state government and to all political subdivisions of the state a list giving the names of persons who have disregarded their obligations to employees. No person appearing on this list and no firm, corporation, partnership or association in which the person has an interest may work as a contractor or subcontractor on a public construction contract for the state or a political subdivision of the state until three years after the date of publication of the list. If the accrued payments withheld under the contract are insufficient to reimburse all the laborers, mechanics, or field surveyors with respect to whom there has been a failure to pay the wages required under AS 36.05.070, the laborers, mechanics or field surveyors have the right of action or intervention or both against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in the proceedings it is not a defense that the laborers, mechanics or field surveyors accepted or agreed to accept less than the required rate of wages or voluntarily made refunds. (§ 3 ch 52 SLA 1959; am § 9 ch 142 SLA 1972)

NOTES TO DECISIONS

Quoted in *City of Sitka v. Construction* 2495 (File Nos. 5774, 5811), 644 P.2d 227 & *Gen. Laborers Local 942, Sup. Ct. Op. No.* (1982).

Sec. 36.05.100. Effect of AS 36.05.070 — 36.05.110 on other laws. AS 36.05.070 — 36.05.110 do not supersede or impair authority granted by state law to provide for the establishment of specific wage rates. (§ 4 ch 52 SLA 1959; am § 10 ch 142 SLA 1972)

Sec. 36.05.110. Contracts entered into without advertising. The fact that a public contract authorized by law is entered into upon a cost-plus-a-fixed-fee basis or otherwise, without advertising for proposals, does not make AS 36.05.070 — 36.05.110 inapplicable if they are otherwise applicable to the contract. (§ 5 ch 52 SLA 1959)

Sec. 36.05.120. Regulations governing contractors.

Repealed by § 17 ch 142 SLA 1972.

Editor's notes. — The repealed section derived from § 6, ch. 52, SLA 1959.

Chapter 10. Employment Preference.

Section	Section
10. Employment preference	40. Application to contracts involving federal funds
20. Apprentices	50, 60. [Repealed]
30. Reduction of work force	

PROPOSED BILL

For an Act entitled: "An Act relating to state grants or appropriations and bidding requirements.

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

\*Section 1. PURPOSE. The legislature finds competitive bidding to be the best procedure to prevent favoritism and assure timely completion of the construction or repair of a public facility at the lowest price and highest quality. The purpose of this Act is to ensure that a recipient of a state grant or appropriation utilizes competitive bidding procedures in awarding a construction or repair contract. In order to assure compliance with this Act, the State agency administering any grant or appropriation shall obtain from every grant recipient an acknowledgement of compliance with AS 37.05.235.

\*Sec. 2. AS 37.05 is amended by adding a new section to read:

Sec. 37.05.235. GRANT OR APPROPRIATION BIDDING REQUIREMENTS.

(a) All recipients of a state grant or appropriation including political subdivisions and unincorporated communities but not including state agencies, shall comply with this section if the expenditure of all or part of the grant or appropriation is to construct or repair a public facility or improve any real property and exceeds \$100,000. *FORCE ACCOUNTING*

(b) A grant or appropriation recipient shall solicit sealed bids by publication calculated to reach prospective bidders in a statewide newspaper and in a local newspaper serving the affected area, and by posting notices in public places within the area where the work is to be performed. All bids shall be sealed when received, and shall be opened in public at the hour stated in the notice.

(c) A grant or appropriation recipient shall award the contract to the lowest responsive and responsible bidder, or it may reject all bids. If a satisfactory bid is not received, the project may be readvertised.

(d) A recipient of a grant or appropriation that is authorized to adopt ordinances and that has adopted a competitive bidding ordinance meeting the requirements of (b) and (c) of this section is exempt from this section.

POSITION PAPER OF

ALASKA CHAPTER

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

TO THE

HOUSE FINANCE COMMITTEE

ON

AN ACT RELATING TO STATE GRANTS

OR APPROPRIATIONS AND BIDDING REQUIREMENTS

(DRAFT COMMITTEE SUBSTITUTE HB 331)



The Alaska Chapter, Associated General Contractors of America, Inc., strongly supports the passage of the draft Committee Substitute for HB 331. HB 331 clarifies existing law to assure that recipients of State public funds utilize procedures aimed at preserving the free enterprise system.

The proposed amendment to AS 37.05 is quite simple. It insures that recipients of public funds for the construction or repair of any public facility must advertise these projects and make an award to the lowest responsive bidder.

The competitive bid process is a universally accepted method of awarding contracts because:

1. It is the most economical bid process. Taxpayers will benefit from this healthy competition because their main interest is to save tax dollars, and to get the maximum return for every tax dollar invested.
2. It is fair for both the owner and contractors.
3. It avoids the unhealthy bias that occurs when contracts are awarded without going to bid.
4. It establishes definite costs before construction begins.
5. It prescribes a date for completion of the work.
6. It ensures quality workmanship and materials.
7. It provides centralized responsibility for the work.

