

**PROCUREMENT**  
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## **Chapter I. General Procurement Procedures**

### **81.000 -- INTRODUCTION**

The purpose of this section of the Administrative Manual is to supplement AS 36.30 and 2 AAC 12. If there is any conflict between this section and the statutes and regulations, the statutes and regulations prevail. One of the intentions of this section is to formalize and centralize procurement policy. Much of the section sets out requirements that are in addition to those detailed in statute and regulation. Some sections contain policy clarifications that address specific questions or problems brought to our attention. Procurement personnel must have:

1. A personal procurement delegation in writing per 2 AAC 12.740 (a);
2. Ready access to AS 36.30, 2 AAC 12, and applicable sections of the Administrative Manual;
3. Their departmental procurement delegation from the Department of Administration (DOA); and
4. A copy of their department's procurement policies and procedures.

This chapter covers the procurement of supplies, services, and professional services as defined by AS 36.30.990(17), (19), and (22). Expenditures that do not fall under the Procurement Code are listed in AS 36.30.850(b) and Appendix 1. The Department of Transportation and Public Facilities (DOTPF) has requirements that must be followed in procurements for construction, the State Equipment Fleet, and the Alaska Marine Highway.

If a procurement involves the expenditure of federal funds, and if there is a conflict between a provision of this chapter and a federal statute, regulation, policy, or requirement, then the federal statute, regulation, policy, or requirement shall prevail per AS 36.30.890.

### **81.005 -- PROCUREMENT DELEGATIONS**

Executive Branch procurement authority is centralized in the Department of Administration (DOA), except for construction, the State Equipment Fleet, and Alaska Marine Highway System procurements under AS 36.30.015(g). DOA delegates procurement authority to other departments after making a written finding that the departments are capable of implementing the delegated authority according to AS 36.30.015. The Commissioner of a department may delegate the procurement authority given to him or her to one or more employee(s) of the department by written memorandum of delegation.

### **81.010 – PROCUREMENT: SERVICES CONSIDERATIONS**

If the services you require would result in an employer/employee relationship, you hire the person through the personnel system, not the procurement system. The State normally cannot enter into a contract with an employee; therefore, you must ensure an employer/employee relationship will not exist before using the procurement system. If part of your mission involves the expenditure of State funds and you are not sure if it falls under the Procurement Code, you should check with your Department procurement staff.

1. The following conditions are indicators that an employer/employee relationship may exist:
  - a. 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 has the right to do so;
  - b. The State has the right to discharge the person;
  - c. The State furnishes the tools, equipment, and a place to work for the individual performing the services.
2. The following conditions are indicators that people are independent contractors:
  - a. They are subject to control or direction of 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;
  - b. They are in business providing a service to the public from which they may derive a profit or suffer a loss.
3. Under certain circumstances, such as the hiring of foreign nationals to work in foreign offices, an agreement that appears to create an employer/employee relationship may be appropriate. These employment agreements (2 AAC 12.990(a)(6)) are not procurements and they are not professional services acquisitions. DOA, Division of Personnel and the Department of Law should review any such proposed employment agreement.

### **81.015 -- SELECTING THE PROCUREMENT PROCEDURE**

To select the applicable procurement procedure you must understand the required supply or service and know the total estimated cost. The table below provides direction for all procurements, except purchases from State Contract Awards, Alaska Correctional Industries, Employment Programs, or cooperative agreements with qualifying public entities.

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Amount	Minimum Procurement Procedure
\$ 2,500 or less	Only one quote or direct purchase when using State Purchasing Card.
\$ 5,000 or less <sup>1</sup>	Reasonable and adequate procedures.
\$25,000 or less	Contact at least three firms or persons for quotes or informal proposals. The solicitation and responses may be either written or verbal.
\$50,000 or less <sup>2</sup>	Contact at least three firms or persons for quotes or informal proposals <sup>3</sup> . The solicitation and responses must be in writing. You must provide written Notice of Award.
Above \$50,000	Issue formal competitive sealed bid or proposal.

When determining the appropriate procurement procedure, you must consider the total value of all similar requirements for supplies and services that your department will solicit during the same time from the same group of vendors. You must also consider any options to renew or extend the contract. For example, if the contract is for \$200/month and will last one year, but includes three one-year renewal options, you must seek the level of competition required for a \$9,600 procurement.

AS 36.30.320(d) precludes "artificial division or fragmentation" in order to purchase under small procurement procedures. There is no definition of artificial division or fragmentation that can address every circumstance. When deciding if a division is artificial or natural, you should consider the following:

**Price:** The higher the price of a group of procurements, the more likely they should be consolidated. You should carefully review the cost of a group of procurements for a year to determine the appropriate level of competition.

**Similarity of Product:** The more similar the product or the more possible it is to find a group of products from one type of vendor, the more likely that the items should be consolidated and made part of a single procurement.

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<sup>1</sup> This level of competition is also appropriate for professional services for the Office of the Governor, or legal or hearing officer services, up to \$25,000; for supplies or services while on travel status with or for the Governor costing no more than \$15,000; or for passenger transportation or fish feed for hatchery use costing no more than \$15,000.

<sup>2</sup> This level of competition is also appropriate for construction contracts costing no more than \$100,000.

<sup>3</sup> A quote is an informal bid. Price is the only factor considered. An informal proposal differs in that price is only one of the factors considered in evaluation.

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**Predictability:** The more predictable the procurement of similar products is, the more likely that the items should be consolidated and made part of a single procurement.

**81.020 – PROCUREMENT REPORT FORM**

Agencies must complete a Procurement Report (form #02-115) for each emergency determination, for single source or limited competition alternative procurement of \$50,000 and less, and for all competitive sealed bids and proposals above \$50,000. The Procurement Report shall be forwarded to the Division of General Services within five days after completion of the procurement.

**81.025 -- STATE CONTRACTS**

The Division of General Services awards contracts for use by all agencies. These contracts are based on Executive Branch needs as determined by historical requirements and discussions with departmental procurement officers. Let the Division of General Services know if you need a specific contract. The establishment of the contracts has two primary goals. The first is to facilitate the procurement process, as you may purchase according to the terms of the contract without issuing bids, requesting quotations or seeking determinations for single source or limited competition. The second goal is to secure good pricing through the State's purchasing power.

If the terms of a mandatory contract cause your agency a hardship, contact the Division of General Services. It may be possible to revise the terms of the contract or to re-bid the contract with your organization excluded.

It is occasionally possible to secure pricing on spot purchases that are less than contract prices. However tempting the spot prices may be, you must purchase from mandatory contracts.

In addition to mandatory state contracts, the Division of General Services has entered into contracts that you are not required to use. However, agencies are encouraged to use these non-mandatory contracts whenever practicable, as they also often result in savings for the State and the agency.

You may find the service codes used to solicit from the Division of General Services' lists in the latest Vendor Mailing List Application.

When you make purchases from state contracts, you should use a Delivery Order (form #02-601) or other form that references the Contract Award number. You must make purchases in the manner described in the contract.

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**81.030 -- FEDERAL GENERAL SERVICES CONTRACTS**

You may not purchase supplies or services from the Federal General Services Administration (GSA) supply schedules, pending further action by GSA and procedures by the Division of General Services.

**81.035 -- ALASKA CORRECTIONAL INDUSTRIES**

Agencies must purchase products and services listed in the Contract Award Manual from Alaska Correctional Industries (ACI), unless ACI or the Division of General Services grants a waiver.

Agencies may directly purchase ACI products and services that are not in the Contract Award Manual only after the Commissioner of DOA determines that the product/service meets marketability standards, meets agency needs, and is available at a reasonable cost. For items not in the Contract Award Manual, you need the following additional approvals:

**For one-time purchases of non-contract items of \$1,000 or less**, the Commissioner of DOA has previously determined that ACI's prices are reasonable and their products and services meet marketability standards of quality. Each department's Commissioner must determine if a product or service produced by ACI will satisfy the agency's needs. This determination may be delegated and is satisfied when an agency places an order with ACI. No additional determination/approval is required.

**For one-time purchases of non-contract items over \$1,000, but no more than \$25,000**, department Commissioners, or their designees, have the authority to make the determination required under AS 33.32.030(c). A written determination must be made that the non-contract product or service offered by ACI meets marketability standards, agency needs, and is available at a reasonable cost. This determination must be in memorandum form and ACI must receive a copy of the determination before making the sale. Guidelines and forms are available at the Division of General Services web site to assist agencies in determining whether the non-contract product or service from ACI, between \$1,000 and \$25,000, meets the requirements of statute.

