

# AAM 82. PROCUREMENT

## CHAPTER VIII: PROCUREMENT DISPUTES

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## CHAPTER VIII. Procurement Disputes

### **AAM 82.010 Aggrieved Respondents (07-99)**

Appeals and protests shall be treated in accordance with [AS 36.30](#) Article 8, [2 AAC 12](#) Article 13, and this Chapter of the Administrative Manual.

### **AAM 82.100 Protests of Small Procurements (06-18)**

An interested party must attempt to resolve the dispute informally with the procurement officer. 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 \$50,000 and under	Ten days from the solicitation or the award, whichever is later
Award of contract greater than \$50,000	Ten days from date of notice of award

If the protestor agrees, the Commissioner of the purchasing department may assign the protest to the procurement officer or other State of Alaska 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\(b\)](#).

## **AAM 82.200      Protests of Formal Procurements (04-14)**

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 authority of DOT&PF.

There are four types of protests:

1. Proposed award of a contract;
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.

## **AAM 82.210      Filing of a Protest (06-18)**

[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 transmitted to the respondent 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 transmitted by the protester, no matter what method, within the 10-day period but not received by the State of Alaska 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 consider the protest as timely under [AS 36.30.565\(b\)](#).

Protests about the solicitation itself 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, 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 competition 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.

<b>AAM 82.220</b>	<b>Contents of the Protest (06-18)</b>
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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 initial protest. 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 accept emailed or faxed protests bearing a signature. 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.

<b>AAM 82.230</b>	<b>Staying the Award (06-18)</b>
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If a protest is filed, the award may 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.

## **AAM 82.240**

### **Preparing Your Decision (06-18)**

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, even if not explicitly 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 your protest decision is accurate and reasonable. Be concise and explain your decision thoroughly, carefully avoiding opinion-based arguments 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 bidders or offerors. Be conservative; do not overcompensate for the error to the detriment of your department and competitors.

Your decision must 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-day period you have to prepare your decision is counted in the same manner as the protest period. Send your decision to the protestor by certified mail, return receipt requested, or other method that provides proof of the date it was received by the protestor, such as electronic certified receipt. 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.

#### **AAM 82.250      Requesting an Extension**

You may be able to extend the 15-day protest response period by up to 30 days (for a total of 45 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.

#### **AAM 82.260      Chart of Protest/Appeal and Related Activities (06-18)**

<i>Time Period</i>	<i>Activity</i>
Protest Period	Ten days following transmission of "Notice of Intent to Award" to interested parties.,.
Procurement Officer Decision on Protest	15 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.

<i>Time Period</i>	<i>Activity</i>
Procurement Officer Protest Report	Ten days following receipt of appeal.
Appellant Comments	Ten days following transmission of procurement officer protest report to Commissioner and Protester.
Commissioner Acceptance or Rejection of Appeal	15 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.

## **AAM 82.300 Procurement Violations: Introduction (06-18)**

Most 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 potentially discipline in consultation with the Division of Personnel and Labor Relations. 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, Shared Services of Alaska for other procurements).

## **AAM 82.310 Procurement Violations: Applicable Statutes (06-18)**

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\(2\)](#), and 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\(2\)](#):

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 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 to undertake criminal prosecution. Law enforcement authorities will also need to determine whether 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.

**AAM 82.320**

**Procurement Violations: Report (06-18)**

The purpose of a Procurement Violation report 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 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 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 handled through personnel actions taken by an individual department.

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

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

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 their actions followed 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 because 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 because 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:

- 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 36.30.930\(2\)](#) 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. If it becomes necessary to identify a specific employee, and disciplinary action taken 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 a 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](#).

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.

<b>AAM 82.330</b>	<b>Procurement Violations: Chief Procurement Officer Review (06-18)</b>
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The purchasing department should send its completed procurement violation report to the Chief Procurement Officer. The Chief Procurement Officer will decide, 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:

- a. 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.
  - b. 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).
  - c. 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.
  - d. 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
  4. Return the report to the purchasing department for additional or modified departmental conclusions
  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.)

## **AAM 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:

<b>AAM 82.350</b>	<b>Remedial Training Procedure (06-18)</b>
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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, the Shared Services of Alaska, Statewide Contracting Office will try to determine if the training was insufficient in some way. If so, the training will be adjusted. If not, the employee will be required to repeat the training and possible disciplinary action taken including reduction of an employee's procurement authority. If the employee has not received training, the Shared Services of Alaska, Statewide Contracting Office will attempt to provide it expeditiously.

<b>Appendix 1</b>	<b>Items Not Covered By Procurement Code (06-18)</b>
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The following items do not fall under the Procurement Code. Departments expending funds for the items below should include documentation in the procurement file that clearly describes the logical, rational, reasonable, method that was used in selecting the recipients of the expended funds. The method described should demonstrate that state funds are expended in a fiscally prudent manner and must demonstrate that competition, if practicable under the circumstances, was obtained. While DOA review and approval is not required, contact the Shared Services of Alaska, Statewide Contracting Office for clarification and guidance when utilizing the following items:

- Items listed under [AS 36.30.850\(b\)](#).
- Membership dues in mission-related organizations.
- Conference attendance fees.
- Contracts with R.E.A.A.S. (Rural Education Attendance Area)