The quality of workmanship and materials is guaranteed by the contract system. The materials which go into the project are prescribed in detail in the specifications and are subject to the approval of the owner. If, in the owner's opinion, the workmanship or the materials are not as specified, the owner can reject the work and order it redone at the contractor's expense.

Not only does the public receive higher quality construction projects when they are contracted out, but the public also receives more for its money. Through long experience, contractors become specialists in one or more particular fields of construction. They have their sources of supply; they know the capacity of their machines and the capability of their personnel. When preparing a bid, a contractor's competitive incentive requires that he give considerable thought to the problem of devising the best and most economical manner of doing the work. His specialized knowledge and experience obtained in the marketplace have been sharpened and are instrumental in saving the taxpayer money on the project.

The contract provides that the project be completed on a prescribed date. The contractor cannot receive final payment or the release of money that is retained while the work is progressing until the job has been completed and accepted -- all to the satisfaction of the owner. This factor, plus his own economic need, gives assurance to the public that the job will be completed on time and within contract price. Many times the contract (bid) price is lower than what the owner expects to pay.

In addition to providing the most efficient and economical means of producing public works construction, contracting out provides a variety of other benefits to the public in the form of risk shifting. Some of these risks which are allocated when construction is done by contract are:

- The public only pays for what it receives; work actually performed is the basis of payment.
- The price is firm and guaranteed by the contract, and the public has no risk of cost increases. All of the variables of the marketplace, such as increases in material prices, wages and shortages are borne by the private contractor.
- Timely completion is assured by a liquidated damage provision.
- Faithful performance is backed by performance and payment bonds.
- Risk of damage during construction is borne by the contractor.
- The contractor must "defend and hold harmless" the public against claims and must provide the public with insurance coverage.
- Quality inspection is at "arm's length" by independent inspectors.
- The final work is warranted and defects must be corrected at no expense to the public.

For the above mentioned reasons, we urge your support of this bill.



SKILL  
RESPONSIBILITY  
INTEGRITY

THE ALASKA CHAPTER  
**ASSOCIATED GENERAL CONTRACTORS  
OF AMERICA, INC.**

BOX 4-250C • ANCHORAGE, ALASKA 99509  
TELEPHONE (907) 561-5354  
TELEX 25-394

Force bill



3201 SPENARD ROAD  
ANCHORAGE  
RICHARD M. FITTINGER  
MANAGER

September 24, 1984

M E M O R A N D U M

COMPETITIVE BIDDING VS. FORCE ACCOUNT

The Alaska Chapter Associated General Contractors of America represents over 800 companies in the State of Alaska. As an organization representing the construction industry we are concerned over the increased utilization by local governments of Force Account and/or the failure to utilize competitive bidding procedures in the award of a public works project. Utilization of Force Account and Sole Source award of public works projects share a common problem -- they fail to protect the public interest.

Presently, the State of Alaska is required to construct public facilities for bid contract. See AS 35.15.010, AS 37.05.230. Many political subdivisions of the state have similar requirements in their ordinances; however, many municipalities, unincorporated communities, and other recipients of state funds do not utilize any competitive bid procedure to safeguard the public interest in the construction or repair of a public facility.

The wise use of public funds for the construction or repair of a public facility requires a competitive bid system. The best way to ensure the statewide implementation of such a system is to require any recipient of state funds to utilize a competitive bid system if those state funds are used in whole or part to construct or repair a public facility.

Sole Source contracting is contrary to the public interest in many ways. The most notorious problem with sole source contracting are the potential for favoritism and kickbacks. Naturally the public usually suffers in the form of higher costs due to the lack of a competitive bidding process. AGC strongly believes all qualified contractors should have an equal opportunity to bid all public projects.

The lure of Force Account Construction is very strong for many administrators and uninformed citizens. At first glance the costs of doing something "yourself" may seem less. For example: a public entity does not pay taxes and does not need a profit. However, there are other "costs" that often go unnoticed in comparisons between the private and public sector, including productivity, unfunded pension liability, depreciation of equipment, and transfer of risk. When a fair and full evaluation of all costs and benefits is made there is little dispute that contracting out is quicker, cheaper, better and less risky than force account construction.

Productivity undoubtedly is one of the major differences between force account and contracting out. The competitive bid system fosters increased productivity:

- Through long experience, contractors become specialists in one or more particular fields of construction. They know their sources of supply; they know the capacity of their machines; and the capability of their personnel.
  
- When preparing a bid, a contractor's competitive incentive requires that considerable thought be given to the problem of devising the best and most economical manner of doing the work. A contractor's specialized knowledge and experience obtained in the market place have been sharpened and are instrumental in saving the taxpayer money on the project.
  
