



ALASKA PUBLIC PROCUREMENT ACADEMY LEVEL I

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LEVEL I – \$1 TO \$25,000

PUBLIC PROCUREMENT IN ALASKA

WHAT IS PROCUREMENT?

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

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

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

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

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

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

INTRODUCTION TO PUBLIC PROCUREMENT

ALASKA’S PROCUREMENT STRUCTURE

The State of Alaska’s executive branch has a mostly centralized procurement structure.

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

Through the commissioner of the Department of Administration, the chief procurement officer delegates the authority to procure supplies and services, with restrictions, to the commissioner of each executive branch agency, who may further delegate this authority to others in their own department. In general, this delegation allows each department to procure for their own needs

in unlimited amounts. The delegation document itself is available at:

<https://oppm.doa.alaska.gov/media/1447/delegat.pdf>

The authority to procure for statewide and multi-agency needs is not delegated and remains with the chief procurement officer. The only agency delegated this authority is the Department of Administration, Office of Procurement and Property Management (OPPM).

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

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

PROCUREMENT ACRONYMS & ABBREVIATIONS

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

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

*Table 1 Guide to Procurement Acronyms & Abbreviations***EXEMPT AGENCIES AS 36.30.**

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

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

*Figure 1 Exempt Agencies***EXEMPT EXPENDITURES AS 36.30**

Like some agencies are exempt from the procurement code, **AS 36.30.850(b)** sets forth 51 types of expenditures of state money that are exempt from the procurement code.

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

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

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

UNAUTHORIZED EXPENDITURES

Tangible items, services, and training that are required to conduct state business are generally authorized. Expenditures that are not essential to state operations are generally unauthorized. Unauthorized expenditures include those that have no clear public purpose or benefit individual employees more than the state.

The following list includes examples of items that are generally not authorized. An agency head may specifically authorize listed items when the mission of the agency or the business requirements for individual job duties justify such an expenditure.

Printing: Printing of a personal nature, such as personal letterhead stationery, holiday cards, or personal photographs. (Photo galleries maintained as state property are generally authorized.)

Fixtures and Equipment: Nonessential office fixtures and equipment such as personalized items, occasional furniture, wall pictures or framing of same, pen and pencil desk sets, etc. (Microwave ovens, refrigerators, and other reasonable kitchen equipment for offices and break rooms may be purchased with approval by the appropriate agency head.)

Determinations on furnishings such as carpeting, draperies, and planters must be made by the Department of Transportation and Public Facilities, depending on who manages the building. State expenditures for purchase of these items without prior approval are prohibited.

Foodstuffs and Utensils: Coffee, doughnuts, or other food, unless reviewed by the appropriate agency head and deemed necessary for such state functions as training, conferences, board meetings, or other gatherings, and not to exceed a reasonable amount.

Dues: Dues for personal memberships in professional and technical associations and organizations when state agency membership is available.

Other: Any items similar in nature or content to the above listed items that cannot be justified as essential in the administration or conduct of a state office or program.

Expenditures on employee recognition and service awards are authorized in accordance with guidelines developed by the Division of Personnel. See AAM 100.090.

Guidance should be sought from the Division of Finance when questionable situations arise.

ETHICS IN PUBLIC PROCUREMENT

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

All State of Alaska executive branch employees are bound by the [Executive Branch Ethics Act](https://www.law.alaska.gov/doclibrary/ethics/EthicsAct.html) <https://www.law.alaska.gov/doclibrary/ethics/EthicsAct.html> found in Alaska Statute 39 and the [Executive Branch Code of Ethics](https://www.law.alaska.gov/doclibrary/ethics/EthicsCode.html) <https://www.law.alaska.gov/doclibrary/ethics/EthicsCode.html> found in Alaska Administrative Code 9 AAC 52, which equates public office to public trust. The Code of Ethics further states that any effort to benefit a personal or financial interest through official action is a violation of public trust.

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

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

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

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

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

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

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

ALASKA PROCUREMENT OFFICER CERTIFICATION PROGRAM

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

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

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

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

CERTIFICATION AND DELEGATION

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

- **LEVEL I PROCUREMENT CERTIFICATION**

Required for procurement officers that perform small procurements from \$5,000 to \$25,000.

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

- **LEVEL II PROCUREMENT CERTIFICATION**

Required for procurement officers that perform small and/or alternate procurements from \$25,000.01 to \$100,000.

