

ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

8177 HOUSE STATE AFFAIRS

4/22

SB 129 - CHIEF PROCUREMENT OFFICER AUTHORITY - COMMENTS AND SUGGESTIONS

1 Some procurement authority has also been delegated to agencies.

2
3 The diversity of organization and structure within the discretion
4 of the department(s) would not be permitted if AS 36.30.010(c) is
5 amended as proposed to prohibit delegation by the CPO of the CPO's
6 statutory duties.

7
8 Abuse of authority by ANY procurement officer, including the CPO,
9 should be handled by appropriate discipline and/or enforcement of
10 existing law.

11
12 **RECOMMENDATION: Regarding Sec. 2. (d)**

13
14 Suggest that Sec. 2. (d) should be deleted, and the language
15 suggested below be substituted in lieu thereof.

16
17 "(d) The chief procurement officer shall not be assigned additional
18 duties inconsistent with or outside the functions ascribed to the
19 position by this chapter."

20
21 **RATIONALE:**

22
23 This proposed amendment of AS 36.30.010 to add a new subsection (d)
24 as drafted will make it impossible for an incumbent CPO to apply
25 for and/or be hired for any other position with the State, creating
26 a chilling effect on any potential for career progression during
27 the term of appointment. The CPO should not be excluded from
28 consideration for other positions. If the intent is to be certain
29 that other duties are not added to detract from the full attention
30 required for performance of CPO functions, or limit the free
31 exercise of independent judgement, then that is what the amendment
32 should say. The language recommended above could accomplish the
33 latter.

34
35 **- Sec. 4.**

36
37 **AS PROPOSED:**

38
39 "AS 36.30.310 is amended to read:
40 Sec. 36.30.310. EMERGENCY PROCUREMENTS . . . A written
41 determination by the chief procurement officer of the basis for the
42 emergency and for the selection of the particular contractor shall
43 be included in the contract file . . ."

44
45 **RECOMMENDATION: Regarding Sec. 4**

46
47 Suggest the proposed amendment of AS 36.30.310 to require written
48 determination by the chief procurement officer for exercise of
49 emergency procurement authority be deleted in its entirety.

50

SB 129 - CHIEF PROCUREMENT OFFICER AUTHORITY - COMMENTS AND SUGGESTIONS

1 RATIONALE:

2
3 Delay occasioned by referral to the CPO for approval will make it
4 impossible for procurement officers to respond appropriately in
5 emergency situations. Timely response to procurement requirements
6 in an emergency is essential in order to mitigate damage and/or
7 loss. When urgency of circumstances demands it, procurement must
8 be accomplished without delay. If routine procedure requires
9 waiting for approval by the CPO before procurement action can be
10 taken to satisfy emergency needs, then it cannot meet expected and
11 appropriate immediate response criteria. The procurement officer
12 with requisite authority who is nearest to the need is the one who
13 has the most knowledge of the urgency, and who is in the best
14 position to exercise independent judgement required to make the
15 written determination regarding a prospective emergency
16 procurement. Restriction for only the CPO to make written
17 determinations for emergency procurement will cripple the State's
18 ability to provide adequate procurement support in response to
19 emergency situations.

20
21 Abuse of authority by ANY procurement officer, including the CPO,
22 should be handled by appropriate discipline and/or enforcement of
23 existing law.

24
25 - Sec. 5.

26
27 AS PROPOSED:

28
29 "AS 36.30 is amended by adding a new section to read:

30 Sec. 36.30.315. DETERMINATIONS BY CHIEF PROCUREMENT OFFICER;
31 CRIMINAL PENALTY. (a) In a determination made by the chief
32 procurement officer under AS 36.30.300 - 36.30.310, the chief
33 procurement officer shall independently examine the material facts
34 of the contract and independently determine whether the contract is
35 eligible for the procurement procedure selected for the contract.

36 (b) If the chief procurement officer knowingly makes a
37 false statement in a determination made by the chief procurement
38 officer under AS 36.30.300 - 36.30.310, the chief procurement
39 officer is guilty of a class A misdemeanor."

40
41 RECOMMENDATION: Regarding Sec. 5. (a)

42
43 Suggest paragraph (a) the proposed addition of new section, (AS
44 36.30.315) be deleted, and language suggested below be substituted
45 in lieu thereof. Also, this amendment should be at AS 36.30.935
46 instead of at AS 36.30.315.

47
48 "Sec. 36.30.935. PROHIBITION AGAINST SUBSTITUTION OF JUDGEMENT IN
49 PROCUREMENT MATTERS. Procurement decisions which form the basis of
50 procurement actions taken within statutory or delegated procurement

SB 129 - CHIEF PROCUREMENT OFFICER AUTHORITY - COMMENTS AND SUGGESTIONS

1 authority are not voidable after the fact, except for reason of
2 illegality. Decisions taken pursuant to law and regulation by a
3 procurement officer are of necessity the product of the independent
4 judgement of such officials. Exertion of undue influence to change
5 decisions or to adversely affect the competitive and statutory
6 process of public procurement is a violation of this chapter."
7

8 RATIONALE:
9

10 If the intent is to require the independent judgement of the CPO in
11 making determinations under AS 36.30, the concept should be
12 applicable to ALL determinations required by and transactions
13 executed by ANY procurement officer under the authority of AS
14 36.30. The ABA Model from which the statute was spawned carried
15 the intent for exercise of independent judgement by the responsible
16 procurement officer, i.e., the final word and responsibility for a
17 procurement transaction is vested in the procurement officer who
18 executes a procurement document within the limits of his/her
19 delegated authority.
20

21 There is another side to this concept which should also be
22 considered. Of course, if the law states that the independent
23 judgement of the CPO is to be exercised, that precludes anyone's
24 substituting their judgement for that of the CPO either before or
25 after the fact. In effect this will strengthen the authority of
26 the CPO and is a good idea. However, it should be noted that if
27 the intent is to make the CPO more responsible for the decisions
28 and approvals rendered in procurement matters, then ENFORCEMENT of
29 the present law is what is needed, i.e., if ANY procurement
30 officer, including the CPO knowingly violates AS 36.30, action
31 should be taken to prosecute pursuant to the law. The present law
32 adequately covers this, but the proposed amendment actually reduces
33 the penalty instead of imposing a heavier charge for knowing
34 violation of AS 36.30 in a procurement matter. If intent is to
35 lighten the stigma of the potential penalty in hopes that
36 enforcement is more likely to occur, then perhaps it should be
37 amended accordingly at AS 36.30.930.
38

39 If the intent is to be sure that the CPO is not merely rubber-
40 stamping someone else's product, then language similar to that
41 recommended above (added at AS 36.30.935) should be used.
42

43 Abuse of authority by ANY procurement officer, including the CPO,
44 should be handled by appropriate discipline and/or enforcement of
45 existing law.
46

47 The language suggested above will protect procurement officers from
48 undue pressures and insulate against political influence thereby
49 reducing potential for circumvention of the Code.
50

1 RECOMMENDATION: Regarding Sec. 5. (b)

2
3 Suggest that paragraph (b) of the proposed amendment (which
4 classifies as a class A misdemeanor, a false statement knowingly
5 made in a determination by the CPO) be added at AS 36.30.930 of the
6 statute, instead of at 36.30.315, if it is to be added at all.
7 Recommend it should not be added.

8
9 RATIONALE:

10
11 The State Procurement Code at AS 36.30.930 already says that
12 knowing violation of the statute is a class C felony. In addition,
13 AS 36.30.687(d) states that misrepresentation in connection with a
14 State procurement is a class C felony. The addition of a section
15 making such violations of this nature when committed by the CPO a
16 Class A misdemeanor appears to conflict with sections 687 and 930
17 and lighten the stigma of the charge when the CPO is the offender.
18 The opposite should be true. If the CPO violates the statute,
19 perhaps a more severe penalty should be assessed. At least, if the
20 emphasis is needed or intended, the class of crime should be
21 consistent with present law, or the classes stated in the existing
22 AS 36.30 should also be changed.

23
24 Abuse of authority by ANY procurement officer, including the CPO,
25 should be handled by appropriate discipline and/or enforcement of
26 existing law.

27
28 - Sec. 6.

29
30 The effective dates in this section should be reconciled with any
31 changes which occur as a result of the foregoing comments and
32 recommendations.

33
34 THE CHANGES SUGGESTED ABOVE ARE MOSTLY TECHNICAL, BUT SHOULD BE
35 MADE IN ORDER TO CLEAR UP POSSIBLE MISUNDERSTANDINGS, AND TO
36 MAINTAIN CONSISTENCY WITH OTHER (UNCHANGED) PROVISIONS OF AS 36.30.

37
38
39 - ADDITIONAL COMMENTS ON SECTIONS SUPPORTED WITHOUT CHANGE

40
41 - Sec. 1.

42
43 The concept of a six-year appointment for the CPO is a good one,
44 provided that the person is not restrained from accepting other
45 positions with the state, i.e., is free to apply for other
46 positions and vacate incumbency as CPO. It is appropriate that the
47 CPO not serve in any dual or conflicting role IN ADDITION TO
48 incumbency as CPO, and that the appointing authority be limited as
49 to assignment of extra duties to the CPO.
50

SB 129 - CHIEF PROCUREMENT OFFICER AUTHORITY - COMMENTS AND SUGGESTIONS

1 - Sec. 2. (e)

2
3 It is consistent with good management and competent salary surveys
4 that the compensation of the CPO be set at the proposed range 26,
5 step C, of the salary schedule established in AS 39.27.011.
6 Putting the CPO salary range into law emphasizes the importance of
7 the role of the CPO. This should make it patently obvious that
8 State procurement is not merely a clerical function.
9

10 - Sec. 3.

11
12 It is consistent with other approval requirements in AS 36.30 to
13 vest authority in the CPO for limited competition procurement.
14

15 Explanation of the underlying philosophy for the concept of limited
16 competition may be helpful in considering how this section of the
17 Code was originally derived. Limited competition in the context of
18 the ABA Model Procurement Code as originally conceived is a
19 function of specification, i.e., whether a purchase description
20 (specification) allows full and open competition or whether it is
21 restrictive. The concept of competition goes all the way back to
22 the basic source of the item, the manufacturer who is the top tier
23 of the distribution system. Full and open competition does not
24 restrict competition at any level. A procurement which by its
25 terms or specification eliminates competition at any tier is
26 restrictive, i.e. limited competition.
27

28 - FULL AND OPEN COMPETITION - GENERIC SPECIFICATION

29
30 Purchase descriptions which are written as a technical
31 specification setting forth all dimensional, material, structural,
32 operational, and other characteristics of an item allow for full
33 and open competition, i.e., any producer who is willing can make
34 it, and any willing source can bid on it. The technical
35 specification in this context is written without calling out a
36 "particular brand name only" or "brand name or equal," and any
37 product which meets the parameters of the technical data will be
38 acceptable.
39

40 - FULL AND OPEN COMPETITION - BRAND NAME OR EQUAL SPECIFICATION

41
42 Purchase descriptions which specify a brand name or several brand
43 names, "or equal" permit the offering of items which are equivalent
44 to the brand name or names specified. This type of specification
45 permits full and open competition because any product which meets
46 the parameters, i.e., is one of the brand name(s) specified, or the
47 equivalent thereof will be acceptable.
48

SB 129 - CHIEF PROCUREMENT OFFICER AUTHORITY - COMMENTS AND SUGGESTIONS

1 * The ABA Model Procurement Code R4-202.02.2 (b)(v) is cited as
2 follows:
3 "Nonrestrictive Use of Brand Name or Equal Specifications. Where a
4 brand name or equal specification is used . . . the use . . . is
5 not intended to limit or restrict competition."
6 [Emphasis supplied.]
7

8 - LIMITED COMPETITION - BRAND NAME ONLY - NO SUBSTITUTE
9

10 A purchase description which requires a particular brand name and
11 no substitute restricts competition and is not a full and open
12 competition procurement. "Limited competition" is derived from
13 this concept. Several lower tier vendors may be able to supply
14 such an item, but only one manufacturer's product will be
15 considered. A procurement for "brand name only - no substitute",
16 thus limits competition in that it restricts all but a single
17 producer from the distribution pattern, even though it is
18 competitive in the lower tiers. Therefore, such a procurement is
19 restrictive of competition. The competition "tree" does not spring
20 from several production sources and is thus "limited".
21

22 * The ABA Model Procurement Code R4-202.02.2 (c)(i) and (ii) are
23 cited as follows: "Brand Name Specification . . . use . . . is
24 restrictive . . . The Procurement Officer shall seek to identify
25 sources from which . . . the designated brand name . . . can be
26 obtained and shall solicit . . . whatever degree of competition is
27 practicable. If only one source can supply the requirement, the
28 procurement shall be made under . . . Sole Source . . ."
29 [Emphasis supplied.]
30

31 * The ABA Model Procurement Code citations at the asterisks above
32 demonstrate how competitive aspects of procurement are determined
33 by the degree of competition permitted or dictated by the
34 specification.
35

36 NOTE: Based on knowledge and belief the view advanced above in
37 defining the concept of "limited competition" is not incorporated
38 in any existing procurement regulations implementing the State
39 Procurement Code. This is probably due to semantics of discussions
40 prior to adoption of the Code, i.e., some of the meaning was lost
41 through well-meaning substitution of terms. Consequently, this
42 revelation of the underlying philosophy for limited competition may
43 come as a shock even to some procurement professionals.
44
45

PEGGY R. THOMAS

9701 Brien

Anchorage, AK 99516

(907) 786-1650 (Office) 346-3416 (Home)

OBJECTIVE: Qualification information herein is provided as background to an expert opinion rendered on the strength of over 35 years professional procurement and contracting experience gained through continued service and provision of sound procurement leadership in government organizations.

EMPLOYMENT HISTORY:

Sep 1988 to Present **Deputy Chief Procurement Officer**
University of Alaska, Anchorage, AK

Jan 1982 to Present **Owner (Consultant: Contracts and Procurement)**
Xprt Consultants, 9701 Brien, Anchorage, AK

Jan 1982 - Apr 1987 **Manager, Supply Division**
Nov 1979 - Jan 1982 **Manager, Supply & Procurement Division**
The Alaska Railroad, Anchorage, AK

Aug 1979 - Nov 1979 **Municipal Purchasing Officer**
Municipality Of Anchorage, Anchorage, AK

Feb 1978 - Aug 1979 **Chief, Contracting & General Services Branch**
U. S. Fish & Wildlife Service, Alaska Region,
Anchorage, AK

Dec 1976 - Feb 1978 **Chief, Services & Construction Contracts Branch**
Alaskan Air Command (AAC), Base Procurement,
Elmendorf AFB, AK

Sep 1973 - Dec 1976 **Deputy Chief, Procurement & Contracting**
Feb 1972 - Sep 1973 **Chief, Contract Administration Branch**
Sep 1971 - Feb 1972 **Chief, Supplies Procurement Branch**
Base Procurement Division, Mountain Home AFB, ID

Jun 1966 - Sep 1971 **Chief, Supplies Procurement Branch**
Jan 1962 - Jun 1966 **Contract Specialist (Construction)**
Dec 1960 - Jan 1962 **Purchasing Agent (Supplies/Services)**
Apr 1958 - Dec 1960 **Housewife, New Mother, Widowed in 1959**
Nov 1955 - Apr 1958 **Supervisory Purchasing Agent**
Dec 1953 - Nov 1955 **Procurement Administration Clerk**
Procurement Offices, Altus AFB, OK & Dyess AFB, TX

PROFESSIONAL CERTIFICATION: **Certified Purchasing Manager (C.P.M.)**
conferred by National Association of
Purchasing Management

AFFILIATIONS: 1983 - Present **Member of MENSA (American Mensa Ltd)**

Current **Purchasing Management Assoc. of AK**

HONORS AND AWARDS

Oct 1965 Outstanding Performance Rating & Quality Salary Increase
Sustained Superior Performance Award

Nov 1967 Dept. of Air Force Suggestion Program Award

May 1968 USAF Certificate of Achievement - Resources Conservation

Feb 1971 Military Airlift Command Personal Achievement Award

Dec 1972 Dept. of Air Force Suggestion Program Award

Dec 1973 Distinguished Public Service Award, Nationwide Program to
Keep America Beautiful

Jul 1974 Distinguished Public Service Commendation by Cecil D. Andrus
Governor, State of Idaho

Jul 1975 Tactical Air Command Certificate of Achievement

May 1976 Outstanding Performance Rating & Quality Salary Increase
Sustained Superior Performance Award

Jul 1976 Command Achievement Award for Resources Conservation FY 76

Nov 1976 Outstanding Procurement Office Award, Tactical Air Command

1983 Who's Who In America

1981-1983 Who's Who of American Women

1981-1983 World Who's Who of Women

1981-1983 Directory of Distinguished Americans

1982-1983 Personalities of America

1982-1983 Personalities of the West and Midwest

1982-1983 Who's Who in the West

1982-1983 International Who's Who of Intellectuals

1982-1983 Community Leaders of America

1982-1983 Two Thousand Notable Americans

1984-1985 Who's Who of Finance and Industry

1984 International Book of Honor

1984 Dictionary of International Biography

XPRT CONSULTANTS

9701 Brien Street
Anchorage, Alaska 99516
(907) 346-3416

6 April 1993

Chairs Frank and Pearce, and Members of the Committee

Senate Finance Committee

Alaska State Senate

SUBJECT: CSSB 129 (STA) - State Procurement - Recommendations and Comments

The attached in-depth review, provides comments and recommendations regarding version SB0129b, CSSB 129(STA).


All in all, the State Procurement Code is good law, is effective when understood and properly applied, and is consistent with principles recommended by the American Bar Association (ABA) in its Model Procurement Code for state governments.

Legislative intent for most apparent purposes of CSSB 129 can be easily accomplished by administrative means, and therefore should not become law as proposed. Amendment of AS 36.30 should be postponed until more in-depth discussion is possible. My services as an expert in the field of public procurement will be donated free of charge for a conference regarding CSSB 129, if you wish, at a time to be arranged to suit our mutual convenience, except I am unavailable during the period 12-18 April 1993.

Better statutory compliance probably won't result from placing more limitations on the Chief Procurement Officer (CPO), but certain aspects of CSSB 129 will enhance the role and position of the CPO and benefit the overall procurement function. However, the bill needs more work before passage to preclude potential inconsistency and misperception.

A brief resume of the undersigned consultant is attached to attest expert qualifications in the field of public procurement. XPRT Consultants is an independent non-partisan firm established in 1982 for consultation, expert services, and representation in procurement and contracting matters. Please give weight to these suggestions regarding CSSB 129. If I can be of any further assistance, please call (907) 346-3416.

Sincerely,


PEGGY R. THOMAS, C.P.M.

Chief Executive Officer

Attachment

CSSB 129 (STA) - STATE PROCUREMENT - SUGGESTIONS AND COMMENTS

1 This updates earlier review of SB 129a, to provide comments and
2 recommendations regarding current version SB0129b, CSSB 129(STA).
3

4 All in all, the State Procurement Code is good law, and effective
5 when understood and applied by procurement professionals. AS 36.30
6 adopted principles recommended by the American Bar Association
7 (ABA) in its Model Procurement Code for state and local government.
8

9 ABA established a "model" instead of a "uniform" code because of
10 the diverse organizational structures used by the various states,
11 and the differences in their procurement needs which require
12 adaptation of any proposed code to local situations. In
13 substantive matters, however, the ABA Model reflects certain basic
14 policies equally applicable to all public procurement.
15

16 In its Introduction to the model code, in pertinent part, the ABA
17 gave the following justification for simplicity in the code:
18

19 ". . . the Code . . . should be a short statute providing the
20 fundamentals of sound procurement which should be implemented by
21 regulations consistent with the statutory framework . . . Moreover,
22 experience has shown that incorporating a large number of details
23 in a statute tends to establish an overly rigid structure which
24 constricts good procurement practices, hinders improvement and
25 reform , and may lead to strained judicial interpretations. The
26 use of regulations to implement statutory policies . . . public
27 participation . . . and appropriate legislative oversight . . .
28 will provide a flexible system capable of promoting efficiency in
29 procurement and conserving the taxpayers' money."
30

31 EXCEPT FOR A FEW MINOR ADMINISTRATIVE OR EDITORIAL AREAS, AS 36.30
32 IS VERY GOOD AS IT IS. LEGISLATIVE INTENT FOR MOST APPARENT
33 PURPOSES OF SB 129 CAN MORE EASILY BE SERVED THROUGH REGULATIONS,
34 AND THEREFORE SHOULD NOT BECOME STATUTORY DETAIL BY AMENDMENT. IT
35 IS STRONGLY RECOMMENDED THAT AMENDMENT OF AS 36.30 SHOULD BE
36 POSTPONED UNTIL MORE IN-DEPTH DISCUSSION IS POSSIBLE. I WILL
37 DONATE MY SERVICES AS AN EXPERT IN THE FIELD OF PUBLIC PROCUREMENT
38 FREE OF CHARGE FOR CONFERENCE REGARDING SB129 TO BE ARRANGED FOR
39 OUR MUTUAL CONVENIENCE, EXCEPT DURING THE PERIOD 12-18 APRIL 1993.
40

41 Past procurement transactions which may have demonstrated problems
42 regarding statutory approval, will probably not be resolved by
43 placing new restrictions on the Chief Procurement Officer (CPO).
44

45 Amendment of the State Procurement Code cannot accomplish what is
46 needed, if willful violation of requirements is the source of a
47 problem. AS 36.30 already provides for criminal prosecution, if
48 such (willful) violations occur, and that such willful violation is
49 a criminal offense whether the offender is the chief procurement
50 officer or any other person.

