ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7542 SENATE LABOR & COMMERCE

7. A statement attesting to whether or not you ever failed to complete a contract due to insufficient resources. Explain.

8. Address the equipment you anticipate using on this work.

   Describe in detail the major items of equipment you have available for this work.

   Do you propose to purchase any major items of equipment for use on this project? If yes, describe type, quantity, and approximate cost.

   Do you propose to rent any equipment for this work? If yes, describe type and quantity.

9. Do you expect to subcontract any of the work contained in this project? If yes, describe.

10. Other information you may desire to present.

The "Request for Pre-qualification" will be evaluated based upon information included therein, provided by references or other reliable sources including the local union 1547 ("IBEW") and past performances on similar City projects. The City may request additional information or conduct interviews if deemed necessary. Each firm will be notified whether or not it is recommended as qualified to bid prior to the time a listing of firms is submitted to the City Council for approval of the bidder's list. BIDS WILL BE ACCEPTED ONLY FROM THOSE CONTRACTORS LISTED ON THE BIDDERS LIST APPROVED BY THE CITY COUNCIL. Pre-qualification to bid shall not excuse bidders from compliance with all subsequent bid and contract requirements.

Prospective proposers should familiarize themselves with the City of Seward Purchasing and Contract Procedures and especially Section 6.10.345 of the Seward City Code. Proposers are responsible for compliance with the Seward City Code. A contractor found not qualified by the City Council may appeal the Council's decision by delivering a "Notice of Appeal" to the City Clerk within ten (10) calendar days following notice of the Council's decision. In order for the Notice of appeal to be accepted for reconsideration by the City Council it shall show that the initial "Request for Pre-qualification" was submitted by the specified date and time required herein. The notice shall also include specific exceptions to the Council's decision and specific factual information to show that the contractor is qualified to perform the work. General assertion that the Council's decision is contrary to law or to fact are not sufficient to warrant reconsideration.

The decision of the Council shall be rendered within 45 days of the "Notice of Appeal", except if the time limits are extended by mutual consent. The decision of the Council shall be final and conclusive unless the contractor commences action through the court within 30 days from receipt of the Council's decision.

The "Request for Pre-qualification" must be submitted to the City Clerk not later than 5:00 p.m. on the 29th of October 1990. Proposals submitted after that date and time shall be returned unopened to the sender and will not be considered. A pre-submittal conference will be held at the Seward City Council Chamber corner of Fifth & Adams starting at 1:30 p.m. on October 17, 1990. Interested contractors are encouraged to attend the conference.

For additional information contact Everett P. Diener, City of Seward's Manager of Engineering and Utilities at 224-3331.

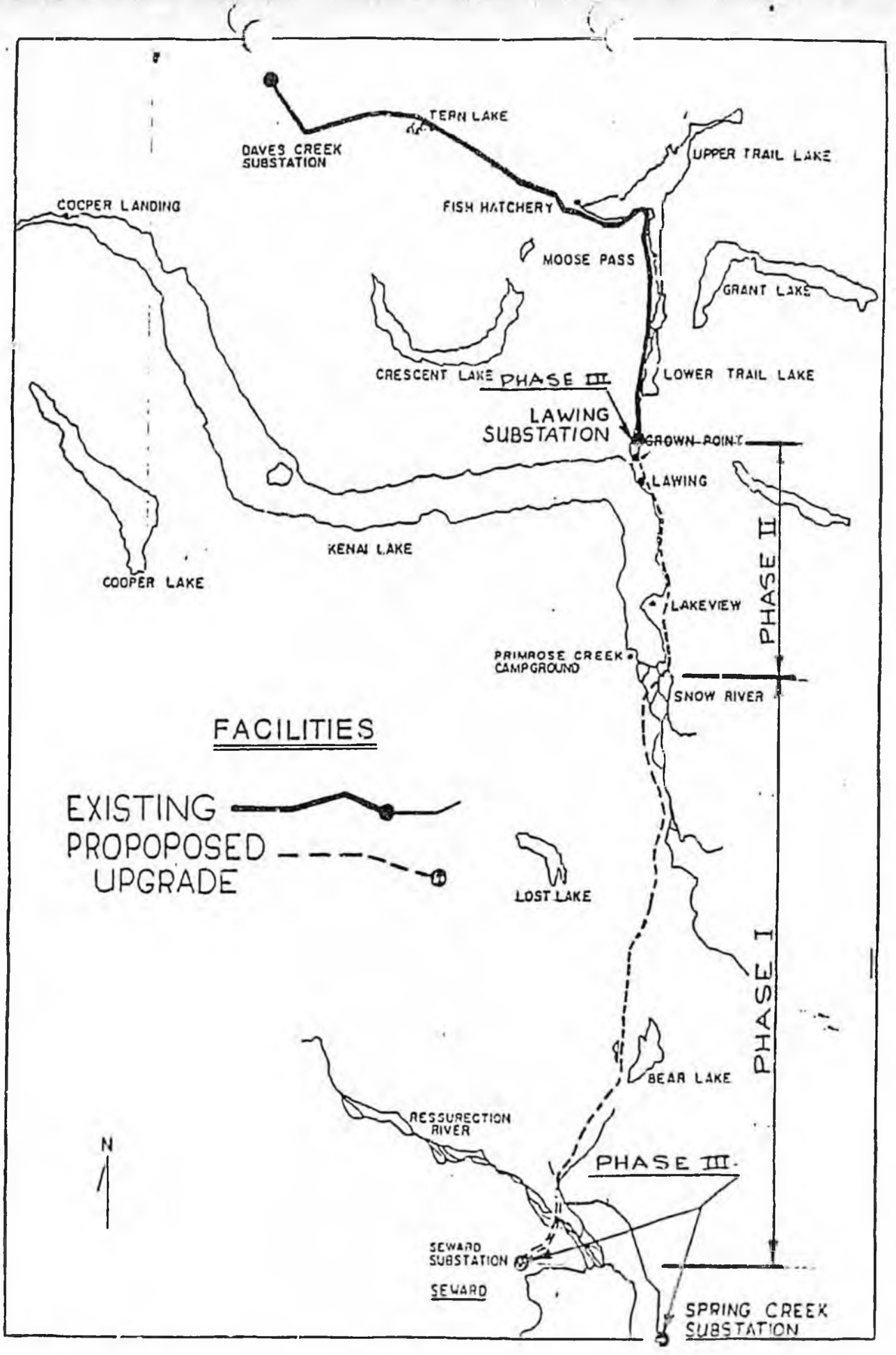
The selection of the qualified proposers will be at the sole discretion of the City of Seward, and the City reserves the right to reject any and all Requests for Pre-Qualification or not to award any contracts if deemed in the best interest of the City. This solicitation does not commit the City of Seward to award any contract for construction of the line or preclude the City from subsequent advertisement for contractors to pre-qualify for this work. This solicitation does not commit the City of Seward to pay any cost incurred in the preparation of the Request for Pre-Qualification or to award any contract.

Enclosures:

1. Map of proposed line.

2. Extracts from City Code

   6.10.135
   6.10.215
   6.10.345


TERN LAKE
DAVES CREEK SUBSTATION
UPPER TRAIL LAKE
COOPER LANDING
FISH HATCHERY
MOOSE PASS
GRANT LAKE
CRESCENT LAKE
PHASE III
LOWER TRAIL LAKE
LAWING SUBSTATION
GROWN POINT
LAWING
KENAI LAKE
COOPER LAKE
LAKEVIEW
PHASE II
PRIMROSE CREEK CAMPGROUND
SNOW RIVER
FACILITIES
EXISTING
PROPOPOSED
UPGRADE
LOST LAKE
PHASE I
BEAR LAKE
RESSURECTION RIVER
N
PHASE III
SEWARD SUBSTATION
SEWARD
SPRING CREEK SUBSTATION

Encl 2

CITY CODE
CHAPTER 6

6.10.135 AWARD ONLY TO RESPONSIBLE BIDDER/PROPOSER. A contract awarded under this chapter shall be made only to a responsible bidder/proposer. The city manager may report to the city council and recommend rejection of a bid or a proposal on the basis of the following criteria:

1. the skill and experience demonstrated by the bidder/proposer in performing contracts of a similar nature;
2. the bidder's/proposer's record for honesty and integrity;
3. the bidder's/proposer's capacity to perform in terms of facilities, personnel and financing;
4. the previous and existing compliance by the bidder/proposer with laws and ordinances relating to the contract;
5. the number and scope of conditions attached to the bid/proposal;
6. the bidder's/proposer's past performance under city contracts. If the bidder/proposer has failed in any material way to perform its obligations under any contract with the city, the bidder/proposer may be deemed a non-responsible bidder/proposer.

(Ord. 615, 1989)

.....

6.10.140 NOT RESPONSIBLE BIDDER/PROPOSER FINDING. A report that the low bidder/proposer is not responsible shall delay the award of the contract until after completion of the procedures outlined below.

1. If the city manager or his designee reports to the city council that the lowest bidder is not responsible, notice shall immediately be sent to the next two lowest bidders or the next two most preferred proposers and the report shall be placed on the agenda of the next scheduled council meeting, provided, that the next council meeting allows two weeks' written notice to the lowest bidder and the next two lowest bidders or most preferred and next two most preferred proposers.
2. At the council meeting, the lowest bidder or most preferred proposer and the city manager or his designee shall have the opportunity to be heard regarding the adverse report.

.....

6.10.215 COMPETITIVE SEALED BIDS - PUBLIC NOTICE. The city clerk shall call for bids by advertising at least once in a newspaper of general circulation in the city not less than two weeks prior to the date set for receiving bids. (Ord. 615, 1989)

.....

6.10.345 PRE-QUALIFICATION OF BIDDERS/PROPOSERS. Pre-qualification of bidders or proposers under Chapter 6.10 is permitted if the city manager determines that pre-qualification is in the public interest. Justification for pre-qualification may include but shall not be limited to the need to restrict bidding to firms having special knowledge and experience in the work required, or a need to expedite contracting procedures. A request for letters of intent shall be advertised in the manner prescribed in Section 6.10.215. The published request shall describe the task(s) to be performed, the minimum qualifications of firms to be selected, and procedures for evaluating those firms. Evaluation criteria may include, but shall not be limited to, the same factors as listed at 6.10.135 for determining a responsible bidder. Firms will be either approved or rejected, with no rating designated to compare firms within either the approved or rejected category. At least three firms must be included in the approved category. The city council shall approve the pre-qualification list by resolution. Requests for bids or proposals will be solicited from only those firms on the approved list and only those pre-qualified firms shall be allowed to submit bids pursuant to this section. (Ord. 615, 1989)

CITY OF SEWARD

P.O. BOX 167
SEWARD, ALASKA 99664

- Main Office (907) 224-3331
- Police (907) 224-3338
- Harbor (907) 224-3130
- Fire (907) 224-3445
- Telecopier (907) 224-3248

November 16, 1990
90-11-208-01

Charles L. Irby, President
Irby Construction Company
P.O. Box 1819
Jackson, MS 39215

Dear Mr. Irby:

Thank you for submitting a request to be pre-qualified to bid on construction of the Seward 115 KV Transmission Line.

We are reviewing your submittal and it appears you have not clearly described your Alaskan experience or listed the firm's key personnel involved with those projects as requested in Item #3. We would appreciate you providing additional data to meet this requirement.

