State of Alaska
Department of Administration
Division of General Services

ALASKA PUBLIC PROCUREMENT MANUAL

LEVEL I

REVISED APRIL 2015

PREPARED BY THE DIVISION OF GENERAL SERVICES, PURCHASING SECTION

DOWNLOAD AKPROCUREMENT FOR QUICK ACCESS TO ALASKA'S PROCUREMENT CODE, GUIDES, AND TRAINING CALENDAR! AVAILABLE FOR IOS AND ANDROID DEVICES.

JASON SOZA
CHIEF PROCUREMENT OFFICER
(907) 465-5684
JASON.SOZA@ALASKA.GOV

TED FOSKET
CONTRACTING MANAGER
(907) 465-5674
TED.FOSKET@ALASKA.GOV

TABLE OF CONTENTS

Level I – $1 to $10,000 3
Introduction to Public Procurement 3
What is Procurement? 3
Ethics in Public Procurement 3
What is a Contract? 4
Competition 5
Price vs. Value 5
Public Procurement in Alaska 7
Alaska's Procurement Structure 7
Alaska Procurement Officer Certification Program 7
Exempt Agencies 9
Exempt Expenditures 10
Procurement Acronyms & Abbreviations 10
Procurement Basics 11
Before you Begin 11
Departmental Contracts 11
Contract Award Manual 11
Evaluating Cost 11
Purchasing Documents 12
Written Determinations 12
Procurement Pitfalls 12
Fragmentation 12
Responsiveness and Responsibility 13
Supplies vs. Services 14
Expired Contracts 16
Tips and Resources 16
Specifications 16
Preferences 18
Handling a Protest 19
Contract Price Adjustments 20
Antitrust Law 20
Other Resources 21
Small Procurements 22
What is a Small Procurement? 22
Conducting a Small Procurement 22
Competition Levels and Methods 22
Small Procurement Protests 23
Basic Contract Administration 23
Small Procurement Matrix 25
Request for Level I Procurement Certification 27
Sample Cure Letter 29
An Antitrust Primer for Procurement Professionals 31
Sample Protest Response Letter 37
Guide to Small Procurement Protests 39
Class Exercises 41

LEVEL I – $1 TO $10,000

INTRODUCTION TO PUBLIC PROCUREMENT

WHAT IS PROCUREMENT?

In short, procurement is the acquisition of goods or services from an external source that will be paid for using state money. This includes the competitive process used to acquire goods and services, the award of a contract, and ongoing contract administration.

Public procurement in Alaska's executive branch is governed by Alaska Statute (AS) 36.30, Alaska Administrative Code 2 AAC 12, Alaska Administrative Manual (AAM) Sections 81 and 82, and the Department of Administration's delegation of purchasing authority. These bodies of law, regulation, and policy are collectively referred to as the **procurement code**.

Legally, "procurement" in Alaska is defined in **AS 36.30.990(19)**:

> *Buying, purchasing, renting, leasing, or otherwise acquiring supplies [or] services; it also includes functions that pertain to the obtaining of a supply [or] services, including description of requirements, selection and solicitation of sources, preparation and award of a contract, and all phases of contract administration.*

The procurement code must be followed whenever procuring with state money, unless otherwise exempted. "State money" is defined in **AS 36.30.990(24)** as:

> *Any money appropriated to an agency or spent by an agency irrespective of its source, including federal assistance...*

The State of Alaska has several procurement methods available to ensure that when an agency acquires goods or services, they are procured at the best possible cost to meet the needs of the agency while promoting fair and open competition and protecting the interests of both the state and the vendors.

ETHICS IN PUBLIC PROCUREMENT

Because public procurement involves the obligation and expenditure of public funds, ethics play a major role in the procurement process.

All State of Alaska executive branch employees are bound by the Executive Branch Ethics Act found in Alaska Statute 39 and the Executive Branch Code of Ethics found in Alaska Administrative Code 9 AAC 52, which equates public office to public trust. The Code of Ethics further states that any effort to benefit a personal or financial interest through official action is a violation of public trust.

As a procurement officer in charge of selecting vendors to be awarded contracts, it is vital that procurements are conducted in a fair, open, and impartial manner, and that even the *appearance* of a conflict of interest is avoided.

The following procurement code of ethics should be adopted and observed by all State of Alaska procurement agencies:

- Avoid the intent and appearance of unethical behavior or practices.
- Diligently follow the procurement code.
- Refrain from any activities that would create a conflict between personal interests and the interests of the state.
- Identify, disclose, and eliminate any conflicts of interest.
- Avoid soliciting or accepting money, loans, credits, discounts, favors, or services from present or potential suppliers which may influence or appear to influence purchasing decisions.
- Ensure that all persons are afforded equal opportunity to compete in a fair and open environment.

If you are ever in a position where you feel there is the potential for a conflict of interest, it is very important that you notify your supervisor immediately and recuse yourself from the project while the situation is reviewed.

WHAT IS A CONTRACT?

Black's Law Dictionary defines a contract as:

> *An agreement between two or more persons which creates an obligation to do or not to do a particular thing.*

To create a legally binding agreement, or contract, the following four elements must be present:

- **OFFER**
  A willingness to enter into a contract based on certain terms. When a state agency receives acceptable responses as part of a procurement, these qualify as an offer.

- **ACCEPTANCE**
  A willingness to be bound by the terms and conditions of the offer. This includes the terms and conditions set forth in the procurement issued by a state agency that have become part of the offer, plus additions such as pricing and delivery terms.

- **CONSIDERATION**
  Anything of value promised to another. Typically, the state promises money in exchange for goods or services.

- **LEGAL OBLIGATION**
  An intent by all parties to the agreement to enter into a legally binding contract.

If one of these elements is missing, a contract may be found to not be legally enforceable.

COMPETITION

Alaska's procurement code is written to encourage the most competitive procurement methods be used before less competitive methods are considered. Competition is important to both the state government and the vendor community in that it encourages not only better pricing and value, but also fairness, transparency, and innovation.

AS 36.30.100 states that "an agency contract shall be awarded by competitive sealed bidding" unless otherwise permitted. This is because the competitive sealed bid, or Invitation to Bid, process, is generally recognized to be the most open and competitive procurement method because it is easily understandable and contract awards made as a result of this process are based on the lowest cost offered to the state.

Agencies are permitted to use other procurement methods described in **AS 36.30**, provided they meet the requirements for using those methods. Other methods include the competitive sealed proposal, or Request for Proposal, process, which awards based on other evaluation criteria in addition to cost, and the single source alternate procurement, which is the least competitive process.

Regardless of the procurement method used, how an agency describes what they need can also affect competition. In general, this description – referred to as the specification – should be written to allow as much competition as possible.

PRICE vs. VALUE

In procurement, especially in public procurement when dealing with the public's money, there is always a balance between saving money and achieving the best value for the state.

The two primary selection methods available under the procurement code include: **price based** Request for Quotation (RFQ) and Invitation to Bid (ITB) solicitations or **value based** Informal Request for Proposal (IRFP) or Request for Proposal (RFP) solicitations. They allow a procurement officer to decide whether to base a contract award solely on cost or to consider other criteria, such as depth of experience, the vendor's understanding of the state's needs, and how the vendor will meet the state's needs.

Both methods have advantages and disadvantages. It is up to the procurement officer to work with their project manager and/or end users to determine which procurement method is most appropriate or to pursue an alternate procurement method.

The following table lists some general characteristics of price based and value based selection methods.

Price Based	Value Based
Ideal for supplies and services that are as commoditized or standardized as possible, allowing for direct comparison of price.	Ideal when the state is unsure of what is needed or when there may be wide variations in proposed solutions.
Easier to evaluate, but may only evaluate cost.	May consider items other than cost, which may add time to the evaluation process.
Typically evaluated by the procurement officer.	Typically evaluated by a Proposal Evaluation Committee (PEC) facilitated by the procurement officer.
No negotiations are allowed.	Best and final offers and negotiations are allowed.

Table 1 Price Based vs. Value Based

PUBLIC PROCUREMENT IN ALASKA

ALASKA'S PROCUREMENT STRUCTURE

The State of Alaska's executive branch has a mostly decentralized procurement structure.

The authority to procure supplies and services on behalf of the state is granted to the commissioner of the Department of Administration in **AS 36.30.005(a)**. The commissioner of the Department of Administration is responsible for appointing a chief procurement officer who is responsible for carrying out the laws, regulations, and policies governing procurement. **AS 36.30.010** describes the duties of the chief procurement officer in detail.

Through the commissioner of the Department of Administration, the chief procurement officer delegates the authority to procure supplies and services, with restrictions, to the commissioner of each executive branch agency, who may further delegate this authority to others in their own department. In general, this delegation allows each department to procure for their own needs in unlimited amounts. The delegation document itself is available at: http://doa.alaska.gov/dgs/pdf/delegat.pdf

The authority to procure for statewide and multi-agency needs is not delegated and remains with the chief procurement officer. The only agency delegated this authority is the Department of Administration, Division of General Services (DGS).

This means that an agency may procure supplies and services on their own, provided they follow their delegation, the procurement code, and that they will be the only user of the contract. If there is a need for a contract that will be used by two or more departments, DGS will conduct the procurement.

In addition to delegating the authority to procure supplies and services to the commissioner of the Department of Administration, **AS 36.30** delegates the authority to procure construction, state equipment fleet needs, and Alaska marine highway system needs to the commissioner of the Department of Transportation & Public Facilities (DOT). Procurements for such needs are conducted per regulations enacted by DOT and are not covered in the Procurement Academy.

ALASKA PROCUREMENT OFFICER CERTIFICATION PROGRAM

Public procurement, by its very nature, it an open and transparent process subject to public scrutiny. It is therefore very important that, as a public procurement officer, you are knowledgeable of the laws, regulations, and policies that govern public procurement in Alaska.

The goal of the Alaska Procurement Officer Certification Program is to provide guidance and procurement certification to employees of the State of Alaska's executive branch who are subject to the state procurement code and who will be performing procurements for supplies and services exceeding $5,000.

The Procurement Academy will not address each department's own internal policies and procedures. It is your responsibility to ensure that you check with your department's

procurement section and are familiar with any such policies and procedures prior to starting a procurement.

CERTIFICATION AND DELEGATION

The Alaska Procurement Officer Certification Program consists of three levels of procurement complexity. Each level corresponds with core training requirements that are building blocks for the next higher level. After completing the training requirements for each level via the Procurement Academy, State of Alaska executive branch employees will be certified to perform procurements that fall within their level and are eligible to receive a delegation of purchasing authority from their department for that particular level. Certification does not guarantee that an employee will receive a delegation from their department.

- **LEVEL I PROCUREMENT CERTIFICATION**
  Required for procurement officers that perform small procurements from $5,000 to $10,000.

  Recertification Requirements: *Level I Procurement Academy is required every 3 years. The* ***Level I Procurement Manual*** *may be substituted for the class, but will not count towards subsequent levels.*

- **LEVEL II PROCUREMENT CERTIFICATION**
  Required for procurement officers that perform small and/or alternate procurements from $10,000 to $100,000.

  Recertification Requirements: *4 procurement-related classes every 3 years, at least 2 must be DGS procurement recertification classes. Classes provided by other organizations will count towards recertification on a 2 hour = 1 class basis.*

- **LEVEL III PROCUREMENT CERTIFICATION**
  Required for procurement officers that perform formal and/or alternate procurements above $100,000.

  Recertification Requirements: *8 procurement-related classes every 3 years, at least 4 must be DGS procurement recertification classes. Classes provided by other organizations will count towards recertification on a 2 hour = 1 class basis.*

While a procurement certification indicates that an employee has received the training necessary to perform procurement actions within their certification level, a written departmental delegation of purchasing authority is needed before that employee can actually conduct a procurement.

Employees who procure supplies and services in amounts below $5,000 or who purchase from existing contracts do not need procurement certification. However, these employees still need a delegation of purchasing authority to conduct procurements under $5,000.

For the purposes of this program, a procurement officer may or may not have the job title of procurement specialist or procurement technician. The procurement officer of record must be certified at the appropriate level as described above and have a valid departmental delegation of purchasing authority.

The procurement officer of record is held accountable for their procurements, even though others may perform some of the work. However, an employee who performs the following procurement-related tasks **must** be certified:

- Issues or amends a solicitation.
- Issues a small procurement Notice of Award.
- Issues a formal procurement Notice of Intent to Award.
- Awards a contract.
- Responds to a protest or contract controversy.
- Conducts an alternate procurement.
- Makes a procurement officer's determination as required by the procurement code.
- Serves as the point of contact to address procurement questions for a solicitation, the process itself, or contract documents.

Not everyone needs to be certified in the procurement process. For example, someone other than the procurement officer may be assigned to review proposals to ensure they meet minimum qualifications, or to track and document the status of received proposals. They do not have to be certified if the work is overseen and checked by a certified procurement officer who is responsible for the decisions and signs all appropriate documents and determinations. In addition, commissioners, deputy commissioners, special assistants, administrative services directors or others that sign or approve RAPs do not need to possess certification.

EXEMPT AGENCIES

Several state agencies, including some located in the executive branch, are exempt from **AS 36.30**. In most cases however, the exemption is made on the condition that the agency will adopt procurement regulations with similar competition requirements as those found in **AS 36.30**. Exempt agencies include:

- University of Alaska **AS 36.30.005(c)**
- Legislature **AS 36.30.020**
- Court System **AS 36.30.030**
- Alaska Aerospace Development Corporation **AS 36.30.015(e)**
- Alaska Railroad Corporation **AS 36.30.015(e)**
- Alaska Housing Finance Corporation **AS 36.30.015(f)**
- Alaska Industrial Development and Export Authority **AS 36.30.015(f)**
- Alaska Retirement Management Board **AS 36.30.015(f)**
- Knik Arm Bridge And Toll Authority **AS 36.30.015(f)**
- Alaska Seafood Marketing Institute **AS 36.30.015(h)**

Figure 1 Exempt Agencies

EXEMPT EXPENDITURES

Like some agencies are exempt from the procurement code, **AS 36.30.850(b)** sets forth 47 types of expenditures of state money that are exempt from the procurement code.

Additionally, **AS 36.30.850(c)** states that contracts between two or more agencies, the state and its political subdivisions, or the state and other governments are exempt. Note that this applies only when the contract does not involve a non-governmental third party.

Finally, **2 AAC 12.050** provides for an exemption with procuring from qualifying employment programs or from youth education and employment programs.

These exemptions are very specific and narrowly interpreted by DGS and the Department of Law. If you think that what you need to procure falls under one of these exemptions, contact your agency's procurement section for guidance.

PROCUREMENT ACRONYMS & ABBREVIATIONS

Throughout the Procurement Academy and when dealing with procurement in general, a variety of acronyms, initialisms, and abbreviations will be used. Below is a reference list of the most commonly used acronyms and their meaning:

AAC	Alaska Administrative Code (regulations)	**NOIA**	Notice of Intent to Award
AAM	Alaska Administrative Manual (policies)	**PEC**	Proposal Evaluation Committee
ARRA	American Recovery & Reinvestment Act	**PIM**	Procurement Information Message
AS	Alaska Statute (law)	**PO**	Purchase Order
ASPS	Authority to Seek Professional Services	**PPI**	Producer Price Index
BAFO	Best and Final Offer	**PR**	Purchase Requisition
CA	Contract Award	**RAP**	Request for Alternate Procurement
CAM	Contract Award Manual	**RFP**	Request for Proposals
CPI	Consumer Price Index	**RFQ**	Request for Quotations
CPO	Chief Procurement Officer	**SAF**	Standard Agreement Form
DO	Delivery Order	**SCF**	Standard Contract Form
IRFP	Informal Request for Proposals	**SOW**	Statement of Work
IRIS	Integrated Resource Information System	**SR**	Stock Request
ITB	Invitation to Bid	**T's & C's**	Terms & Conditions
NOA	Notice of Award		

Table 2 Guide to Procurement Acronyms & Abbreviations

PROCUREMENT BASICS

BEFORE YOU BEGIN

DEPARTMENTAL CONTRACTS

Because departments may procure for their own needs in unlimited amounts, many departments have term contracts that divisions may purchase from on an as-needed basis.

Check with your procurement section before procuring supplies and services to be sure your department does not already have a contract in place. A new procurement may not be necessary.

CONTRACT AWARD MANUAL

DGS maintains a list of contracts that are available to other state agencies and, in some cases, political subdivisions of the state (school districts, city governments, etc.) to purchase from.

Some contracts are **mandatory** and are labeled as such. If a mandatory contract exists for an item you wish to purchase, you must purchase from that contract unless there is a waiver process. Failure to do so constitutes a procurement violation.

The Contract Award Manual (CAM) is located online at:
http://doa.alaska.gov/dgs/cam/index.html

Because the procurement for these contracts has already been conducted, it is not necessary to possess a procurement certification to purchase from these contracts. Check with your agency's procurement section to ensure any internal policies and procedures for purchasing from existing contracts are followed before placing an order.

EVALUATING COST

When dealing with a value based procurement process (IRFP, RFP), cost must always be included as an evaluation criteria, with the following weight parameters:

- The use of 60% for service contracts, 75% for supply contracts, and between 60% and 75% for procurements involving a combination of both is *strongly encouraged.*
- 40% is the minimum cost weight for service contracts and 60% for supply contracts.

A waiver approved by the chief procurement officer is required to set cost weight below the minimums.

PURCHASING DOCUMENTS

DGS maintains a list of all forms needed to conduct a procurement at: http://doa.alaska.gov/dgs/policy.html

This site has the latest revision of forms, policies, and guides. It is recommended that you check this website before starting a new procurement to ensure you are using the most recent procurement documents available.

WRITTEN DETERMINATIONS

A written determination is a document prepared by the procurement officer and kept in the procurement file detailing why a specific decision was made.

There are a number of specific written determinations required by the procurement code at different points in the procurement process. A guide to all mandatory written determinations can be found on the DGS Purchasing Documents page or by following: http://doa.alaska.gov/dgs/pdf/Written%20Determinations.pdf

PROCUREMENT PITFALLS

FRAGMENTATION

AAM 81.020 requires agencies to consider the total value of all similar requirements for supplies and services that will be solicited during the same time from the same group of vendors when determining which type of solicitation to conduct.

This means that if an agency is aware that they will need $10,000 worth of widgets this month and $30,000 worth of the same widgets next month, they must combine those needs into a single procurement worth $40,000.

Fragmentation of needs, or splitting needs into different procurements, sometimes is appropriate. For example, an agency needs graphic design and mailing services under the same general project. It makes sense to obtain the graphic design services separate from the mailing services since it is unlikely that a single vendor could perform both services.