CSSB 129 (STA) - STATE PROCUREMENT - SUGGESTIONS AND COMMENTS

1 Abuse of authority by ANY procurement officer, including the CPO,
2 should be handled through disciplinary action and/or other
3 enforcement according to existing law.
4

5 The essence of emergency procurement requires immediate response by
6 a procurement officer to needs of a using agency. A requirement
7 for additional referral (to the CPO) in an emergency can seriously
8 jeopardize procurement ability to react in time to satisfy urgent
9 needs, and will further compound the consequences of the situation.
10

11 Federal principles applicable to state procurement require a
12 specific determination for use of a cost type contract, so deletion
13 from AS 36.30 will not eliminate the requirement.
14

15 Therefore, it is suggested that more work is needed on the bill to
16 address particular matters discussed in detail below.
17

18 Based on in-depth review, and for consistency with existing law,
19 the following changes should be incorporated in the proposed
20 SB0129b, CSSB 129(STA) if it is enacted.
21

22 - Sec. 1.
23

24 No recommended changes. If enacted should be as proposed.
25

26 As proposed by amendment of AS 36.30.010(a), the concept of a six-
27 year appointment for the CPO is a good one, provided that the
28 person is not restrained from accepting other positions with the
29 state, i.e., is free to apply for other positions and vacate
30 incumbency as CPO. It is appropriate that the CPO not serve in any
31 dual or conflicting role IN ADDITION TO incumbency as CPO, and that
32 the appointing authority be limited as to assignment of extra
33 duties to the CPO.
34

35 - Sec. 2.
36

37 AS PROPOSED:
38

39 "AS 36.30.010 is amended by adding new subsections to read:

40 (c) While a person performs the duties of the chief
41 procurement officer under this chapter, the person may not be
42 employed in or appointed to another position with the state.

43 (e) The annual salary of the chief procurement officer is
44 range 26, of the salary schedule established in AS 39.27.011."
45

46 RECOMMENDATION: Regarding Sec. 2. (c)
47

48 Suggest that Sec. 2. (c) should be deleted, and the language
49 suggested below be substituted in lieu thereof.
50

CSSB 129 (STA) - STATE PROCUREMENT - SUGGESTIONS AND COMMENTS

1 "(c) The chief procurement officer shall not be assigned additional
2 duties inconsistent with or outside the functions ascribed to the
3 position by this chapter."
4

5 RATIONALE:
6

7 The proposed amendment of AS 36.30.010 to add a new subsection (c)
8 as drafted will make it impossible for an incumbent CPO to apply
9 for and/or be hired for any other position with the State, creating
10 a chilling effect on any potential for career progression during
11 the term of appointment. The CPO should not be excluded from
12 consideration for other positions. If the intent is to be certain
13 that other duties are not added to detract from the full attention
14 required for performance of CPO functions, or limit the free
15 exercise of independent judgement, then that is what the amendment
16 should say. The language recommended above could accomplish the
17 latter.
18

19 - Sec. 2. (d)
20

21 No recommended changes. If enacted should be as proposed.
22

23 Adding to AS 36.30.010, section (d) as proposed is consistent with
24 good management and competent salary surveys, i.e., that the CPO's
25 compensation will be set at range 26, of the salary schedule
26 established in AS 39.27.011. Putting the CPO salary range into law
27 emphasizes the importance of the role of the CPO. This should make
28 it patently obvious that State procurement is not merely a clerical
29 function.
30

31 - Sec. 3.
32

33 No recommended changes. If enacted should be as proposed.
34

35 As proposed, amendment of AS 36.30.300(a), regarding delegation by
36 the CPO for approval of small purchases of sole source professional
37 services will be more consistent with small procurement definitions
38 in AS 36.30.320.
39

40 Proposed addition of "AS 36.30.320(a) or (b), as applicable" in
41 this section makes clear that CPO delegation as permitted for small
42 procurements to \$25,000 also includes professional services.
43

44 - Sec. 4.
45

46 No recommended changes. If enacted should be as proposed.
47

48 As proposed, amendment of AS 36.30.305(a), will vest in the CPO
49 (vice the commissioner) approval of limited competition and will be
50 more consistent with other approval requirements in AS 36.30.

1 Also, amendment of AS 36.30.305(a), as proposed, to authorize CPO
2 delegation of approval for limited competition small purchases of
3 professional services will be more consistent with small purchase
4 definitions in AS 36.30.320.

5
6 Proposed addition of "AS 36.30.320(a) or (b), as applicable" in
7 this section makes clear that CPO delegation as permitted for small
8 purchases to \$25,000 also includes professional services.

9
10 **- Sec. 5.**

11
12 **AS PROPOSED:**

13
14 "AS 36.30.310 is amended to read:

15 Sec. 36.30.310. EMERGENCY PROCUREMENTS . . . A written
16 determination by the chief procurement officer of the basis for the
17 emergency and for the selection of the particular contractor shall
18 be included in the contract file . . . Except when there is
19 insufficient time for the chief procurement officer to make the
20 written determination . . . the chief procurement officer may not
21 delegate the authority to make the determination."

22
23 **RECOMMENDATION: Regarding Sec. 5**

24
25 Suggest the proposed amendment of AS 36.30.310 to require written
26 determination by the chief procurement officer and the restriction
27 on delegation for emergency procurement authority be deleted in its
28 entirety.

29
30 **RATIONALE:**

31
32 Delay occasioned by referral to the CPO for either approval or
33 delegation will make it impossible for procurement officers to
34 respond appropriately in emergency situations. Timely response to
35 procurement requirements in an emergency is essential in order to
36 mitigate damage and/or loss. When urgency of circumstances demands
37 it, procurement must be accomplished without delay. If routine
38 procedure requires waiting for approval by or special delegation
39 from the CPO before procurement action can be undertaken to satisfy
40 emergency needs, then expected and appropriate immediate response
41 criteria cannot be met. The procurement officer with requisite
42 authority who is nearest to the need is the one who has the most
43 knowledge of the urgency, and who is in the best position to
44 exercise independent judgement required to make the written
45 determination regarding a prospective emergency procurement.
46 Restriction for only the CPO to make either written determination
47 or special delegation for emergency procurement will cripple the
48 State's ability to provide timely procurement support for adequate
49 response to emergency situations.

CSSB 129 (STA) - STATE PROCUREMENT - SUGGESTIONS AND COMMENTS

1 It is not unusual for an emergency situation to place demands on
2 procurement which require coordinated effort for several purchases
3 or contract transactions in order to meet the needs and urgency of
4 the circumstances. If each transaction must be specially referred
5 to the CPO, or even if SOME must be referred, before procurement
6 can be initiated, discord and confusion may result in improper or
7 inadequate response to the emergency.

8
9 Abuse of authority by ANY procurement officer, including the CPO,
10 should be handled by appropriate discipline and/or enforcement of
11 existing law.

12
13 - Sec. 6.

14
15 AS PROPOSED:

16
17 "AS 36.30 is amended by adding a new section to read:
18 Sec. 36.30.315. DETERMINATIONS BY CHIEF PROCUREMENT OFFICER;
19 CRIMINAL PENALTY. (a) In a determination made by the chief
20 procurement officer under AS 36.30.300 - 36.30.310, the chief
21 procurement officer shall independently examine the material facts
22 of the contract and independently determine whether the procurement
23 is eligible for the procurement method requested.

24 (b) If the chief procurement officer knowingly makes a
25 false statement in a determination made by the chief procurement
26 officer under AS 36.30.300 - 36.30.310, the chief procurement
27 officer is guilty of a class A misdemeanor."
28

29 RECOMMENDATION: Regarding Sec. 6. (a)

30
31 Suggest paragraph (a) of proposed new section, (AS 36.30.315) be
32 deleted, and language suggested below be substituted in lieu
33 thereof. If adopted at all, for relational reasons, this should be
34 added at AS 36.30.935 instead of at AS 36.30.315.

35
36 "Sec. 36.30.935. PROHIBITION AGAINST SUBSTITUTION OF JUDGEMENT IN
37 PROCUREMENT MATTERS. Procurement decisions which form the basis of
38 procurement actions taken within statutory or delegated procurement
39 authority are not voidable after the fact, except for reason of
40 illegality. Decisions taken pursuant to law and regulation by a
41 procurement officer are of necessity the product of the independent
42 judgement of such officials. Exertion of undue influence to change
43 decisions or to adversely affect the competitive and statutory
44 process of public procurement is a violation of this chapter."
45

46 RATIONALE:

47
48 If intent is to require the independent judgement of the CPO in
49 making determinations under AS 36.30, the concept should be
50 applicable * ALL determinations required by and transactions

1 executed by ANY procurement officer under the authority of AS
2 36.30. The ABA Model from which the statute was spawned carried
3 the intent for exercise of independent judgement by the responsible
4 procurement officer, i.e., the final word and responsibility for a
5 procurement transaction is vested in the procurement officer who
6 executes a procurement document within the limits of his/her
7 delegated authority.

8
9 There is another side to this concept which should also be
10 considered. Of course, if the law states that the independent
11 judgement of the CPO is to be exercised, that precludes anyone's
12 substituting their judgement for that of the CPO either before or
13 after the fact. In effect this will strengthen the authority of
14 the CPO and is a good idea. However, it should be noted that if
15 the intent is to make the CPO more responsible for the decisions
16 and approvals rendered in procurement matters, then ENFORCEMENT of
17 the present law is what is needed, i.e., if ANY procurement
18 officer, INCLUDING the CPO knowingly violates AS 36.30, action
19 should be taken to discipline the individual and, as appropriate,
20 prosecute pursuant to the law.

21
22 **RECOMMENDATION: Regarding Sec. 6. (b)**

23
24 Suggest that paragraph (b) of the proposed amendment (which
25 classifies as a class A misdemeanor, a false statement knowingly
26 made in a determination by the CPO) be added at AS 36.30.930 of the
27 statute, instead of at 36.30.315, if it is to be added at all.
28 Recommend it should not be added.

29
30 **RATIONALE:**

31
32 The State Procurement Code at AS 36.30.930 already says that
33 knowing violation of the statute is a class C felony. In addition,
34 AS 36.30.687(d) states that misrepresentation (by anyone) in
35 connection with a State procurement is a class C felony. The
36 addition of a section making such violations of this nature only
37 when committed by the CPO a Class A misdemeanor appears to conflict
38 with sections 687 and 930 and lighten the stigma of the charge when
39 the CPO is the offender. The opposite should be true. If the CPO
40 violates the statute, perhaps an even more severe penalty should be
41 assessed. At least, if the emphasis is needed or intended, the
42 class of crime should be consistent with present law, or the
43 classes stated in the existing AS 36.30 should also be changed.

44
45 Although the present law adequately covers this, the proposed
46 amendment actually reduces the crime instead of imposing a heavier
47 charge for knowing violation of AS 36.30 in a procurement matter.
48 If intent is to lighten the stigma of the penalty in hopes that
49 enforcement is more likely to occur, then perhaps it should be
50 amended as proposed, but, at AS 36.30.930 or by adding 935.

CSSB 129 (STA) - STATE PROCUREMENT - SUGGESTIONS AND COMMENTS

1 If the intent is to be sure that the CPO is not merely rubber-
2 stamping someone else's notion, then language similar to that
3 recommended above under (a) of this section (added at AS 36.30.935)
4 should be used.

5
6 Abuse of authority by ANY procurement officer, including the CPO,
7 should be handled by appropriate discipline and/or enforcement of
8 existing law.

9
10 The language suggested for addition at 935 under (a) of this
11 section will protect procurement officers from undue influence and
12 insulate against political pressure thereby reducing potential for
13 knowing (although coerced) circumvention of the Code.

14
15 The language under Sec. 6 (b) of the bill re: "knowingly" violating
16 the code will not protect a procurement officer who is unduly
17 influenced to follow the judgement of others, perhaps his/her
18 superiors, in a procurement matter.

19
20 Where the proposed language of the bill in Sec. 6(b) says
21 "determine whether the procurement is eligible for the procurement
22 method requested," it seems to support the argument advanced above
23 that the real problem may be one where procurement officers are
24 bowing to the judgement of others in making their procurement
25 decisions. This should not be. The "method" should not be
26 "requested" by others.

27
28 The requester should describe the need, i.e., what is required by
29 the requesting department in terms of a proposed procurement, with
30 enough information to describe what is needed, when, and where.
31 The requester should include in a request whether or not any
32 substitutions are acceptable, and if not, provide justification to
33 the procurement officer to support the restrictive specification.

34
35 It is up to the procurement officer to DETERMINE whether or not a
36 sole source, limited competition, or emergency situation exists,
37 and conduct the procurement process accordingly. IT IS NOT UP TO
38 THE REQUESTER TO ASK OR REQUEST A PARTICULAR METHOD. This is
39 clearly compatible with the definition of "procurement" and
40 "procurement officer" contained in AS 36.30.990 (12) and (13),
41 i.e., the term "procurement" includes "functions that pertain to
42 the obtaining of a supply . . . service . . . including . . .
43 selection and solicitation of sources;" and "procurement officer"
44 means "person authorized to . . . make written determinations . . .
45 within the limits of authority."

46
47 NOWHERE IN AS 36.30 IS THERE ANY REFERENCE TO ANY "REQUESTED"
48 METHOD OF PROCUREMENT. RATHER THERE ARE NUMEROUS OCCURRENCES OF
49 "FINDINGS" AND "DETERMINATIONS" BY THE "PROCUREMENT OFFICER."
50

CSSB 129 (STA) - STATE PROCUREMENT - SUGGESTIONS AND COMMENTS

1 It is the procurement officer who makes "findings," from the "clear
2 and convincing evidence" supplied by a using agency (requester) to
3 support and "specify with particularity" a "determination" as to
4 method of procurement, or whatever is required by law. (See AS
5 36.30.300(a) and (b).)
6

7 The sole source procurement method is triggered by specification
8 requirements and NOT by the request of the using agency. It is a
9 function of procurement to determine whether a particular proposed
10 procurement (specification) lends itself to full and open
11 competition, limited competition, or non-competitive (sole source)
12 procurement. The extent of competition is dictated by the
13 specification or purchase description (request) which is a function
14 of the using agency. Election of the method of procurement is a
15 function of the procurement officer and is within his/her delegated
16 authority. Only a person with delegated procurement authority may
17 undertake to make findings and determinations for a procurement
18 decision, subject of course to any higher level (CPO) approvals
19 required by law. The using agency should neither request nor
20 demand any particular METHOD of procurement, but instead should
21 fully describe the agency's needs, leaving method and process up to
22 the procurement official. The procurement officer responds by
23 acquiring WHAT is requested, at the place and time it is needed, as
24 specified by the using agency.
25

26 Abdication of responsibility by the procurement officer can result
27 in inappropriate procurement decisions when unduly influenced by
28 the using agency. Particular expertise, requisite authority, and
29 professional qualifications for performance of procurement duties
30 is not routinely found outside the procurement function.
31

32 Abuse of authority or abdication of responsibility by ANY
33 procurement officer, including the CPO, should be handled by
34 appropriate discipline and/or enforcement of existing law.
35

36 - Sec. 7.
37

38 AS PROPOSED:
39

40 "AS 36.30.370 is amended to read:
41 Sec. 36.39.370. TYPES OF CONTRACTS. Any type of contract that will
42 promote the best interests of the state may be used, except that
43 the use of a cost-plus-a-percentage-of-cost contract is
44 prohibited."
45

46
47 RECOMMENDATION:
48

49 Suggest this section of the bill be deleted, or at the very least
50 change it to read as in one or the other of the alternatives below:

1 Recommended Alternative #1.

2
3 "AS 36.30.370 is amended to read:
4 Sec. 36.39.370. TYPES OF CONTRACTS. Any type of contract that
5 will promote the best interests of the state may be used, except
6 that the use of a cost-plus-a-percentage-of-cost contract is
7 prohibited. A cost-reimbursement contract may be used only when a
8 determination is made in writing by the procurement officer that a
9 cost-reimbursement contract is likely to be less costly to the
10 state than any other type or it is impracticable to obtain the
11 supplies, services, professional services, or construction required
12 except under a cost-reimbursement contract. Written determination
13 of contract type is not required for small procurements under AS
14 36.30.320(a) or (b)."

15
16 OR

17
18 Recommended Alternative #2

19
20 "AS 36.30.370 is amended to read:
21 Sec. 36.39.370. TYPES OF CONTRACTS. Any type of contract that
22 will promote the best interests of the state may be used, except
23 that the use of a cost-plus-a-percentage-of-cost contract is
24 prohibited. A cost-reimbursement contract may be used only when it
25 is likely to be less costly to the state than any other type or it
26 is impracticable to obtain the supplies, services, professional
27 services, or construction required except under a cost-
28 reimbursement contract."

29
30 RATIONALE:

31
32 Contract "types" are grouped into two broad categories: Fixed-
33 price and Cost-reimbursement. Variations within the two genera
34 range from firm-fixed-price, in which the contractor has full
35 responsibility for performance costs and resulting profit (or
36 loss), to cost-plus-fixed-fee, in which the contractor has minimal
37 responsibility for the performance costs and the negotiated fee
38 (profit) is fixed.

39
40 A firm-fixed-price contract provides maximum incentive for the
41 contractor to control costs and perform effectively and imposes a
42 minimum administrative burden upon the contracting parties. Cost-
43 reimbursement contracts establish an estimate of total cost for the
44 purpose of funding and establishing a ceiling that the contractor
45 may not exceed (except at its own risk) without the approval of the
46 procurement officer. In good practice, cost type contracts are
47 suitable for use only when uncertainties involved in contract
48 performance do not permit costs to be estimated with sufficient
49 accuracy to use any type of fixed-price contract.

1 Prior to use of a cost type contract, a recipient of federal funds
2 (contracts or grants) who is subject to federal cost principles is
3 required to execute written determination and findings showing that
4 "this contract type is likely to be less costly than any other
5 type, or it is impractical to obtain supplies or services required
6 without the use of this contract type. (See 10 U.S.C. 2306(c),
7 2310(b), and 2311 or 41 U.S.C. 254(b), 257(b), and 257(a).) The
8 federal Common Rule imposing procurement standards on recipients of
9 federal funds requires compliance with federal cost principles, and
10 also prohibits use of cost plus a percentage of cost and percentage
11 of construction cost methods of contracting.
12

13 Proposed amendment of AS 36.30.370 to remove the language requiring
14 a determination for use of cost-reimbursement contracts may cause
15 imprudent use of the contract type. Cost type contracts place the
16 greater risk on the state instead of on the contractor, whereas
17 fixed price contracts place the greater risk on the contractor. If
18 cost-reimbursement contracts are used indiscriminately without
19 considering the elements required by present law, its almost
20 certain to result in sharp increases in the cost of procurement
21 contracts awarded by the State. Unless there are affirmative
22 answers to the considerations required by present law, use of cost
23 type contracts is wasteful practice. In addition, failure to
24 consider the criteria as required by present law could result in
25 loss of federal funds.
26

27 Even if the proposed amendment of AS 36.30.370 is enacted, the
28 considerations required by the deleted language will still be
29 retained as an element of true procurement professionalism in
30 selection of contract type. The concept must certainly be
31 maintained in the procurement function of federal fund recipients
32 who must comply with federally prescribed cost principles and
33 procurement standards.
34

35 - Sec. 8.
36

37 No recommended changes. If enacted should be as proposed.
38

39 As proposed, amendment of AS 36.30.610(c), will count the time
40 period for acceptance or rejection of an appeal from the due "date
41 of appellant's comments on the protest report," and will be more
42 consistent with other time requirements, which under certain
43 conditions are subject to extension.
44

45 "Rejection" and "acceptance" as used in the context of AS 36.30.610
46 means determine whether an appeal will be considered on its merits.
47 This context is distinguishable from terminology used in an appeal
48 decision based on merits of the case which either "sustains" or
49 "upholds" the decision of the procurement officer, or grants the
50 relief requested by the appellant. "Rejection" or "acceptance" of

CSSB 129 (STA) - STATE PROCUREMENT - SUGGESTIONS AND COMMENTS

1 an appeal generally is not based on the merits of an appeal, but
2 rather is based on compliance with (or failure to comply) with the
3 requirements of AS 36.30.590.