**For one-time purchases of non-contract items of \$25,001 or more**, the Division of General Services will make individual determinations in accordance with AS 33.32.030(c) for ACI products and services exceeding \$25,000, as well as determinations for ACI products and services for placement in the Contract Award Manual.

**81.040 -- EMPLOYMENT PROGRAMS AND YOUTH EDUCATION AND EMPLOYMENT PROGRAMS**

In accordance with AS 36.30.311 and 2 AAC 12.050, agencies may purchase directly from certified employment programs or accredited youth education and employment programs.

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You must determine that the supplies or services meet the State's requirements and the price represents a reasonable cost. A list of certified employment programs is available from the Chief Procurement Officer. An accredited youth education and employment program is defined in 2 AAC 12.990(14) as a program that allows participants to earn academic credits that a school district in Alaska will recognize. If you make a procurement under this section, you do not need to solicit the private sector.

**81.045 – COOPERATIVE PURCHASING AGREEMENTS**

Competitive quotes, bids, or proposals are not required for goods or services acquired under AS 36.30.700-73. Agencies may participate in, sponsor, conduct, or administer a cooperative agreement with a qualifying public entity, as defined by AS 36.30.790, after obtaining approval from the Division of General Services.

**81.050 -- COORDINATION WITH OTHER AGENCIES**

The purchasing agency is responsible for coordination with other agencies. Any agency that provides a centralized service may ask to be included in the review process. Coordination with the following agencies is required if applicable:

Subject	Agency/Division
Legal Service Procurements	Law/Civil
Changes To Boiler Plate And Standard Provisions	
Payments/ Encumbrances	Administration/Finance
Insurance Questions	Administration/Risk Management
Changes to Insurance Language	
Protest and Appeal Questions	Administration/Hearing Officer
Banking Services	Revenue/Treasury

**81.055 -- OFFERORS WITH DISABILITIES**

The Americans with Disabilities Act (ADA) of 1990 requires that persons with a disability be provided access to programs of state government. This law applies to procurement activities. Agencies must provide access to the procurement process to potential offerors

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or vendors with a disability, to ensure that they can participate with other offerors or vendors on an even and fair basis.

You must conduct evaluation and award according to AS 36.30 and 2 AAC 12 to preserve fair competition between all offerors. Agencies must provide an offeror with a disability those accommodations needed to participate in the procurement process on an equal basis with other offerors. No qualified individual with a disability shall, because of disability, be excluded from participating in the procurement process. With the exception of preferences identified in AS 36.30.170, offerors with a disability will not be given special treatment that would give them an unfair competitive advantage.

You should designate the person responsible for responding to a potential offeror with a disability if the offeror requests special accommodations. All procurement documents shall list a telecommunication device for the deaf (TDD) number. The Division of Vocational Rehabilitation in the Department of Education is available should you require assistance with any of the ADA requirements.

There are particular requirements for procurement documents, public notices, and meetings to ensure that persons with a disability have access to the procurement process.

- 1. Procurement Document -- Special Assistance Provisions:** The procurement document must contain the following provision advising all potential offerors or bidders how to obtain special assistance if needed to understand the contents of the document or participate in the process:

The State of Alaska complies with Title II of the Americans with Disabilities Act of 1990. Individuals with disabilities who may need auxiliary aids, services, and/or special modifications to submit a quote/proposal/bid should contact [insert name of department or division representative, his or her telephone and TDD numbers] no later than [insert date] to make any necessary arrangements.

- 2. Procurement Document -- Certification of Compliance with ADA:** The offeror or bidder must certify that the bidder or offeror complies with the Americans with Disabilities Act of 1990. Services or activities furnished to the general public on behalf of the State must be fully accessible. This is intended to ensure that agencies are in compliance with 28 CFR Part 35 Subpart 35.130 and that services, programs or activities furnished to the public through a contract do not subject qualified individuals with a disability to discrimination based on the disability. To ensure compliance with these requirements, all Invitations to Bid and Requests for Proposals must include the following:

By signing the bid/proposal, the bidder/offeror certifies that the bidder/offeror complies with the American's with Disabilities Act of 1990 and the regulations issued thereunder by the federal government, and certifies that programs, services and activities provided to the general public on behalf of the State

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under a contract resulting from this solicitation comply with the Americans with Disabilities Act of 1990, 28 CFR, Part 35, Subpart B 35.130.

**3. Notices:** When advertising is placed in a newspaper or other publication, the following clause must be included that advises potential respondents how to obtain special assistance if needed to understand the notice or to participate in the process advertised in the notice:

The State of Alaska complies with Title II of the Americans with Disabilities Act of 1990. Individuals with disabilities who need auxiliary aids, services, or special modifications to participate in this procurement should contact [insert name of department or division representative, and their telephone and TDD numbers] no later than [insert date] to make any necessary arrangements.

**4. Meetings:** Any meetings, including pre-bid or proposal conferences, bid openings, proposal presentations, and proposal discussions, must be accessible to a potential offeror or bidder with a disability. You may also need signing interpreters or other accommodations. The following clause must be included in all public procurement meeting notices:

The State of Alaska complies with Title II of the Americans with Disabilities Act of 1990. Individuals with disabilities who need auxiliary aids, services, or special modifications to participate in this meeting should contact [insert name of department or division representative, and their telephone and TDD numbers] no later than [insert date] to make any necessary arrangements.

### **81.060 -- PUBLIC NOTICE OF FORMAL PROCUREMENTS**

Public notice of formal procurements must be provided in accordance with AS 36.30.130 and 2 AAC 12.130. Notice must be published in the Alaska Administrative Journal at least 21 days before the date for the opening of bids or the deadline for receipt of proposals. Notice must also be accomplished by at least one of the methods listed in 2 AAC 12.130(a). The notice shall include the solicitation number issued by the Division of General Services. When you provide notice via newspaper advertising or other media, you may advertise only in a manner intended to reach Alaska vendors.

The procurement officer may shorten the 21-day period by making a written determination, pursuant to AS 36.30.130.

The Division of General Services maintains a register of parties wishing to supply the State with services, supplies, and professional services. A person or firm may be placed on the register by completing the appropriate the Division of General Service's form. An agency may obtain a listing of contractors and/or mailing labels for one or more of the commodity codes from the Division of General Services. The lists provided by the Division of General Services will include only Alaska vendors, unless a list has fewer than three Alaska vendors, in which case it may supply a list containing out-of-state vendors.

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If it is impracticable to follow the rules concerning using Alaska vendors only, you may request an exception from the Division of General Services. The request must be in memorandum format, and must demonstrate why it is impracticable to solicit competition from Alaska vendors only. The request must be approved before soliciting out-of-state vendors.

If an out-of-state vendor requests a copy of a solicitation, you must provide a copy. You also must evaluate bids or proposals received from out-of-state vendors.

**81.065 -- QUESTIONS RECEIVED BEFORE OPENING BIDS, QUOTES, OR PROPOSALS**

There are generally two types of questions. One involves directing the questioner to the specific section of the procurement document where the questioner may find the answer. You may answer these questions over the telephone.

The second type of question involves clarifying or interpreting parts of the procurement document or the intent of the procurement document. You must provide responses to this type of question to all potential offerors in a written addendum to the procurement document.

You must prepare a transcript of all substantive questions and answers asked and given before the solicitation deadline so that you can send that information to all potential bidders or offerors. You must advise potential bidders and offerors to put questions in writing and to confirm telephone conversations in writing.

**81.070 -- PRE-SOLICITATION CONFERENCES**

If your agency plans to have a pre-solicitation conference, you should either tape record the proceedings for possible preparation of a transcript or keep accurate written notes. If your agency responds to substantive questions during the conference, you should reaffirm those answers in writing after the conference and distribute the answers to all potential offerors.

**81.075 -- ALASKA BUSINESS LICENSE**

AS 36.30.110(b), and AS 36.30.210(e) require that bidders and offerors possess a valid Alaska business license at the time of bid opening or the deadline for proposals. This requirement does not apply to the submission of quotes or informal proposals.