However, when fragmentation happens to evade more stringent competitive requirements, it is referred to as **artificial fragmentation** and is prohibited under **AS 36.30.320(d)**. Artificial fragmentation is a procurement violation and knowingly engaging in this practice carries a criminal penalty.

Artificial fragmentation has no precise definition, since it may vary from case to case, but a procurement officer should consider **price, similarity, and predictability** when choosing a procurement method.

Below are some examples of artificial fragmentation:

Artificial Fragmentation	Proper Procurement
An agency conducts three separate procurements to obtain three boilers at $20,000/ea so that they may use catalog prices as verbal quotations.	The agency should have conducted one $60,000 procurement to obtain all three boilers using written quotations.
A procurement officer uses reasonable and adequate judgment to award a $10,000 contract to a vendor and includes four 1-year contract renewal options at $10,000/year.	The procurement officer must consider all renewal options in the total value of the contract. In this case, the procurement officer should have procured this as a $50,000 contract.
Within a one year period, a division purchases the same $75,000 consulting services four times using written quotations.	The division failed to consider the predictability of the services. An as-needed contract worth up to $300,000 should have been established for these services using a formal procurement process.

Table 3 Artificial Fragmentation Examples

RESPONSIVENESS AND RESPONSIBILITY

A contract may only be awarded to a responsive and responsible bidder or offeror.

Responsiveness relates to the bid or proposal itself. A responsive bid or proposal is one that complies with the solicitation in all acceptability and material respects and contains no material defects. A material defect is one that affects **price**, **quality**, **quantity**, or **delivery terms**. Deficiencies affecting responsiveness may not be corrected.

Some examples of defects that would result in a finding of non-responsiveness are:

- An ITB requires bids to be received at the purchasing agency's office no later than 1:00pm on the opening date and the bid is received at 2:00pm.
- A bid is received with no pricing on the bid schedule.
- An ITB required 1,000 widgets, but the bidder only provided pricing for 250 widgets.

Responsibility relates to the capability of the vendor to actually perform the work or provide the items the state is seeking. Responsibility may include a vendor's ability to secure bonding, obtain insurance, or hire sufficient staff. Matters of responsibility may sometimes be addressed or corrected before contract award.

SUPPLIES vs. SERVICES

Supplies and services are two distinct items and contracts for services have their own procurement requirements. **Supplies** are usually any tangible good or commodity while **services** involve only labor.

AS 36.30.990(26) defines "supplies" as:

> *All property of an agency, including equipment, materials, and insurance; it includes privately owned real property leased for the use of agencies, such as office space, but does not include the acquisition or disposition of other interests in land.*

"Services" has two definitions depending on whether or not it is a professional service.

A "service" is defined in **AS 36.30.990(23)**:

> *The furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports that are merely incidental to the required performance; it does not include employment agreements or collective bargaining agreements.*

A "professional service" is defined in **AS 36.30.990(21)** as:

> *Professional, technical, or consultant's services that are predominantly intellectual in character, result in the production of a report or the completion of a task, and include analysis, evaluation, prediction, planning, or recommendation.*

When procuring for services, there are two determinations that must be made before proceeding: 1) whether the service being sought is a professional service or not and 2) that the contract is not written in such a manner that an employer/employee relationship is created.

In all service contracts, professional and non-professional, insurance is required. Standard insurance requirements are included in **Appendix B1/B2**, which must be included in all service contracts and the procurement officer must obtain a copy of the contractor's certificate of insurance meeting these requirements before work may begin. Any waiver or modification to the requirements of **Appendix B1/B2** require prior approval by the Department of Administration, Division of Risk Management.

PROFESSIONAL SERVICE OR NON-PROFESSIONAL SERVICE

In general, tasks that require a process, opinion, and/or recommendation to be developed fall under the scope of professional services while routine tasks do not. Below are some typical examples of professional and non-professional services. Be sure to seek the guidance of your agency's procurement section for assistance in determining whether a service is professional or non-professional.

Professional Service	Non-Professional Service
Marketing Analysis	Copier Repair
Medical/Physician Services	Laboratory Testing Services
Software/Website Development	Website Subscription
Engineering Services	Travel Agency Services
Accounting Services	Janitorial Services
Design Services	Moving Services

Table 4 Examples of Professional and Non-Professional Services

EMPLOYER/EMPLOYEE OR INDEPENDENT CONTRACTOR

If an employer/employee relationship exists, the person must be hired through the personnel system, not a procurement process. The following table shows indicators of both a potential employer/employee relationship and an individual contractor.

Employer/Employee	Independent Contractor
The person is subject to the control of the state, not only as to what will be done, but when, where, and how it will be done. It is not necessary that the state actually direct or control the manner in which services are performed if the state retains the right to do so.	The person(s) is subject to control or direction by the state only as to the result to be accomplished and the work to be done, not as to the means and methods for accomplishing the result.
The state has the right to discharge the person.	The person(s) are in business providing a service to the public from which they derive a profit or suffer a loss.
The state furnishes the tools, equipment, and a place to work for the individual performing the services.	

Table 5 Employer/Employee vs. Independent Contractor

EXPIRED CONTRACTS

A contract is considered to have expired when the period of performance passes with no action taken to extend it, such as exercising a renewal option.

An expired contract cannot be retroactively renewed or otherwise extended. Therefore, if the period of performance for a contract lapses, that contract is no longer valid and in order to continue receiving the supplies or services covered under the contract, a new solicitation or alternate solicitation must be conducted and a new contract awarded.

Active contract administration will help immensely to prevent allowing a contract with available renewals to lapse.

TIPS AND RESOURCES

SPECIFICATIONS

Specifications are what indicate to the vendors what the state needs. (Specifications are also sometimes referred to as a Scope of Work when dealing with services.)

2 AAC 12.070 - .110 describe specifications as they relate to Alaska's procurement code.

2 AAC 12.080(a) tells us the purpose of a specification:

> *The purpose of a specification is to serve as a basis for obtaining, in a cost effective manner, a supply [or] service suitable for the state's needs.*

2 AAC 12.080 requires the state, when possible, to use **functional or performance specifications** when procuring supplies/services and that it is state policy to procure **standard commercial products** if practical.

A functional or performance specification is one that describes what a supply or service is expected to do as opposed to a design specification, which describes exactly how a contractor must manufacture an item or perform a service.

To illustrate why **2 AAC 12.080(b)** requires the use of functional or performance specifications, imagine that the state has a need for a table that can support a 50-pound television:

- A **design specification** would describe how the table must be made by telling the contractor what materials to use, the dimensions, what fasteners to use, and so on.
- A **functional or performance specification** would describe the area where the table will be placed and require the contractor to provide a table that will fit in that area and is capable of supporting a 50-pound television.

If we use a design specification in this example and the table collapses when the television is placed on it, the responsibility likely lies with the state for providing a faulty design and there would be little or no contractual recourse providing the contractor followed the design.

However, if we use a functional or performance specification, the responsibility would lie with the contractor.

2 AAC 12.090 prohibits the state from using **unduly restrictive specifications**, or specifications that have the effect of reducing competition to a single source, unless there is absolutely no other option.

Similarly, **2 AAC 12.100** prohibits the state from using a **brand name specification**, or a specification that limits the procurement to a specific brand and/or model of supply, unless the procurement officer has determined in writing that only that particular brand will satisfy the state's needs.

Specification Tips
The best specifications are those that are clear and written to allow for the most competition. A good goal whenever drafting specifications is to word them such that a 12-year old would be able to understand what the state is looking for.
Use "shall", "must", and "will" whenever possible. Words like "should" or "may" have no effect, since they give the contractor the choice to not do something.
It can be tempting to use vague or ambiguous language when it is unknown exactly what is needed. However, if vague or ambiguous language ever comes into question, an Administrative Law Judge or the courts will always side with the reader's interpretation, not what the writer meant or intended.
Use active, specific language rather than passive, vague language. For instance, "the contractor shall perform" is active and clearly identifies who is responsible for work while "it shall be performed" does not.
Avoid open-ended phrases such as "subject to approval" or "common practice" and instead state exactly who is responsible, like "subject to approval of the project manager", or specify a standard that the contractor must comply with.
Don't repeat language throughout a solicitation since doing so increases the likelihood that a clause or specification will be stated differently, leading to ambiguity.
Always spell out abbreviations and acronyms when they are used for the first time.
If you are referring to external documentation as part of your solicitation, include the documentation as an attachment if possible or refer to a website where the documentation can be retrieved by vendors. (Check and double-check all links to websites.)

Table 6 Specification Tips

PREFERENCES

The State of Alaska has nine different preferences that may be claimed by vendors. A guide to all of these preferences and examples of how to apply them may be found at: http://doa.alaska.gov/dgs/pdf/pref1.pdf

A preference is applied as a percentage reduction of the bidder's or offeror's price **for evaluation purposes only** and if a vendor qualifies for more than one preference, the percentage of each preference will be added together and subtracted from the bid or proposal price **for evaluation purposes only**. A contract will be awarded for the full amount of the bid or proposal regardless of any preferences applied.

The most commonly claimed preference, as well as the preference that a vendor must qualify for before any other preferences may be claimed, is the Alaska Bidder Preference. This preference is worth 5%.

A vendor must meet the requirements of **AS 36.30.990(2)** to qualify for the Alaska Bidder Preference:

> *"Alaska bidder" means a person who*
>
> *(A) holds a current Alaska Business License;*
> *(B) submits a bid for goods, services, or construction under the name as appearing on the person's current Alaska Business License;*
> *(C) 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;*
> *(D) 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, is a limited liability company organized under AS 10.50 and all members are residents of the state, or is a partnership under AS 32.05 or AS 32.11 and all partners are residents of the state; and*
> *(E) if a joint venture, it composed entirely of ventures that qualify under (1)-(4) of this subsection.*

Figure 2 Alaska Bidder Preference Requirements

Another common preference is the Alaska Offerors Preference, described in **2 AAC 12.260(e)**. This preference is applied only when using an informal proposal process and a numerical rating system and is worth 10% of the total points available for rating proposals. A vendor automatically qualifies for the Alaska Offerors Preference if they claim and meet the requirements of the Alaska Bidder Preference.

Other commonly applied preferences include the 3%/5%/7% Alaska Products Preferences which are applied *only* to the qualifying product excluding delivery and other costs, 5% Alaska Veterans Preference, and 15% Employment Program Preference.

No preferences may be applied if not claimed by the vendor, even if the procurement officer knows that the vendor qualifies. Seek guidance from your department's procurement section if you need help interpreting or applying a preference.

HANDLING A PROTEST

Protests of any type of procurement can be frustrating to a procurement officer, but it is important to keep in mind that the protest process is there to protect both the state and vendor community. Many protests have brought mistakes in the procurement process to light that were initially missed and have resulted in improvements to the procurement process. Since we are dealing with public money, allowing vendors the opportunity to bring issues to the state's attention is a critical part of ensuring we are procuring supplies and services in an efficient and effective manner.

When faced with a protest or the prospect of a protest:

Do	Do Not
Accept that a mistake may have been made.	Become defensive.
Remain calm and professional.	Spar or argue with the protestor.
Listen and let the vendor speak.	Try to "slam dunk" the protestor.
Look at the situation from the vendor's point of view.	Blow off or ignore the protestor.

Table 7 Handling a Protest

When responding to a protest, it is important to make sure that all of the protestor's issues have been identified and addressed individually. The response should also cite any applicable rules, the procurement officer's interpretation of the rules, and a conclusion accepting or denying the protest in whole or in part. A way to remember this is the **IRAC** mnemonic – **Issue, Rule, Apply, Conclusion**.

Sample Protest Response Letter contains a sample response using the **IRAC** method and a follow up letter that would come from the procurement officer's supervisor letting the protestor know that a higher level of staff has reviewed the response and agrees.

Below are some tips to help avoid protests:

- Eliminate redundancy in solicitation documents.
- Review specifications for unreasonable restrictions.
- Clearly identify evaluation and award criteria.

- Respond to all bidder questions in a timely and objective manner.
- Consistently apply policies and procedures.

Figure 3 Avoiding Protests

CONTRACT PRICE ADJUSTMENTS

Including contract price adjustment language in solicitations is recommended if there is a possibility of significant economic fluctuation during the contract term. Doing so will encourage participation in the public procurement process, since it reduces risk for the vendors. There are a variety of price adjustment methodologies available. DGS has published a **Contract Price Adjustments** guide, available on the DGS **Purchasing Documents** page: **http://doa.alaska.gov/dgs/pdf/cpi.pdf**

ANTITRUST LAW

The United States has a collection of acts that regulate the conduct and organization of business corporations to promote fair competition. These laws restrict the formation of cartels and prohibit collusion, which includes such behavior as price fixing and bid rigging, and monopolies.

The main federal antitrust acts are:

- Sherman Act (1890)
- Clayton Act (1914)
- Federal Trade Commission Act (1914)
- Robinson-Patman Act (1936)

Antitrust practices can be difficult to pick up, but there are some red flags to watch for as you conduct procurements, such as identical or very similar pricing, a large margin between the low bid and all others, and identical calculation errors or other evidence that vendors had planned or discussed their pricing.

To help guard against antitrust practices, it is helpful to expand the list of vendors who are solicited, consolidate procurements as much as possible, and be very aware of the market so that anomalies and other discrepancies are more apparent.

An Antitrust Primer for Procurement Professionals is a publication from the US Department of Justice that contains more detailed information on what to look for related to antitrust practices and what you should do if you suspect such behavior is occurring.

Notes

OTHER RESOURCES

Below are some procurement-related resources that may be helpful:

- **NIGP ONLINE DICTIONARY OF PROCUREMENT TERMS**
  http://www.nigp.org/eweb/StartPage.aspx?Site=NIGP&webcode=pd-ep_online_dict

- **ALASKA OFFICE OF ADMINISTRATIVE HEARINGS - PROCUREMENT DECISIONS**
  http://aws.state.ak.us/officeofadminhearings/Category.aspx?CatName=PRO

SMALL PROCUREMENTS

WHAT IS A SMALL PROCUREMENT?

Small procurement is the procurement of supplies and services under the small procurement threshold set in **AS 36.30.320**, which is currently $100,000.

There are three small procurement competition levels, with increasing competition required as the amount approaches the $100,000 threshold.

If a procurement is anticipated to be a small procurement, a small procurement process is used to solicit pricing from vendors, and the responses received all exceed the small procurement threshold, the procurement must be canceled and re-competed using a formal procurement process.

CONDUCTING A SMALL PROCUREMENT $10,000 AND UNDER

COMPETITION LEVELS AND METHODS

2 AAC 12.400 describes three levels of competition for small procurements depending on the dollar amount, **including all renewals**. Note that each level of competition is inclusive of the upper limit shown. For instance, a $10,000 procurement may be conducted using reasonable and adequate procedures while a procurement *exceeding* $10,000 must be procured using the next higher level of competition.

Use the Small Procurement Matrix to assist in determining what competitive process to use for each dollar amount, what forms to use, and what procurement records must be kept. The Small Procurement Matrix is included at the end of this chapter and is also located on the DGS Purchasing Documents page.

REASONABLE & ADEQUATE PROCEDURES: $0 - $10,000

2 AAC 12.990(a)(17) defines reasonable and adequate procedures as:

> *Procedures that ensure fairness to potential offerors and competition commensurate with the circumstances of the procurement, considering price, mission requirements, and available competition. [This] includes contacting only one potential offeror in appropriate circumstances.*

This is typically interpreted to mean that the closer you get to the $10,000 upper limit, the more competition you should be seeking for the supplies or services you are seeking.

For example, it may be appropriate to call a single vendor to order one widget that costs $5, but if you're ordering 2,000 of those same widgets, you would seek quotes from more than one vendor to leverage the volume and obtain more favorable pricing and/or other terms.

The $10,000 limit applies to procurements of supplies and services. **2 AAC 12.400(b)** contains varying reasonable and adequate procedures thresholds for other specific supplies and services, such as for fish feed for hatchery use, passenger transportation, and legal services. Check with your procurement section before procuring under one of these limits to ensure it applies.

SMALL PROCUREMENT PROTESTS

The protest processes set forth in the procurement code provide vendors the opportunity to point out potential problems in a particular procurement. The ability for vendors to protest is important in public procurement because it provides a transparent checks and balance system that encourages fair and open competition.

Small procurement protests are governed by **2 AAC 12.695** and the process contains three basic steps:

1. The vendor attempts to informally resolve the protest directly with the procurement officer.
2. The vendor files a written protest with the commissioner of the contracting agency.
3. The commissioner or designee issues a decision, conducts a hearing, or in consultation with the protesting vendor, pursues an alternate dispute resolution, such as arbitration, mediation, or negotiation.

Guide to Small Procurement Protests shows the step-by-step process and associated timelines for handling a small procurement protest.

BASIC CONTRACT ADMINISTRATION

Contract administration is an important, yet often overlooked, part of the procurement process. Because we as procurement officers are dealing with the expenditure of public money, it is crucial that we take steps to ensure it is being spent effectively.

While it may seem that a procurement officer's duties end once a contract is awarded, that is not the case. Without active contract administration, there is no way to know of performance problems with either the state or the contractor until far too late and at likely more cost.

Contract administration includes:

- Assuring the state fulfills its part of the contract.
- Make certain the contractor's performance complies with the requirements of the contract.
- Identify and resolve problems before they reach a critical level.
- Identify when contract changes may be required.
- Keeping detailed, complete, and accurate documentation in the procurement file.
- Track milestone dates, deliverable dates, and contract renewals.

Performance issues must be addressed immediately in writing with a cure letter. A sample cure letter is included in **Sample Cure Letter**.

The cure letter must identify the problem(s), citing relevant contract language, and any corrective action required. The letter must also list the consequences for failing to correct the problem(s) and set a deadline after which the contractor may be found to be in default if corrective actions are not taken.

Finding a contractor to be in default is a serious matter with severe consequences. You will want to work with your department's procurement section to ensure you have sufficient documented evidence to justify a finding of default.

RECORD RETENTION

As part of contract administration, a procurement officer needs to be familiar with the retention schedule for procurement files.

The Department of Education and Early Development, Division of Libraries, Archives, and Museums, Alaska State Archives Section publishes a retention schedule that shows how long certain files must be kept. This schedule can be found at:
http://archives.alaska.gov/pdfs/records_management/gen_admin_rec_retention_schedule.pdf

The schedule for procurement records is Item No. 50.

In general, records relating to small procurements must be kept for the current fiscal year plus 3 years. Be sure to double-check the retention schedule before destroying any procurement files.