- No matter what the skill level, productivity will consistently be higher by a private contractor. This has proven to be true even on complex nuclear power plant construction. A labor department study has concluded that the Tennessee Valley Authority utilizes 25% to 30% more labor to construct its nuclear facilities when compared to facilities constructed by private contractors.<sup>1</sup>

Oftentimes labor cost comparisons between the private and public sector forget to take into account the unfunded pension liability that is accruing to the benefit of the public employees. Similarly, equipment costs are often omitted under the theory that the government entity owns the equipment anyway so there is no "cost" other than operating expenses. Clearly, these and similar items must be included in any cost comparisons.

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<sup>1</sup> Analysis of Tennessee Valley Authority Construction cost for Nuclear Plants & Industry Average; Construction Labor Demand System, U.S. Department of Labor; Washington D.C., July 1981.

In addition to the most efficient and economical means of producing public works construction, contracting out provides a variety of other benefits to the public in the form of risk shifting, which cannot be obtained under in-house performance. Some of these risks which are allocated when construction is done by contract are:

- The public only pays for what it receives; work actually performed is the basis of payment.
- The price is firm and guaranteed by the contract, and the public has no risk of cost increases. All of the variables of the market place, such as increases in material prices, wages and shortages are borne by the private contractor.
- Timely completion is assured by a liquidated damage provision.
- Faithful performance is backed by performance and payment bonds.
- Risk of damage during construction is borne by the contractor, not the public.
- The contractor must "defend and hold harmless" the public against claims and must provide the public with insurance coverage.
- Quality inspection is at "arm's length" by independent inspectors.
- The final work is warranted and defects must be corrected at no expense to the public.

To take these risks away from the taxpayers and put them on a private contractor who, through his payment and performance bond, guarantees the job will be finished according to the terms of the contract, is worth a great deal in dollars. None of this protection of the public's interest exists when work is performed by a public agency with public equipment and personnel - all of the risks are on the taxpayer.

Everyone loses when a public entity undertakes in-house construction of a project and something goes wrong. The local citizens will not enjoy the benefits of that public improvement. All state residents suffer from dollars allocated to an incomplete project, and elected officials are placed in the awkward position of obtaining more money to "feed the alligator".

A classic but unfortunate example of misuse of public construction funds is the experience of the Village of St. Michael. The legislature appropriated \$1.6 million to St. Michael for a sewer and water system. Instead of contracting out the project, the city council decided to build the project itself. The mayor went off to Seattle on a "shopping trip" for supplies and when the barge arrived: "it looked like St. Michael, where there are no cars or pickups, would be getting a highway system, not water and sewer service.

Off came a bulldozer, two big trucks, a road grader and a front-end loader. Off came a crane. Off came three generators. Off came a strange boat with a semi-circular hull and steel bars over the prow that looked like teeth. Off came the parts for a bolt together water tank designed for the stable flatlands of the Midwest, not the tundra and permafrost of St. Michael. Off came a pile of timbers and supplies for a wood-working shop. And off came the bill for 800,000 pounds of freight: \$250,000.00. Not only wasn't there enough money left in the city treasury to pay the shipping, there also wasn't enough money to start the water project."<sup>2</sup>

A requirement that all public works construction be contracted out through competitive bid would have prevented the St. Michael situation and many other abuses and misuses of public funds throughout the state.

The attached draft bill is similar to CS HB311 considered by the 1984 House Finance Committee. Alaska Chapter AGC supports the introduction and passage of this legislation. We believe it will assist in the creation of a fair competitive environment for the construction industry and result in better quality public projects being built at lower cost with less public risk.

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<sup>2</sup> Anchorage Daily News. March 11, 1984.

Alaska



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To: House Finance Committee  
From: Scott A. Burgess, Executive Director  
Date: May 8, 1984  
Subject: HB 331 - Competitive Bid

The attached "Proposed Substitute for HB 331" is the result of the League's initial objections to HB 331 before the Committee in May, 1983, and the subsequent discussions between myself and Resa King, representing the Alaska Chapter of the Associated General Contractors. The proposed substitute removes the most objectionable language of the original bill and focuses on the real issue - competitive bidding. While the League does not have a specific policy on competitive bidding, it is not opposed to the concept. Many of the League's member municipalities have adopted their own purchasing ordinances.

While the League will not oppose the bill in the amended form, we feel its need is unwarranted and an unnecessary interference in local self-government.

If the Committee has evidence of specific problems to warrant action by the Legislature, and believes HB 331 is necessary, the League would urge the Committee to adopt the attached language as a committee substitute.

The League appreciates the Committee's concern on this legislation, and the efforts by the AGC to minimize its negative impacts on municipalities.