Acceptable evidence that the offeror possesses a valid Alaska business license consists of any one of the following:

1. Copy of the Alaska business license.

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2. Certification on the bid or proposal that the bidder/offeror has a valid Alaska business license and has written the license number in the space provided on the bid or proposal.
3. A canceled check that demonstrates payment for the Alaska business license fee.
4. A copy of the Alaska business license application with a receipt stamp from the State's business license office.
5. A sworn notarized affidavit that the bidder/offeror applied and paid for the Alaska business license.
6. Other forms of evidence acceptable to the Department of Law.

Invitations to Bid (ITB) and Requests for Proposals (RFP) shall contain a clause requiring the bidder to have a valid Alaska business license at the time of bid or proposal opening.

For small procurements, vendors must possess a valid Alaska business license before the award of a contract. A business license is not required for small procurements if the vendor is located out of state and ships a product to Alaska or performs a service out of state.

#### **81.080 -- PREFERENCES**

Guides to the various bidder and product preferences are available at the Division of General Services web site (<http://www.state.ak.us/local/akpages/admin/dgs/policy.htm>).

#### **81.085 -- WRITTEN DETERMINATIONS**

There are a number of written determinations that must be made throughout the procurement process. When the statutes or regulations require a determination by the procurement officer, Chief Procurement Officer, or the Commissioner of DOA, a written determination must be prepared and kept in the procurement file. A list of the required written determinations is available at the Division of General Services web site (<http://www.state.ak.us/local/akpages/admin/dgs/home.htm>).

#### **81.090 -- SPECIFICATIONS**

Specifications should include items grown or manufactured in Alaska whenever practicable. You should separate procurements into lots to accommodate Alaskan vendors if Alaskan vendors would not otherwise be able to respond. You should construct lots in a manner that maximizes the opportunity for Alaskan vendors to bid.

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Alaska products shall be used whenever practicable. If Alaskan grown timber, agricultural or seafood products, from Alaskan vendors, are not acceptable, the agency must provide a written determination that states the specific reason why they are not acceptable.

Contract specifications must include a statement that the bidder or offeror will receive the preference granted under AS 36.30.328 if the bid or proposal uses designated Alaskan products that otherwise meet the contract specifications.

When preparing a description or specification for a supply or service you should list all the essential characteristics that are necessary for the supply or service to meet your mission-related needs. Vendors will use the characteristics specified to select the product they offer and the procurement officer must use the characteristics to determine if the product offered is responsive to the solicitation. If the product does not meet or exceed all the characteristics set out in the specification, then it is nonresponsive and is rejected as unacceptable.

There is no set number of essential characteristics that you should provide in a specification. There should be enough characteristics listed to ensure that any product that only minimally meets all of them would still meet your needs. On the other hand, if there are too many essential characteristics listed, the description may eliminate products that would otherwise meet your needs.

Keep in mind that you cannot consider a product unacceptable or nonresponsive to the solicitation if it meets all the essential characteristics of the specifications. You cannot consider a product that exceeds the essential characteristics any more favorably than a product that just meets the essential characteristics, unless you are soliciting proposals or informal proposals.

When writing the specifications, make them as definitive as possible. You must carefully and completely describe the specific services that the bidder or offeror will have to provide. All items must be clearly defined. Wherever possible, you must define intangibles in finite terms. You must describe levels of acceptable performance in specific terms. If you do not specify a required service, you may not receive it. If you specify unnecessary work, the State may pay for services that it does not need.

You should write specifications to obtain standard commercial products at the least cost to the State. A specification should never have the effect of requiring a "Mercedes" when a "Ford" will meet the State's needs.

There are three common types of specifications. These are performance specifications (sometimes called functional specifications), design specifications, and brand name specifications.

### **Performance Specifications**

Performance specifications are generally the best. When using this type of specification you must provide a description of the functional or performance-related characteristics a product must possess to do the job you want done.

### **Design Specifications**

Design specifications describe the process by which the successful vendor will make the product. When using this type of specification, you must provide plans, drawings, materials lists, and a description of the manufacturing process. The successful vendor will then build the product following your instructions.

### **Brand Name Specifications**

Where no other manner of description will suffice except that of a brand name description, a "State approved equivalent" clause shall be included in any resultant solicitation unless there has been a sole brand determination. You must make a written determination before using a brand name specification that limits a procurement to a specific manufacturer's name or catalog number, i.e., sole brand -- no substitute. The determination must provide an explanation of why only the proposed brand will satisfy the State's needs, as required by 2 AAC 12.100. When you use a brand name description as a specification, you shall try to identify other sources from which the designated brand name item or items can be obtained and shall solicit such sources to achieve the level of competition that is practicable. If only one source can supply the requirement, you must make the procurement under single source requirements after obtaining an approved Request for Alternate Procurement (form #02-100).

## **81.095 -- CONTRACTS TAKING PLACE IN MORE THAN ONE FISCAL YEAR**

When contracts are not funded by a continuing appropriation and you wish them to cross fiscal years, the procurement document and the resulting contract must contain a "subject to funding" clause, such as, "the contract resulting from this [ITB, RFQ, or RFP] is subject to the availability of appropriations for the purpose of the contract." If funding for a contract that crosses fiscal years is dependent upon approval of the next year's budget, this section indicates to the contractor that funding for work taking place in the subsequent fiscal year is subject to approval by the legislature.

## **81.100 -- STANDARD CONTRACT CLAUSES**

The Chief Procurement Officer, in consultation with the Attorney General, has established standard contract clauses for state contracts in accordance with AS 36.30.340 and 2 AAC 12.470. These clauses are found in various procurement documents such as the Request for Quotation (form #02-110) and Addendum 1 (form #02-110a), Standard Terms and

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Conditions for Invitations to Bid, Standard Terms and Conditions for High Technology Contracts, Standard Agreement Form, and Appendix A (form #02-093).

You may modify a standard clause only with the prior written approval of the Attorney General, as required by AS 36.30.340 and 2 AAC 12.470. Any revision of the standard insurance or hold harmless clauses requires prior approval of the Division of Risk Management.

**81.105 -- NOTICE OF INTENT TO AWARD**

Notice of Intent to Award must be made on form #02-097, and must be sent to all respondents at least ten days before the award of a contract whenever formal bids or proposals have been solicited.

**81.110 -- PROCUREMENT RECORDS**

Procurement records are public information except as otherwise provided. The agency contract file will contain such records as are reasonably available to demonstrate the justification for the procurement procedure chosen, the notice given, and the basis for the award, taking into account the formality of the procedure chosen. To the extent applicable, the file will contain:

1. A copy of the RAP, and all materials accompanying the RAP, including the written findings of fact supporting the request;
2. A copy of the RFP, RFQ, ITB, or other solicitation document, and all amendments;
3. The procurement plan for innovative procurements;
4. All returned bids, proposals, or quotes, including those that are late;
5. The written statement of reasons for any cancelled solicitation, for any rejected bids, quotes, or proposals, and for any delayed opening of bids, quotes, or proposals;
6. All correspondence with potential offerors or bidders, including a summary of any verbal communications;
7. The question and answer transcript;
8. A copy of each proposal, quote, or bid submitted;
9. The register of bids prepared under AS 36.30.140 or of proposals prepared under AS 36.30.230;
10. Justification for the award, if applicable;

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11. Any written determinations required by AS 36.30 or 2 AAC 12;
12. A copy of the Notice of Intent to Award for formal procurements, or notice of award for small procurements;
13. If the award is to a nonresident, the written statement of reasons for that award;
14. Records received from the contractor concerning its efforts to use Alaskan products; and
15. A copy of the resulting contract including any amendments.

Bidders and offerors may designate trade secrets and technical and proprietary data to be withheld from public disclosure. If the procurement officer agrees with the designation, those materials will be placed in a confidential enclosure in the procurement file.

## **Chapter II. Small Procurements**

### **81.200 -- SMALL PROCUREMENTS**

Small procurements are defined by AS 36.30.320(a) and 2 AAC 12.400. The Alaska bidder, offeror and product preferences apply to all small procurements. Protest procedures are governed by 2 AAC 12.695.

A written notice of award is required for small procurements above \$25,000. The notice must be provided to each firm or person providing a quotation or informal proposal, describe protest rights under 2 AAC 12.695, and the time limitations within which a protest must be received by the purchasing agency.