SMALL PROCUREMENT MATRIX

ESTIMATED PRICE OF PROCUREMENT	MINIMUM COMPETITION REQUIRED	FORMS USED BY AGENCY	PUBLIC NOTICE REQUIREMENT	AWARD METHOD	KEEP IN PROCUREMENT FILE
$10,000 or Less* AS 36.30.320 and 2 AAC 12.400(b) *Reasonable and adequate procedures also apply purchases with a State Purchasing Card and to certain higher value procurements up to $50,000, see 2 AAC 12.400(b). TOTAL value of procurement must include all options to renew or extend. For example: • If contract runs for 3 years, it is the total for the 3 years. • If contract runs for 1 year with 2 one-year renewal options, it is the total for 3 years. *If professional service, ensure contract meets definition per AAM 81.430.*	Use reasonable and adequate procedures that ensure fairness to potential bidders and competition commensurate with the circumstances of the procurement considering price, mission requirements, and available competition. Quote(s) or informal proposal(s) must be solicited from Alaskan vendors prior to soliciting non-Alaskan vendors, unless the procurement officer determines in writing that soliciting Alaskan vendors is not practicable. May not artificially fragment the purchase to avoid a higher level of competition. Postings in electronic media may satisfy the competitive solicitation requirement.	Contract Award, Delivery Order, invoice, or other forms that provide record keeping and accountability. *Professional Services contracts must be in writing. The ASPS form may be required by agency Policy & Procedure (if used, the number is assigned by agency).*	No minimum requirement.	Select the low quote or most advantageous proposal. Include 5% Alaska Bidder Preference, 5% Alaska Veteran Preference, 10% Alaskan Offeror Preference (for informal proposals if a numerical rating system is used), and all other statutory and regulatory preferences that apply. Written determination required if awarding to a non-resident per AS 36.30.362. Protest procedures under 2 AAC 12.695 apply.	Identify agency official responsible for the purchase of supply or service acquired and the vendor's name and price. Copy of contract and any amendments. If reasonable and adequate procedures involve contacting more than one vendor, identify each vendor solicited and their response. Written determination if impracticable to solicit quote(s) or informal proposal(s) from Alaska vendors only. Written determination if awarding to a nonresident (AS 36.30.362) *Copy of ASPS (if used).*

ESTIMATED PRICE OF PROCUREMENT	MINIMUM COMPETITION REQUIRED	FORMS USED BY AGENCY	PUBLIC NOTICE REQUIREMENT	AWARD METHOD	KEEP IN PROCUREMENT FILE
$10,001 to $50,000 AS 36.30.320 and 2 AAC 12.400(c) TOTAL value of procurement must include all options to renew or extend. For example: • If contract runs for 3 years, it is the total for the 3 years. • If contract runs for 1 year with 2 one-year renewal options, it is the total for 3 years. *If professional service, ensure contract meets definition per AAM 81.430.*	At least three firms or persons shall be contacted for quotes or informal proposals. The solicitation and responses may be either written or verbal. You must include the specifications, award criteria, and date and time responses are due. Seek minimum number of quotes or informal proposals from Alaskan vendors prior to soliciting non-Alaskan vendors, unless the procurement officer determines in writing that soliciting from Alaskan vendors is not practicable. May not artificially fragment to avoid a higher level of competition. Postings to the OPN may satisfy the competitive solicitation requirement.	Contract Award, Delivery Order, invoice, or other forms that provide record keeping and accountability. RAP if required. *PROFESSIONAL SERVICES* *The ASPS form may be required by agency Policy & Procedure (if used, the number is assigned by agency).* *Standard Agreement Form (#02-093) or Standard Contract Form (SCF), appropriate appendices, or a document approved by the AG's Office.*	Public notice of solicitation occurs when vendor is contacted for quote or informal proposal. Verbal notice of award provided if contacted by vendors.	Award in accordance with the specifications and award criteria in the solicitation to the responsive and responsible bidder providing the low quote or most advantageous informal proposal. Include 5% Alaska Bidder Preference, 5% Alaska Veteran Preference, 10% Alaskan Offeror Preference (for informal proposals if a numerical rating system is used), and all other statutory and regulatory preferences that apply. Written determination required if awarding to a nonresident per AS 36.30.362. Informal RFP's must weight price no lower than 40% for professional/non-professional services and 60% for supplies, unless department Commissioner approves a waiver in advance. Protest procedures under 2 AAC 12.695 apply.	Identify person who made the solicitation, the specifications, award criteria, date of solicitation, date & time responses were due, names of vendors contacted, summary of verbal responses, copies of all quotes or informal proposals received, and justification for award. Copy of contract, amendments and ASPS or RAP forms if used. Written determination if impracticable to solicit three quotes or informal proposals from Alaska vendors only. Written determination if awarding to a nonresident (AS 36.30.362) RAP if used.
$50,001 to $100,000 AS 36.30.320 and 2 AAC 12.400(d) TOTAL value of procurement must include all options to renew or extend. For example: • If contract runs for 3 years, it is the total for the 3 years. • If contract runs for 1 year with 2 one-year renewal options, it is the total for 3 years. *If professional service, ensure contract meets definition per AAM 81.430.*	At least three firms or persons shall be contacted for quotes or informal proposals. The solicitation and responses must be in writing. Seek minimum number of quotes or informal proposals (three) from Alaskan vendors prior to soliciting non-Alaskan vendors, unless procurement officer determines in writing that soliciting quotes from Alaskan vendors is not practicable. May not artificially fragment the purchase to avoid a higher level of competition. Postings in electronic media may satisfy the competitive solicitation requirement. Service contracts above $50,000 must be performed in the United States unless a waiver has been approved by the Chief Procurement Officer in advance.	Request for Quotation and Addendum I as applicable, Or Informal Request for Proposals (written). Contract Award, Delivery Order, invoice, or other forms that provide record keeping and accountability. RAP if required. *PROFESSIONAL SERVICES* *The ASPS form may be required by Agency P&P (if used, the number is assigned by agency).* *Standard Agreement Form (#02-093) or Standard Contract Form (SCF), appropriate appendices, or a document that has been approved by the AG's Office.*	Public notice of solicitation occurs when vendor is contacted for quote or informal proposal. Written notice of award is sent to all vendors who provided a quote or informal proposal.	Award in accordance with the specifications and award criteria in the solicitation to the responsive and responsible offer providing the low quote or most advantageous informal proposal. Include 5% Alaska Bidder Preference, 5% Alaska Veteran Preference, 10% Alaskan Offeror Preference (for informal proposals if a numerical rating system is used), and all other statutory and regulatory preferences that apply. Notice of Award must be in writing to all vendors who responded to solicitation. Written determination required if awarding to a nonresident per AS 36.30.362. Informal RFP's must weight price no lower than 40% for professional/non-professional services and 60% for supplies, unless department Commissioner approves a waiver in advance. Postings in electronic media may satisfy the notice of award requirement. Protest procedures under 2 AAC 12.695 apply.	A copy of the solicitation, the names of the firms or persons contacted and copies of all written quotations or informal proposals received, notice of award, and justification for award. Copy of contract and any amendments. Written determination if impracticable to solicit three quotes or informal proposals from Alaska vendors only. Written determination if awarding to a nonresident (AS 36.30.362). RAP if used.

REQUEST FOR LEVEL I PROCUREMENT CERTIFICATION

Now that you have completed this reading this manual, complete and submit this Request for Level I Procurement Certification form to your department's certification program administrator. The information may also be transmitted via email.

After receipt, your department will be allowed to delegate purchasing authority to you for the purchase of supplies and services valued at $10,000 and less. **This certification is required for purchases greater than $5,000.**

NOTE: Obtaining Level I Procurement Certification by reading the manual does not meet the prerequisites for taking the Level II or III Procurement Academy classes. In order to take the Level II or III Procurement Academy classes and receive Level II or III certification, you must first take the Level I Procurement Academy in-person class.

Name:	Telephone No:
Department:	Fax No:
Agency/Section:	Email Address:
Address:	Supervisor's Name:
City, State, Zip:	Supervisor's Telephone No:

I certify that I have read and understand this Level I Procurement Manual. I agree to be held accountable for the competent, effective, legal, and ethical interpretation and application of this information.

_____ _____

Name/Work Title **Date**

SAMPLE CURE LETTER

CERTIFIED MAIL NO. _____
RETURN RECEIPT REQUESTED

Date

Contractor
Address
City, ST ZIP
Attn: _____

RE: Contract # _____ - Potential Default Action

Dear Mr./Ms. _____:

This is to advise you that **[CONTRACTOR]** has failed to comply with the terms and conditions of Contract # _____.

The award of this contract was based on your firm's response to RFQ # _____. On page 1 of the solicitation, under Delivery, your firm guaranteed delivery within 30 calendar days after the receipt of an order. **[CONTRACTOR]** received the order on May 1, 2014. Delivery was required on or before May 31, 2014. As of today, June 3, 2014, we have not received the order.

Per RFQ # _____, page 3, item 28. Default:

> *In case of default by the contractor, for any reason whatsoever, the State of Alaska may procure the goods or services from another source and hold the contractor responsible for any resulting excess cost and may seek other remedies under law or equity.*

If **[CONTRACTOR]** fails to deliver the 15 Acme widgets within **XX** calendar days after the receipt of this letter, the state will have no choice but to consider **[CONTRACTOR]** in default and terminate the contract. If that occurs, the state will procure the widgets from another source and **[CONTRACTOR]** will be responsible for any excess costs, which will be calculated as the difference between your firm's bid price and the actual cost of 15 Acme widgets that are purchased from another source. The state may also consider **[CONTRACTOR]** a non-responsible bidder on future solicitations based on its failure to perform under the terms and conditions of Contract # _____.

This matter requires your immediate attention. If you have any questions or need additional clarification, please contact me at (907) **XXX-XXXX**.

Sincerely,

T. Boone Purchaser
Procurement Officer

AN ANTITRUST PRIMER FOR PROCUREMENT PROFESSIONALS

AUTHOR

Robert E. Connolly
Robert E. Connolly, Chief, Middle Atlantic Office, U.S. Department of Justice, Antitrust Division, The Curtis Center, Suite 650 West, 170 South Independence Mall West, Philadelphia, Pennsylvania 19106, (215) 597-7405, e-mail: robert.connolly@usdoj.gov.

ABSTRACT

Bid rigging, price fixing and other typical antitrust violations have a more devastating effect on the American public than any other type of economic crime. Such illegal activity contributes to inflation, shakes public confidence in the country's economy, and undermines our system of free enterprise. In the case of government procurement, such crimes increase the costs of government, increase taxes and undermine the public's confidence in its government. If all those involved in procurement have a working knowledge of the antitrust laws and understand how to identify violations, they can make a significant contribution to law enforcement.

FEDERAL ANTITRUST ENFORCEMENT.

The federal antitrust laws were enacted to preserve our system of free competition. They serve as our primary defense against unlawful attempts to limit competition and increase the purchase price of products and services. As purchasers of goods and services, purchasing departments can be both prime targets for, and sensitive detectors of, antitrust violations.

The Sherman Act prohibits any agreement among competitors to fix prices. Criminal enforcement of the Sherman Act is the responsibility of the Antitrust Division of the United States Department of Justice. Violation of the Sherman Act is a felony punishable by a fine of up to $10 million for corporations, and up to $350,000 or three years imprisonment (or both) for individuals. Civil actions for injunctive relief and treble damages under 15 U.S.C. § 15 is also an effective enforcement tool. In addition, collusion among competitors may violate the federal mail fraud statute, Racketeer Influenced Corrupt Organization (RICO) statute or constitute making false statements to a government agency if false information is provided on a non-collusion affidavit. All of these are felony violations punishable by a fine and imprisonment.

BID RIGGING, PRICE FIXING, AND OTHER TYPES OF COLLUSION

Commencement of criminal prosecution under Section 1 of the Sherman Act requires that the unlawful "contract, combination or conspiracy" occurred within the previous five years. The offense most likely to arise in a procurement context is commonly known as "price fixing" or "bid rigging," and is also referred to as "collusion." An express agreement is not always necessary, and the offense can be established either by direct evidence (such as the testimony of a participant) or by circumstantial evidence (such as big awards that establish a pattern of business being rotated among competitors).

Any agreement or informal arrangement among independent competitors by which prices or bids are fixed is per se unlawful. Where a per se violation is shown, defendants cannot offer any evidence to demonstrate the reasonableness or the necessity of the challenged conduct. Thus, competitors may not justify their conduct by arguing that price fixing was necessary to avoid cut-throat competition, or that price fixing actually stimulated competition, or that it resulted in more reasonable prices.

Price fixing among competitors can take many forms. For example, competitors may take turns being the low bidder on a series of contracts, or they may agree among themselves to adhere to published list prices. It is not necessary that all competitors charge exactly the same price for a given item; an agreement to raise present prices is enough to violate the

law. Other examples of price fixing include: (1) agreements to establish or adhere to uniform price discounts; (2) agreements to eliminate discounts; (3) agreements to adopt a standard formula for the computation of selling prices; (4) agreements not to reduce prices without prior notification to others; (5) agreements to maintain specified discounts; (6) agreements to maintain predetermined price differentials between different quantities, types or sizes of products; and (7) agreements not to advertise prices. Usually, but not always, price-fixing conspiracies include mechanisms for policing or enforcing adherence to the prices fixed.

TYPICAL ANTITRUST BID RIGGING VIOLATIONS

The following describes common bid-rigging patterns you may be able to recognize.

- **Bid Suppression** - In "bid suppression" or "bid limiting" schemes, one or several competitors (who would otherwise be expected to bid or who have previously bid) refrain from bidding or withdraw a previously submitted bid, so that a competitor's bid will be accepted.

- **Complementary Bidding** - "Complementary bidding" (also known as "protective" or "shadow" bidding) occurs when competitors agree to submit token bids that are too high to be accepted (or if competitive in price, then on special terms that will not be acceptable). Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine bidding. Having multiple bidders can lead a purchaser to believe that prices are competitive when this may not be the case, as collusive complementary bids have been arranged.

- **Bid Rotation** - In "bid rotation," all vendors participating in the scheme submit bids, but by agreement take turns being the low bidder. A strict bid rotation defies the law of chance and suggests collusion.

Competitors may also take turns on contracts according to the size of the contract. Many cases of bid rigging have been exposed in which certain vendors or contractors get contracts valued above a certain figure, while others get contracts worth less than that figure.

- **Subcontracting** - Subcontracting is another area for attention. If losing bidders or non-bidders frequently receive subcontracts from the successful low bidder, the subcontracts (or supply contracts) may be a reward for submitting a non-competitive bid or for not bidding at all.

- **Market Division** - Market division schemes are agreements to refrain from competing in a designated portion of the market. Competing firms may, for example, allocate specific customers or types of customers, so that one competitor will not bid (or will submit only a complementary bid) on contracts let by a certain class of potential customers. In return, his competitors will not bid on a class of customers allocated to him. For example, a vendor of office supplies may agree to bid only on contracts let by certain Federal agencies, and refuse to bid on contracts for private companies.

Allocating territories among competitors is also illegal. This is similar to the allocation-of-customers scheme, except that geographic areas are divided instead of customers.

Detecting Bid Rigging, Price Fixing, and Other Types of Collusion. Certain patterns of conduct suggest that illegal restraints on trade have occurred. The following is a checklist of some factors, any one of which may indicate collusion. You should therefore be sensitive to their occurrence.

CHECKLIST FOR POSSIBLE COLLUSION

- Some bids are much higher than published price lists, previous bids by the same firms, or engineering cost estimates. (This could indicate complementary bids.)
- Fewer competitors than normal submit bids. (This could indicate a deliberate plan to withhold bids.)
- The same contractor has been the low bidder and has been awarded the contract on successive occasions over a period of time.
- There is an inexplicably large dollar margin between the winning bid and all other bids.
- There is an apparent pattern of low bids regularly recurring, such as corporation "X" always winning a bid in a certain geographical area for a particular service, or in a fixed rotation with other bidders.
- A certain company appears to be bidding substantially higher on some bids than on other bids with no logical cost differences to account for the differences.
- A successful bidder repeatedly subcontracts work to companies that submitted higher bids on the same projects.
- There are irregularities (e.g., identical calculation errors) in the physical appearance of the proposals, or in the method of their submission (e.g., use of identical forms or stationery), suggesting that competitors had copied, discussed, or planned one another's bids or proposals. If the bids are obtained by mail, there are similarities of postmark or post metering machine marks.
- Two or more competitors file a "joint bid," even though at least one of the competitors could have bid on its own.
- A bidder appears in person to present his bid and also submits the bid (or bond) of a competitor.
- Competitors regularly socialize or appear to hold meetings, or otherwise get together in the vicinity of procurement offices shortly before bid filing deadlines.
- Competitors meet as a group with procurement personnel to discuss or review terms of bid proposals. (This may facilitate subtle exchanges of pricing information.)
- Competitors submit identical bids or frequently change prices at about the same time and to the same extent.
- Bidders that ship their product short distances to the buyer charge the same price as those that ship long distances. (This may indicate price fixing, since otherwise the distant sellers would probably charge more for a given item to account for the extra cost of transportation.)
- Local competitors are bidding higher prices for local delivery than for delivery to points farther away. (This may indicate rigged prices in the local market.)
- Bid prices appear to drop whenever a new or infrequent bidder submits a bid.

SUSPICIOUS STATEMENTS

Statements made by marketing representatives or suppliers may suggest that price fixing is afoot. Examples of such statements, and other representations that are suspicious and may be indicative of price fixing, include:

- Any reference to "association price schedules," "industry price schedules," "industry suggested prices," "industry-wide" or "market-wide" pricing.
- Justification for the price or terms offered "because they follow industry (or industry leaders') pricing or terms," or "follow (a named competitor's) pricing or terms."
- Any reference to "industry self-regulation," etc., such as justification for price or terms "because they conform to (or further) the industry's guidelines" or "standards."
- Any references that the representative's company has been meeting with its competitors for whatever reason.
- Justification for price or terms "because our suppliers, etc., require it" or "because our competitors, etc., charge about the same," or "we all do it."
- Any reference that the representative's company "does not sell in that area," or that "only a particular firm sells in that area," or "deals with that business."

- Statements to the effect that "such and such salesman (of a competitor) should not be making a particular proposal to you," or "should not be calling on you."
- Statements to the effect that it is a particular vendor's "turn" to receive a particular job or contract.
- Statements by a bidder that it was "protecting" another supplier or was submitting a "courtesy," "complementary," "token," or "cover" bid.
- Statements by bidder that suppliers have discussed their prices or bids or that they have some deal or understanding about prices or bids.

CONDITIONS FAVORABLE TO COLLUSION

While price fixing can occur in almost any industry, it is most likely to occur in industries where only a few firms compete, and where the products of those firms are similar. You should be sensitive to industry conditions that increase the probability of collusion.