4
5 Sec. 9.

6
7 AS PROPOSED:

8
9 "AS 36.30.850(b) is amended by adding new paragraphs to read:

10 (30) contracts that are to be performed in an area outside of
11 the country and that require a knowledge of the customs,
12 procedures, rules, or laws of the area;

13 (31) contracts that are between the Department of Law and
14 attorneys who are not employed by the state . . . in situations
15 where the attorney general concludes . . . it is inappropriate for
16 the Department of Law to review or prosecute . . ."

17
18 RECOMMENDATION: Regarding Sec. 9. (b) (30)

19
20 The proposed "(30)" should be changed to read:

21
22 "(30) contracts awarded to foreign suppliers of goods or services
23 which are to be performed outside the United States and which
24 require knowledge of the customs, procedures, rules, or laws of the
25 country where the contract must be performed."

26
27 RATIONALE:

28
29 If the intent is to exempt contracts awarded to foreign firms from
30 the full requirements of AS 36.30, then it should say so. What the
31 CCSB says implies that there will be no Alaska bidders or others
32 who would be able to compete for and perform such contracts which
33 require knowledge of the customs, procedures, rules, or laws of a
34 foreign country. Nothing could be further from the truth, because
35 many Alaskan and other domestic firms are deeply involved in and
36 have expertise in foreign dealings. Businesses which are thus
37 involved have great knowledge of the types described for the
38 proposed exemption.

39
40 If the intent will be satisfied as mentioned here, i.e., exempt
41 contract awards to foreign firms, the language should be changed to
42 read as shown above. The bill should limit the exemption to foreign
43 suppliers of goods or services because if a contract is awarded to
44 a domestic firm all competitive and other AS 36.30 requirements
45 should be applicable. The essential element here is that the
46 described knowledge and performance outside the U.S. is required in
47 order to be eligible for contract award. The eligibility criteria
48 should not be cause for exemption from the good business practices
49 prescribed by AS 36.30.

50

CSSB 129 (STA) - STATE PROCUREMENT - SUGGESTIONS AND COMMENTS

1 It should also be considered whether interpretation of the proposed
2 exemption will open the door for unfettered acquisition of foreign
3 products by the State, i.e., "Made in Taiwan." Exemption from AS
4 36.30 will not only permit non-competitive procurement, but also
5 eliminate Alaska bidder preference for purchases made under the
6 proposed amendment adding AS 36.30.850(b)(30).
7

8 **RECOMMENDATION: Regarding Sec. 9. (b)(31)**
9

10 No recommended changes. If enacted should be as proposed.

11
12 **- Sec. 10.**
13

14 No recommended changes. If enacted should be as proposed.
15

16 This will repeal the statutory requirement for the procurement
17 officer to make a written determination prior to use of total or
18 life cycle cost as a basis for contract award.
19

20 The language to be deleted (AS 36.30.150(b)) merely states a valid
21 concept routinely applied to every prospective procurement, not
22 usually reduced to writing, and which is a mark of professionalism.
23

24 A procurement officer should always, at the time of solicitation,
25 consider whether "the contract promotes overall economy for the
26 purposes intended, encourages competition, is not unduly
27 restrictive, and is in the best interests of the state." If these
28 matters are not considered up front, unprofessional and ineffective
29 procurement will usually follow.
30

31 **- Sec. 11.**
32

33 The effective dates and transitional provisions in this section
34 should be reconciled with any changes which occur as a result of
35 the foregoing comments and recommendations.
36

37 THE CHANGES SUGGESTED ABOVE ARE MOSTLY TECHNICAL, BUT SHOULD BE
38 MADE IN ORDER TO CLEAR UP POSSIBLE MISUNDERSTANDINGS, AND TO
39 MAINTAIN CONSISTENCY WITH OTHER (UNCHANGED) PROVISIONS OF AS 36.30.
40

PROCUREMENT RECORDS AND REPORTS

ARTICLE 7.
PROCUREMENT RECORDS AND REPORTS.

- AS 36.30.500. Retention of procurement records.
- AS 36.30.510. Records of contract awarded under competitive sealed proposals.
- AS 36.30.520. Records of sole source and emergency procurements.
- AS 36.30.530. Public access to procurement information.
- AS 36.30.540. Report to legislature.

AS 36.30.500. RETENTION OF PROCUREMENT RECORDS.

Procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the State archivist. Retained documents shall be made available to the attorney general or a designee upon request and proper receipt.

AS 36.30.510. RECORDS OF CONTRACTS AWARDED UNDER COMPETITIVE SEALED PROPOSALS.

A contract file open for public inspection shall be kept by the commissioner and the contracting agency for each contract awarded under competitive sealed proposals. The file kept by the commissioner shall contain a summary of the information in the file of the contracting agency. The file kept by the contracting agency must contain

- (1) a copy of the contract;
- (2) the register of proposals prepared under AS 36.30.230 and a copy of each proposal submitted; and
- (3) the written determination to award the contract prepared under AS 36.30.250.

AS 36.30.520. RECORDS OF SOLE SOURCE AND EMERGENCY PROCUREMENTS.

(a) The commissioner shall maintain for a minimum of five years a record listing all sole source procurement contracts made under AS 36.30.300 and emergency procurements made under AS 36.30.310. The record must contain

- (1) each contractor's name;
- (2) the amount and type of each contract; and
- (3) a listing of the supplies, services, professional services, or construction procured under each contract.

(b) The Department of Transportation and Public Facilities and any agency to whom the commissioner of administration or the commissioner of transportation and public facilities has delegated procurement authority under AS 36.30.015 shall, by October

Amendment to CSSB 129 (FIN)

Page 5, line 13, insert new section 11 to read:

*Sec. 11. A.S. 36.30.990(12) - (13) are amended to read:

(12) "lease-financing agreement" means a lease-purchase agreement that secures or is related to financing instruments of the lessor, including revenues or certificates of participation, except instruments of the University of Alaska which are secured by student fees or university receipts as defined in AS 14.40.491 and which have annual lease payments of less than \$1,000,000 and which have total lease payments for the full term of the lease of less than \$10,000,000.

(13) "lease-purchase agreement" means a lease that

(A) transfers ownership of the property to the lessee by the end of the lease term;

(B) contains a purchase option at a price less than the fair market value of the property on the date the option is exercisable;

(C) has a term, at inception, equal to 75 percent or more of the economic life of the property; or

(D) contains minimum lease payments, including minimum lease payments during a renewal provided for in the agreement, whose present value at the inception of the agreement equals 90 percent or more of the fair market value at the inception of the agreement of the real property that is the subject of the agreement; the present value shall be determined by using as a discount rate the most recent Bond Buyer 20-Bond G.O. Index; and

(E) does not include leases by the University of Alaska which are secured by student fees or university receipts as defined in AS 14.40.491 and which have annual lease payments of less than \$1,000,000 and which have total lease payments for the full term of the lease of less than \$10,000,000;

Alternative amendment:

page 2, line 12, after "property," insert:

other than lease-purchase or lease-financing agreements by the University of Alaska which are secured by student fees or university receipts as defined in AS 14.40.491 and which have annual lease payments of less than \$1,000,000 and which have total lease payments for the full term of the lease of less than \$10,000,000.

Alternative amendment:

page 2, line 19 after "department" insert"

. other than the University of Alaska.

Position Paper
CSSB 129(FIN)
Department of Administration

The Department of Administration's position is that on balance, CSSB 129(FIN) will improve state procurement. Several sections of the bill seek to make the procurement process more efficient and standardizes the treatment of various types of procurements.

The bill requires the Chief Procurement Officer to perform independent examinations of material facts prior to determining eligibility for alternate procurement methods. Current practice is to rely on the facts as represented by agency personnel and consider those representations as evidence. This change will generally require a longer preparation and review process for alternate procurements. However, the increased review time is offset by improved accountability which will enhance the integrity of the procurement process.

The bill authorizes extensions of real property leases in return for cost savings. The department expects to realize substantial savings in lease costs if current lessors are willing to negotiate reduced rates in exchange for lease extensions. We believe this gives us a valuable tool to reduce costs in our leasing budget while addressing a growing workload crisis.

The bill also adds a requirement to provide notice to the legislature prior to entering into or renewing any real property lease-purchase or lease-financing agreements. In this section, notice requires passage of law. We believe a more streamlined notice procedure should be pursued but agree that lease-purchase or lease-financing of real property should involve the legislature.

The bill amends the emergency procurement section of the code by requiring the Chief Procurement Officer to determine the basis for the emergency and the selection of a contractor. Currently, agency personnel are allowed to make this determination. Delegation of the authority to make the determination would be allowed only when the Chief Procurement Officer does not have sufficient time to make the required determination. The Department will write regulations defining "insufficient time for the Chief Procurement Officer to make the written determination" as the time necessary for the preparation and submission of information to the Chief Procurement Officer plus the time required for the Chief Procurement Officer's review.

The Department supports this bill because it contains some sections that standardize and streamline the procurement process, some sections that increase accountability, and another section that will lead to cost savings.



Nancy Bear Usera
Commissioner
Department of Administration

Position Paper
CSSB 129(FIN)
Department of Administration

The Department of Administration's position is that on balance, CSSB 129(FIN) will improve state procurement. Several sections of the bill seek to make the procurement process more efficient and standardizes the treatment of various types of procurements.

The bill requires the Chief Procurement Officer to perform independent examinations of material facts prior to determining eligibility for alternate procurement methods. Current practice is to rely on the facts as represented by agency personnel and consider those representations as evidence. This change will generally require a longer preparation and review process for alternate procurements. However, the increased review time is offset by improved accountability which will enhance the integrity of the procurement process.

The bill authorizes extensions of real property leases in return for cost savings. The department expects to realize substantial savings in lease costs if current lessors are willing to negotiate reduced rates in exchange for lease extensions. We believe this gives us a valuable tool to reduce costs in our leasing budget while addressing a growing workload crisis.

The bill also adds a requirement to provide notice to the legislature prior to entering into or renewing any real property lease-purchase or lease-financing agreements. In this section, notice requires passage of law. We believe a more streamlined notice procedure should be pursued but agree that lease-purchase or lease-financing of real property should involve the legislature.

The bill amends the emergency procurement section of the code by requiring the Chief Procurement Officer to determine the basis for the emergency and the selection of a contractor. Currently, agency personnel are allowed to make this determination. Delegation of the authority to make the determination would be allowed only when the Chief Procurement Officer does not have sufficient time to make the required determination. The Department will write regulations defining "insufficient time for the Chief Procurement Officer to make the written determination" as the time necessary for the preparation and submission of information to the Chief Procurement Officer plus the time required for the Chief Procurement Officer's review.

The Department supports this bill because it contains some sections that standardize and streamline the procurement process, some sections that increase accountability, and another section that will lead to cost savings.



Nancy Bear Usera
Commissioner
Department of Administration

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



P. O. Box 113300
Juneau, AK 99811-3300
(907) 465-3830
FAX (907) 465-2347

MEMORANDUM

TO: The Honorable Randy Phillips
Chairman, Legislative Budget
and Audit Committee

FROM: Randy S. Welker *Randy*
Legislative Auditor

DATE: February 4, 1993

RE: Recommendations for Amending Procurement Statutes

This memorandum is in response to your concerns regarding continued abuse of established contracting and procurement procedures. Our recent audit on the contract for services related to opening the Arctic National Wildlife Refuge is the most recent of several reports we have issued on abuses and circumvention of contracting procedures. From this background and perspective, we offer the following suggestions about possible amendments to the procurement statutes that would improve the fairness of the procurement process and curb the continuing abuses.

Make the Chief Procurement Officer (CPO) more independent

A central aspect to the State's procurement procedures is the position of the CPO. The primary impetus for the creation of this oversight position was the consensus of Senator Faiks' special committee on state contracting that some independent authority was necessary to make government contracting more fair and open. The minutes of that committee's deliberations indicate that the CPC was intended to act as an independent reviewer and approval authority over government contracting. The concept had been adopted from a model governmental procurement code that served in large measure as a guide to the committee's discussions and review.

In establishing the position of CPO, AS 36.30.010 most significantly provides that removal prior to expiration of a four year term, can be only for cause. Typically directors of state agencies can be removed at the discretion of the administration. Accordingly, the "removal for cause" provision indicates that the legislature wanted the CPO to have more autonomy and authority than a typical agency director. These provisions reflect Senator Faiks'

committee's concern that some measure of independent review be introduced into the state's procurement process.

Since its inception the position of CPO has not functioned as originally intended. The Cowper administration simply gave the Director of General Services and Supply the additional title of CPO. For the most part procurement practices continued as usual. In order to reinforce the independence aspect of the CPO position, the legislature should consider prohibiting the CPO from serving in any other capacity.

The CPO has extensive authority and responsibilities, the most significant being the mandated responsibility to "*procure or supervise the procurement of all supplies, services and professional services by an agency.*" We advise that the statutes be amended to make the intended independence and oversight function of the CPO more definite and clear. One way would be lengthen the term of office to six years rather four. This would clearly indicate that the CPO had a status beyond a single gubernatorial term. Consideration could also be given to making the CPO subject to confirmation by the legislature. The legislature may also feel it necessary to specify the salary or pay range for the position in order to further insulate the CPO from undue influence or pressure from executive branch agencies.

Require CPOs to certify procurement documentation

The procurement statutes repeatedly attempt to fix responsibility for procurement determinations with the CPO. For example, AS 36.30.300 states that a sole source contract can only be awarded after the CPO has determined "*in writing that there is only one source for the procurement exists*" and that "*this written determination must include findings of fact that are supported by clear convincing evidence.*" Further the statute prohibits the CPO from delegating his responsibilities to make such determinations. Such specificity indicates that the legislature wanted the CPO to independently exercise oversight and approval over procurement decisions.

In various audits of specific procurement and contracts we found that the CPO did indeed delegate his responsibility to make independent determinations. Typically, CPOs have been approving requests for alternative procurement (that is, procurement other than competitive sealed bidding) with the caveat that their "*approval is based solely on the attached information provided by [state agency].*" Particularly in procurement that involved the Office of the Governor, past CPOs have acquiesced to the certifications of staff in that office as to the necessity or lack of alternatives when approving sole source solicitations.

In view of this, we recommend that AS 36.30 be amended to specifically require the CPO to independently make, and certify that they made, the necessary determinations for approving non-competitive procurement. More specifically, AS 36.30 could be amended to put in place requirements similar to those that fiscal officers must follow when certifying state expenditures. AS 37.10.030 states that fiscal officers are responsible for "*the existence and correctness of the facts recited in the certificate or stated on the voucher or its supporting papers and for the legality of the proposed payment under the appropriation or fund involved.*"

Accordingly, if similar requirements were inserted in AS 36.30 the CPO could be responsible for accuracy and correctness of the information used for his approvals of limited solicitations. Failure to independently review, evaluate, and verify circumstances surrounding various procurement when certifying alternative procurement requests could subject the CPO to the sanctions of AS 11.56.210, unsworn falsification. The statute makes it a class A misdemeanor to for a person submit a false written or recorded statement which he knows not to be true. Attaching such sanctions to the CPO approvals should further serve to make the CPO more vigilant, which in turn would enhance the position's independence, when approving the use of alternative procurement procedures.

It should be recognized that there are limits to how much the effectiveness of a CPO can be improved by statutory amendment. No matter how much the autonomy and independence of the position is enhanced, the attitude and inclination of the individual appointed to the position is still the most critical element to making the concept of a CPO a workable part of promoting more open and fair government procurement.

Six suggestions for statutory amendments

In summary, we offer the following six suggestions regarding how the State's procurement statutes could be amended to provide more open and fair procurement:

- ◆ Increase the term of the CPO to six years. (AS 36.30.010 (a))
- ◆ Prohibit the CPO from holding any other state position. (AS 36.30.010 (b))
- ◆ Require legislative confirmation of the CPO. (AS 36.30.010 (a))
- ◆ Fix CPO salary in Statute to preclude retaliation. (AS 36.30.010 (a))
- ◆ Replace "commissioner" with CPO in Limited Competition Procurement section of the Procurement Code (Note: No change recommended to commissioner of Transportation reference). (AS 36.30.305 (a))
- ◆ Add statutory requirement that the CPO must "certify" as to the existence and correctness of the facts and the legality of the proposed alternative procurement under the State's procurement code. Further, subject the certification to sanctions under AS 11.56.210. This should apply to all procurement made under Article 4. Other Procurement Methods for which the CPO has approval responsibilities. This includes sole source (AS 36.30.300), limited competition (AS 36.30.305), and emergency procurement (AS 36.30.310).

Sen. Randy Phillips
Chairman
Rep. Terry Martin
Vice Chairman
Sen. Al Adams
Sen. Steve Frank
Sen. Steve Rieger
Sen. Bert Sharp
Rep. John Davies
Rep. Mark Hanley
Rep. Ron Larson
Rep. Eileen MacLean

State of Alaska



Legislative Budget and Audit Committee Sectional Analysis

Session
Rm. 103
State Capitol
Juneau, AK 99801
(907) 465-4949

Interim
P.O. Box 142
Eagle River AK 99577
(907) 694-4949

SB 129

Section 1

Changes the term of office of the Chief Procurement Officer from four (4) to six (6) years.

Section 2.

Prohibits the delegation of the duties of the Chief Procurement Officer.

Prohibits the Chief Procurement Officer from holding more than one state position.

Sets the salary of the Chief Procurement Officer at range 26, step C.

Section 3.

Requires the Chief Procurement Officer rather than the Commissioner to make the determination that a sole source procurement is necessary and in the public interest.

Section 4:

Requires that the Chief Procurement Officer make the written determination on an emergency procurement.

Section 5:

(a) Requires that the Chief Procurement officer independently examine the material facts of a procurement.

(b) Makes it a Class A misdemeanor for the Chief Procurement Officer to knowingly make a false statement in a determination under AS 36.30.300-36.30.310.

Section 6: Transitional provisions

(a) The six year term of the current Chief Procurement Officer shall include the time that the person held the position prior to the effective date of the act.

The other provisions of the act apply the Chief Procurement Officer and to procurements and determinations made after the effective date of the act.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CS SB 129 (FIN) AM

Revision Date: _____
Title: 'An Act relating to State procurement; and providing for an effective date.'
Sponsor: Senate Rules Committee
Requestor: _____

Department Affected: Administration
BRU: Leasing and Facilities
Component: Leasing and Facilities
COMPONENT SERIAL NO. 81

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	*	*	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	*	*	0	0	0	0

CAPITAL	0	0	0	0	0	0
---------	---	---	---	---	---	---

REVENUE FUND SOURCE:	0	0	0	0	0	0
----------------------	---	---	---	---	---	---

FUNDING:

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	*	*	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	*	*	0	0	0	0
TOTAL	*	*	0	0	0	0

POSITIONS:

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

Estimate of current year (FY93) impact: 0

ANALYSIS: (Attach a separate page if necessary.)
See attached.

Prepared by: Dugan Petty, Director
Division: General Services

Phone: _____
Date: _____

Approved by Commissioner: Nancy Bear Usera
Agency: Administration

Date: 2/5/93

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
For further distribution information call the Governor's Legislative Office

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CS SB 129 (FIN) AM

ANALYSIS: (continued)

Sections 1 through 11 made various changes involving the duties of the Chief Procurement Officer and the procurement process that will have a minimal fiscal impact on the division. Section 12 authorizes the extending of leases during FY 94 and the first half of FY 95 if the lessor will agree to

- a. 10 percent reduction in base rent over the extended term; or
- b. 5 percent reduction of base rent over the extended term if lessors make ADA compliance changes.