### **81.210 -- REASONABLE AND ADEQUATE PROCEDURES**

Reasonable and adequate procedures do not mean that it is always acceptable to contact only one offeror. Reasonable and adequate procedures are defined in 2 AAC 12.990 (17) 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 may include contacting only one potential offeror in appropriate circumstances. When determining if competition is reasonable and adequate, you should consider the following:

**Price:** The higher the price, the more competition you should seek;

**Mission Requirements:** If delay will hamper the mission, less competition is acceptable;

**Competition:** The more vendors who can meet the needs, the more competition you should seek.

### **81.220 -- MANDATORY SOLICITATION OF ALASKAN VENDORS**

The minimum number of quotations or proposals must be sought from Alaskan vendors prior to soliciting any non-Alaskan vendors unless you determine in writing that soliciting the minimum number of quotes or proposals from Alaskan vendors is not practicable. You should rotate the lists of vendors from whom you seek quotes or proposals to provide as many Alaska vendors as possible the opportunity to compete for State business.

### **81.230 -- ESTABLISHED CATALOG PRICES**

When seeking verbal quotations for small procurements, you may use established catalog prices or published discounts from established catalog prices in place of direct contact with a vendor. This does not eliminate the need to rotate vendors when making procurements. When using catalogs, the cost of delivery must be calculated and included when determining the low offer.

Established catalog price means the price included in a current catalog, price list, schedule, or other form that:

1. Is regularly maintained by a manufacturer or contractor;
2. Is either published or otherwise available for inspection by customers; and
3. 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 buying public.

### **81.240 -- WRITTEN QUOTATIONS**

Agencies must seek written quotations when making procurements that will exceed \$25,000. You must use a Request For Quotations form (#02-110). An example of an acceptable RFQ form is available at the Division of General Services web site (<http://www.state.ak.us/local/akpages/admin/dgs/policy.htm>). For purchases of "high tech" supplies, you must use the addendum 1 boilerplate (form #02-110a).

## **Chapter III. Competitive Sealed Bidding**

### **81.300 -- COMPETITIVE SEALED BIDDING**

Competitive sealed bid procurements must be made in accordance with AS 36.30 and 2 AAC 12. Agencies must obtain a solicitation number from the Division of General Services for all competitive sealed bids.

You must use the "Standard Terms and Condition" boilerplate in ITBs for supply and service contracts. You must use the "Standard Terms and Condition for High Technology Contracts" boilerplate for the purchase of computers and other high technology acquisitions. These boilerplate provisions are available at the Division of General Services' web site. You are encouraged to use the Division of General Services' Bidmast document to create formal ITBs. Bidmast includes various terms and conditions and is also available at the Division of General Services' web site.

### **81.310 -- RECEIPT OF BIDS**

Bids should be received and kept in sealed envelopes until the advertised opening date and time. Sealed bids should be kept in a secure place. Upon receipt, you should note the date and time of receipt on the envelope. After opening, you should save the envelope (or enough of the envelope to indicate timely receipt) in the procurement file.

### **81.320 -- PROCEDURE IF ONLY ONE RESPONSIVE BID IS RECEIVED**

If only one responsive bid is received, you may award the contract to that bidder if you determine in writing that the price submitted is fair and reasonable, and that other prospective bidders had a reasonable opportunity to respond or that there is not enough time for a new solicitation, as required by 2 AAC 12.190. If you cannot make those determinations, you may cancel the procurement and solicit new bids..

If the one bid received is not fair and reasonable, but further formal procurement procedures are not likely to further the State's interests, you may seek approval of an alternative procurement method.

## **Chapter IV. Competitive Sealed Proposals**

### **81.400 -- COMPETITIVE SEALED PROPOSALS**

Under some circumstances, it may be better to make a procurement by competitive sealed proposals than by competitive sealed bids. For procurements of \$50,000 and less, you may solicit informal proposals for supplies, services, or professional services, employing the level of competition set out in AAM 81.015.

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You may always use competitive sealed proposals to procure professional services; supplies and services for oil and hazardous waste clean up; telephone systems and telephone system maintenance; concession contracts; and leased office space, as set out in 2 AAC 12.215(a) and (b). This means you do not have to prepare a determination under AS 36.30.200(b) in order to use the competitive sealed proposal process instead of competitive sealed bidding when procuring these items.

You may procure other supplies or nonprofessional services above \$50,000 using the competitive sealed proposal process only if you determine in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State, as required by AS 36.30.200(b). You must set out the reasons for the determination in detail. Unless specifically limited to professional services, all sections in this chapter apply to all competitive sealed proposal procurements.

### **81.405 -- PREPARING A COMPETITIVE SEALED PROPOSAL**

No matter how limited the service you require, you must prepare some type of specification before contacting a potential contractor. A request can be in several forms, such as statements of interest and qualifications, requests for proposals, and informal requests for proposals. In all cases, you must provide the same information to all prospective contractors. If you anticipate the contract will continue from year to year, or in phases, you must state that in the original request.

An informal request for proposals may be a letter describing work to be performed or a telephone call that accomplishes the same purpose. You should prepare an outline of requirements before placing any calls to ensure that you provide the same information to all prospective offerors. Keep a record of those whom you call and their responses.

It may be helpful to review the actual wording of contract provisions or RFPs that other agencies have used. The following paragraph should be included in every RFP:

RFP REVIEW: Offerors shall carefully review this RFP for defects and questionable or objectionable materials. Offerors' comments concerning defects and questionable or objectionable material must be made in writing and received by the purchasing authority at least 10 days before the proposal opening date. This will allow time for the purchasing authority to issue an amendment if one is required. It will also help prevent the opening and exposure of proposals upon which award cannot be made. Offerors should send comments to the purchasing authority at the address shown on the front of this RFP.

We encourage you to use the RFP shell developed by the Division of General Services, which is available at the Division of General Services' web site (<http://www.state.ak.us/local/akpages/admin/dgs/policy.htm>).

### **81.410 -- PROFESSIONAL SERVICES**

You should consider the following when preparing to procure professional services:

1. Ensure the project qualifies as a professional service;
2. Coordinate with any agencies that would normally provide the desired service; and
3. Address budgetary considerations and resolve funding requirements.

Some procurements involve a combination of professional services and nonprofessional services and/or supplies. There is no exact separation that determines whether you should make the procurement as a professional service or not. You should first determine whether it is reasonable to separate the professional services from the nonprofessional services and/or supplies. If you determine that separation is reasonable, you should follow the appropriate procedure for each portion of the procurement.

If it is not practical to separate the procurement, then you must decide whether to make the procurement as a professional service or not. A general rule of thumb that should be applied is: if 50 percent or more of the cost of the procurement consists of professional services as defined in Section 81.420, then the procurement may be made as a professional service.

You should separate procurements to accommodate Alaskan vendors if Alaskan vendors would not otherwise be able to respond.

### **81.420 -- DEFINITION OF PROFESSIONAL SERVICES**

It is important to understand the meaning of the term professional services. The provision of a service by a professional does not define that service as a "professional service." Professional services are any professional, technical, or consultant services predominantly intellectual in character. They include analysis, evaluation, prediction, planning, or recommendation, and result in the production of a report or the completion of a task. A professional services contract requires specialized knowledge and training (often through long and intensive academic preparation) or in-depth experience in a particular field or discipline. A contract that is procured as a professional service but that in fact is not a professional service is subject to being voided.

If your requirement does not meet the above definition and description, it should not be procured as a professional service. This does not mean that a competitive sealed proposal process may not be appropriate; it means that you may not make the procurement under the statutory professional services exclusion. If you have doubts that what you are seeking is actually a professional service, contact the Division of General Services.

The following are examples of ways to decide if you require professional services.

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1. If your agency needs a particular computer program, you may purchase the program under a professional services contract only if the program has to be designed specifically for your agency's unique needs, or if the cost of developing the application would be more than the cost of the "off-the-shelf" program. If the program is "off-the-shelf" and usable "as is," you cannot purchase it under a professional services contract.
  
2. A graphic designer may perform a professional service when providing a design for a document, or presentation. In this case, the work required to implement the design would require the unique talent of the designer, and therefore qualifies as a professional service. However, after the graphic designer has completed the camera-ready materials for the document or the materials for the presentation, any printing services required should not be included in the contract as they are not professional services. Any procurement of supplies included with professional services, when you estimate the value of the supplies to exceed 50 percent of the contract price, should not be purchased under this chapter.
  
3. Carpenters can perform a professional service, but only if their expertise is used in a consultant mode. For example, they are performing a professional service when they review a construction or remodeling project or specification to verify the feasibility or quality of the project; however, they cannot actually perform any manual carpentry work under a professional services contract.