- Collusion is more likely to occur if there are few sellers. The fewer the sellers, the easier it is for them to get together and agree on prices. Collusion may also occur when the number of firms is fairly large, but there are a small group of major sellers and the rest are "fringe" sellers who control only a small fraction of the market.
- The probability of collusion increases if the product cannot easily be substituted for another product. The gains from colluding will be high if the product has few, if any, good substitutes.
- The more standardized a product is, the easier it is for competing firms to reach agreement on a common price structure. It is much harder to agree on other forms of competition such as quality or service.

WHAT YOU CAN DO

You can assist in the enforcement of the antitrust laws not only by playing an active role in the detection of collusive bidding, but also by taking positive steps to stimulate competition and prevent collusive behavior. Some of the procedures that can be established to discourage anticompetitive activity include:

- Expand the list of bidders to make it more difficult to collude. To reduce the ability of conspirators to coordinate illegal activities, buyers should solicit as many reliable sources as economically possible. As the number of bidders increases, the probability of successful collusive bidding decreases. Soliciting numerous suppliers will not necessarily prevent a conspiracy, but it can reduce the effectiveness of a conspiracy by providing a larger competitive base. While there is no magic number of bidders above which collusion does not occur, past experience suggests that collusion is more likely to arise where there are five or fewer competitors.
- Consolidate purchases as a defensive tactic. The existence of a large number of contract opportunities facilitates collusion among sellers. When buyers are numerous, and each purchases only a small amount, sellers have less incentive to grant price cuts. Consolidation of purchases tends to increase the value of winning the bid. A firm, even if part of a conspiracy, may be tempted to cheat and take the prize.
- Consider the process of awarding contracts when a tie bid occurs. Not all identical bids are the result of a price-fixing conspiracy. However, you should not inadvertently encourage tie bids by assuring identical bidders an equal or reasonable share of the buyer's business. From a seller's standpoint, it may be better to share business equally with other suppliers at significantly higher prices than to have an uncertain share of the business at lower, competitive prices. Thus, in a tie-bid situation, agencies should consider re-letting the contract, or find some way to award the bid to one of the tied bidders. A lottery system of awarding contracts should not be used.
- Ensure that you understand the elements of collusion, such as bid rigging and market allocation. Provide information to others on how to detect collusion.
- Have procurement records, e.g., bid lists, abstracts and awards, readily available. Looking at a single contract is not enough because records of past bids are needed to determine if a pattern of allocation or rotation is present.

- Report all suspected collusion (based upon a bid analysis, an audit, a complaint from other competitors, or statements by persons who appear knowledgeable, e.g., former employees) to the Antitrust Division for appropriate action.

The State of Alaska believes it is important for all employees who are involved in procurement or purchasing to report suspicious behavior that raises antitrust concerns. Such behavior should be reported to:

Ed Sniffen
Assistant Attorney General
Civil Division, Commercial & Fair Business
Department of Law
1031 W 4th Ave, #200
Anchorage, AK 99501
(907) 269-5100
e-mail: ed.sniffen@alaska.gov

SAMPLE PROTEST RESPONSE LETTER

Mr. J. Doe
Ajax Company
999 Goodnews St.
City, State 99999

Dear Mr. Doe:

This is in response to your protest regarding ITB (insert *number*). Your protest was received on (*insert date*). In preparing this response I read your letter carefully and examined the ITB file, still, I find that I must deny your protest for the reasons set out below.

ISSUE The basis of your protest is that the state should have accepted your bid even though it was late because the courier had guaranteed a delivery date prior to the bid opening.

RULE The relevant statute is AS 36.30.160(a) LATE BIDS:

> *(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.*

APPLY The requirement that bids be received before the bid due date is set by statute. We do not have the authority to change statute.

Your bid was received and date/time-stamped by our office at 1:33pm on April 16, 2014. The bid due date was 5:00pm on April 14, 2014. The delay was not due to an error of the contracting agency, therefore your bid cannot be accepted.

CONCLUSION You have not provided a reason for me to conclude that the bid was improperly awarded. Therefore you protest is denied. I hope my decision is in this matter does not dissuade you from competing for state contracts in the future.

Sincerely,
T. Boon Procurer

NOTE: Use this follow-up letter for FORMAL PROCUREMENT protests only.

Dear Mr. Doe:

This is to advise you that I have reviewed the response to your protest issued by T. Boon Procurer and that I agree with the decision.

If you wish, you may appeal the decision. Your appeal must be received by the commissioner of the Department of Administration within ten days of the date you receive the procurement officer's decision. The appeal period begins with the first calendar day following your receipt of the procurement officer's decision and ends at the close of business on the tenth calendar day, unless the tenth day falls on a weekend or State holiday. If the tenth day falls on a weekend or holiday, the appeal period ends the first working day following weekend or holiday.

If you file an appeal you must send a copy of the appeal to the procurement officer. In accordance with AS 36.30.590, the appeal must be signed by you or your representative and include the following:

- your name, address and telephone number;
- identification of the bid or contract you are appealing;
- a detailed statement of the legal and factual grounds of your protest and appeal;
- copies of **all** relevant documents;
- the form of relief you want;
- a copy of the procurement officer's decision; and
- identification of the factual and/or legal errors, in the procurement officer's decision, that form the basis of your appeal.

The appeal must be written. Telephone notice of your intent to appeal will not be accepted. FAX copies are acceptable, but because there is no signature, telegrams are not. When your appeal is received you will be sent a copy of the protest report developed by the procurement officer and submitted to the commissioner. You will then have seven days from the date that you received the report to submit additional comments. Your comments should be sent to the commissioner.

After considering the information submitted the commissioner will decide:

- if your appeal will be upheld and the procurement officer's decision overturned; or
- if your appeal will be denied; or
- if a hearing will be conducted.

If you have questions about the appeal procedure you should contact the Office of Administrative Hearings:

- Anchorage 907 269-8170
- Juneau 907 465-1886

Sincerely,

J. Smith Procurer
Contracting Manager

GUIDE TO SMALL PROCUREMENT PROTESTS

FIRST STEP

An interested party (vendor) is required to contact the state agency's procurement officer and attempt to informally resolve a concern or dispute.

An interested party is an actual or prospective vendor whose economic interest may be affected substantially and directly by the issuance of a solicitation, award of the procurement, or failure to award the procurement. Whether or not there is an economic interest will depend on the circumstances.

SECOND STEP

If the attempt to informally resolve a problem is unsuccessful – the vendor may then file a written protest with the commissioner of the department performing the procurement. Must also provide copy of the protest to the procurement officer.

1. If protesting a solicitation, the protest must be filed before the date and time set for receipt of the quotes or proposals.
2. If protesting an award less than $50,000, the protest must be filed within 10 days of the solicitation or award, whichever is later.
3. If protesting an award from $50,000 to $100,000, the protest must be filed within 10 days from the date the notice of award is issued.

Protest must contain:

- Name, address, and telephone number of protester;
- Signature of protestor or the protestor's representative;
- Identify the state agency performing the solicitation;
- Identify the solicitation or award at issue;
- Detailed statement of the legal and factual grounds of the protest;
- Form of relief requested (what you want the agency to do).

THIRD STEP

When a protest is received, the procurement officer will immediately give notice of the protest to the contractor or, if no award has been made, to all firms or persons that were solicited for the small procurement. The appropriate commissioner or commissioner's designee may use one of the following options to resolve the protest:

- Issue a decision that sustains the protest, in whole or in part, and provides an appropriate remedy.
- Issue a decision denying the protest.
- With the concurrence of the protester, assign the protest to the procurement officer or other responsible state official for a final administrative resolution under alternate dispute resolution.
- Conduct a hearing consistent with the procedures contained in AS 36.30.670(b).

There are no provisions for administrative appeal under the small procurement protest process. If an interested party is not satisfied with the final decision or resolution, the only option is to take the matter to court.

For specific detailed process refer to AS 36.30.550 and 2 AAC 12.695

CLASS EXERCISES

RESPONSIVENESS CASE STUDY #1

OAH No. 08-0123-PRO

Case:

Kalen & Associates, Inc. (Kalen), a firm located in Fairbanks, submitted a proposal to a Department of Natural Resources (DNR) office in Anchorage to provide surveying and platting services. The deadline for receipt of proposals was 1:30pm.

Kalen had used DHL for overnight shipping between Fairbanks and Anchorage for many years and had never experienced a late delivery. Kalen delivered its proposal to DHL the day before proposals were due with explicit instructions to deliver the proposal to DNR by noon the next day. DHL assured DNR that the proposal would be delivered on time.

Due to events beyond Kalen's control, DHL delivered the proposal at approximately 2:30pm, one hour after the closing time identified in the Request for Proposals.

Kalen stated that it exercised reasonable care to provide for timely delivery of its proposal and should not be held responsible for the error, negligence, or default of an express delivery service.

Questions:

1. Should DNR accept Kalen's proposal? Why or why not?

2. Is Kalen's proposal responsive?

3. Should DNR consider DHL's assurances to Kalen that the proposal would be delivered by noon in their decision?

RESPONSIVENESS CASE STUDY #1

OAH No. 08-0123-PRO

Answers:

1. No. Late is late – the procurement code does not provide a contracting agency with discretion to disregard the time set for receipt of proposals in the request for proposals unless the contracting agency itself makes an error. There was no error on behalf of the contracting agency in this case.

2. No. A late proposal is non-responsive.

3. No. Again, unless the late delivery was caused by the contracting agency, there is no method under procurement code to accept a late proposal.

RESPONSIVENESS CASE STUDY #2

OAH No. 10-0258-PRO

Case:

The Department of Transportation and Public Facilities (DOTPF) issued an ITB for graders and associated equipment. The primary use for these graders was for snow removal purposes. The ITB was split into three lots, each for a different size grader. Lots 1 and 2 were for smaller-sized graders and were to be priced separately, but evaluated at their combined price.

Multiple bids were received and Construction Machinery Industrial (CMI) was the apparent low bidder.

An amendment to the ITB included a new bid schedule that added two slopers to Lot 2 for which pricing was required as part of the bid price. CMI submitted its bid using the original price sheet for Lot 2 and as a result, omitted pricing for the slopers.

For Lot 3, CMI offered a grader that did not meet the horsepower specifications required in the ITB.

CMI maintains that submitting its bid for Lot 2 on the original bid schedule is simply a matter of form that may be waived as a minor informality by the procurement officer. CMI also argues that DOTPF has not shown that the horsepower specification for Lot 3 is a material requirement.

Questions:

1. Is CMI's failure to use the new bid schedule for Lot 2 a basis for a determination of non-responsiveness?

2. Can the procurement officer waive this failure as a minor informality?

3. Is DOTPF's horsepower specification "material"?

RESPONSIVENESS CASE STUDY #2

OAH No. 10-0258-PRO

Answers:

1. Yes. Because CMI provided no cost at all for the additional equipment required on the new Lot 2 bid schedule, this omission affects price and therefore is a basis for a determination of non-responsiveness. Because Lots 1 and 2 were to be combined for evaluation, CMI was found non-responsive in both lots.

2. No. Minor informalities are those that do not affect price, quality, quantity, delivery, or contractual conditions. The failure by CMI to include pricing for two required items directly affects price.

3. Yes. DOTPF showed a reasonable need for the horsepower specifications as written. CMI did not demonstrate that the specifications were unduly restrictive or that it was an abuse of discretion for the procurement officer to conclude that CMI's bid was non-responsive for failure to comply with the specifications.

RESPONSIVENESS CASE STUDY #3

Case:

The Department of Administration (DOA) issued an RFQ for 16 communication shelters. The RFQ required delivery of all shelters in 150 days, with the first shelter being delivered in 45 days and seven days for each additional shelter.

A quote was received from Thermo Bond with a delivery time of 60 days for all 16 shelters. Thermo Bond explained that this delivery schedule was quoted because it was their understanding that DOA wanted prompt delivery of the shelters.

After quotes were opened, Thermo Bond indicated that they could deliver the first shelter within 45 days.

Questions:

1. Is Thermo Bond's original quote responsive?

2. Is Thermo Bond's agreement to deliver the first shelter in 45 days applicable?

RESPONSIVENESS CASE STUDY #3

Answers:

1. No. The RFQ *required* delivery of the first shelter in 45 days and each additional shelter in seven day intervals, meaning that DOA would have three shelters delivered in 59 days. Thermo Bond's delivery schedule would have potentially delivered no shelters until 60 days had passed.

   Thermo Bond's quote is non-responsive because it contains a material variance to DOA's requirements that affects delivery.

2. Thermo Bond's agreement to meet the 45 day requirement cannot be considered because non-responsiveness cannot be cured after opening.

WHAT'S YOUR PREFERENCE?
Practical Application #1

The Department of Natural Resources issued a solicitation for the printing of brochures to educate the residents of Alaska on their department's process for reforesting a section of land. They received three bids for this service.

The bid breakdown, and preference(s) that each vendor is claiming are as follows:

INSTRUCTION: Please apply all applicable preferences for each vendor and determine the low-bidder.

NOTE: For the purpose of this exercise, assume that each vendor meets the minimum qualifying criteria for each preference that they are claiming.

ABC PRINTING

Claiming – Alaska Bidder (5%) and Veteran (5% / $5,000 max) preferences / Class III (7%) product preference

Printing cost	$1,200.00
Delivery cost	$100.00
Total Bid Price	$1,300.00

REACH, INC.

Claiming – Alaska Bidder (5%) and Employment Program (15%) preferences

Printing cost	$1,300.00
Delivery cost	No Charge
Total Bid Price	$1,300.00

LOWER 48 PRINTING AND BINDING

Claiming no preferences

Printing cost	$1,000.00
Delivery cost	$150.00
Total bid price	$1,150.00

WHAT'S YOUR PREFERENCE?
Practical Application #1

The Department of Natural Resources issued a solicitation for the printing of brochures to educate the residents of Alaska on their department's process for reforesting a section of land. They received three bids for this service.

The bid breakdown, and preference(s) that each vendor is claiming are as follows:

ABC PRINTING

Claiming – Alaska Bidder and Veteran preferences & Class III product preference

Printing Cost (including graphic layout, paper, ink, & labor)		$1,200.00
Delivery Cost		$100.00
Total Bid Price		$1,300.00
Preference Valuation		
Alaska Bidder Preference		5%
Alaska Veteran Preference		5%
Value of Preferences	*($13,000 x 10% = $130)*	10%
Class III Product Preference	*($1,200 x 7% = $84)*	7% (product only)
Preference Application		
Total Bid Price		$1,300.00
Total Preference Value		- $130.00
Total Product Preference		- $84.00
Revised Bid Price For Evaluation Purposes		**$1,086.00**

REACH, INC. – Awarded Contract

Claiming – Alaska Bidder & Employment Program preferences

Printing Cost (includes graphic layout, ink, & labor)		$1,300.00
Delivery Cost		No Charge
Total Bid Price		$1,300.00
Preference Valuation		
Alaska Bidder Preference		5%
Employment Program Preference		15%
Value of Preferences	*($1,300 x 20% = $260)*	20%
Preference Application		
Total Bid Price		$1,300.00
Total Preference Value		- $260.00
Revised Bid Price For Evaluation Purposes		**$1,040.00**

LOWER 48 PRINTING AND BINDING

Claiming no preferences

Printing Cost (including graphic layout, paper, ink, & labor)	$1,000.00
Delivery Cost	$150.00
Total Bid Price	$1,150.00
Total Bid Price For Evaluation Purposes	**$1,150.00**

WHAT'S YOUR PREFERENCE?
Practical Application #2

The Department of Education and Early Development issued a solicitation for the fabrication and installation of custom built cabinetry at Mt. Edgecumbe High School.

The bid breakdown, and preference(s) that each vendor is claiming are as follows:

INSTRUCTIONS: Please apply all applicable preferences for each vendor and determine the low bidder.

NOTE: For the purpose of this exercise, assume that each vendor meets the minimum qualifying criteria for each preference that they are claiming.

MENDENHALL MILLWORKS

Claiming – Alaska Bidder (5%) preference / Class III (7%) product preference

Cabinet design and fabrication	$40,000.00
Delivery and installation costs	$5,000.00
Total Bid Price	$45,000.00

EMPLOYMENT PROGRAMS CABINETRY, INC.

Claiming – Alaska Bidder (5%), Employment Program (15%), and Local Agricultural (7%) preferences

Cabinet design and fabrication	$49,000.00
Delivery and installation costs	$1,000.00
Total Bid Price	$50,000.00

TUNDRA CABINETRY

Claiming – Alaska Bidder (5%) preference

Cabinet design and fabrication	$39,500.00
Delivery and installation costs	$500.00
Total bid price	$40,000.00

WHAT'S YOUR PREFERENCE?
Practical Application #2

The bid breakdown, and preference(s) that each vendor is claiming are as follows:

MENDENHALL MILLWORKS

Claiming – Alaska Bidder (5%) preference & Class III product preference

Cabinet Design & Fabrication		$40,000.00
Delivery & Installation Costs		$5,000.00
Total Bid Price		$45,000.00
Preference Valuation		
Alaska Bidder Preference	*($45,000 x 5% = $2,250)*	5%
Class III Product Preference	*($40,000 x 7% = $2,800)*	7% (product only)
Preference Application		
Total Bid Price		$45,000.00
Total Preference Value		- $2,250.00
Total Product Preferences		- $2,800.00
Revised Bid Price for Evaluation Purposes		**$39,950.00**

EMPLOYMENT PROGRAMS CABINETRY, INC. – Awarded Contract

Claiming – Alaska Bidder (5%), Employment Program (15%), & Local Agricultural (7%) preferences

Cabinet Design & Fabrication		$49,000.00
Delivery & Installation Costs		$1,000.00
Total Bid Price		$50,000.00
Preference Valuation		
Alaska Bidder Preference		5%
Employment Program Preference		15%
Local Agricultural & Fisheries Product		7%
Value Of Preferences	*($50,000 x 27% = $13,500)*	27%
Preference Application		
Total Bid Price		$50,000.00
Total Preference Value		- $13,500.00
Revised Bid Price for Evaluation Purposes		**$36,500.00**

TUNDRA CABINETRY

Claiming Alaska Bidder Preference

Cabinet Design & Fabrication		$39,500.00
Delivery & Installation Costs		$500.00
Total Bid Price		$40,000.00
Preference Valuation		
Alaska Bidder Preference	*($40,000 x 5% = $2,000)*	5%
Preference Application		
Total Bid Price		$40,000.00
Total Preference Value		$2,000.00
Revised Bid Price for Evaluation Purposes		**$38,000.00**

SMALL PROCUREMENT CASE STUDY

The Department of Fish & Game (DFG) has a need for three widgets. DFG has determined Echo Widgets is the only brand that will meet the agency's needs and placed phone calls to the four vendors. There is a 30-day delivery requirement.