We also note your objection to the statement required by Item #6 concerning being a party to an appropriate labor agreement with the IBEW. Based on your response we may recommend to City Council that Irby Construction Company be found not qualified to bid. Should you desire to amend your response please do it at this time.

I would appreciate you providing additional information or clarification to enable us to thoroughly evaluate your experience. Your prompt response will be appreciated since we hope to make final determination of qualified contractors prior to the 30th of November for submittal to the City Council on December the 10th. If you have any questions feel free to call me.

Sincerely,

Everett P. Diener

Everett P. Diener
Manager of Engineering & Utilities

cc: Calvert
Arvidson
Schaefermeyer
208 File

EXHIBIT D

NOV 20 '90 08:48 CITY OF SEWARD, ALASKA

CITY OF SEWARD

P.O. BOX 167
SEWARD, ALASKA 99664

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• Harbor (907) 224-3138
• Fire (907) 224-3445
• Telecopier (907) 224-3248

November 16, 1990
90-11-208-01

Aaron H. Downing
President AUC
Irby/Alaska Utility Construction JV
101 East Swanson Avenue
Wasilla, Alaska 99687

Dear Mr. Downing:

Thank you for submitting a request to be pre-qualified to bid on construction of the Seward 115 KV Transmission Line.

We are reviewing your submittal and it appears you have not clearly described your Alaskan experience or listed the firm's key personnel involved with those projects as requested in Item #3. We would appreciate you providing additional data to meet this requirement.

We also note your objection to the statement required by Item #6 concerning being a party to an appropriate labor agreement with the IBEW. Based on your response we may recommend to City Council that Irby/Alaska Utility Construction JV be found not qualified to bid. Should you desire to amend your response please do it at this time.

I would appreciate you providing additional information or clarification to enable us to thoroughly evaluate your experience. Your prompt response will be appreciated since we hope to make final determination of qualified contractors prior to the 30th of November for submittal to the City Council on December the 10th. If you have any questions feel free to call me.

Sincerely,

Everett P. Diener

Everett P. Diener
Manager of Engineering & Utilities

cc: Calvert
Arvidson
Schaefermeyer
208 File

IRBY CONSTRUCTION COMPANY/
ALASKA UTILITY CONSTRUCTION, INC.
JOINT VENTURE
101 East Swanson Avenue
Wasilla, Alaska 99687-8704
(907) 376-3859

November 26, 1990

Everett P. Diener
Manager of Engineering and Utilities
City of Seward
P. O. Box 167
Seward, Alaska 99664

Reference: Your letter of November 16, 1990 - Seward Transmission Line Upgrade

Dear Mr. Diener:

In response to your request for additional data please be advised as follows: Should we be the successful bidder for your transmission line upgrade, our project manager will be Aaron Downing. Mr. Downing, as his resume' shows, has extensive Alaska experience encompassing nearly 40 years in the Alaska electrical construction and utility industry.

Our submitted list of projects shows the Alaska projects completed by our Joint Venture as well as the individual venturers. In addition the principals have further experience such as a 25 miles section of 115kv in Portage Pass, 65 miles of 69kv at Homer Electric, 17 miles of 69kv at Fairbanks, 8 miles of 115kv at Palmer, as well as many other projects. The experience of our organizations and their principals encompasses every major utility in the State of Alaska with the exception of the Cities of Seward and Nome.

As to item number 6, we stand by our prior response. We feel this requirement is unlawful and that we, by making such an attestation, could be found guilty of Anti-Trust violations and hence liable for treble damages. Our preliminary calculations, based upon our cost estimates, shows the total damages could run as high as 12 million dollars

EXHIBIT E

plus attorney fees. Our firm is not willing to become a party to an unlawful agreement as yours appears, and we certainly abhor the risk of a $12,000,000 lawsuit should we acquiesce to the union proviso.

Our experience shows we have not found it necessary to have an exclusive agreement with IBEW Local 1547 in order to acquire sufficient qualified Alaska resident workmen for Alaska projects.

You should be aware the IBEW Local 1547 has less than five hundred qualified outside construction workmen who are bona-fide residents of Alaska. Based upon this information, past experience, and with knowledge of upcoming projects, we believe the union will have to import personnel from outside to meet the state employment needs. We recognize that your pre-qualification does not address local hire and that workmen need not be Alaska residents, but our joint venture operates with the tenant of local hire. We have found it to the benefit of the owner and ourselves to hire the bulk of our construction personnel from the local area in which we are working. Local workman pay your local taxes and utility bills. Workman outside of your service area do not. The City of Seward should look at how many Seward and vicinity residents belong to IBEW and are available for hire against how many Seward and vicinity residents who are not IBEW members, but are available for hire. We are sure that many more Seward people will find employment on the transmission line if the requirement that they also be members of IBEW Local 1547 is removed.

We also find it morally troubling that State of Alaska money which belongs to all Alaskan residents should be narrowly channelled to the sole benefit of less than five hundred people, thereby cutting out the remainder. How can one justify nine and 1/2 million dollars to the benefit of 0.08% of the states population and forsake the others? One must also consider the political consequences of an exclusive IBEW Union hire agreement with the almost certain backlash from other political forces and other unions the next time the City of Seward lobbies for state funds. While the IBEW does have political influence it does not begin to compare with the clout of the remainder of the construction industry which you have evidently chosen to ignore.

We, therefore, are loathe to attest to your requirement that our workmen, and those of our subcontractors, be members of IBEW. We do not relish the prospect of a legal suit in the range of $12,000,000. Nor do we think it morally right that state money should be reserved solely for the benefit of a tiny few at the expense of the vast majority.

We trust this letter provides sufficient data for you approval of our pre-qualification to bid your project.

Very truly yours,

Aaron H. Downing
President AUC
A Joint Venture Partner

AHD:prs
file:sewprebl.01

IRBY CONSTRUCTION CO.

November 26, 1990

City of Seward
P. O. Box 167
Seward, Alaska 99664

Attn: Mr. Everett P. Diener
Manager of Engineering and Utilities

Dear Mr. Diener:

Thank you for your letter (90-11-208-01) of November 16, 1990 requesting additional information to pre-qualify for the construction of the Seward 115 kV Transmission Line

We are in the process of construction or have completed the following Transmission Lines in the State of Alaska.

1. Fritz Creek-Soldotna 115 kV Wood H-Frame - 28.5 miles - Under Construction - Owner, Homer Electric Association.

2. Thompson Pass Avalanche Repair - 14 Strs. - Completed 1989. Joint Venture with Alaska Utility Construction, Inc. Owner, Alaska Energy Authority.

3. Alaska Intertie - 98 Miles - 345 kV Steel Pole Strs - Completed 1984 - Owner - Alaska Power Authority.

Irby Construction Company would have the following personnel available to place on the Seward 115 kV Transmission Line.

1. Pat McBride* - Superintendent - Alaska experience - Assistant Superintendent on the Alaska 345 kV Intertie, Superintendent on the Fritz Creek-Soldotna 115 kV Line.

2. Steve Roberts* - Lineman on the Alaska Intertie, Assistant Superintendent on the Fritz Creek-Soldotna 115 kV Line.

3. Pete Porter - Assistant Superintendent On the Alaska 345 kV Intertie - Superintendent on the Thompson Pass Avalanche Repair.

EXHIBIT F

4. Mike Barnes* - Lineman on the Alaska Intertie - Wire Stringing Foreman on the Fritz Creek-Soldotna 115 kV Transmission Line.

5. Doug Booth - Material Specialist on the Fritz Creek-Soldotna 115 kV Transmission Line.

* Holds Current Alaska Lineman's Certificate.

We note you statement concerning our objection to being a party to an appropriate labor agreement with the IBEW (Item No. 6). We do not desire to amend our response of October 24, 1990.

If we can be of further help or if you have additional questions, please feel free to contact us at 601/969-1811.

Sincerely,

IRBY CONSTRUCTION COMPANY

John R. Nye

John R. Nye
Assistant General Superintendent

JRN/mk

CITY OF SEWARD

P.O. BOX 167
SEWARD, ALASKA 99664

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• Fire (907) 224-3445
• Telecopier (907) 224-3248

November 30, 1990
90-11-208-02

DRAFT

Charles Irby, President
Irby Construction Company
P.O. Box 1819
Jackson, MS 99215

Dear Mr. Irby:

Thank you for your response to our letter requesting clarification of some items on your request to be pre-qualified to bid on construction of the Seward 115 KV Transmission Line.

We find you qualified to perform except for Item # 6 which states that you must be a party to a current labor agreement with the IBEW. Consequently, I have no alternative but to omit your company from the list of contractors I will submit to the City Council as qualified bidders on this project. Therefore, if the City Council approves the recommendation a bid will not be accepted from Irby Construction Company.

For your information this recommendation will appear on the City Council agenda for the meeting on December 10, 1990, and you are invited to appear in person or submit written comments to the City Clerk, Linda Murphy. If you intend to appear you should notify Linda Murphy at 224-3331 (fax 224-3248).

Further, you may appeal the City Council's decision by delivering a "Notice of Appeal" to the City Clerk within ten (10) calendar days following notice of the Council's decision. In order for the Notice of Appeal to be accepted for reconsideration by the City Council it shall show that the initial "Request For Pre-Qualification" was submitted by the specified date and time. The Notice shall also include specific exceptions to the Council's decision and specific factual information to show that you are qualified to perform the work. A general assertion that the Council's decision is contrary to law or to fact are not sufficient to warrant reconsideration.

EXHIBIT G

We sincerely appreciate your response to our original pre-qualification proposal and subsequent amplification on that response.

Sincerely,

Everett P. Diener
Manager of Engineering & Utilities

cc: Calvert
Arvidson
Schaefermeyer
208 File

CITY OF SEWARD

P.O. BOX 167
SEWARD, ALASKA 99664

- Main Office (907) 224-3331
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December 3, 1990
90-11-208-02

Aaron H. Downing, President AUC
Irby/Alaska Utility Construction JV
101 East Swanson Avenue
Wasilla, Alaska 99687

Dear Mr. Downing:

Thank you for your response to our letter requesting clarification of some items on your request to be pre-qualified to bid on construction of the Seward 115 KV Transmission Line.

We find you qualified to perform except for Item # 6 which states that you must be a party to a current labor agreement with the IBEW. Consequently, I have no alternative but to omit your company from the list of contractors I will submit to the City Council as qualified bidders on this project. Therefore, if the City Council approves the recommendation a bid will not be accepted from Irby/Alaska Utility Construction JV.

For your information this recommendation will appear on the City Council agenda for the meeting on December 10, 1990, and you are invited to appear in person or submit written comments to the City Clerk, Linda Murphy. If you intend to appear you should notify Linda Murphy at 224-3331 (fax 224-3248).

Further, you may appeal the City Council's decision by delivering a "Notice of Appeal" to the City Clerk within ten (10) calendar days following notice of the Council's decision. In order for the Notice of Appeal to be accepted for reconsideration by the City Council it shall show that the initial "Request For Pre-Qualification" was submitted by the specified date and time. The Notice shall also include specific exceptions to the Council's decision and specific factual information to show that you are qualified to perform the work. A general assertion that the Council's decision is contrary to law or to fact are not sufficient to warrant reconsideration.

EXHIBIT H

We sincerely appreciate your response to our original pre-qualification proposal and subsequent amplification on that response.