Recertification Requirements: *4 credits or a total of 8 hours of procurement-related classes every 3 years, at least 2 credits equal to 4 hours must be OPPM procurement recertification classes. Classes provided by OPPM, and other approved organizations will count towards recertification on a 2 hour = 1 credit basis.*

- **LEVEL III PROCUREMENT CERTIFICATION**

Required for procurement officers that perform formal and/or alternate procurements above \$100,000.

Recertification Requirements: *8 credits or a total of 16 hours of procurement-related classes every 3 years, at least 4 credits equal to 8 hours must be OPPM procurement recertification classes. Classes provided by OPPM, and other approved organizations will count towards recertification on a 2 hour = 1 credit basis.*

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

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

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

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

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

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

PROCUREMENT BASICS

BEFORE YOU BEGIN

WRITTEN DETERMINATIONS

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

There are a number of specific written determinations required by the procurement code at different points in the procurement process. A guide to all mandatory written determinations can be found on the OPPM <https://oppm.doa.alaska.gov/policy-oversight/policy-resources/user-guide-matrixes/> User Guide & Matrixes, Office of Procurement and Property Management, State of Alaska page or by following: <https://oppm.doa.alaska.gov/media/1744/written-determinations.pdf>

PURCHASING DOCUMENTS

OPPM maintains a list of all forms needed to conduct a procurement at: <https://oppm.doa.alaska.gov/purchasing/documents-and-forms/> This site has the latest revision of forms, policies, and guides. It is recommended that you check this website before starting a new procurement to ensure you are using the most recent procurement documents available.

DEPARTMENTAL CONTRACTS

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

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

STATEWIDE CONTRACTS AGREEMENTS

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

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

The Statewide Contracts Agreement is located online at: <https://oppm.doa.alaska.gov/alaska-centers-of-procurement-excellence/alaska-centers-of-procurement-excellence-acoep/>

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

SMALL PROCUREMENTS

WHAT IS A SMALL PROCUREMENT?

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

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

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

CONDUCTING A SMALL PROCUREMENT \$25,000 AND UNDER

THE STATE OF ALASKA HAS SEVERAL PROCUREMENT METHODS AVAILABLE TO ENSURE THAT WHEN AN AGENCY ACQUIRES GOODS OR SERVICES, THEY ARE PROCURED AT THE BEST POSSIBLE COST TO MEET THE NEEDS OF THE AGENCY WHILE PROMOTING FAIR AND OPEN COMPETITION AND PROTECTING THE INTERESTS OF BOTH THE STATE AND THE VENDORS.

COMPETITION LEVELS AND METHODS

2 AAC 12.400 describes three levels of competition for small procurements depending on the dollar amount, **including all renewals**. Note that each level of competition is inclusive of the upper limit shown. For instance, a \$25,000 procurement may be conducted using reasonable and adequate procedures while a procurement *exceeding* \$25,000 must be procured using the next higher level of competition.

Use the [small-procurement-matrix.pdf \(alaska.gov\)](https://small-procurement-matrix.pdf)

<https://oppm.doa.alaska.gov/media/1746/small-procurement-matrix.pdf> to assist in determining what competitive process to use for each dollar amount, what forms to use, and what procurement records must be kept. The Small Procurement Matrix is included at the end of this chapter and is also located on the OPPM **“Policy” User Guides & Matrixes** page.

REASONABLE & ADEQUATE PROCEDURES: \$0 - \$25,000

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

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

This is typically interpreted to mean that the closer you get to the \$25,000 upper limit, the more competition you should be seeking for the supplies or services you are seeking.

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

The \$25,000 limit applies to procurements of supplies and services. **2 AAC 12.400(b)** contains varying reasonable and adequate procedures thresholds for other specific supplies and services, such as for fish feed for hatchery use, passenger transportation, and legal services. Check with your procurement section before procuring under one of these limits to ensure it applies.

COMPETITION

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

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

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

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

SUPPLIES vs. SERVICES

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

AS 36.30.990(26) defines “supplies” as:

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

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

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

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

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

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

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

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

PRICE vs. VALUE

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

The two primary selection methods available under the procurement code include: **price based** Request for Quotation (RFQ) and Invitation to Bid (ITB) solicitations or **value based** Informal Request for Proposal (IRFP) or Request for Proposal (RFP) solicitations. They allow a procurement officer to decide whether to base a contract award solely on cost or to consider other criteria,

such as depth of experience, the vendor’s understanding of the state’s needs, and how the vendor will meet the state’s needs.