The quotes received include:

The Great Alaska Widget Co. Fairbanks, Alaska	$19,000
Industrial Widgets, Inc. Seattle, Washington	$21,900
Widgets-R-Us Anchorage, Alaska	$23,000
Bridget's Widgets Anchorage, Alaska	$22,000

Note:

- The Great Alaska Widget Co. offered delivery within 34 days. The DFG Project Manager has agreed to accept the new terms.
- Bridget's Widgets has been in business in Alaska for two months.

Questions:

1. Do any preferences apply to this solicitation?
2. Are any written determinations required? If so, which one(s) and when?
3. Who would be awarded a contract?

Page intentionally left blank.

TABLE OF CONTENTS

LEVEL II – ABOVE $10,000 TO $100,000 53
Conducting a Small Procurement Above $10,000 53
Verbal or Written Quotes/Informal Proposals: $10,000 - $50,000 53
Written Quotes/Informal Proposals: $50,000 - $100,000 54
Ethics 54
Misuse of Official Position 54
Improper Gifts 55
Improper Influence 55
Outside Employment 55
Employment Restriction 55
Request for Alternate Procurements (RAPs) 56
General RAP Information 56
What is a Request for Alternate Procurement? 56
Approval Requirements 56
Evidence 56
Amendments to RAPs 58
RAP Types 58
Single Source RAP – AS 36.30.300 / 2 AAC 12.410 58
Limited Competition RAP – AS 36.30.305 / 2 AAC 12.430 59
Exception to Unanticipated Amendment Limitation – 2 AAC 12.485 59
Emergency – AS 36.30.310 / 2 AAC 12.440 59
Innovative – AS 30.30.308 / 2 AAC 12.575 60
Procurement Violations 61
What is a Procurement Violation? 61
Investigating a Procurement Violation 61
Civil and Criminal Penalties 62
Class Exercises 63

LEVEL II – ABOVE $10,000 TO $100,000

CONDUCTING A SMALL PROCUREMENT ABOVE $10,000

2 AAC 12.400 describes three levels of competition for small procurements depending on the dollar amount, **including all renewals**. Note that each level of competition is inclusive of the upper limit shown. For instance, a $10,000 procurement may be conducted using reasonable and adequate procedures while a procurement *exceeding* $10,000 must be procured using the next higher level of competition.

Use the Small Procurement Matrix to assist in determining what competitive process to use for each dollar amount, what forms to use, and what procurement records must be kept. The Small Procurement Matrix is included at the end of the Level I Procurement Academy manual and is also located on the DGS Purchasing Documents page.

VERBAL OR WRITTEN QUOTES/INFORMAL PROPOSALS: $10,000 - $50,000

For procurements costing more than $10,000, but not more than $50,000, at least **three** vendors must be contacted for either a quotation or an informal proposal. The initial contact and the vendors' responses may be made verbally or in writing.

AAM 81.220 requires that the minimum number of quotations or informal proposals must be sought from Alaskan vendors before out-of-state vendors are contacted unless the procurement officer determines in writing that this is not practical. Additionally, lists of vendors should be rotated to provide as many Alaskan vendors as possible the opportunity to compete for state business.

Per **AAM 81.230** an established catalog price (be sure to include any delivery costs) may be used as a verbal quote if the catalog is regularly maintained by the manufacturer or contractor, is published or otherwise available for inspection by customers, and states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general public.

Note that using catalog prices in lieu of verbal quotes does not eliminate the need to rotate vendors set forth under **AAM 81.220**.

For written quotes under this section you must use the **Request for Quotation (RFQ)** form and for informal proposals you may use the **Informal Request for Proposal (IRFP)** template. Both documents are located on the DGS Purchasing Documents page.

WRITTEN QUOTES/INFORMAL PROPOSALS: $50,000 - $100,000

For procurements costing more than $50,000, but not more than $100,000, at least **three** vendors must be contacted, in writing, for either a **written** quotation or a **written** informal proposal.

AAM 81.220 still applies to this level of competition, meaning that the minimum number of quotations or informal proposals must be sought from Alaskan vendors before out-of-state vendors are contacted. Also, unless the procurement officer determines in writing that this is not practical, lists of vendors should be rotated to allow as many Alaskan vendors as possible the opportunity to compete for state business.

Catalog prices may not be used in place of written quotes.

This level of competition also requires that a written **Notice of Award (NOA)** including protest rights is provided to all vendors that responded to the solicitation request.

For written quotes under this section you must use the **Request for Quotation (RFQ)** form and for informal proposals you may use the **Informal Request for Proposal (IRFP)** template. Both documents are located on the DGS Purchasing Documents page.

ETHICS

As mentioned previously, ethics plays a major role in public procurement. A grand jury stated, in a case involving corruption on a procurement matter, that:

> *Government officials must always aim for what is best for the public, not merely for what might be "okay." Every public official has a duty of loyal, faithful and honest service which is clearly inherent in the responsibilities of public office at all levels.*

As public procurement professionals, it is important to keep this in mind and be cognizant and accountable for all actions taken as a procurement officer.

Below are some general prohibitions contained in the Executive Branch Ethics Act and the Executive Branch Code of Ethics.

MISUSE OF OFFICIAL POSITION

Alaska's Code of Ethics states that you:

- May not use position for personal gain or give unwarranted benefit or treatment.
- May not take or withhold official action in which you have a personal or financial interest.
- May not unduly influence the award of a contract.

- May not accept money from anyone other than the state for performance of your official duties.

IMPROPER GIFTS

Public employees may not solicit or accept gifts that benefit them if it can be reasonably inferred that the gift is intended to influence their actions or judgment.

Alaska's Code of Ethics requires that gifts valued over $150 must be reported to your ethics supervisor. **As a public procurement professional, it is strongly encouraged that you not accept any gifts regardless of value.** Once the appearance of an impropriety is suggested, it calls into question all work done to that point and must be defended.

IMPROPER INFLUENCE

You may not take actions or withhold action on the award or administration of a state contract if you have any personal or financial interest. A "personal or financial interest" could include an interest that would benefit yourself, your spouse, or an immediate family member or friend.

If you are ever in a position where you are unsure if you are in a situation that could be a violation of the Code of Ethics, it is important that you seek guidance from your ethics supervisor before proceeding.

OUTSIDE EMPLOYMENT

The Code of Ethics and Ethics Act does not prohibit an executive branch employee from holding another job, however no public employee may work for a person or organization other than the employee's own department if that work is incompatible or in conflict with the discharge of their official duties.

If you have outside employment, it must be reported annually to your designated ethics supervisor.

EMPLOYMENT RESTRICTION

The Code of Ethics specifically prohibits a former public employee from working on any matter in which the former employee had personally and substantially participated while employed by the state until at least two years have passed.

This prohibition is designed to prevent a state employee from awarding or influencing the award of a contract to a vendor in exchange for future employment.

REQUEST FOR ALTERNATE PROCUREMENTS (RAPS)

GENERAL RAP INFORMATION

WHAT IS A REQUEST FOR ALTERNATE PROCUREMENT?

A Request for Alternate Procurement, or RAP, is a procurement method that is used when it is not in the state's best interests to conduct a traditional solicitation.

There are five types of RAPs described in the procurement code:

1. Single Source (**AS 36.30.300** / **2 AAC 12.410**)
2. Limited Competition (**AS 36.30.305** / **2 AAC 12.430**)
3. Exception to Unanticipated Amendment Limitation (**2 AAC 12.485**)
4. Emergency (**AS 36.30.310** / **2 AAC 12.440**)
5. Innovative (**AS 36.30.309** / **2 AAC 12.575**)

Each type of RAP has unique conditions for use, evidence requirements, and approval processes. In all cases, however, when preparing a RAP, the RAP must explain the situation, list the facts, and contain factual evidence relevant to the explanation.

APPROVAL REQUIREMENTS

AS 36.30.320 grants agencies the delegated authority to approve Single Source and Limited Competition RAPs that fall within the $100,000 small procurement threshold. However, this authority cannot be delegated below the level of administrative services director.

Single Source and Limited Competition RAPs for amounts greater than $100,000 and all other types of RAPs must be approved by the chief procurement officer.

EVIDENCE

Single Source and Limited Competition RAPs require **written evidence** to support the request.

The evidence must be verifiable and allow for independent examination and determination. When a RAP is presented to a department head or the chief procurement officer for approval, the RAP document should be able to stand on its own.

The type of evidence required will vary based on the supply or service covered by the RAP. A good thing to keep in mind when collecting evidence is what a competing vendor would say to a judge about the evidence or the source of the evidence to discredit it. Would a competing vendor question your expert's qualifications? Would they question the integrity of your data? You should feel confident with your evidence before submitting a RAP.

Expert testimony is one of the most often used pieces of evidence in Single Source and Limited Competition RAPs. Black's Law Dictionary defines "expert testimony" as:

> *Opinion evidence of some person who possesses special skill or knowledge in some science, profession or business which is not common to the average man and which is possessed by the expert by reason of his special study or experience.*

Expert testimony is acceptable when it can be determined that the expert is unbiased and the testimony clearly demonstrates why the person is an expert.

A state employee may be subject to a criminal penalty if false statements are intentionally included in a RAP.

Below are some general examples of what constitutes evidence and what doesn't.

Acceptable Evidence	Not Evidence
Memo from an expert describing why they are an expert and providing testimony related to the RAP.	Memo containing argument or persuasion.
An affidavit of publication or copy of Online Public Notice showing that a notice was published.	Document stating "several vendors were contacted."
Data collected by a university professor.	Data overheard and repeated by the procurement officer (hearsay).
Letter from an authorized representative of a company stating that a product they manufacture is only available from them.	Letter from a state project manager stating that a product manufactured by a company is only available from that company.
A statement from a senior procurement specialist describing how long a formal procurement for a specific service will likely take.	A statement from a senior procurement specialist describing how scientific data from a different vendor will corrupt the existing data.

Table 1 Examples of Evidence

AMENDMENTS TO RAPS

Occasionally, a RAP is submitted by an agency but, before a contract is awarded, it is found that the time to award a contract granted by DGS must be extended or the amount requested must be changed.

To amend a RAP after it has been approved by the chief procurement officer, submit a memo to the DGS Contracting Officer who processed the original RAP recommendation identifying the RAP in question and explain the necessary changes.

The conditions that allowed approval of the original RAP must still exist in order for the change to be approved.

RAP TYPES

SINGLE SOURCE RAP – AS 36.30.300 / 2 AAC 12.410

Single Source RAPs are the most common type of RAPs processed by state agencies and are subject to the highest evidentiary requirements since they are the least competitive type of procurement. You may not award a single source contract if a reasonable alternative exists.

A Single Source RAP must meet two tests:

1. It is not practical to award a contract competitively.
2. Award of a single source contract is in the state's best interests.

When addressing that award of a single source contract is in the "state's best interests," **2 AAC 12.415** requires that this determination is reasonable, not arbitrary, capricious or prompted by corruption. Further, you must cite the **specific and significant interests** to support the use of a single source procurement.

2 AAC 12.410(d) sets forth examples of circumstances in which a single source procurement may be appropriate, including:

- If the compatibility of equipment, accessories, or replacement parts is the main consideration.
- If there exists a sole source of expertise required to perform a specific professional service.
- If the procurement is for the services of legal counsel for the purpose of advising or representing the state in specific civil or criminal proceedings or on a specific matter before a federal or state regulatory agency, board, or commission.

LIMITED COMPETITION RAP – AS 36.30.305 / 2 AAC 12.430

A Limited Competition RAP is a request to restrict competition to a specific vendor pool. Once approved, the agency may solicit offers or conduct negotiations equally with each vendor to identify the most advantageous vendor and make award.

Like Single Source RAPs, a Limited Competition RAP must meet two tests:

1. Why solicitation should be limited.
2. Why a traditional competitive process is impractical or contrary to the public interest.

EXCEPTION TO UNANTICIPATED AMENDMENT LIMITATION – 2 AAC 12.485

The Exception to Unanticipated Amendment Limitation (EUAL) RAP is needed when an unanticipated amendment exceeds the lesser of 20% of the current contract term or $100,000.

When calculating 20% of the current contract term, the "current contract term" is only the current amount of the contract, not counting any past or future terms. For example, if you have awarded a 1- year contract for $50,000 and there are four 1-year optional renewals each worth $50,000 and you are in the final year of the contract, the current contract term is $50,000. 20% of this amount is $10,000, so any unanticipated amendments exceeding this amount would require an EUAL RAP.

This type of RAP is not applicable to small procurement contracts **unless** an amendment would increase the contract beyond $100,000. Otherwise, a procurement officer may amend a small procurement contract within the small procurement threshold provided the amendment is within the scope of the original contract.

An EUAL RAP **must** address the following topics. Addressing each topic under clearly identified headings will help DGS to process the RAP faster:

- **Legitimacy:** What caused the need for the unanticipated amendment?
- **Scope:** Is the unanticipated work within the scope of the original contract?
- **Contract Clause:** Does the original contract contain a clause authorizing modifications?
- **Extent:** Does the unanticipated work appear to constitute a new undertaking?

EMERGENCY – AS 36.30.310 / 2 AAC 12.440

There are two methods of procuring supplies and/or services related to an emergency, depending on the situation.

AAM 81.510 provides a "72 hour" rule that basically says if there is an imminent threat to public health, welfare, or safety that requires action in less than 72 hours, agencies are delegated the authority to make emergency determinations.

In this situation, an agency would document the emergency in a memo to the procurement file describing the emergency, why procurement action is required in less than 72 hours, and identifying each purchase. The agency would then procure using reasonable means. Within 5 days after the procurement, a procurement report must be submitted to DGS to document the purchases.

When an agency has more than 72 hours to take action, an Emergency RAP form must be completed, explaining why emergency conditions exist and why the normal procurement process is impractical or contrary to the public interest. The RAP must identify the items or services to be purchased and level of competition to be used.

The agency must then submit the RAP to DGS for approval by the chief procurement officer.

In all cases, emergency purchases are limited to the supplies and services directly related to the emergency.

INNOVATIVE – AS 30.30.308 / 2 AAC 12.575

The Innovative RAP process is used to create a procurement procedure that would not otherwise be allowed within the state's procurement code. It requires two levels of approval, by DGS and the Department of Law, and is the least used RAP.

An Innovative RAP must address how the procurement procedure will achieve the best value or why it is advantageous to the state due to new or unique state needs or new technologies. It must be accompanied by a detailed procurement plan.

PROCUREMENT VIOLATIONS

WHAT IS A PROCUREMENT VIOLATION?

A procurement violation is a violation of any part of the procurement code – **AS 36.30**, **2 AAC 12**, **AAM Sections 81** or **82**, or the written delegation of purchasing authority issued by the Department of Administration.

A violation of an agency's internal procurement policy does not constitute a procurement violation that would require a violation report to be submitted to DGS.

Examples of procurement violations include:

- Purchasing a $75,000 item using reasonable & adequate procedures instead of obtaining three written quotes as required by **2 AAC 12.400**.
- Procuring leased office space in violation of an agency's written delegation of purchasing authority.
- Artificially fragmenting an order to avoid more stringent procurement procedures in violation of **AS 36.30.320(d)**.

INVESTIGATING A PROCUREMENT VIOLATION

The investigation process for procurement violations is set out in **AAM 82.300**.

The department's procurement section investigates the procurement violation and prepares a report for submission to the chief procurement officer.

The report prepared by the department must include the following information:

- **Description of the violation:** What type of violation (exceeded authority, lack of competition, etc.), what was purchased, how it was discovered, if it happened once or was repetitive, chronological list of events leading to the violation, and what led to the breakdown in the process.
- **Status of the invoice:** Is the invoice paid or unpaid pending the results of the investigation?
- **Interviews with principles:** Determine the level of procurement knowledge among those involved, their reasoning, and whether they had access to sufficient guidance.
- **Impact to agency:** Did the violation cause excessive costs? Was there a savings achieved? Did it cause public embarrassment or a perception of impropriety?
- **Closing statement:** Describe any actions already taken (training, review process, workload shift, etc.) and whether the violation was inadvertent, process related, planned, or intentional.
- **Department recommendation:** Describe any corrective actions, disciplinary actions, or civil or criminal actions, that are recommended.

The report should also include any supporting documentation as attachments.

Upon receipt of the violation report, DGS will conduct any further investigation as appropriate and make a final recommendation to the chief procurement officer, who will approve or disapprove the recommended actions.

CIVIL AND CRIMINAL PENALTIES

AS 36.30.930 sets out civil and criminal penalties for knowingly violating the procurement code. This law reads as follows:

> *(1) a person who contracts for or purchases supplies, equipment for the state fleet, services, professional services, or construction in a manner the person knows to be contrary to the requirements of this chapter or the regulations adopted under this chapter is liable for all costs and damages to the state arising out of the violation;*
>
> *(2) a person who intentionally or knowingly contracts for or purchases supplies, equipment for the state fleet, services, professional services, or construction under a scheme or artifice to avoid the requirements of this chapter is guilty of a class C felony.*

CLASS EXERCISES

RAP QUESTIONS

1. Can a state employee provide "expert" testimony to justify an alternate procurement?

2. If a formal contract (above $100,000) is placed on a month-to-month extension, is an unanticipated amendment exception RAP required?

3. *True or False:* A requestor must identify the vendors they will contact if an emergency RAP if approved, but they do not need to explain why that level of competition is practicable under the circumstances.

4. A one-year contract, with four one-year renewal options has a total value of $250,000 ($50,000 per contract term). During the last term, can you increase the contract by $50,000 within your own authority?

5. Can a procurement officer provide expert testimony regarding the reasons why there is insufficient time to conduct a formal procurement?

6. A procurement officer has sufficient factual evidence that justifies a single source, but the agency places a $45,000 order before the RAP is prepared. Is it acceptable to obtain approval of the RAP after an order is placed, but before the item is actually delivered?

7. An agency awards an $80,000 contract to a vendor who is the only source for a particular service. They want to amend the contract by $50,000 due to an unanticipated increase in the amount of services required. Can they amend the contract within their authority?

8. An agency submits a RAP for approval. The only evidence furnished is a previous RAP that was approved for the same service. Can a previously approved RAP be used as factual evidence?

9. An agency requests approval of a single source contract for professional services. They believe a particular consultant possesses unique experience and there are no other reasonable sources. Will the consultant's resume serve as sufficient factual evidence to document a single source?