**81.430 -- AUTHORITY TO PROCURE PROFESSIONAL SERVICES**

DOA has the statutory authority to procure professional services other than those related to construction. Construction-related professional services are under the authority of DOTPF. DOA delegates its authority to agencies upon determination that they are capable of implementing the delegated authority. You must procure these services according to AS 36.30, 2 AAC.12, and this Chapter.

The Division of General Services must assign a solicitation number for all formal procurements estimated to exceed \$50,000.

**81.440 -- FORMS FOR PROFESSIONAL SERVICES CONTRACTS**

The minimum contract requirements for professional services contracts are as follows:

<b>Amount</b>	<b>Minimum Contract Form Requirements</b>
\$5,000 or less	The contract must be in writing, but the standard contracting agreement form is not required. The requirement of Attorney General review does not apply.

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Greater than \$5,000	Use a Standard Agreement Form for Professional Services Contract (form #02-093), or other form approved by the Department of Law, and include appropriate appendices. If the standard agreement form is not used, you must submit the contract to the Attorney General's Office for its approval (see Section 81.100)
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**81.450 -- RECEIPT OF PROPOSALS**

Proposals should be received and kept in sealed envelopes until the advertised opening date and time. Sealed proposals should be kept in a secure place. Upon receipt, you should note the date and time of receipt on the envelope. After opening, you should save the envelope (or enough of the envelope to indicate timely receipt) in the procurement file.

**81.460 -- EVALUATING PROPOSALS**

Proposals must be evaluated according to AS 36.30.240-250, and 2 AAC 12.260-315. You must use the Alaska bidder and offeror preferences. You do not base the award on the lowest priced offer, alone. Instead, you use evaluation criteria, including price, to determine the most advantageous offer. You must evaluate all proposals using the factors set out in the RFP. The importance or weighting value of each factor must be set out in the RFP. We cannot establish a standard evaluation point system for all procurements because certain factors may be more important in one procurement than in another.

The proposals may be evaluated by the procurement officer or by a Proposal Evaluation Committee (PEC). If the purchasing agency uses a PEC, it shall consist of at least three State employees or public officials. Individuals who are not state employees or public officials may serve on a PEC if you meet the minimum requirement for state employees or public officials. However, you must exercise caution to ensure that conflicts of interest do not exist. A nonresident of the State of Alaska, other than State employees or officials, may not serve in a voting capacity without prior written approval by the Commissioner of DOA. Requests for nonresident evaluators should explain the value of their participation on the PEC. A representative from the Information Technology Group must be on every PEC involving development of software that will interact with the State's mainframe computer.

**81.460(1) -- EVALUATION CRITERIA**

You should divide evaluation criteria into two areas: minimum requirements and evaluated criteria. The minimum criteria should include every requirement that is necessary to accomplish the task addressed by the RFP. This should include such items as Alaska Business License, professional licenses, certifications, and specific staffing, experience, and location requirements. Any offeror who meets the minimum requirements should be able to accomplish the required task.

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The purpose of the evaluated criteria is to select the best proposal from a group that has already been determined to be acceptable. Specific weights should be based on the relative importance of the criteria being evaluated with the more important criteria receiving the higher weight.

**81.460(2) -- EXPERIENCE FACTOR**

It may be valuable to consider specific experience when evaluating proposals. If this criterion is used, you should consider task-related experience and not agency-related experience. A description of the experience considered valuable should be limited to those specific characteristics necessary to accomplish the goal of the RFP.

A good example of necessary experience might be:

Experience designing Oracle database applications in a Windows NT environment.

If this experience is necessary for the project, then you should make it a minimum requirement and not evaluate it using points. You may use a combination of minimum experience and points evaluation.

A bad example of necessary experience might be:

Previous experience working with department Y, division X.

It is legitimate to consider the offeror's experience in Alaska performing similar work.

**81.460(3) -- COST EVALUATION FACTOR**

Except for those services procured under 2 AAC 12.260(c), price is a mandatory evaluation factor. A good rule of thumb for the minimum weight given to price is forty percent of the total evaluation points. You should review the unique circumstances of your procurement to determine the appropriate weighting for cost.

One means of determining the distribution of points based on price follows:

$$\frac{(\text{Price of Lowest Cost Proposal}) \times (\text{Maximum Points for Cost})}{\text{Price of Each Higher Cost Proposal}} = \text{Points}$$

You should convert costs to points after making adjustments for the Alaska Bidder and other applicable preferences. If a point system is used, you should generally award the contract to or begin negotiations with the offeror with the highest total number of points. If you wish to cancel the process after opening proposals, and not make any award, you must make a determination in accordance with 2 AAC 12.860.

#### **81.460(4) -- ALASKAN OFFEROR'S PREFERENCE**

As required by 2 AAC 12.260(e), you must include an evaluation factor that considers whether an offeror qualifies as an Alaska bidder under AS 36.30.170(b). You must assign at least 10 percent of the total value of the rating system to the Alaska offeror evaluation factor.

#### **81.460(5) -- CLARIFICATION OF OFFERS**

During the evaluation process, the procurement officer or the PEC may communicate with an offeror to clarify uncertainties or eliminate confusion. This communication may not result in a material or substantial change to the proposal, but it may result in an adjustment to the procurement officer or PEC's evaluation.

#### **81.460(6) -- OTHER DISCUSSIONS WITH INDIVIDUAL OFFERORS**

The procurement officer or PEC may give offerors whose proposals are reasonably susceptible for award the opportunity to meet with the procurement officer or PEC, as set out in 2 AAC 12.290. If you hold discussions under 2 AAC 12.290, you must offer an opportunity to participate in the discussions to all those deemed reasonably susceptible for award.

#### **81.470 -- CONTRACT NEGOTIATIONS**

You may negotiate certain, non-material contract terms with the offeror of the highest rated proposal. Any changes made must be reasonable, and may not have the result of changing the ranking of the proposal. If the offeror fails to negotiate in good faith, or fails to negotiate within the time schedule you set, you may terminate negotiations and begin negotiations with the offeror of the next highest ranked proposal.

### **Chapter V. Alternative Procurement**

#### **81.500 -- REQUESTING AN ALTERNATE PROCUREMENT METHOD**

If you believe that it is in the State's interest to use an alternative procurement method, you must obtain approval of a Request for Alternate Procurement (RAP) (form #02-100). In addition to the specific requirements set out below, each RAP must include findings of fact supporting the conclusion that the agency should use an alternate procurement method. The RAP must be accompanied by evidence, which consists of material facts sufficient for independent examination and verification per AS 36.30.315. Evidence may consist of written documents, records, supporting data, affidavits or other information proving that the findings of fact are true and accurate. Mere argument or persuasion does not constitute

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evidence. RAPs that are submitted without evidence sufficient to independently determine the validity of the request will not be considered.

The agency head may approve a single source or limited competition RAP for small procurements, if permitted under the department's delegation of procurement authority.

Requests for approval of alternate procurements for construction, the State Equipment Fleet, and Alaska Marine Highway procurements under AS 36.30.015(g) must be forwarded to the Commissioner of DOTPF for approval.

If the request is approved, the agency must make the procurement in accordance with instructions on the approved RAP. In all cases, that agency must send a copy of the procurement document and the Procurement Report (form #02-115) to the Division of General Services.

### **81.510 -- EMERGENCY PROCUREMENTS**

Emergency procurements are authorized by AS 36.30.310 and 2 AAC 12.440-460. Emergency conditions exist when a timely decision is required to prevent loss of life or damage to property, or to mitigate an imminent threat to public health, welfare, or safety. Emergency conditions may also exist when acquisition through the normal procurement process would be impracticable or contrary to the public interest because of inherent delays.

Before you make the procurement, you must send a completed RAP (form #02-100) to the Chief Procurement Officer. The RAP must explain the situation that exists 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. It must also state the level of competition the agency will use and the reasons for determining the level of competition. Emergency procurements are limited to the procurements necessary to meet the emergency.

Agencies are delegated the authority to make emergency determinations in situations when there is not sufficient time for the agency official to prepare documentation, submit the RAP to the Chief Procurement Officer, and obtain a written determination prior to responding to the emergency. In general, there is not sufficient time to obtain a written determination from the Chief Procurement Officer when action must be taken in less than 72 hours.