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

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

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

Table 2 Price Based vs. Value Based

PROFESSIONAL SERVICE OR NON-PROFESSIONAL SERVICE

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

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

Table 3 Examples of Professional and Non-Professional Services

EMPLOYER/EMPLOYEE OR INDEPENDENT CONTRACTOR

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

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

SPECIFICATIONS

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

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

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

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

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

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

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

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

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

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

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

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

Table 5 Specification Tips

PREFERENCES

The State of Alaska has nine different preferences that may be claimed by vendors. A guide to all of these preferences and examples of how to apply them may be found at: <https://oppm.doa.alaska.gov/media/1453/pref1.pdf> A preference is applied as a percentage reduction of the bidder’s or offeror’s price **for evaluation purposes only** and if a vendor qualifies for more than one preference, the percentage of each preference will be added together and subtracted from the bid or proposal price **for evaluation purposes only**. A contract will be awarded for the full amount of the bid or proposal regardless of any preferences applied.

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

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

“Alaska bidder” means a person who

- (A) holds a current Alaska Business License;*
- (B) submits a bid for goods, services, or construction under the name as appearing on the person’s current Alaska Business License;*
- (C) has maintained a place of business within the state staffed by the bidder or an employee of the bidder for a period of six months immediately preceding the date of the bid;*
- (D) is incorporated or qualified to do business under the laws of the state, is a sole proprietorship and the proprietor is a resident of the state, is a limited liability company organized under AS 10.50 and all members are residents of the state, or is a partnership under AS 32.05 or AS 32.11 and all partners are residents of the state; and*
- (E) if a joint venture, it composed entirely of ventures that qualify under (1)-(4) of this subsection.*

Figure 2 Alaska Bidder Preference Requirements

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

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

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

RESPONSIVENESS AND RESPONSIBILITY

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

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

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

- An ITB requires bids to be received at the purchasing agency’s office no later than 1:00pm on the opening date and the bid is received at 2:00pm.

- A bid is received with no pricing on the bid schedule.
- An ITB required 1,000 widgets, but the bidder only provided pricing for 250 widgets.

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

WHAT IS A CONTRACT?

Black's Law Dictionary defines a contract as:

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

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

- **OFFER**
A willingness to enter into a contract based on certain terms. When a state agency receives acceptable responses as part of a procurement, these qualify as an offer.
- **ACCEPTANCE**
A willingness to be bound by the terms and conditions of the offer. This includes the terms and conditions set forth in the procurement issued by a state agency that have become part of the offer, plus additions such as pricing and delivery terms.
- **CONSIDERATION**
Anything of value promised to another. Typically, the state promises money in exchange for goods or services.
- **LEGAL OBLIGATION**
An intent by all parties to the agreement to enter into a legally binding contract.

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

PROCUREMENT PITFALLS

FRAGMENTATION

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

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

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

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

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

Below are some examples of artificial fragmentation:

Artificial Fragmentation	Proper Procurement
An agency conducts three separate procurements to obtain three boilers at \$20,000/ea. so that they may use catalog prices as verbal quotations.	The agency should have conducted one \$60,000 procurement to obtain all three boilers using written quotations.
A procurement officer uses reasonable and adequate judgment to award a \$25,000 contract to a vendor and includes four 1-year contract renewal options at \$25,000/year.	The procurement officer must consider all renewal options in the total value of the contract. In this case, the procurement officer should have procured this as a \$125,000 contract.
Within a one year period, a division purchases the same \$75,000 consulting services four times using written quotations.	The division failed to consider the predictability of the services. An as-needed contract worth up to \$300,000 should have been established for these services using a formal procurement process.

Table 6 Artificial Fragmentation Examples

EXPIRED CONTRACTS

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

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

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

SMALL PROCUREMENT PROTESTS

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

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

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

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

TIPS AND RESOURCES

BASIC CONTRACT ADMINISTRATION

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

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

Contract administration includes:

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

Performance issues must be addressed immediately in writing with a cure letter. A sample cure letter is included in [Sample Cure Letter](#).

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

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

RECORD RETENTION

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

The Department of Education and Early Development, Division of Libraries, Archives, and Museums, Alaska State Archives Section publishes a retention schedule that shows how long certain files must be kept. This schedule can be found at: <https://archives.alaska.gov/rims/index.html>

The schedule for procurement records is Item No. 45.