Sincerely,

Everett P. Diener by Dac

Everett P. Diener
Manager of Engineering & Utilities

cc: Calvert
Arvidson
Schaefermeyer
208 File

CITY OF SEWARD

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November 30, 1990
90-11-208-01

MEMORANDUM:

TO: HONORABLE MAYOR AND MEMBERS OF CITY COUNCIL

THRU: DARRYL SCHAEFERMEYER, CITY MANAGER

FROM: E. PAUL DIENER, MGR. ENGINEERING & UTILITIES E. Paul Diener by Ed

SUBJECT: PRE-QUALIFICATION OF 115 KV TRANSMISSION LINE CONSTRUCTION CONTRACTORS

A request for contractors to pre-qualify to bid on construction of the Seward 115 KV Transmission Line was properly advertized and five firms responded. In order to be considered for qualification to bid this project, the contractor in addition to being experienced and having the resources to do the work he must be licensed to perform work in the State of Alaska and maintain an office in Alaska where business and contract matters may be conducted. Also, the contractor and their subcontractors must be a party to an appropriate current labor agreement with the IBEW that will assure that work traditionally performed by employees represented by the International Brotherhood of Electrical Workers, local union 1547 is performed by such employees.

The responding firms were: Newbery Alaska, Inc., Norcon, Inc., Irby/Alaska Utility Construction JV, Irby Construction Company and City Electric, Inc. The submittals were reviewed and all of the firms were requested to provided additional information or clarification on their submittals.

Newbery Alaska, Inc., Norcon, Inc. and City Electric, Inc. were found to be qualified to bid on the project. Irby/Alaska Utility Construction JV and Irby Construction Company submittals did not meet the requirement of a current labor agreement with the International Brotherhood of Electrical Workers, local union 1547. Copies of the Irby and Irby/AUC JV proposals are attached for your reference. The other proposals are available from the City Clerk.

RECOMMENDATION:

That the City Council find Newbery Alaska, Inc., Norcon, Inc. and City Electric, Inc. to be qualified to bid on the 115 KV Transmission Line project.

EXHIBIT 1

Sponsored by: Schaefermeyer

CITY OF SEWARD, ALASKA
RESOLUTION NO. 90-152

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SEWARD, ALASKA, APPROVING PREQUALIFIED BIDDERS FOR CONSTRUCTION OF THE SEWARD INTERTIE PROJECT

WHEREAS, by legislative appropriation, the state of Alaska has granted to the city of Seward funds for the construction of much needed improvements to the Seward electrical transmission system; and

WHEREAS, the city has made every effort to expedite the design, acquisition of materials, and construction of the project including the award of design and engineering contracts concurrent with other necessary work for the construction; and

WHEREAS, by doing so, the city has endeavored to make it possible for construction to commence as early as next spring on the project; and

WHEREAS, one of the efforts to expedite construction of the project is the prequalification of bidders for construction of portions of the project; and

WHEREAS, the city has complied with the provisions of the Seward Code with respect to the prequalification process; and

WHEREAS, certain bidders have submitted all required information and met the requirements of the prequalification and have been recommended by the city engineer in consultation with the city's independent engineering firm to be found by the City Council as prequalified bidders;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SEWARD, ALASKA, that:

Section 1. The following named corporations have been found to be prequalified as bidders for construction of the Seward 115 KV transmission line:

Newbery Alaska, Inc.
Norcon, Inc.
City Electric, Inc.

Section 2. The following named firms are found NOT to be qualified because they failed to meet the requirement of a current labor agreement with the International Brotherhood of Electrical Workers Local Union 1547:

EXHIBIT J

CITY OF SEWARD, ALASKA
RESOLUTION NO. 90-152

Irby/Alaska Utility Construction JV
Irby Construction Company

Section 3. Any firm found not qualified may appeal this decision by delivering a "Notice of Appeal" to the City Clerk within ten (10) calendar days following notice of this Resolution and by complying with the appeal procedures set forth in the REQUEST FOR CONTRACTOR TO PREQUALIFY TO BID ON CONSTRUCTION OF SEWARD'S LAWING TO FORT RAYMOND TRANSMISSION LINE.

Section 4. This resolution shall take effect immediately upon its adoption.

PASSED AND APPROVED by the City Council of the city of Seward, Alaska, this 10th day of December, 1990.

THE CITY OF SEWARD, ALASKA

William C. Noll, Mayor

AYES:
NOES:
ABSENT:
ABSTAIN:

ATTEST:

Linda S. Murphy, CMC/AAE
City Clerk

(City Seal)

APPROVED AS TO FORM:

Perkins Coie, Attorneys for the city of Seward, Alaska

Fred B. Arvidson
City Attorney

Stephen M. Ellis
Marc D. Bond
Delaney, Wiles, Hayes,
Reitman & Brubaker, Inc.
1007 West 3rd Avenue, Suite 400
Anchorage, Alaska 99501
907-279-3581

RECEIVED
FEB - 4 1991
HINTZE, HERRIG & WRIGHT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ASSOCIATED BUILDERS AND CONTRACTORS, INC., a Maryland corporation, ASSOCIATED GENERAL CONTRACTORS OF ALASKA, an Alaska nonprofit corporation, IRBY CONSTRUCTION COMPANY, a Mississippi corporation, IRBY/ ALASKA UTILITIES CONSTRUCTION COMPANY, an Alaska corporation, Plaintiffs, vs. CITY OF SEWARD, an Alaska home rule municipality, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1547 (IBEW), a labor union, Defendants.	Case No. A90-001 Civil

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT,
OR, IN THE ALTERNATIVE FOR A PRELIMINARY INJUNCTION

Pursuant to Federal Rules of Civil Procedure 56, 57 and 65, plaintiffs move for summary judgment, or, in the alternative, for a preliminary injunction prohibiting the enforcement of a City of Seward ordinance requiring individual plaintiff companies to be signatories to a collective bargaining agreement with the International Brotherhood of Electrical Workers, Local 1547, in

order to bid on a project to construct an electric transmission line near the City of Seward. This motion is supported by the memorandum submitted herewith, and by the Stipulation filed by the parties in this matter.

DATED at Anchorage, Alaska this 28th day of January, 1991.

DELANEY, WILES, HAYES,
REITMAN & BRUBAKER, INC.
Attorneys for Plaintiffs

By: Stephen M. Ellis
Stephen M. Ellis

By: Stephen M. Ellis
for Marc D. Bond

DELANEY, WILES,
HAYES, REITMAN
BRUBAKER, INC.
SUITE 400
607 WEST 3RD AVENUE
ANCHORAGE, ALASKA
(907) 279-3581

Stephen M. Ellis
Marc D. Bond
Delaney, Wiles, Hayes,
Reitman & Brubaker, Inc.
1007 West 3rd Avenue, Suite 400
Anchorage, Alaska 99501
907-279-3581

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ASSOCIATED BUILDERS AND CONTRACTORS, INC., a Maryland corporation, ASSOCIATED GENERAL CONTRACTORS OF ALASKA, an Alaska nonprofit corporation, IRBY CONSTRUCTION COMPANY, a Mississippi corporation, IRBY/ ALASKA UTILITIES CONSTRUCTION COMPANY, an Alaska corporation, Plaintiffs, vs. CITY OF SEWARD, an Alaska home rule municipality, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1547 (IBEW), a labor union, Defendants.	Case No. A91-001 Civil

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE FOR A PRELIMINARY INJUNCTION

This action concerns a requirement that all prospective bidders for a contract to erect a high tension electric transmission line near the City of Seward (the City) must first enter into a collective bargaining agreement with the International Brotherhood

DELANEY, WILES, HAYES, REITMAN & BRUBAKER, INC.
SUITE 400
1007 WEST 3RD AVENUE
ANCHORAGE, ALASKA
(907) 279-3581

of Electrical Workers, Local 1547. The plaintiffs seek a judgment declaring the requirement to be unlawful, a permanent injunction forbidding its enforcement, and an award of attorney's fees and costs.

This motion seeks summary judgment in favor of the plaintiffs on several of the claims raised in the complaint. In the alternative, the motion seeks a preliminary injunction forbidding enforcement of the requirement pending resolution of this matter.

I. FACTS

The parties have stipulated to all of the relevant facts in this matter. See Stipulation of Facts dated January 25, 1991. The following recitation of pertinent facts, all of which are set forth in the stipulation, forms the basis for this motion.

The City operates the Seward Electric Utility System, which provides commercial and residential electrical service within its allocated service territory. The City has needed expanded electrical transmission capabilities for the last several years. In particular, the City requires the construction of a 115 Kv transmission line from Lawing[1] to Fort Raymond and attendant facilities (the Project).

During the 1990 legislative session, the Alaska

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1 Lawing is located 21 miles north of the City.

DELANEY, WILES, HAYES, REITMAN & BRUBAKER, INC.
SUITE 400
1007 WEST 3RD AVENUE
ANCHORAGE, ALASKA
(907) 279-3581

Legislature approved a grant appropriation of $9.5 million to the City for the Project. 208 SLA 1990, § 144. The City accepted this grant by Resolution 90-086. Exhibit A to the Stipulation.

On July 23, 1990, the State of Alaska and the City entered into a "Standard Agreement Form for Municipal Grants" (Grant) for $9,500,000 for the construction of the electrical line and attendant structures. Exhibit B to the Stipulation.[2]

On October 8, 1990, the City issued a "Request for Contractors to Pre-Qualify[3] to Bid on Construction of the Seward 115KV Transmission Line - Lawing to Fort Raymond." Exhibit D to the Stipulation. The Request included the following language (hereinafter referred to as the "IBEW signatory requirement"):

> The City of Seward is a signatory to a collective bargaining agreement with the International Brotherhood of Electrical Workers (IBEW), Local Union 1547. In order to preserve

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[2] The grant agreement notes: "Signing of this agreement does in now way excuse the recipient of the municipal grant of any other law, Alaska Statute or City code regulations. Recipient must in all cases consult and adhere to all local, State, or Federal laws pertaining to public funds." Exhibit B to the Stipulation at 3.

[3] "Pre-qualification" is a process which allows the owner of a construction project to determine each bidder's competency and responsibility to satisfactorily complete the project before the bidder submits a bid.

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work traditionally performed by employees represented by the IBEW and to avoid the destruction of wages, hours, and conditions of employment achieved through the collective bargaining process, the City has agreed that, to the extent permitted by law, it will not contract, or allow the subcontract, for the construction of the 115 KV main electrical transmission intertie line between Lawing and Fort Raymond Subdivisions within the City of Seward for work traditionally performed by the IBEW except to a party with an appropriate current labor agreement with the IBEW.

The Request for Pre-Qualification shall be submitted on the contractor's letterhead in a format to address each of the following subjects.

. . .

6. A statement attesting that the contractor is a party to an appropriate current labor agreement with the IBEW that will assure that work traditionally performed by

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employees represented by the International Brotherhood of Electrical Workers, local union 1547 ("IBEW") will be performed by such workers.

In October of 1990, both Irby Construction Company ("Irby") and Irby/Alaska Utilities Construction JV ("Irby/AUC") submitted separate requests to be pre-qualified to bid on the Project. Exhibits E and F to the Stipulation. Both companies expressed concerns regarding the IBEW signatory requirement. On November 16, 1990, Everett Diener, Manager of Engineering and Utilities for the City of Seward, wrote letter to Charles Irby of Irby, and Aaron Downing of Irby/AUC. The letters requested additional information concerning the companies' Alaska experience and the identity of the key employees each would have on the Project. The letters also noted Irby's and Irby/AUC's objection to Item #6, said that Mr. Diener would likely recommend to the City Council that Irby and Irby/AUC be found not qualified, and invited Irby and Irby/AUC to change its response to Item #6. Exhibits G and H to the Stipulation.