This bill would result in lease savings by giving the department the opportunity to extend leases if sufficient savings could be achieved. In practice a lease would have to meet certain criteria before the department would agree to an extension under this bill. For example:

- 1. The lease must have an ongoing and projected need by the agency.
- 2. The lease must meet agency needs.
- 3. Extension of the lease must be an overall good business decision.
- 4. The extension must reduce base rent by a minimum of the required 10 percent or 5 percent.

- Not all lessors will agree to a rent reduction in return for an extension, and all leases will not meet our criteria for extension even if the lessor is interested in a cost reduction. It is not possible to accurately predict how much savings will be achieved, but we believe savings could be significant.

FY 94 projected total lease payments are \$31,188.5. There is no way to estimate the fiscal savings at this time. If one-third of our leases average a 5 percent rent reduction and one-third average a 10 percent rent reduction, a \$1,543.8 saving could be achieved. This would result in a base rent reduction for the life of the lease.

CALCULATIONS			
TOTAL LEASE OBLIGATION	PERCENT OF LESSORS AGREEING TO EXTEND		POTENTIAL SAVINGS
31,188.5	at 5%	33%	\$ 514.6
31,188.5	at 10%	33%	<u>1,029.2</u>
			\$1,543.8

This bill gives us significant potential to reduce the current projected lease obligation, but we can only speculate about the actual amount of savings. Several large leases offer very significant opportunity for savings. It is possible savings could fall short or exceed this estimate depending on which lessors are willing to negotiate reductions. The FY 94 leasing budget is comprised of \$26,468.3 in general funds and \$4,720.2 in interagency receipts. Savings could be achieved in both funding sources.

Sen. Randy Phillips
Chairman
Rep. Terry Martin
Vice Chairman
Sen. Al Adams
Sen. Steve Frank
Sen. Steve Rieger
Sen. Bert Sharp
Rep. John Davies
Rep. Mark Hanley
Rep. Ron Larson
Rep. Eileen MacLean

State of Alaska



Legislative Budget and Audit Committee

Session
Rm. 103
State Capitol
Juneau, AK 99801
(907) 465-4949

Interim
P.O. Box 142
Eagle River AK 99577
(907) 694-4949

Memorandum

TO: All Senators

FROM: Senator Randy Phillips, Chair ^{P.E.P.}
Legislative Budget and Audit Committee

DATE: April 19, 1993

RE: CS for Senate Bill No. 129 (FIN)
"An Act relating to state procurement"

The state's procurement code is the most important interface between the state and the business community. Violations of the procurement code and alleged violations of the procurement code have resulted in the firing of commissioners and in the institution of impeachment proceedings against one governor. Especially in the area of large sole source and emergency procurements, the risk of actual or perceived political manipulation is great.

Senate Bill 129 provides additional autonomy and political insulation to the state's chief procurement officer. It also provides additional responsibility to the chief procurement officer for independently verifying the merits of sole-source and emergency procurements.

Senate Bill 129 makes a number of small changes to the procurement code to streamline the process for small procurements and to exempt certain contracts. In addition, it clarifies the timelines for appeal of a procurement protest.

In the area of leasing, Senate Bill 129 provides for Legislative notice and approval of all lease-purchase and lease financing of real property. Lease renewals may be negotiated if cost savings can be shown.

STATE OF ALASKA

DEPARTMENT OF REVENUE

TREASURY DIVISION

WALTER J. HICKEL, GOVERNOR

333 WILLOUGHBY AVENUE, 11TH FLOOR
P.O. BOX 110405
JUNEAU, ALASKA 99811-0405
PHONE: (907) 465-2350
FAX: (907) 465-2394

April 15, 1993

The Honorable Steve Frank, Co-Chair
Senate Finance Committee
State Capitol, Room 518
Juneau, AK 99801-1182

Dear Senator Frank:

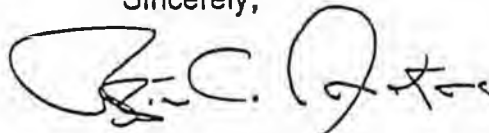
The Department of Revenue (DOR) would like to propose an amendment to CSSB 129 (FIN), Version 8-LS0591K, "An Act relating to state procurement". This amendment deals with refinancing of capital leases set forth on page 2, Sec. 3. We propose the following change to that section at line 12, following "property" insert:

except an agreement related to a refinancing of outstanding balance owing

This amendment would allow the State Bond Committee to take advantage of interest cost savings at opportune times.

Please feel free to contact me at 465-3750 if you have questions.

Sincerely,



Brian C. Andrews
Debt Manager

93-076

cc: Kris Lethin, Governor's Office

AMENDMENT #1

IN THE SENATE

BY SENATOR FRANK

TO: SENATE BILL NO. 129(FIN)

Page 2, line 12, after "property";

Insert:

"except an agreement related to a refinancing of outstanding balance owing"

from Mr. Phillips

Position Paper
CSSB 129(FIN)
Department of Administration

The Department of Administration's position is that on balance, CSSB 129(FIN) will improve state procurement. Several sections of the bill seek to make the procurement process more efficient and standardizes the treatment of various types of procurements.

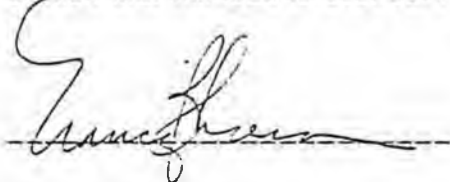
The bill requires the Chief Procurement Officer to perform independent examinations of material facts prior to determining eligibility for alternate procurement methods. Current practice is to rely on the facts as represented by agency personnel and consider those representations as evidence. This change will generally require a longer preparation and review process for alternate procurements. However, the increased review time is offset by improved accountability which will enhance the integrity of the procurement process.

The bill authorizes extensions of real property leases in return for cost savings. The department expects to realize substantial savings in lease costs if current lessors are willing to negotiate reduced rates in exchange for lease extensions. We believe this gives us a valuable tool to reduce costs in our leasing budget while addressing a growing workload crisis.

The bill also adds a requirement to provide notice to the legislature prior to entering into or renewing any real property lease-purchase or lease-financing agreements. In this section, notice requires passage of law. We believe a more streamlined notice procedure should be pursued but agree that lease-purchase or lease-financing of real property should involve the legislature.

The bill amends the emergency procurement section of the code by requiring the Chief Procurement Officer to determine the basis for the emergency, and the selection of a contractor. Currently, agency personnel are allowed to make this determination. Delegation of the authority to make the determination would be allowed only when the Chief Procurement Officer does not have sufficient time to make the required determination. The Department will write regulations defining "insufficient time for the Chief Procurement Officer to make the written determination" as the time necessary for the preparation and submission of information to the Chief Procurement Officer plus the time required for the Chief Procurement Officer's review.

The Department supports this bill because it contains some sections that standardize and streamline the procurement process, some sections that increase accountability, and another section that will lead to cost savings.



Nancy Bear Usera
Commissioner
Department of Administration

Sen. Randy Phillips
Chairman
Rep. Terry Martin
Vice Chairman
Sen. Al Adams
Sen. Steve Frank
Sen. Steve Rieger
Sen. Bert Sharp
Rep. John Davies
Rep. Mark Hanley
Rep. Ron Larson
Rep. Eileen MacLean

State of Alaska



Legislative Budget and Audit Committee

Session
Rm. 103
State Capitol
Juneau, AK 99801
(907) 465-4949

Interim
P.O. Box 142
Eagle River AK 99577
(907) 694-4949

Memorandum

TO: All Senators

FROM: Senator Randy Phillips, Chair ^{R.E.P.}
Legislative Budget and Audit Committee

DATE: April 19, 1993

RE: CS for Senate Bill No. 129 (FIN)
"An Act relating to state procurement"

The state's procurement code is the most important interface between the state and the business community. Violations of the procurement code and alleged violations of the procurement code have resulted in the firing of commissioners and in the institution of impeachment proceedings against one governor. Especially in the area of large sole source and emergency procurements, the risk of actual or perceived political manipulation is great.

Senate Bill 129 provides additional autonomy and political insulation to the state's chief procurement officer. It also provides additional responsibility to the chief procurement officer for independently verifying the merits of sole-source and emergency procurements.

Senate Bill 129 makes a number of small changes to the procurement code to streamline the process for small procurements and to exempt certain contracts. In addition, it clarifies the timelines for appeal of a procurement protest.

In the area of leasing, Senate Bill 129 provides for Legislative notice and approval of all lease-purchase and lease financing of real property. Lease renewals may be negotiated if cost savings can be shown.

Sen. Randy Phillips
Chairman
Rep. Terry Martin
Vice Chairman
Sen. Al Adams
Sen. Steve Frank
Sen. Steve Rieger
Sen. Bert Sharp
Rep. John Davies
Rep. Mark Hanley
Rep. Ron Larson
Rep. Eileen MacLean

State of Alaska



Session
Rm. 103
State Capitol
Juneau, AK 99801
(907) 465-4949

Interim
P.O. Box 142
Eagle River AK 99577
(907) 694-4949

Legislative Budget and Audit Committee

Sectional Analysis

CS SB 129 (FIN)

Section 1:

Changes the term of office of the Chief Procurement Officer from four (4) to six (6) years.

Section 2.

Prohibits the Chief Procurement Officer from holding more than one state position.

Sets the salary of the Chief Procurement Officer at range 23.
(27)

S.A.

Section 3:

Requires legislative notice and approval of all lease-purchase and lease-finance agreements for real property.

Fin.

Wildwood
C.C.

Section 4:

Allows for the delegation of authority for small procurements of professional services.

S.A.

Dept. of Admin.

Section 5:

Requires the Chief Procurement Officer rather than the Commissioner to make the determination that a sole source procurement is necessary and in the public interest.

Allows for the delegation of authority for small procurements of professional services.

Section 6:

Requires that the Chief Procurement Officer make the written determination on an emergency procurement.

S.A.

Dept. of Admin.

Allows for delegation of authority when there is insufficient time for the chief procurement officer to make the determination.

Section 7:

(a) Requires that the Chief Procurement officer independently examine the material facts of a procurement.

(b) Makes it a Class A misdemeanor for the Chief Procurement Officer to knowingly make a false statement in a determination under AS 36.30.300-36.30.310.

Section 8:

Removes the requirement that a cost-reimbursement contract needs to have a written determination by the procurement officer that it is impractical to obtain the supplies or services in another manner.

S.A.
Dept. of Admin.

Section 9:

Clarifies the time period for rejection of an appeal.

S.A.
Dept. of Admin.

Section 10:

Adds two exceptions to the procurement code.

S.A.
Dept. of Admin.

1. contracts performed outside the U.S.
2. contracts between the Department of Law and outside counsel

Section 11:

Deletes the requirement for special determinations for total or life cycle cost contracts.

S.A.
Dept. of Admin.

Section 12:

Authorizes the extension of certain leases when cost savings of 10% can be realized or when a 5% cost savings can be realized and the property is modified to comply with the Americans with Disabilities Act of 1990.

Fin.

Section 13:

(a) The six year term of the current Chief Procurement Officer shall include the time that the person held the position prior to the effective date of the act.

The other provisions of the act apply the Chief Procurement Officer and to procurements and determinations made after the effective date of the act.

Sec. 14 Effective Date

Fin.

MEMORANDUM

State of Alaska

Office of the Governor
Office of Management and Budget
Division of Audit and Management Services
Phone 465-3568
Fax 465-3640

April 9, 1993

TO: Distribution List

FROM: Gary V. Anderson, Director
Division of Audit and Management Services

Attached is the summary of our recently completed Wildwood Acquisition Review, Audit No. 20-4.

Please call June Baker if you would like a copy of the entire report.

Wildwood Acquisition Review

Report 20-04

April 1993
Division of Audit and Management Services

OMB

STAFF PAPERS AND REPORTS

STATE OF ALASKA

OFFICE OF MANAGEMENT AND BUDGET

SUMMARY

The Director of the Office of Management and Budget requested us to review the purchase of the Wildwood Correctional Center and the structure of the related lease financing. This request was the result of concerns expressed by members of the Legislature.

The Department of Administration on behalf of the Department of Corrections had been leasing the Wildwood Correctional Center from the Kenai Natives Association, Inc. since May 1983. The acquisition of Wildwood was a key part of the Department of Corrections long-range plan and the department had been unsuccessfully attempting to obtain funding for the acquisition through the capital budgeting process since 1986. Beginning in 1989, the Department of Corrections also sought approval of lease financing as an alternate means of funding the purchase of Wildwood. Once there was conceptual approval for the acquisition through lease financing, the Department of Corrections requested additional funding for improvements. From April 30, 1992 until at least September 4, 1992, bond counsel and the state were working on one lease financing which was to cover both the acquisition and related improvements (25 year term, annual payments just under \$1 million).

On December 10, 1992 two Certificates of Participation were issued. Certificate A was issued for \$5.655 million to acquire the original leasehold plus 122 acres of surrounding land and buildings and Certificate B was issued for \$4.990 million to finance future improvements to the property. The underlying leases have terms of seven and six years, respectively. Under state law such lease financings do not require legislative approval unless the annual lease payment is over \$1 million, or the total lease payments for the full term of the lease exceed \$10 million. The latter requirement became effective on September 14, 1992. Payments under either lease were less than the minimums requiring legislative approval.

In response to the request for review we interviewed executive branch officials and private sector personnel involved with the acquisition and financing, inspected files and gathered documentation from each of the state agencies and reviewed the lease financing and appraisal documents.

Based on this limited review, we did not identify any violations of state laws, however, we have reached the following conclusions about the lease financing:

1. It is likely that the issue was divided in order to avoid the requirement for legislative approval although environmental problems were also a significant consideration in creating two issues.
2. Regardless of the reasons for splitting the issue, the resulting financing structure does not result in two issues which "stand on their own" and in our opinion legislative approval should have been obtained prior to proceeding with the financing.

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



P. O. Box 113300
Juneau, AK 99811-3300
(907) 465-3830
FAX (907) 465-2347

October 23, 1992

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

OFFICE OF THE GOVERNOR ARCTIC NATIONAL WILDLIFE REFUGE LOBBYING EXPENDITURES

October 23, 1992

Audit Control Number

01-4442-93

As discussed in the Report Conclusions, expenditures were determined to be reasonable and support the purpose of the appropriations. Our review of procurement determined that a sole source/emergency contract was awarded in the absence of clear and convincing evidence that a single source existed. The Auditor Comments section discusses the nature of lobbying expenditures and further clarifies our views on procurement.

The audit was conducted in accordance with government auditing standards. Fieldwork procedures utilized in the course of developing the conclusions presented in this report are discussed in the Objectives, Scope, and Methodology section of this report.

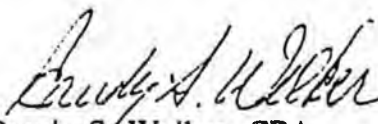

Randy S. Welker, CPA
Legislative Auditor

TABLE OF CONTENTS

	<u>Page</u>
Objectives, Scope, and Methodology	1
Organization and Function	3
Report Conclusions	5
Findings and Recommendations	9
Auditor Comments	13
Agency Response:	
Office of the Governor	15

OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Title 24 of the Alaska Statutes and a special request by the Legislative Budget and Audit Committee, we conducted an audit of executive branch expenditures for lobbying activities related to the Arctic National Wildlife Refuge (ANWR).

Objectives

The specific objectives of the audit were twofold:

1. Review expenditures charged to ANWR appropriations to ensure that their purpose supports the State's goal of opening ANWR to oil and gas development.
2. Evaluate the circumstances surrounding a sole source/emergency contract issued as part of the ANWR lobbying effort. This contract, termed "Arctic Storm," procured development and placement of promotional advertisements intended to convince Congress to allow oil and gas development in ANWR.

Scope

We reviewed expenditures charged to the \$3 million authorized for an ANWR national education effort¹ as well as expenditures charged to the ANWR component of the annual appropriation for executive operations. The latter began in FY 88 and continued through FY 92. The FY 93 \$500,000 capital appropriation for an ANWR national education effort was not reviewed because no expenditures have been charged to it yet.

The Office of the Governor has awarded several contracts attributable to the ANWR effort. In order to understand the circumstances surrounding the sole source/emergency contract cited in the audit request, we reviewed the circumstances surrounding nine of these contracts.

Methodology

The audit request focused our work in two areas: ANWR expenditures and contracting procedures. To evaluate these, we performed the following audit procedures:

1. Vouched expenditures charged to the ANWR appropriations by reviewing payroll records, travel files, vendor files, and contract files at the Office of the Governor and at the contractor's office.

¹Chapter 96, SLA 91, Section 146

2. Identified contracts relating to ANWR efforts through review of expenditures and by using the *Alaska Statewide Procurement Audit Report, January 1, 1991 - December 31, 1991* issued by the Division of Legislative Audit.
3. Analyzed circumstances surrounding the awarding of contracts by comparing timelines, qualifications, and other factors cited in the justifications for selecting contractors.
4. Interviewed Office of the Governor personnel responsible for coordination of the ANWR effort as well as those responsible for expenditure processing and contract administration.
5. Interviewed advertising agency executives familiar with contracting procedures used by the Office of the Governor for the ANWR educational effort.

ORGANIZATION AND FUNCTION

The Office of the Governor is established under the authority of article III, section 1 of the Alaska Constitution. The office's duties are defined in AS 44.19. As the chief executive of the State of Alaska, the governor has the authority and responsibility to initiate policy actions which concern the wide-ranging interests of the State.

Consistent with the state economic development policy outlined in AS 44.99.100, the legislature appropriated funds to be used by the governor to achieve the State's goal of opening the coastal plain of the Arctic National Wildlife Refuge (ANWR) to oil and gas development.² Opening ANWR to oil and gas development is a controversial proposition. The State's goal is consistent with that of oil interests; this position is vehemently opposed by environmental interests.

Twice in the past year, Congress has contemplated legislation which would have opened ANWR to oil and gas development. It was included in the energy bill in October 1991 until filibuster tactics resulted in deletion of the ANWR provision. More recently, it was included in the president's economic recovery legislation considered by Congress during March 1992. Ultimately, Congress adjourned in October 1992 without passing legislation allowing oil and gas development in ANWR.

The Office of the Governor considers opening ANWR a high priority. Accordingly, responsibility for this area has been assigned to a special assistant and ultimately to the deputy chief of staff. An ANWR coordinator was employed for a year beginning in August 1991. Activities in the Washington, D.C. arena are coordinated by the special counsel for state/federal relations.

²As a result of Public Law 96-487 Alaska National Interest Lands Conservation Act passed in 1980, congressional approval is required before the oil and gas exploration may begin in ANWR.

REPORT CONCLUSIONS

Expenditures support the goal of opening ANWR

We found that expenditures charged to these appropriations support the goal of opening ANWR to oil and gas development. Some of these expenditures are unusual when viewed in the context of typical state expenditures, but all were judged reasonable given the intent of the appropriation and the nature of governmental lobbying in our society. As further discussed in the Auditor Comments section of this report, it is difficult to assess the effectiveness of these expenditures.

Three kinds of appropriations have been made for the ANWR effort:

1. An annual operating appropriation which was discontinued after FY 92.
2. A \$3 million appropriation made in Chapter 96, SLA 91, Section 146 of which \$1.7 million is currently unspent.
3. A \$500,000 capital appropriation of which none has been spent.

The table below summarizes how the funds were spent since FY 89.

<i>Appropriation Description</i>	<i>Personal Services</i>	<i>Travel</i>	<i>Contractual</i>	<i>Equipment and Supplies</i>	<i>Total</i>
Chapter 96, SLA 91	\$ 99,747	\$73,350	\$1,114,170 ³	\$22,627	\$1,309,894
1992 operating			65,622		65,622
1991 operating			62,788		62,788
1990 operating	47,049	2,623			49,672
1989 operating	74,574	11,233	44,003		129,810
Total	\$221,370	\$87,206	\$1,286,583	\$22,627	\$1,617,786

Personal services - The expenditures in the 1989 and 1990 operating appropriations were for employment of a special assistant for ANWR employed in the governor's Washington, D.C. office.. Chapter 96, SLA 91 expenditures employed an ANWR coordinator in Anchorage from August 1991 through August 1992. This position reported directly to the governor's deputy chief of staff.

³Includes \$800,000 sole source/emergency contract for Arctic Storm.

Travel - Much of the travel costs are attributable to the "A-Team Outreach" effort during the fall of 1991. This effort targeted various states for media interviews and personal calls regarding ANWR. Teams of Alaskans including former Governor Bill Sheffield and several legislators visited states such as Arizona, South Carolina, Illinois, Pennsylvania, and New York in an effort to gain support for opening ANWR.