10. Is the following statement from a department program manager sufficient to justify approval of an emergency RAP:

    Time is of the essence. The database that houses our central file of clients will crash in 10 days unless we contract with a firm to upgrade the system. If we lose the information it cannot be recreated and our program will suffer irreparable harm. We use information to provide critical services to our clients. Detailed information has been collected from all our clients during office visits, there are no hard copies or backups. It would be impossible to recreate the data."

RAP ANSWERS

1. Yes. However, expert testimony from a state employee is not always sufficient to serve as the only factual evidence. In some cases, their statements could be considered as biased. You should attempt to collect additional factual evidence.

2. Yes, if the value of the extension will exceed the lesser of 20% of the current term or $100,000. Ref. 2 AAC 12.485(d)

3. False. The agency must identify the level of competition they intend to use *and* the reason(s) for determining that level of competition. In addition, the agency must explain why emergency conditions exist and why procurement through the normal process is impracticable or contrary to the public interest. The explanation must define the public interest and illustrate the negative consequences if the RAP is not approved. Ref. AAM 81.510

4. No, since the value of the amendment would exceed 20% of the amount of the current term ($50,000). In this situation, an unanticipated amendment exception (UAE) RAP is required because the increase exceeds $10,000 ($50,000 x 20% = $10,000). Ref 2 AAC 12.485(d)

5. Usually not. Factual evidence that documents the specific reasons *why* there is insufficient time for a normal procurement will usually be provided by someone other than the procurement officer in the form of written material or testimony. However, a procurement officer may provide testimony regarding their area of expertise - procurement. In many RAP situations, the procurement officer will provide a timeline that shows how long it would take their department to conduct a formal procurement.

6. No. RAPs cannot be approved retroactively. In this instance a purchasing violation occurred when the order was placed and must be investigated and reported in accordance with AAM 82.320.

7. No. In this case a UAE RAP is required since the $100,000 small procurement threshold will be breached. Only the Chief Procurement Officer can approve UAE RAPs.

8. Yes, but additional factual evidence is almost always required. The reliability of evidence tends to weaken with age due to changes in the marketplace. New or updated evidence is required to confirm that the circumstances in place when the original RAP was approved still exist.

9. No. Additional factual evidence is required to document why it is impractical to solicit competition and why the award of a single source contract is in the state's best interest. This type of RAP based on a firm or person's "unique" qualifications and experience is probably the most difficult to prove. In almost all instances, a substantial amount of independent third-party evidence/expert testimony is required.

10. Probably not. The program manager is qualified to describe the database itself, explain how it was created and why it's important to preserve the system. However, statements related to the database crashing in 10 days should likely come from a technical person who is trained and has experience in the area of database management.

SMALL PROCUREMENT QUESTIONS

1. If an agency is aware of only two vendors that can provide a $20,000 item, can they solicit quotes from *only* those two vendors?

2. Does a consultant based in Las Vegas need an Alaska Business License if they present a two-day training course in Anchorage?

3. Is it okay to contact only one vendor to purchase an item valued at $10,000?

4. Can a $12,000 contract be amended by $6,000? Can a $12,000 contract be amended by $30,000?

5. If your brother-in-law works as a salesperson for a plumbing supply company and you need to purchase plumbing supplies, what should you do?

6. What two tests must be addressed with factual evidence when completing a single source RAP?

7. You discover that a computer was purchased in violation of your agency's Policy & Procedures governing IT purchases. What do you do?

8. Can you purchase an item that is on a mandatory contract award from another source if the item is substantially less expensive?

9. In response to a written RFQ, a vendor offers a 10% discount if payment is made within 15 days. Can the discount be considered during the evaluation of price in determining the low bidder?

10. Is a Notice of Award required for a $50,000 procurement? A $75,000 procurement?

SMALL PROCUREMENT ANSWERS

1. No, unless a limited competition or emergency alternate procurement is approved.

2. Yes, a business license is required since the service is physically performed in Alaska.

3. It depends. This level of competition requires "reasonable and adequate procedures" to ensure fairness to potential bidders or offerors and competition commensurate with the circumstances of the procurement, considering price, mission requirements, and available competition; "reasonable and adequate procedures" can include contacting only one potential bidder or offeror in appropriate circumstances.

4. As long as the amendment is within the "scope" of the original contract, then yes.

   However, a $30,000 amendment would most likely be considered outside the scope of the original contract. Remember, when assessing the scope of the original contract, the dollar value must also be considered. More than doubling a contract is usually considered outside of the scope.

5. Advise your supervisor of a potential conflict of interest. The procurement should probably be reassigned to another person to avoid even the appearance of a conflict of interest.

6. That it is not practical to award a contract competitively and that award of a single source contract is in the state's best interests.

7. You would likely investigate why the error occurred and how to prevent it, however because it is a violation of internal policy, not of the procurement code or delegation of authority, it is not a procurement violation that would require a written report to be submitted to DGS.

8. No. We must always purchase from mandatory contract awards unless the contract specifies a waiver process. However, if the prices associated with a mandatory contract seem excessive or if the contract cause your agency a hardship or does not meet your needs, contact DGS.

9. No. The standard terms and conditions attached to the RFQ documents state that *"Discounts for prompt payment will not be considered in evaluating the price you quote. However, the state shall be entitled to take advantage of any payment discount(s) offered by the vendor provided payment is made within the discount period."*

10. The Notice of Award is only required for procurements that are *more* than $50,000.

TABLE OF CONTENTS

LEVEL III – ABOVE $100,000 67
Formal Procurements 67
Formal vs. Small Procurements 67
Public Notice Requirements 67
Pre-Solicitation Conferences 67
Notice of Intent to Award 68
Formal Procurement Protests 68
Tie Bids & Proposals 69
Competitive Sealed Bids 70
Conditions for Use 70
Governing Statutes, Regulations, and Policy 70
Clauses 70
Evaluating Bids 71
Competitive Sealed Proposals 72
Conditions for Use 72
Governing Statutes, Regulations, and Policy 72
Clauses 72
Evaluating Proposals 73
Contract Administration 75
Why, What, and Who 75
Contract Governance 75
Elements of Contract Administration 76
Addressing Poor Performance 78
Contract Controversies 79
Bonds 79
Liquidated Damages 80
Formal Procurement Matrix 81
Guide to Formal Procurement Protests 83
Class Exercises 85

LEVEL III – ABOVE $100,000

FORMAL PROCUREMENTS

FORMAL VS. SMALL PROCUREMENTS

A formal procurement is any procurement above $100,000. The process, from start to finish, has many more requirements and steps than a small procurement and can take months to complete.

Formal procurements are conducted using a competitive sealed bid (price based) or competitive sealed proposal (value based) process using the Invitation to Bid (ITB) or Request for Proposals (RFP) forms.

PUBLIC NOTICE REQUIREMENTS

AS 36.30.130 requires that notice of formal procurements must be posted on the Alaska Online Public Notice System for at least 21 days. This period may be shortened for a specific procurement if the procurement officer determines in writing that a shorter notice period is advantageous and adequate competition is anticipated.

In addition to posting to the Alaska Online Public Notice System (OPN), notice may include publication in a newspaper that will reach prospective bidders and offerors and notices posted in public places in areas where the work will be performed or materials furnished. These additional public notice methods are not mandatory, but can be used when practical to reach an extended audience.

PRE-SOLICITATION CONFERENCES

Both the competitive sealed bid and competitive sealed proposal processes allow the procurement officer to hold a pre-solicitation conference after issuance of the ITB or RFP, but before the bid opening or deadline for receipt of proposals.

A pre-solicitation conference is a meeting held with potential bidders/offerors for the purpose of answering questions, clarifying any ambiguities, and responding to general issues with the solicitation. Such a conference can be very helpful to ensure that all parties have a common understanding of what the state is seeking to purchase.

If any changes are required or substantive questions are answers, an amendment to the solicitation may be issued as a result. This amendment must be distributed to all registered vendors and posted to the OPN.

Pre-solicitation conferences may be optional or mandatory, depending on the nature of the solicitation.

Be advised that if a pre-solicitation conference is held within 12 days of the opening date or deadline set for receipt of proposals, a protest of the contents of the solicitation may be filed at any time up to the closing date rather than 10 days prior as normally required (*see* Guide to Formal Procurement Protests).

NOTICE OF INTENT TO AWARD

Unlike a small procurement requiring written quotes where award is made and all respondents are notified of the award after the fact, the formal procurement process requires the issuance of a Notice of Intent to Award (NOIA), which lets interested parties know that the state will enter into a contract with the identified vendor.

The NOIA must include protest rights and be issued at least 10 days prior to contract award.

FORMAL PROCUREMENT PROTESTS

When dealing with formal procurements, the procurement code allows for an interested party to protest the award of a contract, the proposed award of a contract, the contents of a solicitation, or the cancellation of a solicitation.

2 AAC 12.990(7) defines an interested party as:

> *An actual or prospective bidder or offeror whose economic interest might be affected substantially and directly by the issuance of a contract solicitation, the award of a contract, or the failure to award a contract.*

In general, before bid opening or the deadline set for receipt of proposals, an interested party is any vendor who was sent a copy of the solicitation or registered to receive amendments. After bid opening or the deadline set for receipt of proposals, an interested party is any vendor who submitted a response. This is a general interpretation, however, and may not apply depending on the circumstances.

Protests of formal procurements are dealt with in the following areas of the procurement code:

- Statute: **AS 36.30.560 - .615, .670 - .699**
- Regulation: **2 AAC 12.210, .615, .650 - .670, .990**
- Policy: **AAM 82.100 - .260**

Guide to Formal Procurement Protests contains step-by-step instructions and timelines for handling a formal procurement protest.

TIE BIDS & PROPOSALS

From time to time, a procurement may result in a tie between two or more low bids or two or more tied proposals.

2 AAC 12.900 provides guidance in these situations and states:

> *If tied bids or proposals exist, award shall be made through a random drawing. Award may not be made by dividing the procurement among identical bidders.*

When choosing the method of random drawing (names in a hat, drawing straws, etc.), it is essential that the process is documented and witnessed by others.

COMPETITIVE SEALED BIDS

The competitive sealed bid process, also called the Invitation to Bid (ITB) process, is a formal price based procurement process. When conducting competitive sealed bid procurements, an ITB is the form used to solicit responses, responses are referred to as **bids**, and respondents are referred to as **bidders**.

CONDITIONS FOR USE

AS 36.30.100 states, as a general policy:

> *Except as otherwise provided in this chapter… an agency contract shall be awarded by competitively sealed bidding.*

This means that unless there is a specific need to procure using some other method, which would require a **written determination**, the competitive sealed bid process must be used.

A competitive sealed bid process is most used when:

- Requirements can be described in finite and specific detail.
- The contract will be awarded to the lowest responsive and responsible bidder.
- Competition is readily available.
- There is enough time for the process.
- There is no need to hold negotiations.

GOVERNING STATUTES, REGULATIONS, AND POLICY

While the procurement code applies to all procurements in general, the competitive sealed bid process is specifically governed by:

- Statute: **AS 36.30.100 - .190**
- Regulation: **2 AAC 12.120 - .210**
- Policy: **AAM 81.300 - .320**

CLAUSES

DGS maintains an ITB template that contains all the clauses and instructions necessary to draft an ITB document suitable for issuance. This template is available on the DGS **Purchasing Documents** page.

EVALUATING BIDS

Bids are first evaluated to determine responsiveness and responsibility (*see* **Responsiveness and Responsibility**). A non-responsive bid, one that doesn't conform in all material respects to the ITB, must be rejected.

Bids are then evaluated to determine which bid offers the lowest cost to the state in accordance with the ITB and after all applicable preferences are considered.

The lowest bid is the apparent successful bidder.

If only one responsive bid is received, **2 AAC 12.190** states that award may be made to the single bidder if the bidder is responsible, the procurement officer finds that the price submitted is fair and reasonable, and other bidders had reasonable opportunity to respond or there is not adequate time for a re-solicitation.

If any of these conditions are not true, the bid may be rejected and: a new solicitation may be conducted, the procurement may be canceled, or the supplies/services are procured using an **alternate procurement** method (*see* **Request for Alternate Procurements (RAPs)**).

COMPETITIVE SEALED PROPOSALS

The competitive sealed proposal process, also called the Request for Proposals (RFP) process, is a formal **value based** procurement process. When conducting competitive sealed proposal procurements, an RFP is the form used to solicit responses, responses are referred to as **proposals**, and respondents are referred to as **offerors**.

CONDITIONS FOR USE

2 AAC 12.215 allows for the use of the competitive sealed proposals process for the following supplies and services without requiring a written determination:

- Professional services.
- Supplies and services for clean-up of oil and hazardous substances.
- Telephone systems and telephone system maintenance.
- Concession contracts.
- Leased office space. (Remember that the authority to procure leased office space is not delegated to agencies.

Competitive sealed proposals for other goods and services must include a written determination by the procurement officer that documents the need for the value based procurement.

A competitive sealed proposals process is most used when:

- Specifications cannot be made sufficiently definite and certain to permit selection based only on price.
- Judgment is required in evaluating proposals and it is advantageous to require a balancing of price, quality, qualifications, and other factors.
- Testing, experimentation, or other evaluation is required with a new product or technology.

GOVERNING STATUTES, REGULATIONS, AND POLICY

While the procurement code applies to all procurements in general, the competitive sealed proposal process is specifically governed by:

- Statute: **AS 36.30.200 - .290**
- Regulation: **2 AAC 12.215 - .315**
- Policy: **AAM 81.400 - .480**

CLAUSES

DGS maintains an RFP template that contains all the clauses and instructions necessary to draft an RFP document suitable for issuance. This template is available on the DGS Purchasing Documents page.

One of the major differences between drafting an ITB and drafting an RFP is the addition of **evaluation criteria** to the RFP document. When developing evaluation criteria, the criteria must be clearly and concisely stated, be associated with a point value or weight, and all the criteria should have a direct link back to the specifications. *You cannot evaluate proposals against evaluation criteria not included in the RFP.*

While the RFP template contains sample evaluation criteria, it is strongly recommended that you develop your own based on the specification requirements.

Cost must always be included as an evaluation criteria (*see* **Evaluating Cost**).

EVALUATING PROPOSALS

The proposal evaluation process can be simple or complex, depending on the type of supplies/services being sought and the number of evaluation criteria being used.

The procurement code allows for both numerical and non-numerical proposal rating systems. DGS recommends the use of numerical ratings, since a number speaks for itself and requires no explanation. A non-numerical rating system requires the use of narrative explanations, which may add a significant amount of time to the evaluation process.

If only one responsive proposal is received, **2 AAC 12.270** states that the procurement officer may make an award, reject the proposal, or reject the proposal and re-solicit proposals.

PROPOSAL EVALUATION COMMITTEE

Proposals may be evaluated by either the procurement officer or a Proposal Evaluation Committee (PEC) made up of at least three state employees or public officials selected by the procurement officer. When using a PEC, each member must sign a form indicating that no ethical conflicts of interest exist between them and any of the offerors and PEC members must independently review and rate the proposals per **2 AAC 12.260(i)**. Once proposals have been independently ranked, the procurement officer will call a meeting to discuss and finalize scores. At no point shall ratings be assigned based on voting or consensus. All ratings must be independently made.

It is desirable that cost proposals are withheld from the PEC during evaluation, since cost is objectively scored and should not be considered when rating technical scores. PEC members should also have no contact with offerors and should report any contact attempts made by an offeror to the procurement officer.

A **PEC Evaluator's Guide** is available on the DGS **Purchasing Documents** page that goes over these and more details related to PEC's. PEC members should be provided a copy of this guide before the evaluation process begins.

CLARIFICATION OF OFFERS

2 AAC 12.285 allows the procurement officer or the PEC to communicate with an offeror for clarification of uncertainties or elimination of confusion concerning the contents of a proposal. These communications cannot result in a material or substantive change to the proposal. The procurement officer or the PEC may adjust their scores as the result of clarifications.

PROPOSAL DISCUSSIONS

2 AAC 12.290 sets forth a process that allows the procurement officer to enter into discussions with all the offerors of proposals deemed to be reasonably susceptible for award to ensure full understanding of the RFP and proposal and must be limited to specific sections of these documents.

Following discussions, the procurement officer may set a deadline for receipt of best and final proposals from those offerors with whom discussions were held. Proposals may be re-evaluated after receipt of best and final submissions.

Unlike clarifications, best and final offers may result in a material or substantive change to the proposal.

CONTRACT NEGOTIATION

2 AAC 12.315 allows for the procurement officer to negotiate with the offeror of the highest-ranked proposal for the purpose of obtaining contract terms consistent with the RFP and terms favorable to the state. Changes may be made to the proposal during negotiations, but they must be reasonable and must not have the effect of changing the ranking of the highest-ranked proposal. For instance, during negotiations, an offeror cannot increase their cost to add services if doing so would cause them to lose points and thus no longer have the highest-ranked proposal.

If the procurement officer determines that the offeror fails to negotiate in good faith or within the time period set, negotiations may be terminated with that offeror. The procurement officer may then begin contract negotiations with the offeror of the next highest ranked proposal.

CONTRACT ADMINISTRATION

WHY, WHAT, AND WHO

Contract administration encompasses a wide variety of ongoing day-to-day activities that take place after a contract is awarded and may continue until after it expires.

WHY?

Active contract administration is critical to ensure that requirements set forth in the contract are adhered to and satisfied.

WHAT?

Contract administration includes the management of all actions taken after award of a contract to assure compliance with the contract.

These actions include ensuring the timely delivery of goods or services, compliance with contractual schedules and milestones, inspection and timely acceptance of deliverables, ensuring all payments are made in accordance with the contract terms, exercising optional renewals as necessary, and terminating the contract at the appropriate time.

WHO?

The procurement officer for a procurement may not always be the contract administrator. In many cases, the end-user, project manager, or other stakeholder takes on the day-to-day administration of a contract after it is awarded.

Regardless of who is assigned the task of contract administration, they should be very familiar with and understand the solicitation and contract, including knowing the roles and responsibilities of both the state and contractor. The contract administrator may be put into situations where there is no clear answer, so good problem solving skills and the ability to maintain composure and professionalism in case of conflict are excellent qualities for the contract administrator to have as well.

CONTRACT GOVERNANCE

In order to properly administer a contract, the administrator must be familiar with how the contract is structured and have access to the guidance of a procurement professional that is knowledgeable in the bodies of law that the contract is based on.

The contract is made up of all terms and conditions within the contract award document as well as any documents incorporated by reference, which may include the solicitation and any appendices or attachments, and is governed not only by the procurement code, but in areas where the procurement code is silent, the Uniform Commercial Code (**AS 45.02**) and contract law.