By letter dated November 26, 1990, Aaron Downing submitted additional information on Irby/AUC's Alaska experience, and designated the key employees. The letter also elaborated on the

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objection to Item #6. Exhibit J to the Stipulation. On the same date, John Nye of Irby responded, submitting additional information on Irby's Alaska experience, and designating the Irby key employees. Mr. Nye declined to amend the objection to Item #6. Exhibit I to the Stipulation.

On November 30, 1990, Mr. Diener sent a letter to Charles Irby stating:

> We find you qualified to perform except for Item #6 which states that you must be a party to a current labor agreement with the IBEW. Consequently, I have no alternative but to omit your company from the list of contractors I will submit to the City Council as qualified bidders on this project. Therefore, if the City Council approves the recommendation a bid will not be accepted from Irby Construction Company.

Exhibit M to the Stipulation.

The City's December 3, 1990, response to Irby/AUC was substantially the same. Exhibit N to the Stipulation.

On November 30, 1990, Mr. Diener sent a memorandum to the Seward Mayor and City Council, finding Irby and Irby/AUC to be not

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qualified for failure to comply with the requirement of a current labor agreement with IBEW. Exhibit K to the Stipulation.

On December 10, 1990, the Seward City Council adopted Resolution 90-152, which approved the list of bidders, omitting Irby and Irby/AUC on the basis of Item #6. Exhibit L to the Stipulation.

The City intends to proceed with the bidding process in order to commence construction of the Project in 1991. Pursuant to its collective bargaining agreement with the IBEW, and the resolutions adopted by the City Council, the City will not accept bids from Irby or Irby/AUC. Irby and Irby/AUC are in all respects fully qualified, in terms of skill, knowledge and experience, to construct the Project, having been so found by the City of Seward's designated representative. See Exhibits M and N to the Stipulation. The sole basis for this discrimination is the lawful refusal of Irby and Irby/AUC to enter into a collective bargaining agreement with the IBEW, where the IBEW has not been certified by the National Labor Relations Board as the legal representative of Irby's or Irby/AUC's employees.

II. PROCEDURAL POSTURE

A. THIS COURT HAS JURISDICTION OF THIS MATTER

The Complaint alleges jurisdiction based on 28 U.S.C. § 1337(a) [commerce and antitrust regulation], 28 U.S.C. § 1343(a)(3)

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[civil rights], 29 U.S.C. § 1132 [ERISA], 28 U.S.C. § 2201(a) [declaratory judgment], Civil Rule 57 [declaratory judgment], and the doctrine of pendent jurisdiction. This memorandum relies upon all of the foregoing provisions, with the exception of 29 U.S.C. § 1132 [ERISA].[4] It is obvious jurisdiction lies with this Court as to all issues raised herein with the possible exception of the argument in Section III(B) below, in which we show that the City's imposition of the IBEW signatory requirement is unlawful because it is pre-empted by the National Labor Relations Act. However, pertinent authority readily establishes the court's jurisdiction as to that issue as well.

In Golden State Transit Corp. v. City of Los Angeles (Golden State II), ___ U.S. ___ 110 S.Ct. 444, 450, 107 L.Ed.2d 420 (1989) the Court explained that in situations such as involved here, the National Labor Relations Board has neither authority nor jurisdiction:

> Although the National Labor Relations Board has exclusive jurisdiction to prevent and remedy unfair labor practices by employers and unions, it has no authority to address conduct

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[4] ERISA issues are not addressed herein because of the existence of an apparent material issue of fact.

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protected by the NLRA against governmental interference.[5] There is thus no comprehensive enforcement scheme for preventing state interference with federally protected labor rights that would foreclose the § 1983 remedy. Nor can there be any substantial question that our holding in Golden State I that the city's conduct was pre-empted was within the competence of the judiciary to enforce. Rather, the city argues that it cannot be held liable under § 1983 because its conduct did not violate any rights secured by the NLRA. On the basis of our previous cases, we reject this argument. We agree with petitioner that it is the intended beneficiary of a statutory scheme that prevents governmental interference with the collective-bargaining process and that the NLRA gives it rights enforceable against governmental interference in an action under § 1983.

The Court's footnote 5 is illuminating. It provides:

> The Court of Appeals was thus

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> mistaken in ruling that because the NLRB has exclusive jurisdiction to redress violations of the NLRA by labor and mangement, the federal courts do not have jurisdiction to address claims of governmental interference with interests protected by the Act. Our cases have repeatedly stressed the distinctions between the two types of claims, see Brown v. Hotel Employees, 468 U.S. 491, 503, 104 S.Ct. 3179, 3186, 82 L.Ed.2d 373 (1984); Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 145, n. 6, 96 S.Ct. 2548, 2555, n. 6, 49 L.Ed.2d 396 (1976); Railroad Trainmen v. Terminal Co., 394 U.S. 369, 382, n. 17, 89 S.Ct. 1109, 1117, n. 17, 22 L.Ed.2d 344 (1969).

110 S.Ct. at 450, n. 5.

Accordingly, this court does have jurisdiction to address

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the claim that the City has improperly interfered with interests protected by the NLRA.

B. SUMMARY JUDGMENT

Summary judgment is appropriate where there is no genuine dispute as to the material facts, and the movant is entitled to judgment based on the undisputed facts as a matter of law. Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir. 1985); Fed.R.Civ.P. 56(c). Material facts are those which may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A genuine dispute exists where there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. Id.

In this case, the parties have stipulated to the material facts, leaving no genuine dispute to be resolved by a jury. The case is thus ripe for decision by the court on this motion.

C. PRELIMINARY INJUNCTION

It appears the court will be able to resolve this matter on the motion for summary judgment. If so, the plaintiffs request as part of their relief that the court permanently enjoin enforcement of the IBEW signatory requirement. However, the court discerns genuine issues of material fact, or requires additional time to resolve the matter, the plaintiffs request the

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court issue a preliminary injunction forbidding enforcement of the IBEW signatory requirement.

In evaluating a motion for a preliminary injunction, the court must examine four elements. The definitive elucidation of these elements, and their relative importance, is set forth in State of Alaska v. Native Village of Venetie, 856 F.2d 1384, 1388-89 (9th Cir. 1988):

> Traditionally, there are four factors to be considered before a court decides to grant or deny preliminary injunctive relief:
>
> 1) The likelihood of the plaintiff's success on the merits;
>
> 2) the threat of irreparable harm to the plaintiff if the injunction is not imposed;
>
> 3) the relative balance of this harm to the plaintiff and the harm to the defendant if the injunction is imposed; and
>
> 4) the public interest.

See Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980); 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2948 at 430-

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31 (1973).

In Warm Springs Dam Task Force v. Gribble, 565 F.2d 549, 551 (9th Cir. 1977), this court treated factors two and three above as a single factor (citing Alpine Lakes Protection Society v. Schlapfer, 518 F.2d 1089, 1090 (9th Cir. 1975)), and further noted that factor four is but one more interest to be balanced along with the interests of the parties. Id. Thus, there essentially are only two factors to be considered: The likelihood of the plaintiff's success on the merits; and, the relative balance of potential hardships to the plaintiff, defendant, and public.

These two factors have been employed in a test framed in the alternative. Basically, plaintiffs are entitled to preliminary injunctive relief if:

1) They demonstrate

- a probable success on the merits, and

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- a possibility of irreparable injury;

2) or if they demonstrate a fair chance of success on the merits (i.e. serious questions are raised), and

- the balance of hardships tips sharply in their favor.

See Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983); Miss Universe, Inc. v. Flesher, 605 F.2d 1130, 1134 (9th Cir. 1979); William Inglis & Sons Baking Company v. ITT Continental Baking Company, Inc., 526 F.2d 86, 88 (9th Cir. 1975).

It is settled that the alternatives in the above test are not to be treated as two separate tests, but rather, as "extremes of a single continuum." Benda v. Grand Lodge of International Association of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978), cert. dismissed, 441 U.S. 937, 99 S.Ct.

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2065, 60 L.Ed.2d 667 (1979). The proper approach is best summarized as follows:

> The critical element in determining the test to be applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly. Aguirre v. Chula Vista Sanitary Service, 542 F.2d 779 (9th Cir. 1976).

Id.; see also Inglis, 526 F.2d at 88.

Thus, in order to obtain an injunction, the plaintiffs must demonstrate some persuasive combination of likely success on the merits and likely threat of irreparable injury. In addition, the court should examine whether an injunction is in the public interest.

In the instant case, plaintiffs can demonstrate both likely success on the merits and substantial irreparable harm. In addition, the public interest compels the issuance of an injunction in this matter.

If the injunctive relief is not granted, plaintiffs will be precluded from even bidding on the $14 million Project. In view

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of the uncertainties of the bidding process, it is very difficult to estimate the losses which will be suffered by Irby and Irby/AUC, the two plaintiffs fully qualified to bid on the Project, except for the IBEW signatory requirement.

As is further alleged in the Complaint and demonstrated in this Memorandum, the IBEW signatory requirement works a denial of plaintiffs' constitutional and statutory rights. The constitutional deprivation, without more, constitutes irreparable injury. See, e.g., Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976) (Opinion of Brennan, J.) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). See also Golden State Transit Corp. v. City of Los Angeles (Golden State I), 475 U.S. 608, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986) (enjoining local government action preempted by NLRA); General Electric Co. v. New York State Dept. of Labor, 891 F.2d 25 (2d Cir. 1989) (authorizing injunction against state law preempted by ERISA); Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee, 685 F.Supp. 718 (N.D. Cal. 1988), aff'd 891 F.2d 719 (9th Cir. 1989) (injunction granted on both NLRA and ERISA grounds).

III. THE IBEW SIGNATORY REQUIREMENT VIOLATES FEDERAL, STATE AND LOCAL CONSTITUTIONAL AND STATUTORY PROVISIONS.

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Federal, state and local laws protect the plaintiffs from edicts such as the IBEW signatory requirement. In particular, 42 U.S.C. § 1983 specifically authorizes a civil action for deprivation of rights secured by the United States Constitution and federal laws.

The IBEW signatory requirement violates the equal protection and due process rights of the plaintiffs. The requirement also violates the National Labor Relations Act (NLRA), the Employee Retirement Income Security Act (ERISA), and the Sherman Antitrust Act. In addition to federal laws, the requirement violates the Code of the City of Seward.

This court is empowered to declare the rights of the parties under the Declaratory Judgment Act, and to enter an injunction forbidding enforcement of the IBEW signatory requirement. The court should also enter judgment awarding attorney fees and costs to the plaintiffs as authorized in 42 U.S.C. § 1985.