Contractual - This category includes a variety of expenditures ranging from printing and mailing of ANWR educational brochures to contracts with advertising agencies to payments to lobbying firms in Washington, D.C.

Equipment and Supplies - Expenditures in this category purchased an exhibit booth used at a reception held in Washington, D.C. and office equipment including two fax machines, a microcomputer, printer, and software.

Sole source contract issued improperly

The audit request asked us to review the circumstances of an \$800,000 sole source/emergency contract issued during March 1992. The stated purpose of the contract was:

To have a contractor develop and arrange for media placement of a series of ANWR promotional advertisements. The advertisement shall be used to convince Congress to vote to open ANWR.

As explained in Recommendation No. 1, it is our judgement that the Office of the Governor directed this procurement to the contractor of their choice; not to the only source available. The Office of the Governor inappropriately used sole source procurement to respond to what they considered an emergency situation. The emergency was based on the short lead time available. Our views concerning timing as justification for non-competitive ANWR procurement are discussed in the Auditor Comments section of this report.

The appropriation language of Chapter 96, SLA 91 imposes additional legislative requirements on ANWR expenditures. It prohibits any person participating in the development of a request for proposals for ANWR promotion from making a bid on the contract. In other words, no one who defines contract deliverables should be eligible to benefit from providing those deliverables. While the sole source/emergency contract does not strictly fall under this prohibition, the intent of the language may have been violated. As discussed in Recommendation No. 1, the Office of the Governor was working with the sole source contractor for two weeks before any procurement documents were completed. Based on this fact and discussions with employees of both the State and the contractor, we conclude that the contractor exercised considerable influence over contract development prior to receiving the sole source contract.

Noncompetitive contracts are the rule rather than the exception

During the course of this audit, we reviewed nine contracts related to the ANWR effort. Seven of these bypassed the competitive sealed proposal process outlined in AS 36.30. They were issued under either sole source or emergency authority.

We took exception to two of these in the Division of Legislative Audit's recent statewide procurement audit⁴ for citing the "personal trust and confidence" as justification for bypassing the competitive process and issuing sole source contracts.

One contract, which qualifies as a small purchase under 2 AAC 12.400, had no evidence that any steps were taken to provide competition. In our view, this does not meet the requirements of the procurement code.

The remaining four contracts cited timing considerations in the justification for alternative procurement. This is not surprising given the need to react to political occurrences outside the control of the Office of the Governor. However, as discussed in Auditor Comments, it is our opinion that better planning would have reduced the need for noncompetitive contracting.

⁴ Audit No. 02-4425-92 *Alaska Statewide Procurement January 1, 1991 through December 31, 1991.*

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

The Office of the Governor should ensure that contracting practices are consistent with the procurement code.

Laws governing state procurement were substantially revised by Chapter 106, SLA 86 with the goal of improving contracting practices. This is reflected in the purpose of the legislation which states in part that the procurement code should:

... 3. *provide for increased public confidence in the procedures followed in state procurement;*

4. *ensure the fair and equitable treatment of all persons who deal with the procurement system of the state;*

... 6. *foster effective broad-based competition within the free enterprise system;*

7. *provide safeguards for the maintenance of a procurement system of quality and integrity; ...*

Our review of the circumstances surrounding the March 1992 \$800,000 sole source/emergency contract shows that the Office of the Governor did little to achieve these altruistic objectives. On the contrary, the evidence supports the conclusion that the contractor was selected and even billed the Office of the Governor for almost \$11,000 in personnel services rendered before the chief procurement officer made the sole source and emergency determinations.

The sole source determination required by AS 36.30.300 must include findings of fact that support by clear and convincing evidence the determination that only one source exists. This determination cannot be delegated; state agencies submit justifications to the chief procurement officer who makes the determination. In this case, as is generally true, the chief procurement officer's determination simply repeats the factors outlined in the agency justification and contains the disclaimer that it is "*based solely on the attached information provided by the Office of the Governor.*"

Emergency procurements are governed by AS 36.30.310 and 2 AAC 12.440. Like the sole source determination above, the determination of emergency by the chief procurement officer or commissioner of administration is required before an emergency procurement may be made.

The justification for the sole source/emergency procurement outlined by the Office of the Governor includes three factors. We take issue with each:

a. Timing - The need to act quickly is cited due to a pending vote on the president's economic recovery legislation. The same justification was used for an October 1991 emergency procurement request which was approved but never implemented. In both cases, the Office of the Governor intended to run advertisements in targeted states. The first procurement was dropped when the U.S. Senate's attempt to bring the energy bill to the floor for a vote failed. The second procurement proceeded despite the fact that the president's economic recovery legislation was held in the first of several committee referrals. While we acknowledge the difficulty in trying to forecast how legislation moves through Congress, it is apparent that the Office of the Governor knew that advertising would accompany other efforts to influence Congress long before the March 6, 1992 request for sole source/emergency procurement was submitted to the chief procurement officer.

b. Secret targets - Probably the strongest argument for sole source procurement was the State's reluctance to let more than one vendor know of their planned media buy. The justification states that *"if the target areas were made known, political parties opposed to opening ANWR would wage that information against the State's lobbying efforts."* However, the need for secrecy was not a factor in the October 1991 request for emergency procurement. At that time, the Office of the Governor intended to solicit quotes from at least three bidders. Given that the procurement is essentially the same as that planned for October, it is debatable whether secrecy was necessary in order to solicit bids. We also believe that the solicitation could have been structured so as not to reveal the State's planned advertising strategy.

Additionally, according to the justification, only one contractor *"possesses a proprietary list that names a portion"* of the target locations. It is our view that the value of this proprietary information was overstated in the sole source/emergency justification. Alaska's congressional delegation had provided the Office of the Governor with target areas and individuals coordinating the Governor's ANWR efforts were keeping their own evolving list of target locations. We saw no evidence that the contractor's proprietary information significantly impacted the ultimate media buy.

c. Coordination with tourism advertising - The Office of the Governor cited concerns that ANWR advertisements could conflict with tourism advertisements. We do not agree that having the same contractor handle both contracts is the best method for coordinating advertising. It is not unreasonable to expect two agencies of state government to be able to coordinate their advertising efforts.

It is our judgement that the Office of the Governor directed this procurement to the contractor of their choice; not to the only source available. Evidence shows that the Office of the Governor was working with the contractor in February, more than two weeks before the sole source/emergency justification was submitted to the chief procurement officer.

We are concerned about the example set by this contract for other state agencies and the public. The Office of the Governor obtained chief procurement officer support in the

absence of what we find to be clear and convincing evidence for a sole source contract. Additionally, despite the fact that it occasionally results in emergency procurement, poor planning does not justify a situation in which competitive procurement is "impracticable or contrary to the public interest" per AS 36.30.310. We recommend that individuals responsible for procurement reacquaint themselves with the purpose and the language of the procurement code before initiating similar contracting relationships.

AUDITOR COMMENTS

Difficult to assess propriety and effectiveness of lobbying expenditures

The State of Alaska's efforts to open ANWR to responsible oil and gas development is unusual when viewed in the context of typical state activities. Conducting an educational and lobbying campaign to effect congressional action results in expenditures which are not addressed in the Alaska Administrative Manual. Small gifts for individuals arranging meetings and bartending costs for a hosted reception are examples of expenditures which are reasonable and may even be necessary in the lobbying culture, but which are not customary uses of state funds.

Procurement of professional services is often difficult to manage. This is especially true for some of the more intangible activities which fall under the broad spectrum of lobbying. It is not possible to relate value with esoteric services such as making needed congressional contacts, advocating the State's position on ANWR issues, and coordinating coalition activities.

Most of the forces which govern the future of ANWR are outside of the State's control. Political action to influence these forces can be expensive and results of these efforts are often not susceptible to measurement. Since 1989 the State has spent \$1.6 million toward the goal of opening ANWR. Assessing the success of these efforts is a subjective process as it is not clear what impact state lobbying efforts have had on the ANWR issue in Washington, D.C. and across the nation.

Timing as justification for non-competitive procurement

The timing consideration supporting the sole source/emergency justification further loses credibility when viewed in terms of the overall ANWR educational effort. In May 1991, during testimony before the House Finance Committee, the administration outlined a campaign strategy for ANWR citing how the appropriation would be used. This strategy planned for the hiring of contractors and cited the need to commence immediately.

Despite the testimony supporting the appropriation, the administration did not initiate procurement using competitive sealed proposals until April 1992. In the meantime, five contracts were awarded under less than full competition; four of these cited timing factors as justification for alternate procurement.

In Recommendation No. 1 we state that the Office of the Governor knew advertising would be procured long before the March 6, 1992 request for alternate procurement was submitted to the chief procurement officer. Evidence supporting this statement includes:

1. Administration testimony supporting the appropriation in May 1991.

2. Request for alternate procurement submitted in October 1991 for essentially the same procurement.
3. Internal top level strategy memo dated December 13, 1991 which includes proposal for "placement of page dominant advertisements emphasizing jobs and/or energy security themes in approximately 20 newspapers around the country."

It is our opinion that inadequate planning and coordination between individuals responsible for the ANWR educational effort contributed to the reactive nature of procurement. We recognize that factors outside of the State's control affect the opportunities for lobbying. However, it is likely that had the administration proceeded immediately to retain firm(s) to assist in their educational effort, the non-competitive procurements could have been avoided.

Potential for sole source contractor to have advantage in competitive procurement

One potential outcome of a sole source contract is an unfair advantage granted the contractor in subsequent competitive procurement. Accordingly, we evaluated the circumstances of the subsequent contract in which the same contractor prevailed in the competitive sealed proposal process. We found no violations of the procurement code and in fact it appears that the Office of the Governor made every attempt to keep the process fair. However, the possibility of some advantage remains when the contractor's proposal is to develop a follow up campaign to the initial project for which they were judged to be the sole source for procurement.



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

December 15, 1992

RECEIVED
DEC 15 1992

LEGISLATIVE AUDIT

Mr. Randy Welker
Legislative Auditor
Legislative Audit Division
P.O. Box 113300
Juneau, AK 99811-3300

Dear Mr. Welker:

This letter is in response to the October 23, 1992 Audit Report on the Office of the Governor, Arctic National Wildlife Refuge Lobbying (ANWR) expenditures. We have reviewed the report, Audit Control Number 01-4442-92, and appreciate the auditor's concurrence that the expenditures charged to the appropriation are reasonable and meet the goal of opening ANWR to oil and gas development.

We disagree with the auditor's conclusion that the \$800,000 sole source/emergency contract was awarded in the absence of clear and convincing evidence. We believe that the findings and recommendations are subjective and in some cases, not accurate. Our November 2, 1992 letter addressed the factors the auditor took issue with. Given the unique circumstances surrounding the procurement, the Office of the Governor chose the only source available.

The Office of the Governor does not agree that noncompetitive contracts are the rule rather than the exception as the report indicates. Each sole source or emergency authority contract is awarded in response to its own unique set of circumstances. The Office of the Governor follows all the administrative procedures and obtains the Chief Procurement Officer's approval prior to establishing these contracts.

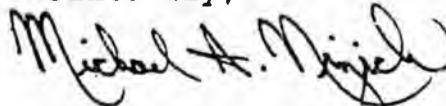
The contract that qualified as a small purchase under 2 AAC 12.400 contains no evidence of the steps taken to provide competition, as such evidence is not required. The Procurement Code states that agencies shall use procedures adequate and reasonable to provide competition. It does not require that a record be established for the competition to be determined adequate and reasonable. The contract itself provides the record to facilitate auditing of the purchasing agency.

December 15, 1992

In conclusion, it is the opinion of Legislative Audit that the justification used in awarding the \$800,000 sole source/emergency contract lacked "clear and convincing evidence." The Office of the Governor disagrees. It is our opinion that such evidence was provided.

The Procurement Code as it stands is very broad. What "clear and convincing evidence" means to one may be entirely different than what it means to another. We would support the establishment of specific guidelines as to what qualifies as "clear and convincing evidence" to alleviate these differences of opinion in the future.

Sincerely,

A handwritten signature in cursive script that reads "Michael A. Nizick".

Michael A. Nizick
Administrative Director

Sen. Randy Phillips
Chairman
Rep. Terry Martin
Vice Chairman
Sen. Al Adams
Sen. Steve Frank
Sen. Steve Rieger
Sen. Bert Sharp
Rep. John Davies
Rep. Mark Hanley
Rep. Ron Larson
Rep. Eileen MacLean

State of Alaska



Session
Rm. 103
State Capitol
Juneau, AK 99801
(907) 465-4949

Interim
P.O. Box 142
Eagle River AK 99577
(907) 694-4949

Legislative Budget and Audit Committee

Sectional Analysis

CS SB 129 (FIN)

Section 1:

Changes the term of office of the Chief Procurement Officer from four (4) to six (6) years.

Section 2.

Prohibits the Chief Procurement Officer from holding more than one state position.

Sets the salary of the Chief Procurement Officer at range 23.

Section 3:

Requires legislative notice and approval of all lease-purchase and lease-finance agreements for real property.

Section 4:

Allows for the delegation of authority for small procurements of professional services.

Section 5:

Requires the Chief Procurement Officer rather than the Commissioner to make the determination that a sole source procurement is necessary and in the public interest.

Allows for the delegation of authority for small procurements of professional services.

Section 6:

Requires that the Chief Procurement Officer make the written determination on an emergency procurement.

Allows for delegation of authority when there is insufficient time for the chief procurement officer to make the determination.

Section 7:

(a) Requires that the Chief Procurement officer independently examine the material facts of a procurement.

(b) Makes it a Class A misdemeanor for the Chief Procurement Officer to knowingly make a false statement in a determination under AS 36.30.300-36.30.310.

Section 8:

Removes the requirement that a cost-reimbursement contract needs to have a written determination by the procurement officer that it is impractical to obtain the supplies or services in another manner.

Section 9:

Clarifies the time period for rejection of an appeal.

Section 10:

Adds two exceptions to the procurement code.

1. contracts performed outside the U.S.
2. contracts between the Department of Law and outside counsel

Section 11:

Deletes the requirement for special determinations for total or life cycle cost contracts.

Section 12:

Authorizes the extension of certain leases when cost savings of 10% can be realized or when a 5% cost savings can be realized and the property is modified to comply with the Americans with Disabilities Act of 1990.

Section 13:

(a) The six year term of the current Chief Procurement Officer shall include the time that the person held the position prior to the effective date of the act.

The other provisions of the act apply the Chief Procurement Officer and to procurements and determinations made after the effective date of the act.

Section 14;

Effective date provisions.

Sen. Randy Phillips

Chairman

Rep. Terry Martin

Vice Chairman

Sen. Al Adams

Sen. Steve Frank

Sen. Steve Rieger

Sen. Bert Sharp

Rep. John Davies

Rep. Mark Hanley

Rep. Ron Larson

Rep. Eileen MacLean

State of Alaska



Session

Rgn. 103

State Capital

Juneau, AK 99801

(907) 465-4949

Interim

P.O. Box 142

Eagle River AK 99577

(907) 694-4949

Legislative Budget and Audit Committee

Sectional Analysis

CS SB 129 (STA)

Section 1:

Changes the term of office of the Chief Procurement Officer from four (4) to six (6) years.

Section 2.

Prohibits the delegation of the duties of the Chief Procurement Officer.

Prohibits the Chief Procurement Officer from holding more than one state position.

Sets the salary of the Chief Procurement Officer at range 23.

Section 3. NEW Section

Allows for the delegation of authority for small procurements of professional services.

Section 4.

Requires the Chief Procurement Officer rather than the Commissioner to make the determination that a sole source procurement is necessary and in the public interest.

(New) Allows for the delegation of authority for small procurements of professional services.

Section 5:

Requires that the Chief Procurement Officer make the written determination on an emergency procurement.

(New) Allows for delegation of authority when there is insufficient time for the chief procurement officer to make the determination.

Section 6:

(a) Requires that the Chief Procurement officer independently examine the material facts of a procurement.

(b) Makes it a Class A misdemeanor for the Chief Procurement Officer to knowingly make a false statement in a determination under AS 36.30.300-36.30.310.

NEW Section 7:

Removes the requirement that a cost-reimbursement contract needs to have a written determination by the procurement officer that it is impractical to obtain the supplies or services in another manner.

NEW Section 8:

Clarifies the time period for rejection of an appeal.

NEW Section 9:

Adds two exceptions to the procurement code.

1. contracts performed outside the U.S.
2. contracts between the Department of Law and outside counsel

NEW Section 10:

Deletes the requirement for special determinations for total or life cycle cost contracts.

Section 11 Transitional Provisions:

(a) The six year term of the current Chief Procurement Officer shall include the time that the person held the position prior to the effective date of the act.

The other provisions of the act apply the Chief Procurement Officer and to procurements and determinations made after the effective date of the act.

Sen. Randy Phillips
Chairman
Rep. Terry Martin
Vice Chairman
Sen. Al Adams
Sen. Steve Frank
Sen. Steve Rieger
Sen. Bert Sharp
Rep. John Davies
Rep. Mark Hanley
Rep. Ron Larson
Rep. Eileen MacLean

State of Alaska



Legislative Budget and Audit Committee

Session
Rm. 103
State Capitol
Juneau, AK 99801
(907) 465-4949

Interim
P.O. Box 142
Eagle River AK 99577
(907) 694-4949

Memorandum

TO: Senator Drue Pearce, Co-Chair
Senate Finance Committee

Senator Steve Frank, Co-Chair
Senate Finance Committee

FROM: Senator Randy Phillips, Chair ^{REP.}
Legislative Budget and Audit Committee

DATE: March 17, 1993

RE: Senate Bill No. 129
"An Act relating to the state's chief procurement officer."

The above referenced bill has been referred to the Senate Finance Committee.

Please consider this as my formal request that S.B. 129 be scheduled before your committee for an early hearing.

If you have any questions or comments do not hesitate to call me at 4949. Your cooperation is appreciated.

Sen. Randy Phillips
Chairman
Rep. Terry Martin
Vice Chairman
Sen. Al Adams
Sen. Steve Frank
Sen. Steve Rieyer
Sen. Bert Sharp
Rep. John Davies
Rep. Mark Hanley
Rep. Ron Larson
Rep. Eileen MacLean

State of Alaska



Legislative Budget and Audit Committee

Session
Rm. 103
State Capitol
Juneau, AK 99801
(907) 465-4949

Interim
P.O. Box 142
Eagle River AK 99577
(907) 694-4949

Memorandum

TO: Senator Loren Leman, Chair
State Affairs Committee

FROM: Senator Randy Phillips, Chair *R.E.P.*
Legislative Budget and Audit Committee

DATE: February 22, 1993

RE: Senate Bill No. 129
"An Act relating to the state's chief procurement officer."

The above referenced bill has been referred to the State Affairs Committee.

Please consider this as my formal request that S.B. 129 be scheduled before your committee for an early hearing.

If you have any questions or comments do not hesitate to call me at 4949. Your cooperation is appreciated.



Alaska State Legislature

Senator Randy Phillips

SESSION
 State Capitol
 Juneau, AK 99801
 (907) 465-4949
 800-478-4950
 Fax: 465-4979

INTERIM
 P.O. Box 142
 Eagle River AK 99577
 (907) 694-4949

CHAIR
 Legislative Budget & Audit
 Community & Regional Affairs

VICE-CHAIR
 Transportation

MEMBER
 Alaska Commission on
 Postsecondary Education

Phillips' Fax

DATE: 3-17-97

TO: Jerry Bennett . Fax# 2029
Legal Services

FROM: Jerry Bennett Fax# (907) 465-4979
Sen R. Phillips . Tel: (907) 465-4949
 Toll Free: (800) 478-4950

Comments: The attached language
has been suggested for SB 129.
Please give me a call at 2705
and let me know if you think
we can get this to work.
Jerry Bennett

36.30.010

(c) While a person performs the duties of the chief procurement officer under this chapter, the person may not serve in another capacity, or be employed in or appointed to another position with the state.

(d) To protect the independence of the chief procurement officer, and to ensure that the position is free from political influence, except for administrative purposes only, the chief procurement officer shall maintain an office free from oversight by the (commissioner or the department of administration or the executive branch). The department of administration shall provide staff support to the chief procurement officer sufficient to perform the duties of this chapter.

AMENDMENT

IN THE SENATE

BY FRANK

TO: CSSB 129(FIN)

Page 1, line 1, following "procurement" insert:
"and providing for an effective date"

Page 6, after line 16; insert new bill sections to read:

" * Sec 15. section 12 of this Act is retroactive to May 15, 1993.