### **81.520 -- LIMITED COMPETITION**

Limited competition procurements are authorized by AS 36.30.305 and 2 AAC 12.430. Requests for approval of a limited competition procurement must be made on a completed RAP (form #02-100). The RAP must contain findings of fact that support the determination that other sources are not suitable or acceptable, and that the competitive sealed bidding,

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competitive sealed proposal, and small procurement processes are impractical or contrary to the public interest. The RAP must be approved by your Commissioner or by the Chief Procurement Officer, as set out in your delegation of procurement authority.

**81.530 -- SINGLE SOURCE**

Single source procurements are authorized by AS 36.30.300 and 2 AAC 12.415-420. Requests for approval of single source procurements must be made on a completed RAP (form #02-100). The RAP must contain findings of fact that support by clear and convincing evidence the determination that competitive sealed bidding, competitive sealed proposals, limited competition, or small procurement procedures are impractical or are contrary to the public interest, and that award of a single source contract is in the State's best interest. The findings must specify the State interest that will be advanced by using a single source procurement. For examples of appropriate single source procurements, see 2 AAC 12.410(d). The RAP must be approved by your Commissioner or by the Chief Procurement Officer, as set out in your delegation of procurement authority.

**81.540 -- INNOVATIVE PROCUREMENTS**

Innovative procurements are authorized by AS 36.30.308 and 2 AAC 12.575. Requests for approval of an innovative procurement must be made on a completed RAP (form #02-100). The RAP must contain findings of fact that support the determination that it is advantageous to the State to use an innovative competitive procurement process in the procurement of new or unique requirements of the State, new technologies, or to achieve best value. The RAP must be approved by the Chief Procurement Officer.

You must submit a procurement plan to the Department of Law for review and approval as to form before issuing public notice. The plan must address the method of solicitation, scope, method of award, protest procedures, and contract provisions.

**81.550 -- REQUESTS FOR CONTRACT AMENDMENTS EXCEEDING LIMITS**

When an unanticipated amendment to an existing contract would be beyond the limits described in AAM 81.600, the agency must send its request to exceed the amendment limits to the Division of General Services on a completed RAP (form #02-100).

If the contract is for construction, the State Equipment Fleet, or Alaska Marine Highway procurements under AS 36.30.015(g), the agency must send the RAP to the Commissioner of DOTPF. If the contract is for legal services, the agency must send the RAP to the Attorney General.

The RAP must be accompanied by a written explanation listing specific reasons why the amendment is in the state's best interest, and must address the following:

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- 1. Legitimacy:** Whether a change is legitimate and due to unforeseen circumstances that occurred as work progressed, and whether the reasons for the change were unforeseen at the time the contract was established, as opposed to an effort to evade procurement requirements;
- 2. Scope:** Whether the additional work is within the scope of the original contract;
- 3. Contract Clauses:** Whether the contract contains clauses authorizing modification;
- 4. Extent:** Whether the amendment represents any important general change that alters the essential identity or main purpose of the original contract, or is of such importance as to constitute a new undertaking.

The Chief Procurement Officer, the Commissioner of DOTPF, or the Attorney General, as applicable, must make a written determination that the amendment is in the State's best interests. If the RAP is approved, the agency should amend the contract.

#### **81.560 -- AMENDMENTS TO RAPS**

If it is necessary to request an amendment to an approved RAP (form #02-100), agencies should address a memo to the Chief Procurement Officer. The memo must explain the required changes, state whether the conditions that allowed approval of the original RAP still exist, and provide an approved/disapproved signature block.

### **Chapter VI. Preparing a Contract**

#### **81.600 -- TYPES OF CONTRACTS**

Any type of contract that will meet the State's needs and promote the State's best interests is acceptable, except a cost-plus-a-percentage-of-cost contract.

#### **81.610 -- AWARD TO NONRESIDENT**

If you award a contract to an offeror who does not reside in or maintain a place of business in Alaska, and if the services, supplies, or construction that are the subject of the contract could have been obtained in the State, you must make a written determination that contract award to the nonresident is in the State's best interest, as required by AS 36.30.362. You must keep the written determination in the contract file. This section does not apply to competitive sealed bids or competitive sealed proposals.

## **81.620 -- CONTRACTING FOR SOFTWARE**

When contracting for software development or enhancement, you should address the following questions:

Who owns the code in the software developed by the contractor?

Who owns the rights to software that is derived from software developed by the contractor?

Who owns the rights to any pre-existing code included in software developed under contract for your department?

What rights did your department buy?

Does your department have exclusive rights to the software?

Are your department's rights time-limited?

How may your department use the software?

Can other departments use the software?

Can you use the software at multiple sites?

Can the software be ported to additional hardware platforms?

## **Chapter VII. Contract Amendments**

### **81.700 -- CONTRACT AMENDMENTS**

There are two basis types of amendments: anticipated and unanticipated. There are differences in the way you should handle each type.

**Anticipated:** These are amendments that were foreseen at the time of procurement. To qualify as an anticipated amendment, the solicitation and resulting contract must advise offerors of the potential of the amendment. Most anticipated amendments involve contract renewals. There is no limit to these amendments but prior to procurement, you must make a written determination pursuant to AS 36.30.390. Examples of solicitation and contract language you should use are:

**In Solicitations:** "The State wishes to establish a one-year contract with the State's option to renew for two additional one-year periods."

**In Contracts:** "Renewal--The State reserves the right to renew this contract for two additional one-year periods."

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References to potential amendments may not be so broadly read as to negate the statutory requirements for competition.

**Unanticipated:** These are amendments that were not foreseen at the time of procurement and must be addressed dependent on value and effect. Agencies may handle amendments that do not cause any increase in the original contract cost within the requirements of the contracting department. Agencies may amend contracts for supplies and services established under small procurement procedures within the scope of the original contract, but the amendment may not increase the contract beyond the small procurement limits established under AS 36.30.320. Agencies may amend contracts whose original price exceeded \$50,000 within the scope of the original contract by the lesser of 20 percent of the original term of the contract, or a subsequent current term of the contract, as applicable, or \$50,000.

If the unanticipated amendment would exceed the applicable limit in the preceding paragraph, the agency must treat it as a new procurement or as an amendment exception under 2 AAC 12.485, as set out in AAM 81.550.

Amendments to legal services contracts which were subject to Attorney General approval under AS 36.30.015(d), must be approved by the Attorney General

## Chapter VII. Procurement Disputes

### 82.010 -- AGGRIEVED RESPONDENTS

Appeals and protests shall be treated in accordance with AS 36.30.550-699, and this Chapter of the Administrative Manual.

### 82.100 -- PROTESTS OF SMALL PROCUREMENTS

An interested party must attempt to resolve the dispute informally. If that attempt is not successful, he or she may protest the solicitation or award of a small procurement contract. The protest must be in writing, must contain the information required by AS 36.30.560, and must be filed with the Commissioner of the purchasing agency or the Commissioner's designee. The protester must file a copy of the protest with the procurement officer.

The deadlines for filing a protest of a small procurement are as follows:

Type of Protest	Deadline
Solicitation	Before quotations or proposals are due
Award of contract less than \$25,000	Ten days from the solicitation or the award, whichever is later
Award of contract greater than \$25,000	Ten days from date of notice of award

If the protestor agrees, the purchasing Commissioner may assign the protest to the procurement officer or other state official for alternate dispute resolution. In other cases, the Commissioner or his or her designee may issue a decision sustaining or denying the protest, or may conduct a hearing using the procedures set out in AS 36.30.670(b).

### 82.200 -- PROTESTS OF FORMAL PROCUREMENTS

It is extremely important that all procurement officers handle protests in a uniform manner. DOA will offer advice and answer questions where practicable. This Chapter does not apply to construction contracts that are the responsibility of DOTPF.

There are four types of protests:

1. Proposed award of a contract;

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2. The award of a contract;
3. A solicitation of "supplies, services, and professional services" by an agency; and
4. The cancellation of a solicitation.

**82.210 -- FILING OF A PROTEST**

AS 36.30.565(a) defines the protest period (for award and proposed award of a contract) as within 10 days following issuance of a "Notice of Intent to Award." The method of computing the 10 day period is that the first day of the protest period is the day following the date the notice of intent to award is dated and mailed even though the first day may be a weekend or holiday. Once you identify the first day, the rest of the 10 days are calendar days. If the 10th day falls on a holiday or weekend, the close of the 10 day period is the close of business of the workday immediately following the holiday or weekend.