ORDER OF PRECEDENCE

Because a contract award document may be made up of many other documents, it is important to establish a clear order of precedence in case of conflicting terms or conditions between the documents.

For example, the order of precedence for a contract awarded as the result of a competitive sealed proposal process might look like this:

In case of conflict, the following order of precedence shall govern:

1. *This contract document (Standard Contract Form, Appendices A – D)*
2. *Appendix E: RFP 2010-0200-9999 issued by the Department of Administration on July 12, 2010.*
3. *Appendix F: Best and Final Offer submitted by Vendor on August 15, 2010.*
4. *Appendix G: Proposal submitted by Vendor on August 10, 2010.*

If, after the contract is awarded and day-to-day administration is happening, if there is conflicting language found between the RFP and the proposal submitted by the contractor, the contract administrator can refer to this order of precedence to determine that the language in the RFP would prevail.

SPECIFICATIONS

A poorly written solicitation is the most common reason contracts fail to meet an agency's needs. Specifications are the most important part of a procurement and it is important that they are written clearly and concisely so that the vendor community can easily determine what the state is seeking.

ELEMENTS OF CONTRACT ADMINISTRATION

Contract administration can be made into a more routine task if broken down into its basic elements:

CHECKLISTS

Keeping a checklist of administrative duties related to a contract can help to ensure that no duties or deadlines are missed, such as deliverable deadlines, payments, testing, and so on. Scheduling these tasks using your calendar or project management software can also help.

DOCUMENTATION

The most important part of contract administration is documenting all contract actions taken, problems encountered, and solutions agreed to. Proper documentation is critical in resolving disputes and pursuing claims. Whenever there are non-compliance issues or other concerns, it is important that the contractor is made aware of them in writing for additional followed-up later on.

CONTRACT FILE

Documentation is no good if it cannot be easily and quickly located. A well-organized procurement and contract file is key. This file should contain the solicitation document, all responses and communications received, the contract award, all correspondence, payment records, documentation of receipt and acceptance/rejection of deliverables, performance logs, contractor evaluation, and close-out letter.

PERFORMANCE MONITORING

A contract administrator should always be actively monitoring all aspects of a contractor's performance so that potential problems can be identified and corrected before they grow into major issues. Effective written communication is vital to this process so that documentation is kept and to assist the administrator in following up on problems to ensure they are being addressed.

ACCEPTANCE

Accepting supplies or other deliverables includes inspecting and testing per the contract to ensure they meet the specifications set forth in the solicitation document.

CONTRACT RENEWAL

It is very important that renewal dates are tracked, since an expired contract cannot be resurrected, leading to a need to conduct an entirely new procurement.

Before renewing a contract, however, it is good practice to take another look at the market conditions and contract pricing to determine if the state could save money by re-procuring or by using another contract or cooperative agreement. When making this determination, the costs to the state in time and resources of conducting a new procurement must be taken into consideration.

If the contract administrator decides to renew the contract, the contractor's insurance certificates should be checked to make sure they are still valid and if not, make sure that new ones are obtained.

The contract renewal (or a month-to-month extension) **must** happen in its entirety, in writing, before the contract expires.

AMENDMENTS, ASSIGNMENTS, AND NOVATIONS

If an amendment was included in the solicitation and the contractor provided a cost that was evaluated, it is considered an anticipated amendment and may be exercised per the terms of the contract. The most common anticipated amendment is an optional renewal.

If there is a need for additional work that was not included as part of the solicitation and contract award, it is an unanticipated amendment and is subject to the unanticipated amendment limitations set forth in 2 AAC 12.485(d).

An **assignment** is when a contractor transfers rights, such as the right to be paid, under a contract to a third party. Assignment of a contract requires written approval from the procurement officer.

A **novation** transfers all rights and obligations to a new party. This process requires the consent of all original parties to the contract and written approval of the procurement officer. A novation happens most commonly when a business is sold to a new party and/or the business changes names.

CONTRACT CLOSE-OUT

When the contract comes to an end, the contract administrator should communicate the notice of contract expiration or termination to the contractor in a letter. This will prevent the contractor from providing services to the state past their obligated timeframe, which could potentially be a procurement violation if the state were to continue accepting and paying for the services. This close-out may include a contractor evaluation.

ADDRESSING POOR PERFORMANCE

In the course of administering contracts, it is likely that a contract administrator will encounter an underperforming contractor at some point.

As mentioned, active contract administration is vital to recognize and resolve problems before they reach a greater magnitude. However, sometimes even active contract administration isn't enough and the contractor continues performing poorly.

In these cases, a performance remedy must be sought. Available options are:

- Document all problems as they happen, including any correspondence with the contractor, and request a cure. A sample cure letter is included as an attachment to the Level I manual. Escalate when necessary on both sides, meaning that you, your supervisor, or your director may need to contact a manager, VP, or CEO who works for the contractor.

- Terminate the contract for cause or convenience and re-procure.
- Accept the poor performance with the understanding that the longer poor performance is accepted, the weaker the state's case is to pursue any future recourse.
- Pursue a contract claim under **AS 36.30.620**.

The importance of documentation in all of these options cannot be stressed enough. Anytime a contractor's performance is called into question, the possibility of other parties becoming involved grows significantly, and it is crucial that the state is in a position to defend the actions being taken.

RED FLAGS

Below are some common examples of things that may come up during a contract that could indicate a performance issue that needs to be addressed:

- Delayed or no response to correspondence or phone calls.
- Requests for exceptions to contract requirements.
- Lack of progress on milestones or failure to provide deliverables.
- Repeated changes in contractor personnel.
- Calls from creditors or suppliers.

CONTRACT CONTROVERSIES

Contract controversies are claims levied against a contractor by the state or against the state by the contractor and are governed under **AS 36.30.620**.

For example, if a contractor has been providing supplies for the state under a contract and it comes to light that the contractor has been knowingly overcharging on each order, the state may choose to pursue a claim against the contractor to recover the amount overcharged.

The contract controversy process is similar to the protest process.

BONDS

The procurement code allows for the state to require bid bonds, performance bonds, and surety deposits from a contractor before contract award. Bonds are typically seen in construction procurements and are required by law in some cases; however they may also be used in procurements of supplies and services. Before including a bond requirement in a solicitation, it is recommended that you check with your procurement section and possibly the attorney general's office.

BID BOND

A bid bond protects the state in the event that the bidder or offeror refuses to enter into a contract after the award or the bidder or offeror withdraws their bid/proposal before award. Bid

bonds discourage those who don't actually intend to follow through from responding to a solicitation.

PERFORMANCE BOND

A performance bond is a bond that guarantees that the contractor will fully perform the contract and guarantees against breach of contract. In the case that a performance bond is paid out, the proceeds are used to complete the contract or compensate for loss in the event of nonperformance.

SURETY DEPOSIT

Per **2 AAC 12.810**, a surety deposit may be used in place of a bond and may be made as an irrevocable letter of credit or cash. A surety deposit must be approved by the commissioner of the purchasing agency before it is submitted.

LIQUIDATED DAMAGES

A liquidated damages clause may be included in a solicitation and is a way to assure timely completion of a contract. Use of a liquidated damages clause is rare as it can prove to be administratively burdensome to both the state and the contractor, so be sure it is really necessary before including it.

Typically, a liquidated damages clause is structured so that if a contractor fails to perform a certain task or set of tasks by a specific date, the state will then begin to collect liquidated damages.

The amount of the liquidated damages must represent a good faith estimate of the actual damages incurred due to non-performance and must be supported by reasonable calculations. Liquidated damages cannot be punitive.

FORMAL PROCUREMENT MATRIX

ESTIMATED PRICE OF PROCUREMENT	MINIMUM COMPETITION REQUIRED	FORMS USED BY AGENCY	PUBLIC NOTICE REQUIREMENT	AWARD METHOD	KEEP IN PROCUREMENT FILE
Request for Proposals (RFP) Process – Supplies, Services, or Professional Services					
Greater than $100,000 AS 36.30.200 The TOTAL procurement value must include all options to renew or extend. For example: • If contract runs for 1 year with 2 one-year renewal options, use the total value for all 3 years. Purchase Requisition (form #02-099) must be sent to the Division of Enterprise Technology Services for telephone systems, radios, and other telecommunications equipment (see agency delegation of authority). Agencies are to submit requirements for construction, State Equipment Fleet vehicles, mobile homes, portable shelter units and prefabricated and/or sectional office, housing or shelter units directly to the Department of Transportation and Public Facilities. Agencies may not procure leased office space without a specific delegation of authority from the Division of General Services (DGS). Note: Procurements for legal services must be approved in advance by the Attorney General's Office.RFPs for Architects, engineers, and land surveys follow different procedures.	Issue formal Request for Proposals (RFP) in accordance with AS 36.30.130 and 2 AAC 12.130. The Competitive Sealed Proposals (CSP) process may be used for non-professional service contracts if the procurement officer determines in writing, with particularity, that the use of a CSP is more advantageous to the state than an ITB AS 36.30.200(b). No determination is required to use a CSP for professional service contracts. Service contracts above $25,000 must be performed in the United States unless a waiver has been approved by the Chief Procurement Officer in advance.	Agencies should use DGS's RFP shell (see DGS's internet home page for copies of the document). Request for Proposal must contain: a) date, time, place for delivery of proposals; b) specific description of service, supply or professional service; c) contract terms and conditions; d) sufficient information for an offeror to submit proposal; e) evaluation criteria and its relative importance or weight; and f) price must be an evaluation criteria. If professional service, ensure contract meets definition per AAM 82.430. Clearly state all mandatory requirements. An ASPS form for Professional Services may be required by an agencies P&P (if used, the number is assigned by the agency). A Standard Agreement Form (#02-093) and appropriate appendices for Professional Services that has been approved by AG's Office. Delivery order may be used for non Professional Services contracts. RAP form (#02-100) if applicable.	Circulate RFP for 21 days unless procurement officer determines in advance and in writing that a shorter notice period is advantageous and adequate competition is anticipated. Agencies should "time/date" stamp proposal envelops immediately upon receipt. Advertise on the State of Alaska Online Public Notice system and when practicable, at least one of the following advertising methods may be used per AS 36.30.130 and 2 AAC 12.130: • Publication in a newspaper of general or local circulation. • Notices posted in public places where work will be performed or material/supplies furnished. • Publication in other appropriate media, including electronic media. The Chief Procurement Officer must approve requests to provide out-of-state notice if it is impracticable to solicit only from Alaskan vendors.	Award is made to the proposal determined in writing to be the most advantageous to the state taking into consideration price and the evaluation factors in the RFP (AS 36.30.250). The evaluation committee is made up of a procurement officer, or at least three state employees or public officials (2 AAC 12.260). Only in-state residents can participate on the evaluation committee unless an exception is approved by the Commissioner of Administration (AAM 81.470). Include a 5% Alaska bidder preference, 5% Alaska veteran preference, 10% Alaskan offerors preference (if a numerical rating system is used), and all other statutory and regulatory preferences that apply. Only timber, lumber or manufactured lumber products originating in Alaska shall be used unless it is determined to be impracticable under AS 36.15.010. A valid Alaska business license is required at the time the contract is awarded (AS 36.30.210). You must issue a written Notice of Intent to Award (AS 36.30.365). A written determination required if awarding to a nonresident (AS 36.30.362). RFP's must weight price at 40% or higher for professional/non-professional services and 60% or higher for supplies, unless the Chief Procurement Officer approves a waiver.	Copy of: • ASPS (if required by Agency P&P). • RAP (if used). • Original RFP. • All proposals including late proposals. • All RFP amendments. • Register of Proposals prepared under AS 36.30.230 • Vendor list or advertising order. • Required licenses, permits, insurance coverage, etc. • Relevant RFP correspondence. • Written determination of award prepared under AS 36.30.250. • Contract document. • Procurement summary report prepared under AS 36.30.510 - 520. • All determinations required by statute, regulation, or the Alaska Administrative Manual. • Notice of Intent to Award. • Protest, if filed; procurement officer's decision, protest report, appellant comments, appeal, Commissioner's decision if applicable. • List of PEC members. • All scoring sheets and notes. Confidential items identified under AS 36.30.230(a).

ESTIMATED PRICE OF PROCUREMENT	MINIMUM COMPETITION REQUIRED	FORMS USED BY AGENCY	PUBLIC NOTICE REQUIREMENT	AWARD METHOD	KEEP IN PROCUREMENT FILE
Invitation to Bid (ITB) Process – Supplies or Services					
Greater than $100,000 AS 36.30.100. The TOTAL procurement value must include all options to renew or extend. For example: • If the contract will run for 1 year with 2 one-year renewal options, use the total value for all 3 years Purchase Requisition (form #02-099) must be sent to the Division of Enterprise Technology Services for telephone systems, radios, and other telecommunications equipment (see agency delegation of authority). Agencies are to submit requirements for construction, State Equipment Fleet vehicles, mobile homes, portable shelter units and prefabricated and/or sectional office, housing or shelter units directly to the Department of Transportation and Public Facilities. Agencies may not procure leased office space without a specific delegation of authority from the Division of General Services (DGS).	Issue a formal Invitation to Bid (ITB) in accordance with AS 36.30.130 and 2 AAC 12.130. Service contracts above $25,000 must be performed in the United States unless a waiver has been approved by the Chief Procurement Officer in advance.	Agencies must use the Standard Terms and Conditions boilerplate, and High Tech boilerplate, if applicable (see DGS's internet home page for copies of the documents). The AG's Office must approve any changes to these documents. Agencies should use DGS's ITB shell (see DGS's internet home page). Delivery Order (form #02-601) may be used for contract document.	Circulate ITB for 21 days unless procurement officer determines in advance and in writing that a shorter notice period is advantageous and adequate competition is anticipated. Agencies should "time/date" stamp bid envelops immediately upon receipt. Advertise on the State of Alaska Online Public Notice system and when practicable use at least one of the following methods per AS 36.30.130 and 2 AAC 12.130: • Publication in a newspaper of general or local circulation. • Notices posted in public places where work will be performed or material/supplies furnished. • Publication in other appropriate media, including electronic media. The Chief Procurement Officer must approve requests to provide out-of-state notice if it is impracticable to solicit only from Alaskan vendors.	Award to the lowest responsive and responsible bidder per AS 36.30.170. Include in evaluation: * 5% Alaska bidder preference per AS 36.30.321(a). * 5% Alaska veteran preference per AS 36.30.321(f). * 3%, 5%, or 7% Alaska product preference per AS 36.30.332. * 15% Employment program preference per AS 36.30.321(b). * 10% Alaskans with disabilities preference per AS 36.30.321(e). * 7% Local agricultural and fisheries product preference per AS 36.15.050. * Recycled product preference per AS 36.30.337. Only timber, lumber or manufactured lumber products originating in Alaska shall be used unless it is determined to be impracticable under AS 36.15.010. Valid Alaska business license required at the time the contract is awarded per AS 36.30.110. To qualify as an Alaska bidder , as defined under AS 36.30.990(2), a valid Alaska business license is required at the time designated for bid opening. You must issue a written Notice of Intent to Award (AS 36.30.365). Written determination required if awarding to a nonresident per AS 36.30.362.	Copy of: • Original ITB. • RAP (if used). • All bids including late bids. • All bid amendments. • ITB bidlog. • Vendor list or advertising order. • The name of each bidder, bid prices, and other appropriate information tabulated under AS 36.30.140 and 2 AAC 12.150. • Relevant ITB correspondence. • Contract document. • All determinations required by statute, regulation, or the Alaska Administrative Manual. • Notice of Intent to Award. • Protest, if filed; procurement officer's decision, protest report, appellant comments, appeal, Commissioner's decision if applicable.

GUIDE TO FORMAL PROCUREMENT PROTESTS

PROTEST OF SOLICITATION

A protest alleging improprieties or ambiguities in a solicitation (ITB, RFP, or other) **must be filed with the procurement officer at least 10 days prior to the date bids or proposals are due** unless the solicitation is on shortened notice or another date is provided in the solicitation. If a pre-bid or pre-proposal conference is held within 12 days of the closing date, the protest must be filed prior to closing. (AS 36.30.565) A protest of the cancellation of a solicitation must be filed within 10 days. (2 AAC 12.615)

PROTEST OF PROPOSED AWARD OR AWARD OF CONTRACT

A protest alleging improprieties in a proposed award or award of contract **must be filed with the procurement officer within 10 days of the Notice of Intent to Award**. (AS 36.30.565) These are typically based on the scoring or evaluation of bids and proposals, or determinations regarding responsiveness or responsibility.

NOTIFICATION

The procurement officer must immediately notify all "interested parties" of the filing of a protest of a solicitation or a proposed award. AS 36.30.570) If the protest is filed after the contract award, only the contractor is notified. (AS 36.30.570)

DECISION

A written decision **must be issued by the procurement officer within 15 days after the protest is filed** unless the Commissioner of Administration extends the time. (AS 36.30.580)

APPEAL

An appeal **must be filed with the Commissioner of Administration within 10 days of receipt of the decision.** (AS 36.30.590) The procurement officer provides notice to parties who were notified of the protest; copies are provided only to parties requesting them. (AS 36.30.595)

REPORT

The procurement officer must file a "complete report" with the Commissioner of Administration **within 10 days after receipt of the report,** unless the Commissioner of Administration extends the time. Copies are provided to the protestor and to parties who have requested them. (AS 36.30.605)

COMMENTS

The protestor may file comments on the report with the Commissioner of Administration **within 10 days after receipt of the report**, unless the Commissioner of Administration extends the time. The protestor must send copies of the comments to the procurement officer and to parties who have requested them. (AS 36.30.605)

SUMMARY DECISION

The Commissioner of Administration may, within 15 days after the protestor's comments are due, reject an appeal as untimely or issue a decision without a hearing if there are no genuine issues of fact. (AS 36.30.610) Otherwise, a hearing is scheduled before a hearing officer in coordination with the parties. (AS 36.30.630)

HEARING

The hearing officer may hold a conference to settle, simplify, or identify the factual and legal issues, may require the parties to submit evidence and to state their position on the issues, and may rule on motions. An evidentiary hearing at which witnesses testify under oath will be conducted if necessary. (AS 36.30.670)

DECISION AFTER HEARING

The hearing officer issues a recommended decision. The Commissioner of Administration must issue a final decision within 20 days after the hearing. (AS 36.30.675 -.680)

APPEAL TO SUPERIOR COURT

The final decision of the Commissioner of Administration may be appealed to superior court **within 30 days.** (AS 36.30.685)

CLASS EXERCISES

PROTEST AND APPEAL QUESTIONS

1. A bidder protests the evaluation criteria in your RFP two days before the deadline for receipt of proposals. Your RFP states:

   "Protests based on any omission or error, or on the content of the solicitation, will be disallowed if these faults have not been brought to the attention of the procurement officer, in writing, at least ten days before the deadline for receipt of proposals."