* Sec. 16. Section 12 and 15 of this Act take effect immediately under AS 01.10.070(c). "

DEPARTMENT OF REVENUE

TREASURY DIVISION

333 WILLOUGHBY AVENUE, 11TH FLOOR
P.O. BOX 110405
JUNEAU, ALASKA 99811-0405
PHONE 907/465-2350
FAX 907/465-2394

April 15, 1993

The Honorable Steve Frank, Co-Chair
Senate Finance Committee
State Capitol, Room 518
Juneau, AK 99801-1182

Dear Senator Frank:

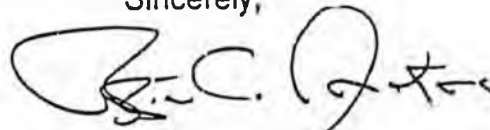
The Department of Revenue (DOR) would like to propose an amendment to CSSB 129 (FIN), Version 8-LS0591K, "An Act relating to state procurement". This amendment deals with refinancing of capital leases set forth on page 2, Sec. 3. We propose the following change to that section at line 12, following "property" insert:

except an agreement related to a refinancing of outstanding balance owing

This amendment would allow the State Bond Committee to take advantage of interest cost savings at opportune times.

Please feel free to contact me at 465-3750 if you have questions.

Sincerely,



Brian C. Andrews
Debt Manager

93-076

cc: Kris Lethin, Governor's Office

Jerry -
Mr. Phillips
Rick Jolie

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 15, 1993

The Honorable Steve Frank
Alaska State Senate
State Capitol
Juneau, Alaska 99811-1182

Re: Proposed amendment to
CSSB 129 (STA)

Dear Senator Frank:

At the request of your legislative assistant, Rick Solie, we have reviewed the proposed amendment to CSSB 129 (STA) which will allow the Department of Administration, the Alaska Court System, the Legislative Affairs Agency and the University of Alaska to negotiate lease extensions for up to a maximum of five years. It exempts these extensions from the procurement code. This amendment requires that before an extension can be entered into that it result in at least a 10 percent costs savings to the agency. Alternatively, the cost savings may be reduced to minimum of 5 percent provided the leasing entity brings its lease premises into compliance with the American with Disabilities Act of 1990 (ADA) -- assuming they are not currently in compliance. Lease extensions successfully negotiated under this amendment must be reported quarterly to the Legislative Budget and Audit Committee.

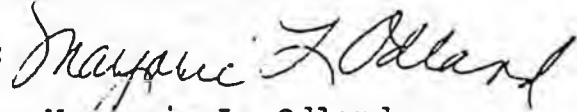
We find no constitutional problems with this amendment. So long as the agency negotiating an extension under this amendment realizes the minimum 10 percent cost savings or minimum 5 percent cost savings with ADA compliance, potential competitive bidders for other lease space will have no viable claim that the state is not in compliance with the procurement code, AS 36.30, because such an extension is exempt under AS 36.30.

We hope this addresses your questions.

Sincerely yours,

CHARLES E. COLE
ATTORNEY GENERAL

by:


Marjorie L. Odland
Assistant Attorney General

WALTER G. MICHAEL, GOVERNOR
PLEASE REPLY TO
7 1031 W 4TH AVENUE SUITE 300
ANCHORAGE, ALASKA 99501-1982
PHONE 907 269 5100
FAX 907 276-3697
7 KEY BANK BUILDING
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-2679
PHONE 907 452 1566
FAX 907 456-1317
7 P.O. BOX 110300 STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE 907 465 3600
FAX 907 463 5295

Sec. 36.25.025. Optional municipal exemption. A municipality, by ordinance adopted by its governing body, may exempt contractors from compliance with the provisions of AS 36.25.010(a) if the estimated cost of the project does not exceed \$400,000, and

(1) the contractor is, and for two years immediately preceding the award of the contract has been, a licensed contractor having its principal office in the state;

(2) the contractor certifies that it has not defaulted on a contract awarded to the contractor during the period of three years preceding the award of a contract for which a bid is submitted;

(3) the contractor submits a financial statement, prepared within a period of nine months preceding the submission of a bid for the contract and certified by a public accountant or a certified public accountant licensed under AS 08.04, demonstrating that the contractor has a net worth of not less than 20 per cent of the amount of the contract for which a bid is submitted; and

(4) the total amount of all contracts that the contractor anticipates performing during the term of performance of the contract for which a bid is submitted does not exceed the net worth of the contractor reported in the certified financial statement prepared and submitted under (3) of this section by more than seven times. (§ 1 ch 81 SLA 1978)

Cross references. — For related provisions, see AS 29.10.200(18) and AS 29.25.010(a)(10).

Collateral references. — Right of municipal corporation to recover back from contractor payments made under contract violating competitive bidding statute. 33 ALR3d 397.

Liability of municipality on quasi contract for value of property or work furnished without compliance with bidding requirements. 33 ALR3d 1164.

Municipal property as subject to mechanic's lien. 51 ALR3d 657.

Chapter 30. State Procurement Code.

Article

1. Organization of State Procurement (§§ 36.30.005 — 36.30.095)
2. Competitive Sealed Bidding (§§ 36.30.100 — 36.30.190)
3. Competitive Sealed Proposals (§§ 36.30.200 — 36.30.270)
4. Other Procurement Methods (§§ 36.30.300 — 36.30.320)
5. Preference for Alaska Products (§§ 36.30.322 — 36.30.338)
6. Preference for Recycled Products (§ 36.30.339)
7. Contract Formation and Modification (§§ 36.30.340 — 36.30.480)
8. Procurement Records and Reports (§§ 36.30.500 — 36.30.540)
9. Legal and Contractual Remedies (§§ 36.30.560 — 36.30.699)
10. Intergovernmental Relations (§§ 36.30.700 — 36.30.790)
11. General Provisions (§§ 36.30.850 — 36.30.995)

Cross references. — For statement of legislative purpose in enacting this chapter, see § 1, ch 106, SLA 1986, in the Temporary and Special Acts.

Collateral references. — Revocation, prior to execution of formal written contract, of vote or decision of public body awarding contract to bidder. 3 ALR3d 864.

Liability of municipality on quasi con-

tract for value of property or work furnished without compliance with bidding requirements. 33 ALR3d 1164.

Furnishing public official with meals, lodging, or travel, or receipt of such benefits, as bribery. 67 ALR3d 1231.

Duty of public authority to disclose to contractor information, allegedly in its possession, affecting cost or feasibility of project. 88 ALR3d 182.

Article 1. Organization of State Procurement.

Section	Section
06. Centralization of procurement authority	50. Lists of contractors
10. Chief procurement officer	60. Specifications
15. Executive branch agencies	70. Supply management
20. Legislature	80. Leases
30. Court system	90. Delivery of supplies
40. Procurement regulations	95. Procurement of paper

Sec. 36.30.005. Centralization of procurement authority.

(a) Except as otherwise provided, all rights, powers, duties, and authority relating to the procurement of supplies, services, and professional services, and the control over supplies, services, and professional services vested in or exercised by an agency on January 1, 1988, are transferred to the commissioner of administration and to the chief procurement officer. Authority granted under this subsection shall be exercised in accordance with this chapter.

(b) Except as otherwise provided, all rights, powers, duties, and authority relating to the procurement of construction and procurements of equipment or services for the state equipment fleet and the control over construction of state facilities and the state equipment fleet vested in or exercised by an agency on January 1, 1988, are transferred to the commissioner of transportation and public facilities, subject to regulations adopted by the commissioner of administration. Notwithstanding AS 44.68.110, authority relating to disposals from the state equipment fleet is vested in the commissioner of transportation and public facilities, subject to regulations adopted by the commissioner of administration. Authority granted under this subsection shall be exercised in accordance with this chapter.

(c) Notwithstanding other provisions of law, all rights, powers, duties, and authority relating to the procurement of supplies, services, professional services, and construction and the disposal of supplies for the University of Alaska are transferred to the Board of Regents. To the maximum extent possible, authority granted under this subsection shall be exercised in accordance with this chapter. The Board of

Regents shall adopt regulations under this subsection that are substantially equivalent to the regulations adopted by the commissioner of administration to implement this chapter. For the purposes of this subsection, unless the context otherwise requires, in this chapter

- (1) "agency" means a subunit of the University of Alaska;
- (2) "attorney general" means the president of the University of Alaska;
- (3) "chief procurement officer" means a person designated by the president of the University of Alaska whose qualifications are substantially equivalent to those provided in AS 36.30.010(n);
- (4) "commissioner," "commissioner of administration," or "commissioner of transportation and public facilities" means the Board of Regents or the president of the University of Alaska if so designated by the Board of Regents by regulations adopted under this subsection; and
- (5) "department" means the University of Alaska. (§ 2 ch 106 SLA 1986; am §§ 1, 2 ch 65 SLA 1987)

NOTES TO DECISIONS

Cited in *Bowers Office Prods., Inc. v. Inc. v. Department of Admin.*, 778 P.2d University of Alaska, 765 P.2d 1095 1153 (Alaska 1989). (Alaska 1988); Dick Fischer Dev. No. 2.

Sec. 36.30.010. Chief procurement officer. (a) The commissioner shall appoint to the partially exempt service the chief procurement officer of the state. The chief procurement officer must have at least five years of prior experience in public procurement, including large scale procurement of supplies, services, or professional services, and must be a person with demonstrated executive and organizational ability. The chief procurement officer may be removed by the commissioner only for cause. The term of office of the chief procurement officer is four years.

(b) Except as otherwise specifically provided in this chapter, the chief procurement officer shall

- (1) procure or supervise the procurement of all supplies, services, and professional services needed by an agency;
- (2) exercise general supervision and control over all inventories of supplies belonging to an agency and prescribe the manner in which supplies shall be purchased, delivered, stored, and distributed;
- (3) prescribe the time, manner, authentication, and form of making requisitions for supplies and services;
- (4) sell, trade, transfer between agencies, or otherwise dispose of surplus, obsolete, or unused supplies and make proper adjustments in the accounts of agencies concerned;

(5) establish and maintain programs for the inspection, testing, and acceptance of supplies and services and the testing of samples submitted with bids;

(6) prescribe standard forms for bids and contracts; and

(7) provide for other matters that may be necessary to carry out the provisions of this chapter and the regulations adopted under this chapter. (§ 2 ch 106 SLA 1986)

Sec. 36.30.015. Executive branch agencies. (a) The commissioner of transportation and public facilities may delegate to another agency the authority to contract for construction. Before delegating authority to an agency under this subsection, the commissioner of transportation and public facilities shall make a written determination that the agency is capable of implementing the delegated authority. Notwithstanding delegation of authority under this subsection, contracts for construction are governed by this chapter and regulations adopted by the commissioner of administration under this chapter.

(b) The commissioner of administration may delegate to an agency the authority to contract for and manage services, professional services, and supplies. Notwithstanding delegation of authority under this subsection, an agency's exercise of the authority is governed by this chapter and regulations adopted by the commissioner under this chapter. Before delegating authority to an agency under this subsection, the commissioner shall make a written determination that the agency is capable of implementing the delegated authority.

(c) The commissioner of administration may not delegate the authority to dispose of supplies or the authority to adopt regulations under this chapter.

(d) An agency may not contract for the services of legal counsel without the approval of the attorney general.

(e) The board of directors of the Alaska Railroad Corporation and the board of directors of the Alaska Aerospace Development Corporation shall adopt procedures to govern the procurement of supplies, services, professional services, and construction. The procedures must be substantially equivalent to the procedures prescribed in this chapter and in regulations adopted under this chapter.

(f) The board of directors of the Alaska Housing Finance Corporation, notwithstanding AS 18.56.088, shall adopt regulations under AS 44.62 (Administrative Procedure Act) and the board of trustees of the Alaska State Pension Investment Board shall adopt regulations under AS 37.10.240 to govern the procurement of supplies, services, professional services, and construction for the respective public corporation and board. The regulations must

(1) reflect competitive bidding principles and provide vendors reasonable and equitable opportunities to participate in the procurement process; and

(2) include procurement methods to meet emergency and extraordinary circumstances.

(g) The Department of Transportation and Public Facilities shall adopt regulations to manage the procurement of supplies, services, professional services, and construction for the repair, maintenance, and reconstruction of vessels, docking facilities, and passenger and vehicle transfer facilities of the Alaska marine highway system. The regulations must be based on principles of competitive procurement consistent with this chapter to satisfy the special requirements of the Alaska marine highway system as determined by the Department of Transportation and Public Facilities. (§ 2 ch 106 SLA 1986; am §§ 8, 9 ch 30 SLA 1990; am § 11 ch 168 SLA 1990; am § 6 ch 88 SLA 1991; am § 8 ch 31 SLA 1992; am § 2 ch 94 SLA 1992; am § 111 ch 4 FSSLA 1992)

Effect of amendments. — The first 1990 amendment, effective July 1, 1990, in subsection (e), substituted "board of directors" for "boards of directors" and deleted a reference to the Alaska State Housing Authority" in the first sentence; and added subsection (f).

The second 1990 amendment, effective June 22, 1990, deleted "by the corporation" at the end of the first sentence in subsection (e).

The 1991 amendment, effective July 2, 1991, inserted "and the board of directors of the Alaska Aerospace Development Corporation" in the first sentence in subsection (e).

The first 1992 amendment inserted "and the board of trustees of the Alaska

State Pension Investment Board shall adopt regulations under AS 37.10.240" and "and board" in the first sentence in subsection (f).

The second 1992 amendment, effective June 19, 1992, added subsection (g).

The third 1992 amendment, effective July 1, 1992, in subsection (f), rewrote the introductory paragraph.

Effective date of 1992 amendment. — Under § 28, ch. 31, SLA 1992, the amendment to (f) of this section made by § 8, ch. 31, SLA 1992, takes effect on the earlier of July 1, 1993 or the date established by resolution of the Alaska State Pension Investment Board for the transfer to it of securities and assets of the relevant retirement systems.

Sec. 36.30.020. Legislature. The Legislative Council shall adopt and publish procedures to govern the procurement of supplies, services, professional services, and construction by the legislative branch. The procedures must be based on the competitive principles consistent with this chapter and must be adapted to the special needs of the legislative branch as determined by the Legislative Council. The procedures must be consistent with the provisions of AS 36.30.080(b) — (c). (§ 2 ch 106 SLA 1986; am § 6 ch 181 SLA 1990; am § 1 ch 73 SLA 1992)

Effect of amendments. — The 1990 amendment, effective July 1, 1990, added the last sentence.

The 1992 amendment, effective September 14, 1992, made a section reference substitution in the last sentence.

Sec. 36.30.030. Court system. The administrative director of courts shall adopt and publish procedures to govern the procurement of supplies, services, professional services, and construction by the judicial branch. The procedures must be based on the competitive principles consistent with this chapter and must be adapted to the special needs of the judicial branch as determined by the administrative director of courts. The procedures must be consistent with the provisions of AS 36.30.080(b) — (c). (§ 2 ch 106 SLA 1986; am § 7 ch 181 SLA 1990)

Effect of amendments. — The 1990 amendment, effective July 1, 1990, substituted "administrative director" for "ad-

ministratror" in the second sentence and added the last sentence.

Sec. 36.30.040. Procurement regulations. (a) The commissioner shall adopt regulations governing the procurement, management, and control of supplies, services, professional services and construction by agencies. The commissioner may audit and monitor the implementation of the regulations and the requirements of this chapter with respect to using agencies.

(b) The commissioner shall adopt regulations pertaining to

- (1) suspension, debarment, and reinstatement of prospective bidders and contractors;
- (2) bid protests;
- (3) conditions and procedures for the procurement of perishables and items for resale;
- (4) conditions and procedures for the use of source selection methods authorized by this chapter, including sole source procurements, emergency procurements, and small procurements;
- (5) the opening or rejection of bids and offers, and waiver of informalities in bids and offers;
- (6) confidentiality of technical data and trade secrets submitted by actual or prospective bidders or offerors;
- (7) partial, progressive, and multiple awards;
- (8) storerooms and inventories, including determination of appropriate stock levels and the management of agency supplies;
- (9) transfer, sale, or other disposal of supplies;
- (10) definitions and classes of contractual services and procedures for acquiring them;
- (11) providing for conducting price analysis;
- (12) use of payment and performance bonds in connection with contracts for supplies, services, and construction;
- (13) guidelines for use of cost principles in negotiations, adjustments, and settlements;
- (14) conditions under which an agency may use the services of an employment program;

(15) a bidder's or offeror's duties under AS 36.30.115 and 36.30.210; and

(16) the elimination and prevention of discrimination in state contracting because of race, religion, color, national origin, sex, age, marital status, pregnancy, parenthood, handicap, or political affiliation. (§ 2 ch 106 SLA 1986; am § 1 ch 102 SLA 1989)

Effect of amendments. — The 1989 36.30.100(c) at the end of subsection amendment, effective September 10, 1989, deleted "as defined under AS

Sec. 36.30.050. Lists of contractors. (a) The commissioner shall establish and maintain lists of persons who desire to provide supplies, services, professional services, or construction services to the state.

(b) A person who desires to be on a list shall submit to the commissioner evidence of a valid Alaska business license. A biennial fee may be established by regulation in an amount reasonably calculated to pay the costs of administering this section. A construction contractor shall also submit a valid certificate of registration issued under AS 08.18. The commissioner, by regulation, may require submission of additional information.

(c) The lists may be used by the chief procurement officer or an agency when issuing invitations to bid or requests for proposals under this chapter. The lists may be used by the legislative council, the court system, and the Alaska Railroad Corporation.

(d) [Repealed, § 24 ch 65 SLA 1987.] (§ 2 ch 106 SLA 1986; am §§ 3, 24 ch 65 SLA 1987; am § 112 ch 4 FSSLA 1992)

Effect of amendments. — The 1992 ity," following "court system," in subsection amendment, effective July 1, 1992, deleted "the Alaska State Housing Author-

Sec. 36.30.060. Specifications. (a) The commissioner shall adopt regulations governing the preparation, revision, and content of specifications for supplies, services, professional services, and construction required by an agency. The commissioner shall monitor the use of these specifications.

(b) Specifications for construction of highways must conform as closely as practicable to those adopted by the American Association of State Highway and Transportation Officials.

(c) The commissioner may obtain expert advice and assistance from personnel of using agencies in the development of specifications. Specifications must promote overall economy for the purposes intended and encourage competition in satisfying the state's needs, and may not be unduly restrictive. The requirements of this subsection regarding the purposes and nonrestrictiveness of specifications apply to all

specifications, including those prepared by architects, engineers, designers, and other professionals.

(d) In this section, "specification" means a description of the physical or functional characteristics, or of the nature of a supply, service, professional service, or construction project; it may include requirements for licensing, inspecting, testing, and delivery. (§ 2 ch 106 SLA 1986)

Opinions of attorney general. — a project labor agreement that prefers the hire of employees who are members of a labor union. Jan. 19, 1990 Op. Atty Gen. While the Alaska Energy Authority may execute contracts for construction of power projects, it probably cannot execute

Sec. 36.30.070. Supply management. The commissioner shall adopt regulations governing the

- (1) management of supplies during their entire life cycle;
- (2) sale, lease, or disposal of surplus supplies by public auction, competitive sealed bidding, or other appropriate method;
- (3) purchase of surplus supplies by an employee of the using or disposing agency; and
- (4) transfer of excess supplies. (§ 2 ch 106 SLA 1986)

Sec. 36.30.080. Leases. (a) The department shall lease space for the use of the state or an agency wherever it is necessary and sensible, subject to compliance with the requirements of this chapter. A lease may not provide for a period of occupancy greater than 40 years. An agency requiring office, warehouse, or other space shall lease the space through the department.

(b) The department, legislative branch, or judicial branch may enter into lease-purchase agreements, including lease-financing agreements. A lease-purchase agreement must provide that lease payments are subject to annual appropriation.

(c) If the department, legislative branch, or judicial branch intends to enter into or renew a lease or lease-purchase agreement, except an agreement related to a refinancing, with an annual rent to the department, legislative branch, or judicial branch that is anticipated to exceed \$1,000,000, or with total lease payments that exceed \$10,000,000 for the full term of the lease, the department, legislative branch, or judicial branch shall provide notice to the legislature. The notice must include the anticipated annual lease obligation amount, the anticipated total construction, acquisition, or other costs of the project, and, if the total lease payments for the full term of the lease exceed \$10,000,000, the total lease payments for the full term of the lease. The department may not enter into or renew an agreement requiring notice under this subsection unless the project has been approved by the legislature by law. An appropriation for the project does not constitute approval of the project for purposes of this subsection. The

department may not enter into an agreement under this subsection if the optional renewal period allowed under the agreement exceeds two years. In this subsection, "term" includes defined renewal options.