In considering whether a protest is filed on a timely basis, the protest must be received by the State within the 10 day period. Protests mailed within the 10 day period but not received by the State within that period are not timely. If the protest is untimely, the procurement officer should notify the protestor that the protest is untimely and explain why. If the protest is delayed by actions of the State, so that it is not received within the 10 days, you must to consider the protest as timely under AS 36.30.565(b).

Protests with regard to solicitation are timely if received at least 10 days prior to the bid or proposal opening date. This does not mean that you should ignore a protest received only five days before the opening date that points out a serious error made by the State. In that instance, the opening date should be delayed and the error corrected or the solicitation canceled, or some other appropriate action taken.

Protests concerning the cancellation of a solicitation must be received no later than 10 days after the procurement officer issues a notice of cancellation.

If a protest is filed concerning the award of a contract that is not let on a competitive basis (single source, emergency, or limited informal solicitation), the 10 day appeal period begins on the day following the date the contractor has been advised to proceed with performance under the contract. Protest of innovative procurements must follow the procedures set out in the procurement plan.

**82.220 -- CONTENTS OF THE PROTEST**

The protest must contain "a detailed statement of the legal and factual grounds of the protest, including copies of relevant documents." This statement sets the parameters of the matters you will address in the response. An appeal is limited to those matters addressed in the statement. If the protest contains no grounds for the protest, you should reject it. AS 36.30.560(2) requires that the protest be signed. You should reject

any protest by telex or telegraph, but should accept protests bearing a signature received on a FAX machine. You should send notice of the protest to all interested parties, as required by AS 36.30.570, as well as other State offices affected by the protest..

### **82.230 -- STAYING THE AWARD**

If a protest is filed, the award should be made unless the Procurement Officer of the contracting agency determines in writing that:

1. A reasonable probability exists that the protest will be sustained; or
2. Stay of the award is not contrary to the best interests of the State.

You may not stay an award without making such a determination.

### **82.240 -- PREPARING YOUR DECISION**

In preparing your decision (response to the protest), as required by AS 36.30.580, be sure that you have thoroughly researched all points raised in the protest. You will receive protests in a variety of formats and the persons who prepared them will have a variety of research and writing skills. Check on those matters that are implied, although not concisely stated.

You are probably the person responsible for the contract award or the author of the solicitation against which the protest is filed. We all tend to become defensive concerning complaints about the work that we have done and there is a natural tendency to defend rather than realistically evaluate that work. Step back and review the points raised by the protest from the viewpoint of a neutral third party. You may want to get the viewpoint of one or more persons who have not been associated with the procurement.

In preparing your decision, respond only to those points raised by the protest. Deal with the facts of the matter as they exist, even if the facts do not support the position you would like to take. It is important that you try to be accurate with your decision. It is equally important that your decision is reasonable. Be concise in writing your decision. Explain your decision thoroughly, but stay away from extra material or personal philosophy. Do not provide new material with which the protestor can take issue.

If there was a flaw in the process, determine the impact of that flaw. Did you fail to do something required by law or regulation? Is the flaw significant to the overall result? Can or should the flaw be repaired or is the flaw a fatal one requiring the process or a phase of the solicitation or evaluation process be redone? Think about the impact that rebidding or proposing will have if the bids or proposals have already been exposed to the competitors.

If you need to take remedial action, admit the fault and explain how you intend to remedy the situation. In formulating a remedy, be fair, not just to the protestor, but to all

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bidders or offerors. Be conservative; do not overcompensate for the error to the detriment of your department and competitors.

Your decision should explain the process by which your decision may be appealed and explain that the State must receive any appeal within the 10-day appeal period. The 10-day appeal period is computed just like the protest period. Although statute or regulation does not require it, it is good policy to send a copy of your decision to all parties to whom you sent a copy of the protest.

The 15 days you have to prepare and mail your decision are counted in the same manner as the protest period. Send your decision to the protestor by certified mail, return receipt requested. The date the protestor receives your decision determines the dates of the appeal period. Keep the receipt. If the decision is appealed, you will have to furnish the receipt.

**82.250 -- REQUESTING AN EXTENSION**

You may be able to extend the 15-day protest response period up to a total of 30 days for good cause. If you need an extension, you must request it from the Commissioner of the DOA or his or her designee. Do not wait until the last day to request an extension. Your request for an extension will be given positive consideration if the issues are very complex, additional material is needed that is not readily available prior to the preparation of your decision, or other legitimate reasons for delay are present. The Commissioner will probably deny a request for extension made because you are busy with other matters or for similar reasons. If the Commissioner grants your request for extension, you must immediately notify the protestor of the new date that your decision is due.

Do not fail to answer the protest and, consequently, let it default to an appeal. Failing to deal with the problem will not make it go away.

You may direct any questions relative to the protest or appeal process to the DOA's Hearing Officer.

**82.260 -- CHART OF PROTEST/APPEAL AND RELATED ACTIVITIES**

Time Period	Activity
Protest Period	Ten days following mailing of "Notice of Intent to Award." or service in person by FAX or other machine transmission.
Procurement Officer Decision on Protest	Fifteen days from receipt of protest (may be extended up to a total of 30 days on approval of Commissioner).
Appeal of Protest	Ten days following protestor's receipt of procurement officer decision on protest.

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Procurement Officer Protest Report	Ten days following receipt of appeal.
Appellant Comments	Ten days following mailing of procurement officer protest report.
Commissioner Acceptance or Rejection of Appeal	Fifteen days from receipt of appellant comments or expiration of the time to file comments.
Schedule Hearing	No time limit.
Issue Decision	Twenty days from the close of the hearing record.

Days as used in this chart are calendar days unless the last day of the period falls on a weekend or holiday, in which case the last day of any period will be the end of the first workday following the weekend or holiday.

**82.300 -- PROCUREMENT VIOLATIONS: INTRODUCTION**

The large majority of Procurement Code violations will be inadvertent and the result of administrative error, lack of knowledge, or simple carelessness. In these cases, corrective action is the responsibility of the purchasing department, involving better procedures, employee training, and progressive discipline. In all cases, however, whatever the cause of the violation, it is the responsibility of the purchasing department to prepare a report of Procurement Code violations for the reviewing division (DOTPF, Chief Contracts Officer, for procurements of construction, the State Equipment Fleet, or Alaska Marine Highway procurements under AS 36.30.015(g), or DOA, Division of General Services for other procurements).

**82.310 -- PROCUREMENT VIOLATIONS: APPLICABLE STATUTES**

Title 36.30 of the Alaska Statutes contains the State Procurement Code. Certain violations of the Code may be subject to civil and criminal penalties as provided by AS 36.30.930(1) and AS 36.30.930(2), as described below.

Civil Penalties, AS 36.30.930(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.

Criminal Penalties, AS 36.30.930(2):

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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.

In the case of civil penalties, the penalties apply only if the person who violated the requirements of the Code did so knowingly. In other words, the person committing the violation must have been aware that he or she was acting contrary to the requirements of the Code at the time the violation occurred. Violations that are the result of administrative error or mistake, ignorance, and carelessness usually do not lead to civil penalties. The determining factor is what the person understood the procurement requirements to be when the violation occurred, and whether or not the person believed he or she was acting in compliance with those requirements.

In the case of criminal penalties, the statute is violated only if the person engaged in a scheme or artifice to avoid the requirements of the Code, and he or she did so knowingly or intentionally. In this instance, the violation must have been committed in a deliberate manner, involving some calculated means, such as multiple procurement documents for a single procurement, or a deliberate misstatement of fact, which is purposefully designed to avoid the requirements of the Code. As a practical matter, legally admissible documentary evidence of such wrongdoing must be available in order to undertake criminal prosecution. Law enforcement authorities will also need to determine whether or not the intended result of such a scheme involved personal gain for either the person committing the violation, or a friend or relative of the person, or the vendor, or whether some other vendor was significantly injured, whether intended or not. Absent such results, criminal prosecution may not be successful, and civil penalties and administrative remedies may be more appropriate.

**82.320 -- PROCUREMENT VIOLATIONS: REPORT**

The purpose of such reports is, first, to pinpoint weaknesses in the State's procurement process, including the Procurement Code itself, and to find ways to improve State procurement. Secondly, the purpose of such reports is to determine whether or not a violation has reached the level requiring civil or criminal penalties, and to take such action as may be appropriate under the circumstances. The purpose of placing the responsibility for the initial investigation of violations with the purchasing department is twofold. First, it requires that departmental management carefully examine the procurement procedures in place within a department. If lasting improvements are needed in a department's internal procurement procedures, they can best be achieved through the department's own initiative. Second, in cases involving avoidable administrative error or carelessness, employee discipline can only be effected through the management prerogatives of an individual department.