A. THE PLAINTIFFS HAVE ASSERTED A VALID CLAIM UNDER 42 U.S.C. § 1983.

Congress has provided a remedy for persons whose federal rights have been violated. 42 U.S.C. § 1983 provides:

> **Section 1983. Civil action for deprivation of rights.**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or

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usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Analysis of a claim under § 1983 requires a two step inquiry. Golden State Transit Co. v. City of Los Angeles (Golden State II), --- U.S. ---, 110 S.Ct. 444, 448, 107 L.Ed.2d 420 (1989); Livadas v. Aubry, 749 F.Supp. 1526, ---- (N.D.Cal. 1990). "First, the plaintiff must assert the violation of a federal right," not merely the violation of federal law. Golden State II, 110 S.Ct. at 448. This requires an analysis of several factors: (1) Does the provision in question create obligations binding on the governmental unit, or does it merely express a congressional preference for

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certain kinds of treatment? Golden State II, 110 S.Ct. at 448; Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 19, 101 S.Ct. 1531, 1541, 67 L.Ed.2d 694 (1981). (2) Is the interest asserted sufficiently certain that it is within the competence of the judiciary to enforce? Golden State II, 110 S.Ct. at 448; Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 431-432, 107 S.Ct. 766, 775-776, 93 L.Ed.2d 781 (1987). (3) Is the plaintiff an intended beneficiary of the federal law? Golden State II, 110 S.Ct. at 448; Wright, 479 U.S., at 430, 107 S.Ct., at 774.

The United States Supreme Court has held that NLRA creates "rights" in labor and management that are protected against government interference. Golden State II, 110 S.Ct. at 449-52, and see discussion in section B, below. Furthermore, the Court has also held that where the National Labor Relations Board does not have jurisdiction over a matter, a party protected by the NLRA may seek redress in a § 1983 action in federal court. Id. Finally, an employer is a party intended to be protected by the NLRA. Id.

The second inquiry under a § 1983 analysis, once the plaintiff establishes a prima facie claim under the statute, is whether the defendant can show Congress specifically foreclosed a remedy under § 1983 by providing a comprehensive enforcement mechanism for protection of the federal right. Golden State II, 110

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S.Ct. at 448; Smith v. Robinson, 468 U.S. 992, 1005 n.9, 104 S.Ct. 3457, 3464 n.9, 82 L.Ed.2d 746 (1984). There is no such mechanism under the facts of this case.

Moreover, the plaintiffs' rights are also protected under the equal protection and due process clauses of the United States Constitution, and the Sherman Antitrust Act. Cf. Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee, 685 F.Supp. 718 (N.D. Cal. 1988), aff'd, 891 F.2d 719 (9th Cir. 1989).

Thus, all of the factors are readily satisfied in this case. The plaintiffs are entitled to damages for the violation of their rights, and to an award of attorney fees and costs pursuant to 42 U.S.C. § 1985.

B. THE NATIONAL LABOR RELATIONS ACT PROHIBITS THE IBEW SIGNATORY REQUIREMENT IN LETTING PUBLIC PROJECTS TO BID.

The IBEW signatory requirement seeks to impose a labor agreement on employers who wish to bid on the Project even if the union is not the certified bargaining representative of the employer's employees. The City, as a state entity, is forbidden from so doing by the National Labor Relations Act (NLRA).

The National Labor Relations Act occupies the field of interstate commerce in labor, except where matters of purely local

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concern allow for local governance. Guss v. Utah Labor Relations Board, 353 U.S. 1, 3, 77 S.Ct. 598, 599, 1 L.Ed.2d 601 (1957). The areas of local concern are limited, and do not include the authority to mandate a collective bargaining agreement between a private employer and a labor union.

Congress has seen fit to leave to the economic markets the issue of whether an employer comes to terms with a labor union. Golden State I, 475 U.S. at 616, 106 S.Ct. at 1399-1400. The IBEW signatory requirement imposes upon every bidder-employer the obligation not only to bargain with the IBEW, but to come to an agreement. That edict is pre-empted by the NLRA.

The NLRA only requires an employer to bargain with the properly selected representative of its employees. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5). Indeed, it is an unfair labor practice for an employer to coerce employees in the exercise of their rights to organize and select a union, or not to organize, as they see fit. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1).

The proper representative of the employees is that designated or selected by the majority of the employees in a bargaining unit. NLRA § 9(a), 29 U.S.C. § 159(a). In this instance, no bargaining representative has been designated or selected, yet the City of Seward is forcing would-be bidders to deal

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exclusively with the IBEW Local 1547.

Even if would-be bidders could be forced to bargain in good faith with the IBEW, they can not be forced to come to an agreement or to accept a specific pre-designated agreement. NLRA requires only that the parties bargain in good faith, not that they come to an agreement.[5] NLRA § 8(d), 29 U.S.C. § 158(a)(5) and (d). Golden State I, 475 U.S., at 616, 106 S.Ct., at 1399.

The United States Constitution, Art. VI, cl. 2, provides that the laws of the United States "shall be the supreme law of the land."[6] Under the Supremacy clause, state and local laws, together with policies which conflict with the NLRA, are unenforceable and the proper subject of a declaratory judgment and injunctive relief.

"The [United States Supreme] Court has articulated two distinct NLRA pre-emption principles." Metropolitan Ins. Co. v.

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[5] The IBEW signatory requirement is thus wholly inconsistent with the NLRA. Further, the IBEW has an obvious and enormous advantage in any such negotiations, since the prospective bidder is compelled to reach an agreement with the IBEW in order to bid on the Project.

[6] United States Constitution, Art. VI, cl. 2, provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

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Massachusetts, 471 U.S. 724, 748, 105 S.Ct. 2380, 2394, 85 L.Ed.2d 728 (1985); Golden State Transit Co. v. City of Los Angeles (Golden State I), 475 U.S. 608, 613, 106 S.Ct. 1395, 1398, 89 L.Ed.2d 616 (1986); Associated Builders and Contractors of Mass. v. Mass. Water Resources Authority, --- F.2d ---, 135 L.R.R.M. (BNA) 22713, 59 U.S.L.W. 2266, 1990-2 Trade Cases ¶ 69,229, 1990 WestLaw 163312, at p.6 (1st Cir. 1990), opinion vacated and rehearing en banc granted.

First, the so-called Garmon pre-emption rule "prohibits States from regulating 'activity that the NLRA protects, prohibits, or arguably protects or prohibits.'" Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282, 286, 106 S.Ct. 1057, 1061, 89 L.Ed.2d 223 (1986), citing San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959).

Second, the so-called Machinists rule "precludes state and municipal regulation 'concerning conduct that Congress intended to be unregulated.'" Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S., at 749, 105 S.Ct., at 2394, citing Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976).

While the Garmon rule may have application here, it is the Machinists rule with which we are primarily concerned. Although the labor-management relationship is structured by the NLRA, certain

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areas intentionally have been left "to be controlled by the free play of economic forces." Machinists, 427 U.S., at 140, 96 S.Ct., at 2553, quoting N.L.R.B. v. Nash-Finch Co., 404 U.S. 138, 144, 92 S.Ct. 373, 377, 30 L.Ed.2d 328 (1971).

The United States Supreme Court takes a dim view of government efforts to regulate the rights of employers and employees as to the organization and recognition of labor unions, and negotiation of contracts. In Machinists, an employer and a union were engaged in collective bargaining over an expired contract. The members of the union engaged in a concerted refusal to work overtime and the employer filed a charge with the National Labor Relations Board claiming that such action was an unfair labor practice. The Board found the concerted activity was not an unfair labor practice. The employer had simultaneously filed an unfair labor practice complaint with the Wisconsin Employment Relations Commission. The Commission agreed with the employer, and filed a cease and desist order against the union. The Court found such conduct was merely one of the economic weapons available to unions under the NLRA, and held the state law and Commission order to be pre-empted by the NLRA.

> Our decisions since Briggs-Stratton have made it abundantly clear that state attempts to

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> influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB ... The availability or not of economic weapons that federal law leaves the parties free to use cannot "depend upon the forum in which the [opponent] presses its claims." (Citation omitted.)

Machinists, 427 U.S., at 153, 96 S.Ct., at 2559.

The preemption set forth in Machinists was reinforced in Wisconsin Dept. of Industry, Labor and Human Relations v. Gould Inc., 475 U.S. 282, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986). In Gould, the employer contested a state law which barred state agencies from purchasing "any product known to be manufactured or sold by any persons or firm" named on a list kept by the Department of Industry of persons or firms found by the NLRB to have violated the NLRA in three separate cases within a 5-year period. 475 U.S., at 283-84, 106 S.Ct., at 1059-60.

Wisconsin attempted to defend the policy by arguing that it was not using its regulatory or police powers, but rather merely its spending powers. As a "market participant," Wisconsin argued that it was freed of the restrictions ordinarily placed on states by

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the Commerce Clause. 475 U.S., at 289, 106 S.Ct., at 1062. The Court noted that while the position of market participant did free Wisconsin from certain Commerce Clause prohibitions, the blacklist policy was "tantamount to regulation," and forbidden by the NLRA:

> Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties. (Citations omitted.) The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. (Citations omitted.) The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and

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have a different role to play.

475 U.S., at 290, 106 S.Ct., at 1063.

Golden State also provides an example of improper government interference preempted by the NLRA. The case involved the City of Los Angeles, which had issued an operating franchise to a taxi cab company. The company applied for renewal of the franchise. While the application was pending, the company's employees went out on strike. The City Council declined to renew the franchise, but statements by the Council President indicated that the Council would vote to renew the franchise if the company settled its labor dispute before the franchise expired. The dispute was not settled, and the franchise expired. Golden State I, 475 U.S. at 609-11, 106 S.Ct. at 1396-97. The Court held that such actions interfered with the bargaining process, and were preempted by the NLRA. In Golden State II, the Court held the employer was entitled to bring an action against the City based on 42 U.S.C. § 1983.

This same principle was recently enforced in Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee, 685 F.Supp. 718 (N.D. Cal. 1988), aff'd, 891 F.2d 719 (9th Cir. 1989). California had adopted a statute requiring employers to abide by certain terms of union apprenticeship

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programs. The district court held the NLRA pre-empted the requirement:

> By requiring Hydrostorage to become a party to certain provisions of the Boilermakers' collective bargaining agreement, the [state] is intruding into the area of collective bargaining from which Congress under the NLRA has excluded it. As the Court explained in Golden State [I]: the NLRA requires an employer and a union to bargain in good faith. But it does not require them to reach an agreement.

685 F.Supp. at 616.

In Charlesgate Nursing Center v. Rhode Island, 723 F.Supp. 859 (D.R.I. 1989), the court held the NLRA pre-empted a statute which made it unlawful for employers to utilize the services of third parties in recruiting or hiring strike replacements. Again, the court found that the state unlawfully prohibited activity which Congress intended as a legitimate economic weapon for employers' use in collective bargaining.

The City's requirement that bidders be IBEW signatories violates the NLRA by dictating not only (1) that bidders must deal exclusively with the IBEW (even if their employees do not so

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choose), but (2) also dictating that bidders must come to terms with the IBEW. This is not a matter of "peripheral concern" in the employer-employee relationship. Rather it is the core concern of the NLRA. See Golden State I, 475 U.S. at 618 n.8, 106 S.Ct. at 1400 n.8.

The pre-emptive effect of the Machinists rule applies equally to state and local governments, and it does not matter whether the government acts through general law, court order or bidding specifications. Golden State I, 475 U.S. at 614 n.5, 106 S.Ct. at 1398 n.5; Associated Builders and Contractors of Mass. v. Mass. Water Resources Authority, --- F.2d ---, 135 L.R.R.M. (BNA) 22713, 59 U.S.L.W. 2266, 1990-2 Trade Cases ¶ 69,229, 1990 WestLaw 163312, at p.6 n.15 (1st Cir. 1990), opinion vacated and rehearing en banc granted.

In addition, it does not matter whether the government acts as a market participant or a market regulator. Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282, 287-88, 106 S.Ct. 1057, 1061, 89 L.Ed.2d 223 (1986); Golden State I, 475 U.S., at 618, 106 S.Ct., at 1400; Associated Builders and Contractors of Mass. v. Mass. Water Resources Authority, supra.