(d) When the department is evaluating proposals for a lease of space, the department shall consider, in addition to lease costs, the life cycle costs, function, indoor environment, public convenience, planning, design, appearance, and location of the proposed building.

(e) When the department is considering leasing space, the department should consider whether leasing is likely to be the least costly means to provide the space. (§ 2 ch 106 SLA 1986; am § 1 ch 58 SLA 1990; am §§ 8, 9 ch 181 SLA 1990; am §§ 2, 3 ch 73 SLA 1992)

Effect of amendments. — The first 1990 amendment, effective June 5, 1990, inserted "or renew" before "a lease" and before "an agreement" in the first and third sentences, respectively, and added the final sentence, in subsection (c).

The second 1990 amendment, effective July 1, 1990, rewrote subsection (b); and, in subsection (c), rewrote the first sentence and inserted "requiring notice" in the third sentence.

The 1992 amendment, effective September 14, 1992, in subsection (c), rewrote the first two sentences and added the last sentence; and added subsections (d) and (e).

Editor's notes. — Section 3, ch. 68, SLA 1990 provides that the 1990 amendment to AS 36.30.080(c) by § 1, ch. 68, SLA 1990 "applies to an agreement that is entered into on or after June 5, 1990 and does not apply to a lease or to the renewal of a lease if the lease is in existence on June 5, 1990."

Opinions of attorney general. — Equipment-lease financing is covered by the procurement code and the statutory requirement of legislative approval. Sept. 17, 1987 Op. Atty Gen.

Sec. 36.30.090. Delivery of supplies. Supplies purchased under this chapter shall be delivered at a location within the state unless the department determines that a point of delivery outside the state would be in the best interest of the state. A bid or proposal involving the procurement of supplies shall specify the delivery location and shall state that the price is the delivered price at that location. (§ 1 ch 8 SLA 1989)

Sec. 36.30.095. Procurement of paper. Except as otherwise required under AS 36.15.050 or AS 36.30.322 — 36.30.338, when a state agency purchases paper, at least 15 percent of the quantity purchased must be recycled paper unless the commissioner of the department in which the agency is located makes a written finding that recycled paper is not available for the purchase or that, after application of the procurement preference under AS 36.30.339, the recycled paper is more expensive than the nonrecycled paper. If the agency is not located in a department, the procurement officer for the agency shall make the written finding. If the agency is located in the Office of the Governor, the governor shall make the written finding. (§ 1 ch 175 SLA 1990)

Delayed amendment. — Effective July 1, 1994, this section is amended by § 2, ch. 175, SLA 1990 to read: "Except as otherwise required under AS 36.15.050 or AS 36.30.322 — 36.30.338, when a state agency purchases paper, at least 25 percent of the quantity purchased must be recycled paper unless the commissioner of the department in which the agency is located makes a written finding that recycled paper is not available for the purchase or that, after application of the procurement preference under AS 36.30.339, the recycled paper is more expensive than

the nonrecycled paper. If the agency is not located in a department, the procurement officer for the agency shall make the written finding. If the agency is located in the Office of the Governor, the governor shall make the written finding."

Editor's notes. — Section 9, ch. 175, SLA 1990 provides that this section applies to procurements that begin on or after September 19, 1990. Section 10, ch. 175, SLA 1990 provides that the amendments to this section that are effective July 1, 1994, apply to procurements that begin on or after July 1, 1994.

Article 2. Competitive Sealed Bidding.

Section

- 100. General policy
- 110. Invitation to bid
- 115. Subcontractors
- 120. Bid security
- 130. Public notice of invitation to bid
- 140. Bid opening

Section

- 160. Bid acceptance and bid evaluation
- 160. Late bids; correction or withdrawal of bids; cancellation of awards
- 170. Contract award after bids
- 180. Purpose
- 190. Multi-step sealed bidding

Collateral references. — Right of municipal corporation to recover back from contractor payments made under contract

violating competitive bidding statute. 33 ALR3d 397.

Sec. 36.30.100. General policy. (a) Except as otherwise provided in this chapter, or unless specifically exempted by law, an agency contract shall be awarded by competitive sealed bidding.

(b) Competitive sealed bidding is not required

(1) when the commissioner determines in writing that food, clothing, or medical supplies, or supplies for use in laboratory or medical studies may be purchased otherwise to the best advantage of the state;

(2) for the purchase of products or services manufactured or provided by an employment program; or

(3) for the purchase of products or services provided by the correctional industries program established under AS 33.32.

(c) *(Repealed, § 20 ch 102 SLA 1989.)* (§ 2 ch 106 SLA 1986; am § 20 ch 102 SLA 1989; am § 7 ch 2 FSSLA 1992)

Effect of amendments. — The 1989 amendment, effective September 10, 1989, repealed subsection (c).

The 1992 amendment, effective July 1, 1992, rewrote subsection (b).

Collateral references. — Requirement that public contract be awarded on competitive bidding as applicable to contract for public utility. 81 ALR3d 979.

Sec. 36.30.110. Invitation to bid. (a) When competitive sealed bidding is used, the procurement officer shall issue an invitation to bid. It must include a time, place, and date by which the bid must be received, purchase description, and a description of all contractual terms and conditions applicable to the procurement.

(b) The bidder must have a valid Alaska business license at the time designated in the invitation to bid for bid opening. A bidder for a construction contract shall also submit evidence of the bidder's registration under AS 08.18.

(c) If the commissioner of transportation and public facilities makes a written finding that the release of the estimated cost of a construction contract would adversely affect the state's ability to obtain the best competitive bid, the estimated cost is confidential information and may not be released to the public before bid opening. (§ 2 ch 106 SLA 1986; am §§ 2, 3 ch 102 SLA 1989)

Effect of amendments. — The 1989 amendment rewrote the present first sentence in subsection (b) and added subsection (c).

Sec. 36.30.116. Subcontractors. (a) Within five working days after the identification of the apparent low bidder, the apparent low bidder shall submit a list of the subcontractors the bidder proposes to use in the performance of the contract. The list must include the name and location of the place of business for each subcontractor and evidence of the subcontractor's valid Alaska business license. A bidder for a construction contract shall also submit evidence of each subcontractor's registration under AS 08.18. If a subcontractor on the list did not have a valid Alaska business license and a valid certificate of registration under AS 08.18 at the time the bid was opened, the bidder may not use the subcontractor in the performance of the contract, and shall replace the subcontractor with a subcontractor who had a valid Alaska business license and a valid certificate of registration under AS 08.18 at the time the bid was opened.

(b) A bidder may replace a listed subcontractor if the subcontractor

- (1) fails to comply with AS 08.18;
- (2) files for bankruptcy or becomes insolvent;
- (3) fails to execute a contract with the bidder involving performance of the work for which the subcontractor was listed and the bidder acted in good faith;
- (4) fails to obtain bonding;
- (5) fails to obtain insurance acceptable to the state;
- (6) fails to perform the contract with the bidder involving work for which the subcontractor was listed;
- (7) must be substituted in order for the prime contractor to satisfy required state and federal affirmative action requirements;
- (8) refuses to agree or abide with the bidder's labor agreement; or

(9) is determined by the procurement officer not to be a responsible subcontractor.

(c) If a bidder fails to list a subcontractor or lists more than one subcontractor for the same portion of work and the value of that work is in excess of half of one percent of the total bid, the bidder shall be considered to have agreed to perform that portion of work without the use of a subcontractor and to have represented the bidder to be qualified to perform that work.

(d) A bidder who attempts to circumvent the requirements of this section by listing as a subcontractor another contractor who, in turn, sublets the majority of the work required under the contract violates this section.

(e) If a contract is awarded to a bidder who violates this section, the purchasing officer may

(1) cancel the contract; or

(2) after notice and a hearing, assess a penalty on the bidder in an amount that does not exceed 10 percent of the value of the subcontract at issue. (§ 2 ch 106 SLA 1986; am §§ 4, 5 ch 65 SLA 1987; am § 2 ch 163 SLA 1988; am § 4 ch 102 SLA 1989)

Effect of amendments. — The 1988 amendment added the last sentence in subsection (a). The 1989 amendment, effective September 10, 1989, substituted "subcontractor" for "bidder" at the end of paragraph (b)(9).

Sec. 36.30.120. Bid security. (a) Bid security shall be required for all competitive sealed bidding for construction contracts when the price is estimated by the procurement officer to exceed an amount established by regulation of the commissioner. Bid security on construction contracts under the amount set by the commissioner may be required when the circumstances warrant. Bid security may be required for competitive sealed bidding for contracts for supplies, services, or professional services in accordance with regulations of the commissioner when needed for the protection of the state.

(b) Bid security must be a bond provided by a surety company authorized to do business in the state or otherwise supplied in a form satisfactory to the commissioner. Bid security must be in an amount equal to at least five percent of the amount of the bid.

(c) When the invitation to bid requires security, the procurement officer shall reject a bid that does not comply with the bid security requirement unless, in accordance with regulations, the officer determines that the bid fails to comply in a nonsubstantial manner with the security requirements. (§ 2 ch 106 SLA 1986; am § 5 ch 102 SLA 1989)

Effect of amendments. — The 1989 amendment, effective September 10, 1989, rewrote the second sentence of subsection (b).

Sec. 36.30.130. Public notice of invitation to bid. (a) The procurement officer shall give adequate public notice of the invitation to bid at least 21 days before the date for the opening of bids. If a determination is made in writing that a shorter notice period is necessary for a particular bid, the 21-day period may be shortened. The determination shall be made by the chief procurement officer for bids for supplies, services, or professional services. The determination shall be made by the commissioner of transportation and public facilities for bids for construction or acquisition of property for the state equipment fleet. Notice shall be published in the Alaska Administrative Journal. The time and manner of notice must be in accordance with regulations adopted by the commissioner of administration. When practicable, notice may include

(1) publication in a newspaper calculated to reach prospective bidders;

(2) notices posted in public places within the area where the work is to be performed or the material furnished; and

(3) notices mailed to all active prospective contractors on the appropriate list maintained under AS 36.30.050.

(b) Failure to comply with the notice requirements of this section does not invalidate a bid or the award of a contract. If the state fails to substantially comply with the requirements of (a) of this section, the state is liable for damages caused by that failure. (§ 2 ch 106 SLA 1986)

Collateral references. — Sufficiency of notice to public works contractor on United States project under Miller Act (40 USCS § 270b(n)). 98 ALR Fed 778.

Sec. 36.30.140. Bid opening. (a) The procurement officer shall open bids at the time and place designated in the invitation to bid. All bid openings are open to the public. The amount of each bid and other relevant information that is specified by regulation of the commissioner, together with the name of each bidder, shall be recorded.

(b) The information recorded under (a) of this section is open to public inspection as soon as practicable before the notice of intent to award a contract is given under AS 36.30.365. The bids are not open for public inspection until after the notice of intent to award a contract is given. To the extent the bidder designates and the procurement officer concurs, trade secrets and other proprietary data contained in a bid document are confidential. (§ 2 ch 106 SLA 1986; am § 6 ch 65 SLA 1987)

Sec. 36.30.150. Bid acceptance and bid evaluation. (a) Bids shall be unconditionally accepted without alteration or correction, except as authorized in AS 36.30.160. The procurement officer shall evaluate bids based on the requirements set out in the invitation to bid, which may include criteria to determine acceptability such as inspection, testing, quality, delivery, and suitability for a particular purpose. The criteria that will affect the bid price and be considered in evaluation for award must be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation to bid must set out the evaluation criteria to be used. Criteria may not be used in bid evaluation if they are not set out in the invitation to bid.

(b) A contract based on total or life cycle costs may be awarded only when the chief procurement officer or, for construction contracts or procurements for the state equipment fleet, the commissioner of transportation and public facilities, determines in writing at the time of contract solicitation that the contract promotes overall economy for the purposes intended, encourages competition, is not unduly restrictive, and is in the best interests of the state. (§ 2 ch 106 SLA 1986)

Sec. 36.30.160. Late bids; correction or withdrawal of bids; cancellation of awards. (a) Bids received after the bid due date and time indicated on the invitation to bid may not be accepted unless the delay was due to an error of the contracting agency.

(b) Correction or withdrawal of inadvertently erroneous bids before or after bid opening, or cancellation of awards or contracts based on bid mistakes may be permitted in accordance with regulations adopted by the commissioner. After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the state or fair competition may not be permitted. Except as otherwise provided by regulation, a decision to permit the correction or withdrawal of a bid, or to cancel an award or contract based on bid mistake, shall be supported by a written determination made by the procurement officer. If a bidder is permitted to withdraw a bid before award, an action may not be maintained against the bidder or the bid security. (§ 2 ch 106 SLA 1986)

Collateral references. — Right of bidder for state or municipal contract to rescind bid on ground that bid was based upon his own mistake or that of his employee. 2 ALR4th 991.

Application, to determination of govern-

ment's liability under public contract, of doctrine of "constructive" invocation of clause authorizing termination for convenience of government — modern cases. 104 ALR Fed 661.

Sec. 36.30.170. Contract award after bids. (a) Except as provided in (b) — (h) of this section, the procurement officer shall award a contract based on the solicited bids with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set out in the invitation to bid.

(b) The procurement officer shall award a contract based on solicited bids to the lowest responsive and responsible bidder after an Alaska bidder preference of five percent, an Alaska products preference as described in AS 36.30.322 — 36.30.338, and a recycled products preference under AS 36.30.339 have been applied. In this subsection, "Alaska bidder" means a person who

- (1) holds a current Alaska business license;
- (2) submits a bid for goods, services, or construction under the name as appearing on the person's current Alaska business license;
- (3) has maintained a place of business within the state staffed by the bidder or an employee of the bidder for a period of six months immediately preceding the date of the bid;
- (4) is incorporated or qualified to do business under the laws of the state, is a sole proprietorship and the proprietor is a resident of the state, or is a partnership and all partners are residents of the state; and

(5) if a joint venture, is composed entirely of ventures that qualify under (1) — (4) of this subsection.

(c) Except as otherwise provided under (e) or (f) of this section, if a bidder qualifies under (b) of this section as an Alaska bidder, is offering services through an employment program, and is the lowest responsible and responsive bidder with a bid that is not more than 15 percent higher than the lowest bid, the procurement officer shall award the contract to that bidder. This subsection does not give a bidder who would otherwise qualify for a preference under this subsection a preference over another bidder who would otherwise qualify for a preference under this subsection.

(d) The procurement officer shall award an insurance-related contract based on solicited bids to the lowest responsive and responsible bidder after an Alaska bidder preference of five percent. In this subsection, "Alaska bidder" means a person who meets the criteria set out in (b)(1) — (5) of this section and who is an Alaska domestic insurer.

(e) If a bidder qualifies under (b) of this section as an Alaska bidder, is a sole proprietorship owned by an individual who is a person with a disability, and is the lowest responsible and responsive bidder with a bid that is not more than 10 percent higher than the lowest bid, the procurement officer shall award the contract to that bidder. This subsection does not give a bidder who would otherwise qualify for a preference under this subsection a preference over another bidder who

would otherwise qualify for a preference under this subsection or (f) of this section.

(f) If a bidder qualifies under (b) of this section as an Alaska bidder, if 50 percent or more of the bidder's employees at the time the bid is submitted are persons with a disability, and if the bidder is the lowest responsible and responsive bidder with a bid that is not more than 10 percent higher than the lowest bid, the procurement officer shall award the contract to that bidder. The contract must contain a promise by the bidder that the percentage of the bidder's employees who are persons with a disability will remain at 50 percent or more during the contract term. This subsection does not give a bidder who would otherwise qualify for a preference under this subsection a preference over another bidder who would otherwise qualify for a preference under this subsection or (e) of this section.

(g) The division of vocational rehabilitation in the Department of Education shall add to its current list of qualified employment programs a list of individuals who qualify as persons with a disability under (e) of this section and of persons who qualify under (f) of this section as employers with 50 percent or more of their employees being persons with disabilities. A person must be on this list at the time the bid is opened in order to qualify for a preference under (e) or (f) of this section.

(h) A preference under (c), (e), or (f) of this section is in addition to any other preference for which the bidder qualifies, including the preference under (b) of this section; however, a bidder may not receive a preference under both (e) and (f) of this subsection for the same contract.

(i) This section applies to all insurance contracts involving state money. In this subsection, "state money" includes state grants and reimbursement to municipalities, school districts, and other entities.

(j) In this section, "person with a disability" means an individual

(1) who has a severe physical or mental disability that seriously limits one or more functional capacities in terms of employability; in this paragraph, "functional capacities" means mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, or work skills;

(2) whose physical or mental disability

(A) results from amputation, arthritis, autism, blindness, burn injury, cancer, cerebral palsy, cystic fibrosis, deafness, head injury, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, musculo-skeletal disorders, neurological disorders, paraplegia, quadriplegia, other spinal cord conditions, sickle cell anemia, specific learning disability, or end stage renal disease; in this subparagraph, "neurological disorders" include stroke and epilepsy; or

(B) is a disability or combination of disabilities that are not identified in (A) of this paragraph and that are determined on the basis of an evaluation of rehabilitation potential to cause substantial functional limitation comparable to a disability identified in (A) of this paragraph; and

(3) whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time. (§ 2 ch 106 SLA 1986; am §§ 7 — 9 ch 65 SLA 1987; am §§ 6, 18 ch 102 SLA 1989; am § 3 ch 175 SLA 1990; am §§ 1 — 3 ch 114 SLA 1992)

Revisor's notes. — Subsection (i) was formerly AS 36.30.850(e). Renumbered in 1992. Subsection (j) enacted as (i). Relettered in 1992.

Effect of amendments. — The 1989 amendment, effective September 10, 1989, deleted "as defined under AS 36.30.100(c)" following "employment program" in subsection (c); and divided subsection (i) (formerly AS 36.30.850(e)) into two sentences, substituting "In this subsection, 'state money' includes" for "including" at the beginning of the present second sentence.

The 1990 amendment, in subsection (h), inserted "and a recycled products preference under AS 36.30.324" in the first sentence in the introductory paragraph and

made a series of minor stylistic changes throughout the subsection.

The 1992 amendment, effective June 23, 1992, made a subsection reference substitution in subsection (a); rewrote subsection (c); and added subsections (e)-(i).

Editor's notes. — Section 6, ch. 114, SLA 1992 provides that the 1992 amendments to this section apply "to procurements that begin on or after June 23, 1992."

Opinions of attorney general. — An agent will be considered the bidder only if the agent is in fact a principal with the power to convey a leasehold interest in its own right. Otherwise, he is not entitled to the bidder preference. July 1, 1989 Op. Atty Gen.

NOTES TO DECISIONS

Quoted in *State v. Johnson*, 779 P.2d 778 (Alaska 1989).

Collateral references. — Validity, construction, and effect of requirement under state statute or local ordinance giving

local or locally qualified contractors a percentage preference in determining lowest bid. 89 ALR4th 587.

Sec. 36.30.180. Purpose. The legislature finds that there exists in the state continuing high unemployment, underutilization of resident construction and supply firms, and high costs unfavorable to the welfare of Alaskans and to the economic health of the state. The purpose of bidder preference for resident firms when the state acts as a market participant is to encourage local industry, strengthen and stabilize the economy, decrease unemployment, and strengthen the tax and revenue base of the state. (§ 1 ch 70 SLA 1985)

Revisor's notes. — Formerly AS 37.05.226. Renumbered in 1988.

Sec. 36.30.190. Multi-step sealed bidding. When it is considered impractical to initially prepare a definitive purchase description to support an award based on price, the procurement officer may issue an invitation to bid requesting the submission of unpriced technical offers to be followed by an invitation to bid limited to the bidders whose offers are determined to be technically qualified under the criteria set out in the first solicitation. (§ 2 ch 106 SLA 1986)

Article 3. Competitive Sealed Proposals.

Section

- 200. Conditions for use
- 210. Request for proposals
- 220. Standard overhead rate
- 230. Disclosure of proposals
- 240. Discussion with responsible offerors and revisions to proposals

Section

- 260. Award of contract
- 260. Contract execution
- 266. Multi-step sealed proposals
- 270. Architectural, engineering, and land surveying contracts

Sec. 36.30.200. Conditions for use. (a) Except as otherwise provided in this chapter, or unless specifically exempted by law, an agency contract shall be awarded by competitive sealed proposals if it is not awarded by competitive sealed bidding. Construction may only be procured by competitive sealed proposals if the conditions under (c) of this section are met.