When you interview an individual who may be subject to disciplinary action as a result of an investigation, the individual is entitled to be accompanied by a union representative upon request. Contact the Division of Personnel if you need advice.

Reports of Procurement Code violations should be structured in the following manner.

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1. Description of the Violation

Briefly describe the violation, i.e., department's procurement authority was exceeded, unauthorized single source procurement, competitive proposals, bids, or price quotes not solicited, etc. Cite the specific statute, regulation, Administrative manual section, or DOA Delegation of Authority clause. Describe the services or supplies that were purchased, and indicate how the violation was discovered.

2. Purchasing Department's Investigation

Provide a chronological listing of the events that led to the Procurement Code violation. Each of the individuals involved in the procurement must be interviewed to determine what their exact knowledge of the State Procurement Code requirements was, and if they understood whether or not their actions were in compliance with the Code at the time the procurement violation took place. It is also imperative that you collect and examine all documents pertaining to the procurement. You should organize these documents chronologically and attach them to the report.

You should list and describe each event sequentially. Be as specific and complete as possible about the dates, the individuals involved, and communications between the participants, both within and outside the department. These events should describe what happened, who was involved, and how and why the violation occurred. You should cover the following general areas at a minimum:

- a. Describe the decision to procure and the purpose of the procurement;
- b. Describe the vendor and/or product selection process, and describe the minimum specifications or selection criteria that were used;
- c. Describe the causes of the violation, and describe the reasons why the procurement process broke down;
- d. Describe corrective actions taken by the department to prevent future violations. Attach copies of any new procedures that the agency has implemented as a result of this violation; and
- e. Describe any costs or damages that may have been suffered by the State and that were caused by the violation. Explain how these costs were determined. If you determine that no damages or costs occurred as a result of the violation, explain how you reached that determination.

3. Purchasing Department's Conclusions

In this section, the purchasing department should state its conclusions regarding the extent of the violation and the final disposition of the violation.

You should address the following areas:

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- a. A brief statement of the nature of the violation;
  - b. A brief description of the service or supplies that were purchased in violation of the Procurement Code and the value of any loss to the State;
  - c. A conclusion regarding the propriety of the department's selection process and the reasonableness of the department's minimum specifications, and a brief statement of reasons supporting that conclusion;
  - d. A conclusion as to whether the violation was inadvertent and unknowing, or knowing and intentional, and a statement of reasons supporting that conclusion; and
  - e. A conclusion, and brief statement of reasons supporting that conclusion, about the appropriateness of (a) disciplinary or other corrective action; (b) assessment of a civil penalty under AS 36.30.930(1); or (c) initiation of a criminal investigation under AS 36.30.930(2).

After reviewing the report, the Chief Procurement Officer may adopt the department's conclusions, return the report to the department for further inquiry, or refer the report to the Attorney General for consideration of criminal prosecution under AS 36.39.930(2) and AS 36.30.940.

Because this report will become an Official State record, it must be objective and factual. It should never contain unsupported allegations or unverified accusations, except when specifically labeled as an unsupported allegation or unverified accusation. To the extent it becomes necessary to identify a specific employee, disciplinary action that is also included within State personnel records, that part of the report should be contained in a separate section marked confidential and not open for public inspection, as provided by AS 39.25.080. If the report contains information that identifies a specific disciplinary action that will become part of personnel records, it should begin with the following statement:

\* \* \* \* CONFIDENTIAL NOTICE \* \* \* \*

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Those portions of this report, and the attachments thereto, which identify a specific employee's disciplinary action and which became part of the State personnel records, are confidential, and are not open to public inspection, as provided by AS 39.35.080.

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When it becomes necessary for a purchasing department to seek restitution from a person for costs and damages arising out of the violation under AS 36.30.930(1), and the person refuses to voluntarily repay the State, the matter should be referred to the Attorney General for civil enforcement and collection under AS 36.30.940.

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If at any time during an investigation it becomes apparent that a criminal violation has occurred, the purchasing department shall immediately notify the reviewing division. The Chief Procurement Officer, in consultation with the Office of the Attorney General, will determine how the investigation will then proceed.

**82.330 -- PROCUREMENT VIOLATIONS: CHIEF PROCUREMENT OFFICER REVIEW**

The purchasing department should send its completed procurement violation report to the Chief Procurement Officer. The Chief Procurement Officer will make a determination, including but not limited to the following:

1. This violation was the result of administrative error. The person(s) who contracted for the services and supplies resulting in this violation did not do so in a manner the person(s) knew to be contrary to the requirements of the State Procurement Code, or the regulations adopted under the Code, at the time the violation occurred. The purchasing department should handle corrective action through improved procedures, training, and/or as a personnel management matter.

2. The facts of this matter indicate that the person(s) who contracted for the services or supplies resulting in this violation did so in a manner the person(s) knew to be contrary to the requirements of the State Procurement Code, or the regulations adopted under the Code, at the time the violation occurred. The following civil penalties, under AS 36.30.930(1), should be invoked by the purchasing department:

2A. The State will return the services or supplies purchased in violation of the Procurement Code to the vendor for refund. Vendor return-to-stock charges, if any, are to be assessed against the person(s) who knowingly violated the Code.

2B. If the vendor refuses to accept the return of the service or supplies, the total purchase cost is to be assessed against the person(s) who knowingly violated the Code. In such an event, the services and supplies become the property of such person(s).

2C. If the vendor refuses to accept the return of the services or supplies, or the purchasing department determines that State retention of the services or supplies is in the State's best interest, any additional cost to the State for retaining the services or supplies, above their proper procurement cost, is to be assessed against the person(s) who knowingly violated the Code.

2D. The following additional damages to the State, having a demonstrated monetary cost to the State of \$\_\_\_\_\_, are to be assessed against the person(s) who knowingly violated the Code. These additional costs were calculated as follows:

3. Return the report to the purchasing department for additional information, as follows:

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4. Return the report to the purchasing department for additional or modified departmental conclusions, as follows:

5. Refer this violation to the Office of the Attorney General for review and possible criminal prosecution, under AS 36.30.930(2). Documentary evidence is available that indicates the person(s) involved in this purchase knowingly or intentionally, through scheme or artifice, sought to avoid the requirements of the State Procurement Code. (All documentary evidence must be attached and forwarded to the Office of the Attorney General, together with this report.)

**82.340 -- PROCUREMENT VIOLATIONS: ATTORNEY GENERAL REVIEW**

If the Chief Procurement Officer forwards the procurement violation to the Attorney General, the Attorney General should make one of the following determinations:

1. This case has been accepted for civil enforcement for collection of costs and damages.
2. Insufficient evidence is available to warrant civil enforcement at this time. Please provide the following information by \_\_\_\_\_.
3. This case has been declined for civil enforcement because of:
4. This case has been declined for prosecution because of:

**82.350 -- REMEDIAL TRAINING PROCEDURE**

At the request of a department or employee, or when the Chief Procurement Officer finds an apparent procurement violation that indicates an employee is procuring incorrectly, the Chief Procurement Officer will attempt to provide remedial training. If the employee has already received training in the area of interest, we will try to determine if the training was insufficient in some way. If so, we will adjust it. If not, the employee will be re-exposed to the training and have disciplinary action applied. Disciplinary action may include reduction of an employee's procurement authority. If the employee has not received training, we will provide it expeditiously. If our videotape library can address the area of error, the employee may be required to view specific tapes before his or her procurement authority is reinstated.

### **Appendix 1 – Items Not Covered By Procurement Code**

The following items do not fall under the Procurement Code. Departments expending funds for these items should have a rational, reasonable method of selecting the recipients of the expended funds. DOA review is not required.

- Items listed under AS 36.30.850(b).
- Membership dues in mission-related organizations.
- Conference attendance fees.
- Payments made to third parties on behalf of a second party when the payments, if made directly to the second party, would not have fallen under the Procurement Code.
- Contracts with R.E.A.A.S. (Rural Education Attendance Area)
- Transfers or expenditures of funds where the end product of the transaction does not result in consideration in the form of supplies, services, or professional services being returned to the State.