   Can you reject the protest based solely on this language?

2. After you issue the Notice of Intent to Award a contract (NOI), an interested party asks for copies of all Proposal Evaluation Committee (PEC) score sheets and notes. Do you have to provide this information?

3. The NOI lists a total of five bidders. Can the fifth highest bidder protest the award to the lowest bidder?

4. An ITB will result in a one-year term contract. There are 15 items listed in the bid schedule and award will be made as one lot based on the quantity of "one" for each item. The ITB provided estimated annual quantities for each of the 15 items in excess of the quantities listed on the bid schedule. A protest is received prior to the deadline for receipt of bids. The protestor requests that the item quantities on the bid schedule be increased to reflect the annual estimated quantities. Do you have to amend the ITB?

5. A protestor raises new issues under an appeal to the Commissioner of Administration. These issues were not included in the protest. Should you address the new issues in your protest report to the Commissioner?

6. Can an interested party protest an award under a Single Source Alternate Procurement?

7. You fail to respond to a protest within the 15 days or obtain an extension of time from the Commissioner of Administration. What happens next?

8. Your ITB specifies a Honda Generator, Model A145 – no substitute. A bidder files a protest prior to the deadline for receipt of bids and states that the brand/model they offer is equivalent to the Honda. Can you deny the protest because your agency wants a Honda, Model A145?

9. You receive a timely protest concerning your NOI. There are no legal or factual issues identified, but instead the protestor wants to reserve the right to file a protest a later date. What should you do?

PROTEST AND APPEAL ANSWERS

1. No. If the protest identifies material issues and your agency is not under a valid time constraint to award a contract, you should extend the deadline for receipt of proposals and respond to the protest.

   Keep in mind that protests based on alleged improprieties or ambiguities in the solicitation may be filed before the deadline for receipt of bids or proposals if a pre-bid or pre-proposal conference is held within 12 days of the deadline, or if your solicitation has a shortened public notice period - AS 36.30.565

2. Yes, PEC score sheets and notes are considered public information after the Notice of Intent to Award a contract (NOI) has been issued.

3. Possibly. An interested party must have a direct and substantial economic interest that may be affected by the award. If the protest has merit, you should accept the protest, remedy the situation and re-issue the NOI.

4. Yes. Also note that if your ITB did *not* have annual estimated quantities and but you can obtain reasonably accurate estimates; you should still amend the ITB.

5. Yes. Respond to the new issues, but also point out that these new issues were not raised in the original protest and should not be considered under the appeal.

6. Yes. AS 36.30.560 states that an interested party may protest "the award of a contract, the proposed award of a contract, or a solicitation for supplies, services, professional services, or construction." Interested parties may protest alternate procurements.

7. Per AS 36.30.580(c), "If a decision is not made the date it is due, the protester may proceed as if the procurement officer had issues a decision adverse to the protester."

8. Not unless the procurement officer has determined in writing that only the identified brand/model number will satisfy the state's needs and the determination has a reasonable basis in fact.

9. Advise the protestor, as soon as possible that there are no procedures under law which allow an interested party to "reserve the right" to file a late protest.

   Keep in mind that AS 36.30.565(b) states that "If a protester shows good cause, the procurement officer of the contracting agency may consider a file protest that is not timely." Generally, a procurement officer should accept a late protest if it has merit.

PROPOSAL EVALUATION EXERCISE

RFP Title: Data Entry Services

RFP Number: 2015-0200-1104

Procurement Officer

T. Boone Procurer

Purpose of RFP

Provide data entry services for various state agencies in Juneau, Alaska.

Scope of Work

A complete set of keypunch instructions and form samples will be provided to the contractor upon contract award. The contractor must, within 30 days and at no cost to the state:

- meet with each agency to discuss the work required under the contract;
- develop software programs, templates, form sets, or other technologies for each application to facilitate entry of the data; and
- process sample application batches to demonstrate the ability to produce the work required by this RFP.

Minimum Qualifications

To be considered responsive, offerors must meet the following minimum qualifications:

- Must possess at least 3 years of data entry experience.
- Must have experience processing at least 1 million documents annually.
- All data entry staff much have at least 2 years of data experience as described in this RFP.

Evaluation Criteria

Data Entry/Verification Process	10 points
Priority Work Completion	10 points
Experience & Qualifications	10 points
Cost	60 points
Alaska Offerors Preference	10 points

Offeror - Data Express

Data Entry/Verification Process

Please described your organization's entire data entry/verification process after receipt of the data and keypunch instructions from the state.

After jobs have been logged in and their due dates recorded, our data entry supervisor will distribute the work to the most qualified operator(s). Once the job has been keyed, she will then determine who will verify the work and ensure such verification is done timely.

Priority Work Completion

Please describe your procedures for completing priority work sooner than the required delivery dates.

We always attempt to complete our work as quickly as possible, regardless of the scheduled due date. We maintain a large enough staff to accommodate special, early turn-around times, or out of the ordinary jobs. We do take our obligations very seriously, so if a small one-time priority job arises during a period when we are busy with another priority assignment, we will contact both agencies and ttempttoneg mutually acceptable deadlines.

Experience & Qualifications

Please describe your organization's experience and qualifications, specifically how you meet the minimum qualifications of at least 3 years of data entry experience, processing at least 1,000,000 documents each year, and that each data entry staff member has at least 2 years of data entry experience as described in this RFP.

We have been the provider of data entry services to state agencies in Juneau for the past 22 years. We have specific experience with every job contained in the RFP and are familiar with each document, form and respective data entry instruction. Over the last five years our company has processed more than 1.5 million source documents each year.

The attached resumes confirm that the supervisor has 22 years experience as a data entry operator and she has been our supervisor for the past 6 years. Our assistant supervisor has six years of prior data entry experience. Our four data entry operators each have over nine years experience; two of them have over 20 years experience.

Alaska Offerors Preference

Does your organization qualify for the Alaska Bidder Preference?

Yes.

PROPOSAL EVALUATION FORM

Person or Firm Name Data Express

Name of Proposal Evaluation (PEC) Member _____

Date of Review _____

RFP Number 2015-0200-1104

Proposals will be evaluated against the questions set out below.

Data Entry/Verification Process — 10 points **Points_____**

How well does the proposal indicate an acceptable data entry/verification process after receipt of the data and keypunch instructions from the state?

EVALUATOR'S NOTES _____

_____

Priority Work Completion — 10 points **Points_____**

To what extent does the proposal allow for the flexibility to complete work sooner than the required delivery dates?

EVALUATOR'S NOTES _____

_____

Experience & Qualifications — 10 points **Points_____**

To what extent do the offeror's firm and staff members exceed the minimum experience requirements?

EVALUATOR'S NOTES _____

_____

Total Points_____

Offeror – Crazy Dan's Data Shack

Data Entry/Verification Process

Please described your organization's entire data entry/verification process after receipt of the data and keypunch instructions from the state.

Once documents are picked up, they will be logged in with time of arrival and due date noted. Documents will be keyed and verified. It is the responsibility of the supervisor to log all documents and batches in and out to ensure they are accounted for before and after the staff has keyed and verified the data. The documents are never out of the control of either the supervisor or the employee, so public access is avoided.

Priority Work Completion

Please describe your procedures for completing priority work sooner than the required delivery dates.

Our staff prides itself on quick turn-around.

Experience & Qualifications

Please describe your organization's experience and qualifications, specifically how you meet the minimum qualifications of at least 3 years of data entry experience, processing at least 1,000,000 documents each year, and that each data entry staff member has at least 2 years of data entry experience as described in this RFP.

Our company has provided data entry services in Alaska for the past 10 years and over the past 3 years, we have processed over 1,000,000 source documents each year. The attached resumes confirm that each of our data entry technicians has over two years data entry experience.

Alaska Offerors Preference

Does your organization qualify for the Alaska Bidder Preference?

Yes.

PROPOSAL EVALUATION FORM

Person or Firm Name Crazy Dan's Data Shack

Name of Proposal Evaluation (PEC) Member _____

Date of Review _____

RFP Number 2015-0200-1104

Proposals will be evaluated against the questions set out below.

Data Entry/Verification Process — 10 points **Points_____**

How well does the proposal indicate an acceptable data entry/verification process after receipt of the data and keypunch instructions from the state?

EVALUATOR'S NOTES _____

_____

Priority Work Completion — 10 points **Points_____**

To what extent does the proposal allow for the flexibility to complete work sooner than the required delivery dates?

EVALUATOR'S NOTES _____

_____

Experience & Qualifications — 10 points **Points_____**

To what extent do the offeror's firm and staff members exceed the minimum experience requirements?

EVALUATOR'S NOTES _____

_____

Total Points_____

Offeror – Business Exchange

Data Entry/Verification Process

Please described your organization's entire data entry/verification process after receipt of the data and keypunch instructions from the state.

Our courier will pick up the documents and our staff will then enter and verify the data.

Priority Work Completion

Please describe your procedures for completing priority work sooner than the required delivery dates.

Since the number of documents per week will fluctuate, we will take the stance that the fastest turn-around possible is the only viable option.
Because of our production based pay schedule, there is plenty of incentive to work extra to make a deadline, and the existing staff is willing and able to do just that.

Unanticipated workloads could easily be handled by our staff doing extra work, or in the event of a very large increase, by drawing from our list of "temps." There are a number of people who have "temped" for us on a part-time ongoing basis for several years who have experience in data entry. We have ongoing employment agreements in place for all our temps.

Experience & Qualifications

Please describe your organization's experience and qualifications, specifically how you meet the minimum qualifications of at least 3 years of data entry experience, processing at least 1,000,000 documents each year, and that each data entry staff member has at least 2 years of data entry experience as described in this RFP.

Business Exchange has not specifically keyed information from large volumes of source documents in the past. However, we have experience typing large certified transcripts and have provided secretarial services in Juneau for 15 years. Whether it's word processing or data processing, they both require strong keyboard skill which are already in place at our company. We also provide computerized telephone answering, which is another form of data entry.

We have attached resumes of our supervisor who has 12 years of experience managing Business Exchange. Resumes of 4 secretary/typists are also attached. Each has over 3 years of experience.

Alaska Offerors Preference

Does your organization qualify for the Alaska Bidder Preference?

Yes.

PROPOSAL EVALUATION FORM

Person or Firm Name Business Exchange

Name of Proposal Evaluation (PEC) Member _____

Date of Review _____

RFP Number 2015-0200-1104

Proposals will be evaluated against the questions set out below.

Data Entry/Verification Process — 10 points **Points_____**

How well does the proposal indicate an acceptable data entry/verification process after receipt of the data and keypunch instructions from the state?

EVALUATOR'S NOTES _____

_____

Priority Work Completion — 10 points **Points_____**

To what extent does the proposal allow for the flexibility to complete work sooner than the required delivery dates?

EVALUATOR'S NOTES _____

_____

Experience & Qualifications — 10 points **Points_____**

To what extent do the offeror's firm and staff members exceed the minimum experience requirements?

EVALUATOR'S NOTES _____

_____

Total Points_____

CONTRACT AMENDMENT QUESTIONS

1. Can a $20,000 contract be amended by $30,000 if the services are within the scope of the original contract?

2. A $200,000 contract contains the following language:

   The State reserves the sole right to purchase 20 additional widgets (valued at $100,000) during the term of the contract if its budget request is approved by the Legislature.

   Is an Unanticipated Amendment Request for Alternate Procurement (RAP) required?

3. A contract for helicopter maintenance specifically states under Contract Intent:

   This is a mandatory maintenance contract for the State's Bell 206B helicopter, N3445Z.

   If the State sells this helicopter and purchases another brand/model that is more expensive to maintain, can they amend the contract to include the new helicopter and increase the maintenance rates?

4. An agency's contract expired last week. Can they submit an Unanticipated Amendment RAP to renew the contract retroactively?

5. Is a renewal option considered an anticipated or unanticipated amendment?

6. An agency awards a $200,000 contract for the design and development of a new computerized inventory system. During design, the agency identifies new and additional functionality they want incorporated into the system. The additional work will cost $45,000. Is an Unanticipated Amendment RAP required?

7. Is it acceptable to award a contract that does not specify a maximum contract amount?

8. An agency awards a $200,000 contract for consulting services. They amend the contract by $40,000 to include additional work within the scope of the original contract. Next, they secure approval via an Unanticipated Amendment RAP to amend the contract by $140,000 to include additional work within the scope of the original contract.

   Finally, the agency identifies even more additional work within the scope of the original contract. The value of this work is $120,000. What should the agency do?

9. A contract states:

   The State and the successful bidder/contractor agree: (1) any holding over of the contract excluding any exercised renewal options, will be considered as a month-to-month extension, and all other terms and conditions shall remain in full force and effect and (2) to provide written notice to the other party of the intent to cancel such month-to-month extension at least 30 days before the desired date of cancellation.

   If the total contract term is 12 months and the value of each month is $20,000, can the procurement officer extend the contract on a month-to-month basis for 6 months without processing an Unanticipated Amendment RAP?

CONTRACT AMENDMENT ANSWERS

1. No, a $30,000 unanticipated amendment would probably not be considered within the scope of a $20,000 contract.

2. No, this type of amendment would be considered anticipated. The requirement was contemplated under the contract, provided the agency's budget request was approved. The State would simply issue a contract amendment.

3. No, the scope of the original contract limited the maintenance work to a specific brand and model of helicopter.

4. No, a dead contract cannot be renewed retroactively. The agency must conduct a new procurement, or seek approval of an emergency or single source Request for Alternate Procurement (RAP) if sufficient factual evidence exists to document an alternate procurement.

5. Anticipated, a renewal option that is mentioned in both the solicitation and resulting contract is considered an anticipated amendment.

6. Yes, since the value of additional work exceeds the lessor amount of 20% of the current contract term, or $100,000 (Ref 2 AAC 12.485).

7. No, statutes require that all contracts identify a maximum dollar amount. Otherwise, how do you know when to apply the "lessor of 20% of the current contract term or $100,000" unanticipated amendment rule under 2 AAC 12.485?

8. Conduct a new procurement, or seek the approval of a single source RAP. The value of unanticipated amendments is cumulative. In this case, a $200,000 contract has already been amended by $180,000. An additional unanticipated amendment valued at $120,000 would increase the total of all unanticipated amendments to $300,000 which is probably outside the scope of a $200,000 contract.

9. No, this type of extension would be considered an unanticipated amendment subject to the limits of 2 AAC 12.485. based on the current contract amount of $240,000 ($20,000 per month), the contract could be extended for two months ($40,000) which is less than 20% of the contract value. However, an Unanticipated Amendment RAP is required if the extension will exceed $48,000 (20% of the value of the contract term).

TOP 10 QUESTIONS

1. If I receive only one bid or proposal in response to a formal procurement (above $100,000), do I still have to issue a Notice of Intent to Award?

2. The day before a deadline for receipt of bids or proposals (either small or formal procurement) a vendor calls and asks for an extension of time. Should the deadline date be extended?

3. Does a state employee need to possess a DGS procurement certification certificate in order to purchase from an existing contract?

4. I solicited three verbal quotes in response to a small procurement as the cost was estimated to be less than $50,000. However, the lowest quote received was $52,000. Can I proceed with the award, even though the verbal quote threshold is $50,000?

5. I received only one proposal. Does it still need to be scored?

6. I work in the Department of Public Safety. Can I purchase from a contract established by the Department of Fish and Game?

7. A bid arrived 10 minutes late, but the delay was caused by the carrier (United States Postal Service, Fed Ex, UPS, etc.). Can I accept the bid?

8. Does a vendor responding to a formal RFP or ITB have to possess a valid Alaska Business License when they submit their proposal or bid if they will perform all the services outside Alaska, or if they are located outside Alaska and will merely ship a product to the state?

9. Same question as above, but what if it’s a small procurement?

10. How much authority do Proposal Evaluation Committee (PEC) members have? For example, can they determine responsiveness, cancel a solicitation, etc.?

TOP 10 ANSWERS

1. Yes. AS 36.30.365 expressly states *"At least 10 days before the formal award of contract… the procurement officer shall provide to each bidder or offeror notice of intent to award a contract."* There is no exception provided in statute for instances when a single bid or proposal is received.
2. It depends on the circumstances. Unless you are under a critical time constraint to award a contract, you should seriously consider extending the deadline. In many cases, it's in the state's best interest to extend the deadline in order to increase competition.
3. No. DGS Procurement Officer Certification is required in order for an individual to *conduct* procurements. If you are purchasing from an established contract, the "procurement" has already occurred. However, departments should delegate some type of authorization to individuals in order for them to purchase from state contracts.
4. Yes, if there was a *reasonable basis* for the initial cost estimate (see PIM #58). This policy also applies to "reasonable and adequate" procurements under the $10,000 or less threshold [2 AAC 12.400(b)]. The procurement officer must justify the reasonableness of their initial cost estimate and include any relevant documentation in the procurement file. However, if the lowest quote grossly exceeds the upper dollar limit, the procurement must be cancelled and re-solicited using the next highest competitive level. Also, since AS 36.30.320 specifically prohibits the use of small procurement procedures for procurements above $100,000, if all quotes exceed $100,000, the procurement must be cancelled.
5. Yes, it should be scored for several reasons. All solicitations must state that each proposal will be evaluated according to specific evaluation criteria and we must always follow the terms and conditions of a solicitation during evaluation. Further, both AS 36.30.250 (formal RFPs) and 2 AAC 12.400 (informal RFPs) state that award must be made to the "most advantageous" proposal. Criteria for determining the most advantageous proposal should not be ignored simply because only one proposal was received.
6. No. Unless the Chief Procurement Officer has made a specific one-time delegation to the department, departments do not have the delegated authority to establish multi-department contracts.
7. No. Late bids cannot be accepted unless the state was responsible for the delay, such as misplacing or misfiling a bid.
8. Trick question! Prior to recent revisions to the procurement code, vendors were required to possess a valid Alaska Business License *prior to the deadline for receipt of bids or proposals*, regardless of where they were located, where the work would be performed, or if they were merely shipping a product to the state. Vendors are still required to possess a valid Alaska Business License, but *not until the time the contract is awarded* - AS 36.30.110 (b).
9. An Alaska Business License is not required for small procurements if the offeror is located outside of Alaska and all work will be performed out of state (this includes merely shipping products to the state).
10. PEC members participate in the scoring of the proposals and may make recommendations to the procurement officer. However, they do not have the authority to determine responsiveness or responsibility, cancel a solicitation, etc. Only the procurement officer has the authority to make those determinations.