(b) The commissioner may provide by regulation that it is either not practicable or not advantageous to the state to procure specified types of supplies, services, or construction by competitive sealed bidding that would otherwise be procured by that method. When the chief procurement officer, or for construction contracts or procurements for the state equipment fleet, the commissioner of transportation and public facilities, determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the state, a contract may be entered into by competitive sealed proposals in accordance with the regulations. When it is determined that it is practicable but not advantageous to use competitive sealed bidding, the chief procurement officer or commissioner of transportation and public facilities shall specify with particularity the basis for the determination.

(c) When the chief procurement officer determines that it is advantageous to the state, a procurement officer may issue a request for proposals requesting the submission of offers to provide construction in accordance with a design provided by the offeror. The request for proposals shall require that each proposal submitted contain a single price that includes the design/build. (§ 2 ch 106 SLA 1986)

Sec. 36.30.210. Request for proposals. (a) A request for competitive sealed proposals must contain the date, time, and place for delivering proposals, a specific description of the supplies, construction, services, or professional services to be provided under the contract, and the terms under which the supplies, construction, services, or professional services are to be provided. The request must require the offeror, no later than five working days after the proposal that is the most advantageous to the state is identified, to list subcontractors the offeror proposes to use in the performance of the contract. The list must include the name and location of the place of business for each subcontractor, the work to be subcontracted to each subcontractor, and evidence of the subcontractor's valid Alaska business license. An offeror for a construction contract shall also submit evidence of the offeror's registration under AS 08.18 and evidence of registration for each listed subcontractor.

(b) A request for proposals must contain that information necessary for an offeror to submit a proposal or contain references to any information that cannot reasonably be included with the request. The request must provide a description of the factors that will be considered by the procurement officer when evaluating the proposals received, including the relative importance of price and other evaluation factors.

(c) Notice of a request for proposals shall be given in accordance with procedures under AS 36.30.130. The procurement officer may use additional means considered appropriate to notify prospective offerors of the intent to enter into a contract through competitive sealed proposals.

(d) The provisions of AS 36.30.115(b) — (c) apply to competitive sealed proposals.

(e) The offeror must have a valid Alaska business license at the time designated, in the request for proposals, for opening of the proposals. (§ 2 ch 106 SLA 1986; am § 10 ch 65 SLA 1987; am §§ 7, 8 ch 102 SLA 1989)

Effect of amendments. — The 1989 amendment, effective September 10, 1989, in subsection (a), rewrote the second sentence and, in the third sentence, substituted "must" for "shall" and inserted "the work to be subcontracted to each subcontractor"; and added subsection (e).

Sec. 36.30.220. Standard overhead rate. (a) An agency that provides services to another agency under a contract covered by this chapter shall establish a standard overhead rate. If an agency submits a proposal in response to a request for competitive sealed proposals, the agency must include its standard overhead rate within its proposal.

(b) In this section, "standard overhead rate" means a charge established for services and professional services from an agency that is

designed to compensate the agency for administration and support services incidentally provided with the services contracted for. (§ 2 ch 106 SLA 1986)

Sec. 36.30.230. Disclosure of proposals. The procurement officer shall open proposals so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals containing the name and address of each offeror shall be prepared in accordance with regulations adopted by the commissioner. The register and the proposals are open for public inspection after the notice of intent to award a contract is issued under AS 36.30.365. To the extent that the offeror designates and the procurement officer concurs, trade secrets and other proprietary data contained in the proposal documents are confidential. (§ 2 ch 106 SLA 1986)

Sec. 36.30.240. Discussion with responsible offerors and revisions to proposals. As provided in the request for proposals, and under regulations adopted by the commissioner, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors reasonably susceptible of being selected for award shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before the award of the contract for the purpose of obtaining best and final offers. In conducting discussions, the procurement officer may not disclose information derived from proposals submitted by competing offerors. AS 44.62.310 does not apply to meetings with offerors under this section. (§ 2 ch 106 SLA 1986)

Sec. 36.30.250. Award of contract. (a) The procurement officer shall award a contract under competitive sealed proposals to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the state taking into consideration price and the evaluation factors set out in the request for proposals. Other factors and criteria may not be used in the evaluation. The contract file must contain the basis on which the award is made.

(b) In determining whether a proposal is advantageous to the state, the procurement officer shall take into account, in accordance with regulations of the commissioner, whether the offeror qualifies as an Alaska bidder under AS 36.30.170(b), is offering the service of an employment program, or qualifies for a preference under AS 36.30.170(e) or (f). (§ 2 ch 106 SLA 1986; am § 9 ch 102 SLA 1989; am § 4 ch 114 SLA 1992)

Effect of amendments. — The 1989 amendment, effective September 10, 1989, deleted "as defined in AS 36.30.100(c)" at the end of subsection (b).
The 1992 amendment, effective June 23, 1992, in subsection (b), added ", or qualifies for a preference under AS 36.30.170(e) or (f)" to the end and made a related stylistic change.

The 1992 amendment, effective June

Sec. 36.30.260. Contract execution. A contract awarded under competitive sealed proposals must contain:

- (1) the amount of the contract stated on its first page;
- (2) the date for the supplies to be delivered or the dates for construction, services, or professional services to begin and be completed;
- (3) a description of the supplies, construction, services, or professional services to be provided; and
- (4) certification by the project director for the contracting agency, the head of the contracting agency, or a designee that sufficient funds are available in an appropriation to be encumbered for the amount of the contract. (§ 2 ch 106 SLA 1986)

Sec. 36.30.265. Multi-step sealed proposals. When it is considered impractical to initially prepare a definitive purchase description to support an award based on listed selection criteria, the procurement officer may issue an expression of interest requesting the submission of unpriced technical offers, and then later issue a request for proposals limited to the offerors whose offers are determined to be technically qualified under the criteria set out in the expression of interest. (§ 10 ch 102 SLA 1989)

Sec. 36.30.270. Architectural, engineering, and land surveying contracts. (a) Notwithstanding conflicting provisions of AS 36.30.100 — 36.30.260, a procurement officer shall negotiate a contract for an agency with the most qualified and suitable firm or person of demonstrated competence for architectural, engineering, or land surveying services. The procurement officer shall award a contract for those services at fair and reasonable compensation as determined by the procurement officer, after consideration of the estimated value of the services to be rendered, and the scope, complexity, and professional nature of the services. When determining the most qualified and suitable firm or person, the procurement officer shall consider the

(1) proximity to the project site of the office of the firm or person unless federal law prohibits this factor from being considered in the awarding of the contract; and

(2) employment practices of the firm or person with regard to women and minorities.

(b) If negotiations with the most qualified and suitable firm or person under (a) of this section are not successful, the procurement officer shall negotiate a contract with other qualified firms or persons of

demonstrated competence, in order of public ranking. The procurement officer may reject all or part of a proposal.

(c) This section does not apply to contracts awarded in a situation of public necessity if the procurement officer certifies in writing that a situation of public necessity exists.

(d) Notwithstanding the other provisions of this section, a procurement officer may include price as an added factor in selecting architectural, engineering, and land surveying services when, in the judgment of the procurement officer, the services required are repetitious in nature, and the scope, nature, and amount of services required are thoroughly defined by measurable and objective standards to reasonably enable firms or persons making proposals to compete with a clear understanding and interpretation of the services required. In order to include price as a factor in selection, a majority of the persons involved by the procurement officer in evaluation of the proposals must be registered in the state to perform architectural, engineering, or land surveying services.

(e) This section does not apply to a contract that incorporates both design services and construction. (§ 2 ch 106 SLA 1986) *

CROSS REFERENCES. — For professional registration requirements for contracts under this section, see AS 36.90.100.

Article 4. Other Procurement Methods.

Section	Section
300. Sole source procurements	310. Emergency procurements
305. Limited competition procurements	320. Small procurements

Sec. 36.30.300. Solo source procurements. (a) A contract may be awarded for supplies, services, professional services, or construction without competitive sealed bidding, competitive sealed proposals, or other competition in accordance with regulations adopted by the commissioner. A contract may be awarded under this section only when the chief procurement officer or, for construction contracts or procurements for the state equipment fleet, the commissioner of transportation and public facilities determines in writing that there is only one source for the required procurement or construction. A sole source procurement may not be awarded if a reasonable alternative source exists. The written determination must include findings of fact that support by clear and convincing evidence the determination that only one source exists. Except for procurements of supplies, services, or construction that do not exceed the amount for small procurements under AS 36.30.320(a), the authority to make the determination required by this subsection may not be delegated.

(b) The using agency shall submit written evidence to support a sole source determination. The commissioner of administration or the commissioner of transportation and public facilities, as appropriate, may also require the submission of cost or pricing data in connection with an award under this section.

(c) The procurement officer shall negotiate with the single supplier, to the extent practicable, to obtain a contract advantageous to the state.

(d) Procurement requirements may not be artificially divided, fragmented, aggregated, or structured so as to constitute a purchase under this section or to circumvent the source selection procedures required by AS 36.30.100 — 36.30.270. (§ 2 ch 106 SLA 1986; am § 11 ch 102 SLA 1989)

Effect of amendments. — The 1989 amendment, effective September 10, 1989, in subsection (a), deleted "of administration" at the end of the first sentence and added "Except for procurements of sup-

plies, services, or construction that do not exceed the amount for small procurements under AS 36.30.320(a)" at the beginning of the last sentence.

Sec. 36.30.305. Limited competition procurements. (a) A contract for supplies, services, professional services, or a construction contract under \$100,000, may be awarded without competitive sealed bidding or competitive sealed proposals, in accordance with regulations adopted by the commissioner. A contract may be awarded under this section only when the commissioner, or, for construction contracts under \$100,000 or procurements for the state equipment fleet, the commissioner of transportation and public facilities, determines in writing that a situation exists that makes competitive sealed bidding or competitive sealed proposals impractical or contrary to the public interest. Procurements under this section shall be made with competition that is practicable under the circumstance. Except for procurements of supplies, services, or construction that do not exceed the amount for small procurements under AS 36.30.320(a), the authority to make a determination required by this section may not be delegated.

(b) The using agency shall submit written evidence to support a determination under this section.

(c) Procurement requirements may not be artificially divided, fragmented, aggregated, or structured so as to constitute a purchase under this section or to circumvent the source selection procedures required by AS 36.30.100 — 36.30.270.

(d) Sole source procurements may not be made under this section.

(e) Architectural, engineering, and land survey contracts under AS 36.30.270 may not be made under this section. (§ 11 ch 65 SLA 1987; am § 12 ch 102 SLA 1989)

Effect of amendments. — The 1989 amendment, effective September 10, 1989, in subsection (a), deleted "of administrative" at the end of the first sentence and following "commissioner" in the second sentence and added "Except for procure-

ments of supplies, services, or construction that do not exceed the amount for small procurements under AS 36.30.320(a)" at the beginning of the last sentence.

Sec. 36.30.310. Emergency procurements. Procurements may be made under emergency conditions as defined in regulations adopted by the commissioner when there exists a threat to public health, welfare, or safety, when a situation exists that makes a procurement through competitive sealed bidding or competitive sealed proposals impracticable or contrary to the public interest, or to protect public or private property. An emergency procurement need not be made through competitive sealed bidding or competitive sealed proposals but shall be made with competition that is practicable under the circumstances. A written determination by the procurement officer of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The written determination must include findings of fact that support the determination. (§ 2 ch 106 SLA 1986)

Sec. 36.30.320. Small procurements. (a) A procurement for supplies, services, or construction that does not exceed an aggregate dollar amount of \$25,000 may be made in accordance with regulations adopted by the commissioner for small procurements.

(b) A contract for professional services that does not exceed \$25,000 may be made under regulations adopted by the commissioner for small procurements, except that an agency may not contract for the services of legal counsel without the approval of the attorney general.

(c) Small procurements need not be made through competitive sealed bidding or competitive sealed proposals but shall be made with competition that is practicable under the circumstances.

(d) Procurement requirements may not be artificially divided or fragmented so as to constitute a purchase under this section or to circumvent the source selection procedures required by AS 36.30.100 — 36.30.270.

(e) The procurement officer shall give adequate public notice of intent to make a procurement under this section in accordance with regulations adopted by the commissioner. (§ 2 ch 106 SLA 1986; am § 12 ch 65 SLA 1987; am § 13 ch 102 SLA 1989; am § 8 ch 2 FSSLA 1992)

Effect of amendments. — The 1989 amendment, effective September 10, 1989, substituted "\$10,000" for "\$25,000" in subsection (a).

The 1992 amendment, effective July 1, 1992, substituted "\$25,000" for "\$10,000" in subsection (a).

Article 5. Preference for Alaska Products.

Section	Section
322. Use of local forest products	332. Classification of Alaska products
324. Use of Alaska products and recycled Alaska products	334. Identification of Alaska products
326. Contract specifications	336. Application
328. Grant of Alaska products preference	338. Definitions
330. Penalty for failing to use designated products	

Cross references. — For similar provisions applicable to procurements using state money of forest, agricultural, and fisheries products, see AS 36.15.

Sec. 36.30.322. Use of local forest products. (a) Only timber, lumber, and manufactured lumber products originating in this state from Alaska forests may be procured by an agency or used in construction projects of an agency unless the manufacturers and suppliers who have notified the commissioner of commerce and economic development of their willingness to manufacture or supply Alaska forest products

(1) have been given reasonable notice of the forest product needs of the procurement or project; and

(2) are unable to supply the products at a cost that is within seven percent of the price offered by a manufacturer or supplier of non-Alaska forest products.

(b) The provisions of AS 36.30.326 — 36.30.332 do not apply to procurements of timber, lumber, and manufactured lumber products or the use of those items in construction projects of an agency.

(c) During the period of performance of a state contract the contractor shall maintain records showing efforts made in using Alaska forest products or evidence of Alaska forest products not being available or reasonably competitive. The contractor shall provide the records to the procurement officer on a periodic basis, as required by regulations adopted by the commissioner of commerce and economic development. (§ 2 ch 106 SLA 1986; am §§ 13, 14 ch 65 SLA 1987)

Collateral references. — Validity, construction, and effect of state and local laws requiring governmental units to give "purchase preference" to goods manufactured or services performed in state. §4 ALR4th 419.

Sec. 36.30.324. Use of Alaska products and recycled Alaska products. Alaska products shall be used whenever practicable in procurements for an agency. Recycled Alaska products shall be used when they are of comparable quality, of equivalent price, and appropriate for the intended use. (§ 2 ch 106 SLA 1986; am § 4 ch 63 SLA 1988)

Effect of amendments. — The 1988 amendment added the second sentence.

Sec. 36.30.326. Contract specifications. Contract specifications for a procurement for an agency must include a provision that a bidder or offeror that designates in a bid or proposal the use of Alaska products identified in the specifications will receive the preference granted under AS 36.30.328 in the evaluation of the bid or proposal if the designated Alaska products meet the contract specifications. (§ 2 ch 106 SLA 1986)

Sec. 36.30.328. Grant of Alaska products preference. In the evaluation of a bid or proposal for a procurement for an agency, a bid or offer that designates the use of Alaska products identified in the contract specifications and designated as Class I, Class II, or Class III state products under AS 36.30.332 is decreased by the percentage of the value of the designated Alaska products under AS 36.30.332. (§ 2 ch 106 SLA 1986)

Sec. 36.30.330. Penalty for failing to use designated products. (a) If a successful bidder or offeror who designates the use of an Alaska product in a bid or proposal for a procurement for an agency fails to use the designated product for a reason within the control of the successful bidder or offeror, each payment under the contract shall be reduced according to the following schedule:

(1) for a Class I designated Alaska product — four percent;

(2) for a Class II designated Alaska product — six percent;

(3) for a Class III designated Alaska product — eight percent.

(b) A person is not a responsible bidder or offeror if, in the preceding three years, the person has twice designated the use of an Alaska product in a bid or proposal for a procurement for an agency and has each time failed to use the designated Alaska product for reasons within the control of the bidder or offeror.

(c) The procurement officer shall report to the commissioner of commerce and economic development each contractor penalized under (a) of this section. The commissioner of commerce and economic development shall maintain a list of contractors determined not to be responsible bidders under (b) of this section. (§ 2 ch 106 SLA 1986)

Sec. 36.30.332. Classification of Alaska products. (a) The commissioner of commerce and economic development shall adopt regulations establishing the value added in the state for materials and supplies produced or manufactured in the state that are used in a state procurement and establishing whether a product qualifies as a recycled Alaska product. The commissioner shall publish a list of the prod-

ucts annually. A supplier may request inclusion of its product on the appropriate list.

(b) Materials and supplies with value added in the state that are
(1) more than 25 percent and less than 50 percent produced or manufactured in the state are Class I products;

(2) 50 percent or more and less than 75 percent produced or manufactured in the state are Class II products; and

(3) 75 percent or more produced or manufactured in the state are Class III products.

(c) In a bid or proposal evaluation a

(1) Class I product is given a three percent preference;

(2) Class II product is given a five percent preference;

(3) Class III product is given a seven percent preference. (§ 2 ch 106 SLA 1986; am § 15 ch 65 SLA 1987; am § 5 ch 63 SLA 1988)

Effect of amendments. — The 1988 amendment, in subsection (a), divided the former first sentence into the present first two sentences and added "and establishing whether a product qualifies as a recycled Alaska product" at the end of the first sentence.

Sec. 36.30.334. Identification of Alaska products. An agency may identify specific Alaska products for use in making a procurement. (§ 2 ch 106 SLA 1986)

Sec. 36.30.336. Application. Notwithstanding other provisions of this chapter, AS 36.30.322 — 36.30.338 apply to all procurements subject to this chapter, except as provided in AS 36.15.050 and AS 36.30.322(b). (§ 2 ch 106 SLA 1986; am § 3 ch 62 SLA 1987; am § 16 ch 65 SLA 1987)

Sec. 36.30.338. Definitions. In AS 36.30.322 — 36.30.338

(1) "Alaska product" means a product of which not less than 25 percent of the value, as determined in accordance with regulations adopted under AS 36.30.332(a), has been added by manufacturing or production in the state;

(2) "produced or manufactured" means processing, developing, or making an item into a new item with a distinct character and use through the application within the state of materials, labor, skill, or other services;

(3) "product" means materials or supplies but does not include gravel and asphalt;

(4) "recycled Alaska product" means an Alaska product of which not less than 50 percent of the value of the product consists of a product that was previously used in another product, if the recycling process is done in the state. (§ 2 ch 106 SLA 1986; am § 17 ch 65 SLA 1987; am § 6 ch 63 SLA 1988)

Reviser's notes. — Reorganized in 1980 to alphabetize the defined terms. **Effect of amendments.** — The 1988 amendment added paragraph (4).

Article 6. Preference for Recycled Products.

Section

339. Procurement preference for recycled products

Sec. 36.30.339. Procurement preference for recycled products. (a) In the evaluation of a bid or proposal for an agency procurement of products, the agency shall decrease the bid or proposal by five percent if the bid or proposal indicates that the products being purchased will be recycled products.

(b) A decrease made under (a) of this section is in addition to other preferences allowed for the procurement.

(c) The department shall establish the minimum percentage of recycled content that will qualify a product as a recycled product under (a) of this section. (§ 4 ch 175 SLA 1990)

Article 7. Contract Formation and Modification.

Section

340. Review and approval by the Attorney General
350. Bid cancellation, rejection
360. Determination of responsibility
362. Determination to award a contract to a nonresident
365. Notice of intent to award a contract
370. Types of contracts
390. Multi-term contracts

Section

400. Cost or pricing data
410. Right to inspect plant
420. Right to audit records
430. Standard modification clauses for contracts
460. Modification of standard clauses
470. Fiscal responsibility
480. Cost principle regulations

Collateral references. — Effect of stipulation, in public building or construction contract, that alterations or extras must be ordered in writing. 1 ALR3d 1273.

Validity and construction of "no dam-

age" clause with respect to delay in building or construction contract. 74 ALR3d 187.

Construction contract provision excusing delay caused by "severe weather". 85 ALR3d 1085.

Sec. 36.30.340. Review and approval by the Attorney General. If a contract contains a term that is in conflict with a state standard form contract term or if a standard term is deleted or modified by a term that is not standard, the contract must be reviewed by the Attorney General and approved as to form. (§ 2 ch 106 SLA 1986)