Finally, and significantly, the alleged importance of the government's claimed purpose is irrelevant. Rather, the court

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focuses on the effect of the government policy on the operation of federal legislation. Perez v. Campbell, 402 U.S. 637, 652, 91 S.Ct. 1704, 1712, 29 L.Ed.2d 233 (1971); Associated Builders and Contractors of Mass. v. Mass. Water Resources Authority, supra.

The City and IBEW may argue they are exempted from pre-emption by the so-called "hot cargo provisions"[7] of NLRA § 8(e) and 8(f), 29 U.S.C. § 158(e) and (f). These sections merely permit private employers in the construction industry to enter into "hot cargo" agreements, and to voluntarily sign union agreements prior to actually hiring employees or prior to the union obtaining majority status. NLRB v. Ironworkers Local 103, 434 U.S. 335, 98 S.Ct. 651, 54 L.Ed.2d 586 (1977)[8]. This is no authority for state or local

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[7] A "hot cargo provision" has been described by the Ninth Circuit as follows:

> A "hot cargo provision," so named because of the prevalence at one time of such provisions in Teamsters Union contracts, is an agreement between a union and an employer by which the employer promises not to use the materials or, as in this case, the services of nonunion employers.

Pacific Northwest Chapter of Associated Builders & Contractors, Inc. v. N.L.R.B., 609 F.2d 1341, 1343 n.1 (9th Cir. 1979), on rehearing, 654 F.2d 1301 (9th Cir. 1981), affirmed in part, vacated in part, Woelke & Romero Framing, Inc. v. N.L.R.B., 456 U.S. 645, 102 S.Ct. 2071, 72 L.Ed.2d 398 (1982).

[8] The Court observed that any such agreements must be the product of voluntary and mutual negotiations:

> Congress was careful to make its intention clear that pre-

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governments to restrict the collective bargaining rights of private employers. Government agencies are expressly excluded from coverage under the NLRA. 29 U.S.C. § 152(2).

Thus, the City's imposition of the IBEW signatory requirement is pre-empted by the NLRA. As an agent of the state government, the City may not, through the guise of a collective bargaining agreement, impose an obligation on employers which violates their rights under the NLRA.

C. THE IBEW SIGNATORY REQUIREMENT VIOLATES THE SHERMAN ANTITRUST ACT AND THE LANDRUM GRIFFIN AMENDMENTS TO THE NLRA.

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal..." 15 U.S.C. § 1. The Sherman Act precludes conspiracies between labor organizations and non-labor organizations designed to reduce competition. See Connell Const. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975); Allen Bradley Co. v. Local Union No. 3, Int'l Brotherhood of Elec. Workers, 325 U.S. 797, 65 S.Ct.

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hire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle.

434 U.S. at 348 n.10, 98 S.Ct. at 659 n.10.

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1533, 89 L.Ed. 1939, rehearing denied, 326 U.S. 803, 66 S.Ct. 11, 90 L.Ed. 489 (1945); Allied Int'l, Inc. v. International Longshoremen's Ass'n, 640 F.2d 1368 (1st Cir. 1981), aff'd, 456 U.S. 212, 102 S.Ct. 1656, 72 L.Ed.2d 21 (1982); Imperial Constr. Management Corp. v. Laborers Int'l Union of N. America Local 96, 133 L.R.R.M. (BNA) 2452 (N.D. Ill. Jan. 17, 1990); C&W Constr. Co. v. Brotherhood of Carpenters and Joiners of America, Local 745, 687 F. Supp 1453 (D. Haw. 1988).

In the case at bar, plaintiffs allege that, through the imposition of the IBEW signatory requirement by the Seward-IBEW collective bargaining agreement and city ordinance, defendants have conspired to reduce competition in the construction industry by precluding non-union contractors from even bidding on the Project. Defendants' actions are not protected by either the statutory or non-statutory exemptions to Section 1 of the Sherman Act, and their conduct is therefore unlawful and should be enjoined.

1. The Statutory Exemption Does Not Apply.

The statutory exemption to the Sherman Act is set forth in the Clayton Act, 15 U.S.C § 17, 29 U.S.C. § 52, and the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105 and 113. This exemption does not apply where a union acts in combination with non-labor groups. Allen Bradley Co. v. Local Union No. 3, Int'l Brotherhood

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of Elec. Workers, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945). In that decision, certain unions were found to have unlawfully participated with a combination of businessmen to "prevent all competition from others." Similarly, in United Mineworkers of America v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), the Court noted:

> Likewise, if as is alleged in this case, the union became a party to a collusive bidding arrangement designed to drive Phillips and others from the TVA spot market, we think any claim to exemption from antitrust liability would be frivolous at best.

An example of the application of this rule is found in Larry V. Muko, Inc. v. Southwestern Penn. Bldg. and Const. Trades Council, 609 F.2d 1368 (3d Cir. 1979), cert. denied, 459 U.S. 916, 103 S.Ct. 229, 74 L.Ed.2d 182 (1982). In that case a restaurant chain entered into an agreement with labor organizations that the chain would not award construction contracts to any non-union contractor. The court held such an agreement was not entitled to statutory exemption from federal antitrust laws. 609 F.2d at 1373. See also, Smitty Baker Coal Co., Inc. v. United Mine Workers of America, 620 F.2d 416 (4th Cir. 1980), cert. denied, 449 U.S. 870,

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101 S.Ct. 207, 66 L.Ed.2d 89 (1980).

Nor does the IBEW signatory requirement foster the goals established by the statutory exemption from the Sherman Act. The purpose of the exemption is to permit labor unions to acquire and use to their advantage a monopoly in labor of a particular kind in relation to the employer with which it has a collective bargaining agreement. Neither the union nor the municipal employer may seek to use this advantage to deprive other, non-union employers (or union employees with collective bargaining agreements with unions other than the IBEW) of the right to bid on, and to win, public contracts for the construction of public facilities.

Through the IBEW signatory requirement, included in the collective bargaining agreement between the City of Seward and the IBEW, and enforced by city ordinance, the defendants have conspired to impose their agreement on other employers and, in so doing, to reduce competition from non-IBEW employers, employees, and unions. The Agreement represents nothing more than a gross attempt to preclude all but IBEW contractors from participating in the Project. Thus the statutory exemption cannot apply.

2. The IBEW Signatory Requirement is not Protected by the Non-Statutory Exemption.

The Supreme Court has created a non-statutory exemption to the antitrust laws for conduct not directed at "commercial

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competition." Apex Hosiery Co. v. Leader, 310 U.S. 469, 495-96, 60 S.Ct. 982, 993-94, 84 L.Ed. 1311, 128 A.L.R. 1044 (1943). In this case, however, the IBEW signatory requirement is aimed directly at commercial competition, and seeks to exclude from even bidding on the Project those companies who choose, or whose employees choose, not to deal with the IBEW.

3. The City of Seward and the IBEW do not Enjoy Immunity Under the Parker v. Brown Doctrine

The Supreme Court has established non-statutory immunity from federal antitrust laws for certain activities undertaken or regulated by the states. Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943); Patrick v. Burget, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988). In Patrick, the Court reiterated the requirements for such immunity:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy." Second, the anti-competitive conduct "must be 'actively supervised' by the state itself. Only if an anti-competitive act of a private party meets both of these requirements, is it fairly attributable to the State.

486 U.S. at 99, 108 S.Ct. at 1663.

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"When the State itself has not directed or authorized an anti-competitive practice, the state's subdivisions in exercising their delegated power must obey the antitrust laws." Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 416, 98 S.Ct. 1123, 1138, 55 L.Ed.2d 364 (1978) (Opinion of Brennan, J.). "The requirement of clear articulation and affirmative expression is not satisfied when the State's position is one of mere neutrality respecting the municipal actions challenged as anti-competitive." Community Communications Co. v. City of Boulder, 455 U.S. 40, 55, 102 S.Ct. 835, 843, 70 L.Ed.2d 810 (1982).

Municipalities are fully subject to federal antitrust laws. "Municipalities, on the other hand, are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. [Citing Lafayette.] Rather, to obtain exemption [under Parker v. Brown], municipalities must demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.' Id." Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38-39, 105 S.Ct. 1713, 1716, 85 L.Ed.2d 25 (1985).

There is no suggestion that the State of Alaska has sanctioned, let alone mandated, a requirement that all bidders on

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the Project must have a collective bargaining agreement with the IBEW. Indeed, the City of Seward procurement code itself requires contracts to be let to the "lowest qualified responsive and responsible bidder." City of Seward Code § 6.10.230. Nothing in the code authorizes the City to impose a qualification wholly unrelated to job performance -- i.e., being signatory to a contract with a specific IBEW union -- on all prospective bidders.

Accordingly, no exemption from federal antitrust statutes exists. The IBEW signatory requirement violates those statutes and should be enjoined.

D. THE IBEW SIGNATORY REQUIREMENT VIOLATES PLAINTIFFS' EQUAL PROTECTION AND DUE PROCESS RIGHTS.

The Fourteenth Amendment to the United States Constitution provides as follows:

> No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendment is applicable to any entity

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acting under color of state law ("state action") and a civil action for deprivation of Fourteenth Amendment rights is available pursuant to 42 U.S.C. § 1983. See Section @, supra.

The Alaska Constitution, Art. I, Sec. 1 provides in part "that all persons are equal and entitled to equal rights, opportunities, and protection under the law..." Art. I, Sec. 7 provides in part: "No person shall be deprived of life, liberty, or property, without due process of law."

1. The IBEW Signatory Requirement Violates the Plaintiffs' Equal Protection Rights under the United States and Alaska Constitutions.

These constitutional provisions have uniformly been held as prohibiting state-sponsored discrimination against particular groups of persons (such as merit shop contractors) and as creating a cause of action to redress such discrimination. Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), reh. denied, 448 U.S. 917, 101 S.Ct. 39, 65 L.Ed.2d 1180 (1980) (guarantee of equal protection is a right to be free from invidious discrimination in statutory or other governmental classifications). See also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), where the Supreme Court affirmed a judgment striking down Richmond's minority business enterprise plan, as violative of the equal protection clause of the Fourteenth

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Amendment. The plan required non-minority contractors, who were awarded city construction contracts, to subcontract at least 30% of each contract to minority business enterprises.

Art. I, Sec. 1 of the Alaska Constitution is a prohibition against laws which, in their application, make unjust distinctions between persons. Leege v. Martin, 379 P.2d 447, 451 (Alaska 1963). The Alaska Constitution provides greater protection to individual rights than does the United States Constitution. State v. Enserch Alaska Const., Inc., 787 P.2d 624, 631 (Alaska 1989). The Alaska Supreme Court has outlined the analysis required under the Alaska equal protection clause as follows:

> [W]e first determine the importance of the individual interest impaired by the challenged enactment. We then examine the importance of the state interest underlying the enactment. Depending upon the importance of the individual interest, the equal protection clause requires that the state's interest fall somewhere on a continuum from mere legitimacy to a compelling interest. Finally, we examine the nexus between the state interest and the state's means of furthering that interest. Again

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depending upon the importance of the individual interest, the equal protection clause requires that the nexus fall somewhere on a continuum from substantial relationship to least restrictive means. The equal protection clause thus requires that all enactments be substantially related to a legitimate state interest. Some enactments are held to higher standards, and may even need to be the least restrictive means of achieving a compelling state interest.