<https://archives.alaska.gov/documents/rims/schedules/admin/02-45-1.pdf>

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

OTHER RESOURCES

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

- **NIGP ONLINE DICTIONARY OF PROCUREMENT TERMS**
http://www.nigp.org/eweb/StartPage.aspx?Site=NIGP&webcode=pd-ep_online_dict
- **ALASKA OFFICE OF ADMINISTRATIVE HEARINGS - PROCUREMENT DECISIONS**
<https://aws.state.ak.us/OAH>

SMALL PROCUREMENT MATRIX

ESTIMATED PRICE OF PROCUREMENT	MINIMUM COMPETITION REQUIRED	FORMS USED BY AGENCY	PUBLIC NOTICE REQUIREMENT	AWARD METHOD	KEEP IN PROCUREMENT FILE
<p>\$25,000 or Less*</p> <p>AS 36.30.320 and 2 AAC 12.400(b)</p> <p>*Reasonable and adequate procedures also apply purchases with a State Purchasing Card and to certain higher value procurements up to \$50,000, see 2 AAC 12.400(b).</p> <p>TOTAL value of procurement must include all options to renew or extend. For example:</p> <ul style="list-style-type: none"> • If contract runs for 3 years, it is the total for the 3 years. • If contract runs for 1 year with 2 one-year renewal options, it is the total for 3 years. <p><i>If professional service, ensure contract meets definition per AAM 81.430.</i></p>	<p>Use reasonable and adequate procedures that ensure fairness to potential bidders and competition commensurate with the circumstances of the procurement considering price, mission requirements, and available competition.</p> <p>Quote(s) or informal proposal(s) must be solicited from Alaskan vendors prior to soliciting non-Alaskan vendors, unless the procurement officer determines in writing that soliciting Alaskan vendors is not practicable.</p> <p>May not artificially fragment the purchase to avoid a higher level of competition.</p> <p>Postings in electronic media may satisfy the competitive solicitation requirement.</p>	<p>Contract Award, Delivery Order, invoice, or other forms that provide record keeping and accountability.</p> <p><i>Professional Services contracts must be in writing. The ASPS form may be required by agency Policy & Procedure (if used, the number is assigned by agency).</i></p>	<p>No minimum requirement.</p>	<p>Select the low quote or most advantageous proposal.</p> <p>Include 5% Alaska Bidder Preference, 5% Alaska Veteran Preference, 10% Alaskan Offeror Preference (for informal proposals if a numerical rating system is used), and all other statutory and regulatory preferences that apply.</p> <p>Written determination required if awarding to a non-resident per AS 36.30.362.</p> <p>Protest procedures under 2 AAC 12.695 apply.</p>	<p>Identify agency official responsible for the purchase of supply or service acquired and the vendor's name and price.</p> <p>Copy of contract and any amendments.</p> <p>If reasonable and adequate procedures involve contacting more than one vendor, identify each vendor solicited and their response.</p> <p>Written determination if impracticable to solicit quote(s) or informal proposal(s) from Alaska vendors only.</p> <p>Written determination if awarding to a nonresident (AS 36.30.362)</p> <p><i>Copy of ASPS (if used).</i></p>