787 P.2d at 631-32 (footnotes and citations omitted).

Both federal and Alaska courts have held that economic classifications may violate equal protection rights. For example, in Master Printers Ass'n v. Board of Trustees of Junior College, 356 F. Supp. 1355 (N.D. Ill. 1973), plaintiff, a trade association representing 400 non-union printing firms, brought an action to declare unconstitutional defendant's practice of soliciting bids for printing educational materials from only union firms. The district court noted "the long line of cases holding the precise conduct [i.e., union-only restriction] alleged here is unconstitutional and against public policy. 356 F.Supp. at 1357. The district court

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invoked Anthony P. Miller, Inc. v. Wilmington Housing Auth., 165 F.Supp. 275 (D. Del. 1958), in which another district court found "'by the clear weight of authority, a municipal corporation cannot discriminate in favor of organized labor ... .'" Master Printers, 356 F.Supp. at 1357, quoting Miller, 165 F.Supp. at 279 (citations omitted).

The district court in Master Printers denied defendant's motion to dismiss and in so doing offered a comment that could have been made with respect to the present controversy:

> We note here that the issue is not purely a labor one, i.e., whether a state or municipal corporation can support organized labor exclusively but rather the general question of whether as a matter of public policy the lowest bidder ought to be granted the contract in order to conserve public funds irrespective of the union or non-union implications or whether discrimination results from restriction to unions alone.

356 F.Supp. at 1357 (emphasis in original).

In a more recent case, Three Rivers Cablevision, Inc. v. City of Pittsburgh, 502 F.Supp. 1118 (W.D. Pa. 1980), plaintiff

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Three Rivers challenged the city's award of a cable television contract to one of several bidders on equal protection and due process grounds. The district court held that plaintiff's equal protection claim was clearly cognizable because plaintiff alleged that the ostensibly neutral state bidding statute was not applied with an even hand. 502 F.Supp. at 1033. In supporting this conclusion, the district court quoted Yick Wo v. Hopkins, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 1073, 30 L.Ed. 220 (1886), a seminal decision in equal protection jurisprudence:

> Though [a] law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

502 F.Supp. at 1133.

In State v. Enserch Alaska Construction, Inc., 787 P.2d 624 (Alaska 1989), the court held that a state law providing preference to residents of economically distressed zones for certain

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employment on public works projects was unconstitutional under the equal protection clause. In Gilman v. Martin, 662 P.2d 120 (Alaska 1983), the court held that a municipal ordinance granting preferences to municipal residents in the acquisition of municipal land under a land sale lottery violated the equal protection rights of non-residents.

The right to engage in economic endeavor is an important right for state equal protection purposes, which requires close scrutiny of laws impinging on that right. Enserch, 787 P.2d at 632-33. "Close scrutiny of enactments impairing the important right to engage in economic endeavor requires that the state's interest underlying the enactment be not only legitimate, but important, and that the nexus between the enactment and the important interest it serves be close." 787 P.2d at 633.

The laudatory goal of the City of Seward procurement code is to insure that the lowest qualified and responsible bidder obtains each contract to supply services or products to the City. City of Seward Code § 6.10.230. It seems more than a little far-fetched that the drafters of the Code envisioned the day when to be "qualified" a bidder had to have a collective bargaining agreement with a particular union. Rather, this is an irrational preference, mandated by City of Seward ordinances, which violates the equal

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protection rights of the plaintiffs. It is an artifice with "the underlying objective of assisting one class [IBEW contractors and IBEW members] over another [non-union contractors, non-union employees and contractors with non-IBEW unions]." 787 P.2d at 634.

There is no rational basis for the IBEW signatory requirement. There is no evidence, indeed, there has been no finding at all by the City Council, that IBEW-signatories are the only contractors who can complete this job. Even had there been any such evidence, the City cannot demonstrate that the IBEW signatory requirement was carefully tailored and narrowly drafted to solve any demonstrated problems. The requirement violates the plaintiffs' equal protection rights and should be enjoined.

2. The IBEW Signatory Requirement Violates the Plaintiffs' Due Process Rights under the United States and Alaska Constitutions.

The Fourteenth Amendment provides that in order to assert a claim for denial of due process, one must allege and prove that he was deprived unjustly of a protected liberty or property interest. As articulated in Board of Regents v. Roth, 408 U.S. 564, 572, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972), property interests do not emanate from the Constitution, but are established on rules or understandings based on federal or state laws, including statutes, which may create legitimate claims of entitlement to the benefits

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which they confer. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). A deprivation of such a protected property interest without due process is an actionable wrong.

A due process claim requires a two-step analysis. The plaintiff must prove: (1) that it had a definite liberty or property interest; and (2) that such interest was abridged, under color of state law, without appropriate process. Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

In Three Rivers, the plaintiff contended that the protected property interest denied by defendant was the right to have a cable television contract awarded in accordance with the requirements of a municipal ordinance governing the process. The process plaintiff claimed to be due was adherence to the city's own procurement requirements. In supporting plaintiff's contention that its constitutional right to due process was violated, the district court noted:

> That a true property interest existed in the award of the contract cannot, as defendants urge, be summarily rejected by noting that, unlike the usual due process case, plaintiffs are not being deprived of some benefit which

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> they presently enjoy, rather than one which they desire to acquire in the future. Both the Supreme Court and the Third Circuit have recognized that a due process interest in benefits sought to be obtained may arise out of the very provisions regulating their disbursement.

502 F.Supp. at 1129, citing Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), and Winsett v. McGinnes, 617 F.2d 996 (3rd Cir. 1980), cert. denied, 449 U.S. 1093 (1981). See also Metric Constructors, Inc. v. Gwinett County, 729 F.Supp. 101 (N.D. Ga. 1990) (recognizing property interest in disappointed bidder of public contract). Similarly, Alaska courts have recognized that disappointed bidders on public contracts may have a potential "property interest" which could support a due process claim. See Alyeska Ski Corporation v. Holdsworth, 426 P.2d 1006 (Alaska 1967).

In the present case, plaintiffs' interest in the award of the Project contract is sufficient to invoke due process. Plaintiffs are being denied a property interest in the award of project construction contracts to the "lowest qualified responsive and responsible bidder." City of Seward Code § 6.10.230. Skill,

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ability and integrity, rather than union affiliation, dictate a bidder's "responsibility."

Plaintiffs have been and are ready, willing, and able to bid on the Project, and are fully qualified to perform the contract. However, by incorporating the IBEW signatory requirement into the "qualifications" process, the City has precluded the plaintiffs from even bidding on the Project. In this manner, the City has denied plaintiffs the process to which they are due, and an injunction should issue.

E. THE IBEW SIGNATORY REQUIREMENT IS NOT AUTHORIZED BY THE CITY OF SEWARD CODE.

The City of Seward has provided for the procurement from third parties of goods and services required by the City. The procurement code is found in Title 6, "Purchasing, Contracts, and Professional Services." The purpose of Title 6 is set forth in § 6.01.010.[9] In general, the Code requires the use of competitive

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[9] City of Seward Code § 6.01.010 provides:

> 6.01.010 Purpose. The purpose of this title is to:
> A. maximize the purchasing value of public funds in the procurement of goods and services for the city;
> B. provide an efficient system for the purchase of goods and services without creating unreasonable administrative burdens and restrictions;
> C. provide flexibility in the methods of purchasing goods and services in order to meet the goals and objectives of the city as determined by the city council;
> D. provide for the fair and equitable treatment of all

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bidding to obtain goods and services valued in excess of $10,000. Code § 6.10.110.

The Code mandates the award of any contract to a "responsible bidder/proposer." Code § 6.10.135 allows a city manager to recommend to the city council rejection of a bid on the basis of select criteria.[10] None of these criteria include the absence of a collective bargaining agreement of any kind, let alone

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persons involved in the provision of goods and services to the city; and

E. prevent collusion and anti-competitive practices by the providers of goods and services.

[10] This section provides:

6.10.135 Award only to responsible bidder proposer. A contract awarded under this chapter shall be made only to a responsible bidder/proposer. The city manager may report to the city council and recommend rejection of a bid or a proposal on the basis of the following criteria:

1. the skill and experience demonstrated by the bidder/proposer in performing contracts of a similar nature;

2. the bidder's/proposer/s record for honesty and integrity;

3. the bidder's/proposer's capacity to perform in terms of facilities, personnel and financing;

4. the previous and existing compliance by the bidder/proposer with laws and ordinances relating to the contract;

5. the number and scope of conditions attached to the bid/proposal;

6. the bidder's/proposer's part performance under city contracts. If the bidder/proposer has failed in any material way to perform its obligations under any contract with the city, the bidder/proposer may be deemed a non-responsible bidder/proposer.

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an agreement with a particular union.

In addition, the Code specifically states that contracts "shall be let by the city council to the lowest qualified responsive and responsible bidder .... ." Code § 6.10.230.[11] Nothing in this section authorizes the City Council to set any qualifications for bidders other than those which relate to the ability of the bidder to fully perform the contract in a timely manner.

The imposition of the IBEW signatory requirement is therefore unauthorized by the Code, and in violation of it. The court should enjoin enforcement of the requirement.

CONCLUSION

The City of Seward requires the construction of a high voltage electrical transmission line to insure good quality and reliable service to its electric customers. The State of Alaska and the City have each appropriated public funds to permit the construction of this line. The public interest is clearly found in the expeditious and expert construction of this Project at the lowest cost consistent with the bid's specifications.

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[11] This section of the Code incorporates a local bidder preference most likely unconstitutional as violative of the equal protection provisions of the Alaska and United States Constitutions. See, e.g., State v. Enserch Constr., Inc., 787 P.2d 624 (Alaska 1989) (state law directing employment of local residents in economically depressed zones held unconstitutional).

DELANEY, WILES, HAYES, REITMAN & BRUBAKER, INC.
SUITE 400
607 WEST 3RD AVENUE
ANCHORAGE, ALASKA
(907) 279-3581

Unfortunately, the City and the IBEW, whether through coercion or cooperation, have elected to impose a requirement wholly unrelated to the goal: Any prospective bidder, whether ultimately successful or unsuccessful, must negotiate and contract with the IBEW in order to line up at the starting gate.

This requirement violates the NLRA, because it constitutes municipal government intervention in the labor market in an area which Congress has seen fit to leave to market forces. The requirement violates ERISA, because it impermissibly relates to employee benefit plans regulated by ERISA. The requirement violates equal protection and due process rights, because it unfairly, and without any factual basis, discriminates against merit shop companies. The requirement violates federal antitrust laws. The requirement is without authority in the City of Seward procurement code.

These constitutional provisions and laws seek to preserve this goal: That governments such as the City of Seward be prohibited from injecting themselves into commerce and labor matters preserved to the free market by Congress. The City has no legitimate interest in forbidding non-union contractors or contractors with agreements with non-IBEW unions from bidding on the Project, and the law rightly enjoins such a proscription.

DELANEY, WILES, HAYES, REITMAN & BRUBAKER, INC.
SUITE 400
1007 WEST 3rd AVENUE
ANCHORAGE, ALASKA
(907) 279-3581

DELIVER TO: LIOCDAR

ORIGINAL
SENT: 02/20/91 TIME: 15:44
FROM: LIOCMIL
SUBJECT: 91-02-090;PL;SB95;2/20
PRINT DATE: 02/20/91 TIME: 15:44

SUBJECT LINE TO READ: TC NO.; PL FS;SHORT SUBJECT;DATE

T/C NO: 91-02-090
DATE: 2/20
SPONSOR: S LABOR AND COMMERCE
SUBJECT: SB 95 UNFAIR LABOR
MODERATOR: JUDY
SITE: ANCHORAGE

PARTICIPANT LIST

TO TESTIFY

NAMES/REPRESENTING	ADDRESS	PHONE	BILL NO.
1. RICHARD CATTANACH			
2. JIM LANE/AGC			
3. STEPHEN WALSH/AGC			
4.			
5.			
6.			

TO OBSERVE

NAME/ REPRESENTING	ADDRESS	PHONE	BILL NO.
1.			
2.			
3.			
4.			
5.			

BACK UP NUMBER 561-1199
EMAIL ADDRESS LIOCMIL

UNABLE:
OBSERVED:
TOTAL:

START TIME: END TIME:

DELIVER TO: LTOCACB

ORIGINAL

SENT: 03/13/91 TIME: 16:15
FROM: LTOCFBX
SUBJECT: CS FOR SB 95
PRINT DATE: 03/13/91 TIME: 16:15

TO ADAM.
FROM FRAN/FBX:

COULD WE PLEASE HAVE A COPY OF THE CS FOR SB95 FAXED TO THE OFFICE FOR OUR PARTICIPANTS? FAX # 456-3346. THANKS

TINA IN KODIAK

DELIVER TO: LIOCACB

ORIGINAL
SENT: 03/13/91 TIME: 15:51
FROM: LIOCMIL
SUBJECT: 91-03-039;BL;SB 26,64,95;3-13
PRINT DATE: 03/13/91 TIME: 15:51

T/C NO 91-03-039
DATE: 03-13091
SPONSOR: S LABOR & COMMERCE
SUBJECT: SB 26,SB 64,SB 95
MODERATOR: JUDY

BRIDGE LIST

1. JNU
2. ANC
3. FBX
4. KOD
5. SOL
6.

I can explain the

time constraints

if you'd rather not call on him.

It'z do.
Ask him for phone #
we'll call in morning.

Bruce Gabriel SB 95

PH # 262 - 4700

SB
95
(File 2)

Municipality of Anchorage

P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
(907) 343-4433
TOM FINK,
MAYOR

OFFICE OF THE MUNICIPAL MANAGER

April 3, 1991

Senator Drue Pearce, Chair
Senate Labor and Commerce Committee
P.O. Box V
Juneau, Alaska 99811

Dear Senator Pearce:

Enclosed is a copy of the Municipality of Anchorage position on SB 95, Unfair labor practice exemptions.

Please distribute this letter to your committee members for today's hearing on the bill.

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

Sincerely,

Larry D. Crawford

Larry D. Crawford
Municipal Manager

Municipality of Anchorage

P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
(907) 343-4425

TOM FINK,
MAYOR

DEPARTMENT OF EMPLOYEE RELATIONS

April 3, 1991

To Whom It May Concern:

The Municipality of Anchorage is opposed to Senate Bill No. 95 that is "An Act relating to agreements between a labor organization and a public employer."

Reasons:

1. This Bill conflicts with the philosophy embodied in Article II, Section II of the Anchorage Home Rule Charter which guarantees "The right - whether as a contractor, as a taxpayer, or both - to competitive bidding for goods and services furnished to the Municipality, subject only to exceptions established by ordinance."

2. According to the Bill, employers and unions through their labor contract would be allowed to prohibit the employer from doing business with other employers on construction or maintenance contracts. This could result in the restraint of trade in that it would provide statutory authority for third party boycotts whereby an employer could be prohibited from doing business with a firm because it was not signatory to a labor agreement or because the employer was engaged in a work stoppage with a labor organization.

3. The Municipality does not believe that it should encourage the types of activities that the Bill would invite because they would be contrary to the best interests of the public.

In conclusion, the Bill appears to have serious flaws pertaining to the principles of free trade and the right to do business within the context of the competitive process.

Sincerely,

James R. Jose
Employee Relations Director

a:sb-95

MAY 6 1991

UNITED BROTHERHOOD OF

Carpenters and Joiners of America

LOCAL UNION [illegible] 1281

407 DEN[illegible]

PHONE 276-3533

ANCHORAGE, ALASKA 99501

Fax: 276-7962

May 2, 1991

Dear Senator,

As both Business Manager of Carpenters Local 1281 and President of the Western Alaska Building Trades, I wish to express support for SB-95.

These projects have been touted as "Union Bills". This is simply not the truth. They are, in fact, Alaska Hire bills. It is the only way to legally guarantee Alaska hire. It does not require that the State enter into such an agreement, it only gives them the option. Also, it does not preclude any contractor from bidding on a state project.

In times of declining oil revenue, the state should look at, and have the option of, saving money in any way it can.

Sincerely,

Phil Thingstad
Business Manager
Carpenters Local 1281

PT/sh

Alaska State Legislature

Senator Drue Pearce, Chair
Senator Virginia Collins, Vice Chair
Senator Dick Eliason
Senator Rick Halford
Senator Jay Kerttula

WHILE IN JUNEAU
P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-3844

3111 C STREET, SUITE 150
ANCHORAGE, ALASKA 99504
(907) 561-2018

SENATE LABOR AND COMMERCE
COMMITTEE

April 27, 1991

Robert G. Latto
7655 Jewel Lake Road
Anchorage, AK 99502

Dear Mr. Latto:

The Senate Labor & Commerce Committee, which I chair, held three hearings on Senate Bill 95, Project Labor Agreements, and passed the bill on to the next committee of referral, the Judiciary Committee.

We adopted several amendments. These included protecting maintenance labor agreements already in place, limiting PLA's to projects in excess $7,000,000 of local or state funds and providing for the sunset of the project labor agreement statute on January 1, 1995. I have enclosed a copy of the CS SB 95(L&C) for your review.

I encourage you to contact Senator Halford the chair of the Judiciary Committee with any other suggestions on this bill. Thank you for sharing your thoughts with me.

Sincerely,

Drue Pearce, Chair

Attachment

DP:rrm

APR 2 9 1991

April 24, 1991

Sen. Drue Pearce
District G
Anchorage, AK

Sen. Pearce,

I feel the need to write you a follow up letter on the support of HB 223, and SB 95.

Being a long time Alasken worker, and resident, these bills that enhance P.L.A. (Project Labor Agreements) are very important to me. they are a move in the right direction, to bring the work back to Alaska residents through local hire.

Please don't listen to the pressure, and big money of Associated General Contractors. A.G.C. has never supported local hire.

Arco has used P.L.A. before, and they have been beneficial to the company. Therefore I think the state can, and should enact the use of P.L.A.

Please support Sen. Rodey, and Rep. Ellis on those P.L.A. bills.

Thank you,

Robert G. Latto

Robert G. Latto
7655 Jewel Lake Rd.
Anchorage, AK 99502

APR 2 4 1991

Rod
Sent noted
w Sud.
see what
changes we
need.

April 22, 1991

Sen. Drue Pearce
Dist. G
Anchorage, AK

Sen. Pearce,

I would like your support on these bills for Alaska workers: SB-95 and HE-223.

I think it is time we Alaskans stood up for our rights to do the work that rightfully belongs to us.

I have lived, and worked in Alaska for 33 years. Lately I see more, and more of my work, and other Alaskans, being done by workers, and contractors from the lower 48.

I am an Ironworker, and have been un-employed for the past 6 mo. I understand the seasonal aspect of construction work, but when our jobs are taken by out side workers, it makes it increasingly hard to earn a living in Alaska.

The money these out-side workers earn in Alaska goes back to their home states with them. It is a big loss to Alaska.

I feel that these 2 bills, are a step in the right direction, in enhancing local hire of Alaskans, and Alaskan contractors.

I thank you for answering the response questions I filled out.

I hope you will support all Alaskans in your work in Juneau.

Thank You,

Robert G. Latto

Robert G. Latto
7655 Jewel Lake Rd.
Anchorage, AK 99502

P.S. I would like to add, that I am in total agreement with the above letter by my husband.

Sincerely,

Vernie1 Latto

April 22, 1991

No answer

Sen. Drue Pearce
District G
Anchorage, AK

Sen. Pearce,

I would like to voice my objections to House bills No.'s 268, 249, 170, & 175; which would liberalize the Alaskan Abortion Statutes.

1. I am against abortions for any reason.
2. I am against any funding whatsoever to support abortions.
3. I am against having any child doing anything so serious as abortion without parental concent.
4. No doctor should be forced to perform an abortion.
5. There always should be a waiting period in a decision as terrible an act as abortion.
6. Anything as serious as an abortion should definitely be done at a licensed, and regulated facility, and only by a licensed physician or surgeon.

If two people, adult or youth, know how to play around with sex, then they also need to take responsibility for their actions. The youth needs to be taught to care about others besides themselves.

We cannot go around demanding our rights over someone else's. We need to defend these babies. We cannot continue to ignore God's laws, and not expect to eventually to suffer the judgements of God. If you do not believe in God, consider these unborn children just because they are people who need defending.

Sincerely,

Verniel Latto

Verniel Latto
7655 Jewel Lake RD.
Anchorage, AK 99502

ASSOCIATED GENERAL CONTRACTORS of ALASKA

AGC of Alaska
Fascimile Transmission
AGC Fax No. 562-6118

To: Rod Mourant
Sen. Pearce's Office

Fax No: 463-5352

From: Jim Lone

Regarding: Seward Case

The decision by the judge was oral. A transcript is being typed at this time. Don't know when it will be completed.

Number of Pages (Not including this sheet) 0

ASSOCIATED GENERAL CONTRACTORS of ALASKA

[illegible] • ANCHORAGE, [illegible]
P.O. BOX [illegible] • ANCHORAGE, [illegible]
TELEPHONE [illegible] • FAX [illegible]

March 7, 1991

Senator Drue Pearce
Chairman, Senate Labor & Commerce Committee
P.O. Box V
Juneau, AK 99811

RE: Senate Bill 95

Dear Senator Pearce:

The Associated General Contractors of Alaska is seriously concerned about SB 95 which is currently under review by your committee. We believe that the bill is an attempt to sell union hire as the only acceptable local hire alternative. This bill not only raises serious legal questions, we believe that it will raise the cost of construction to the State while at the same time disenfranchising the many non-union Alaskan contractors and their employees.

We can understand the frustrations the unions have experienced in dealing with the non-Alaskan contractors and their non-resident employees, but we believe that their proposed solution will result in a great injustice to the non-union Alaskan contractors and their employees.

The AGC is sympathetic to the desire to utilize construction dollars to benefit Alaskan contractors and Alaskan residents. We believe that in the era of limited State capital budgets, the State needs to maximize the long-term benefits derived from the capital budget, and this can only be accomplished by a more efficient allocation of budget monies to capital projects. We believe that the desire for local hire and the efficient allocation of the capital budget can better be accomplished by the utilization of bonuses than through the implementation of a State-wide program of union hire.

To provide a better understanding of our opposition to SB 95, we have attached a copy of AGC's Position Paper for your review. Hopefully after a more thorough review of the ramifications of the

bill, your committee will oppose the bill and work with others to develop a local hire statute that will not only withstand the legal challenges that will surely follow but will treat both union and non-union employees fairly.

Sincerely,

ASSOCIATED GENERAL CONTRACTORS
OF ALASKA

Stephen L. Walsh
President