ESTIMATED PRICE OF PROCUREMENT	MINIMUM COMPETITION REQUIRED	FORMS USED BY AGENCY	PUBLIC NOTICE REQUIREMENT	AWARD METHOD	KEEP IN PROCUREMENT FILE
<p>\$25,001 to \$50,000</p> <p>AS 36.30.320 and 2 AAC 12.400(c)</p> <p>TOTAL value of procurement must include all options to renew or extend. For example:</p> <ul style="list-style-type: none"> If contract runs for 3 years, it is the total for the 3 years. If contract runs for 1 year with 2 one-year renewal options, it is the total for 3 years. <p><i>If professional service, ensure contract meets definition per AAM 81.430.</i></p>	<p>At least three firms or persons shall be contacted for quotes or informal proposals. The solicitation and responses may be either written or verbal. You must include the specifications, award criteria, and date and time responses are due.</p> <p>Seek minimum number of quotes or informal proposals from Alaskan vendors prior to soliciting non-Alaskan vendors, unless the procurement officer determines in writing that soliciting from Alaskan vendors is not practicable.</p> <p>May not artificially fragment to avoid a higher level of competition.</p> <p>Postings to the OPN may satisfy the competitive solicitation requirement.</p>	<p>Contract Award, Delivery Order, invoice, or other forms that provide record keeping and accountability.</p> <p>RAP if required.</p> <p><u>PROFESSIONAL SERVICES</u></p> <p><i>The ASPS form may be required by agency Policy & Procedure (if used, the number is assigned by agency).</i></p> <p><i>Standard Agreement Form (#02-093) or Standard Contract Form (SCF), appropriate appendices, or a document approved by the AG's Office.</i></p>	<p>Public notice of solicitation occurs when vendor is contacted for quote or informal proposal.</p> <p>Verbal notice of award provided if contacted by vendors.</p>	<p>Award in accordance with the specifications and award criteria in the solicitation to the responsive and responsible bidder providing the low quote or most advantageous informal proposal.</p> <p>Include 5% Alaska Bidder Preference, 5% Alaska Veteran Preference, 10% Alaskan Offeror Preference (for informal proposals if a numerical rating system is used), and all other statutory and regulatory preferences that apply.</p> <p>Written determination required if awarding to a nonresident per AS 36.30.362.</p> <p>Informal RFP's must weight price no lower than 40% for professional/non-professional services and 60% for supplies, unless department Commissioner approves a waiver in advance.</p> <p>Protest procedures under 2 AAC 12.695 apply.</p>	<p>Identify person who made the solicitation, the specifications, award criteria, date of solicitation, date & time responses were due, names of vendors contacted, summary of verbal responses, copies of all quotes or informal proposals received, and justification for award.</p> <p>Copy of contract, amendments and ASPS or RAP forms if used.</p> <p>Written determination if impracticable to solicit three quotes or informal proposals from Alaska vendors only.</p> <p>Written determination if awarding to a nonresident (AS 36.30.362)</p> <p>RAP if used.</p>

ESTIMATED PRICE OF PROCUREMENT	MINIMUM COMPETITION REQUIRED	FORMS USED BY AGENCY	PUBLIC NOTICE REQUIREMENT	AWARD METHOD	KEEP IN PROCUREMENT FILE
<p>\$50,001 to \$100,000</p> <p>AS 36.30.320 and</p> <p>2 AAC 12.400(d)</p> <p>TOTAL value of procurement must include all options to renew or extend. For example:</p> <ul style="list-style-type: none"> If contract runs for 3 years, it is the total for the 3 years. If contract runs for 1 year with 2 one-year renewal options, it is the total for 3 years. <p><i>If professional service, ensure contract meets definition per AAM 81.430.</i></p>	<p>At least three firms or persons shall be contacted for quotes or informal proposals. The solicitation and responses must be in writing.</p> <p>Seek minimum number of quotes or informal proposals (three) from Alaskan vendors prior to soliciting non-Alaskan vendors, unless procurement officer determines in writing that soliciting quotes from Alaskan vendors is not practicable.</p> <p>May not artificially fragment the purchase to avoid a higher level of competition.</p> <p>Postings in electronic media may satisfy the competitive solicitation requirement.</p> <p>Service contracts above \$50,000 must be performed in the United States unless a waiver has been approved by the Chief Procurement Officer in advance.</p>	<p>Request for Quotation and Addendum I as applicable,</p> <p>Or</p> <p>Informal Request for Proposals (written).</p> <p>Contract Award, Delivery Order, invoice, or other forms that provide record keeping and accountability.</p> <p>RAP if required.</p> <p><u>PROFESSIONAL SERVICES</u></p> <p><i>The ASPS form may be required by Agency P&P (if used, the number is assigned by agency).</i></p> <p><i>Standard Agreement Form (#02-093) or Standard Contract Form (SCF), appropriate appendices, or a document that has been approved by the AG's Office.</i></p>	<p>Public notice of solicitation occurs when vendor is contacted for quote or informal proposal.</p> <p>Written notice of award is sent to all vendors who provided a quote or informal proposal.</p>	<p>Award in accordance with the specifications and award criteria in the solicitation to the responsive and responsible offer providing the low quote or most advantageous informal proposal.</p> <p>Include 5% Alaska Bidder Preference, 5% Alaska Veteran Preference, 10% Alaskan Offeror Preference (for informal proposals if a numerical rating system is used), and all other statutory and regulatory preferences that apply.</p> <p>Notice of Award must be in writing to all vendors who responded to solicitation.</p> <p>Written determination required if awarding to a nonresident per AS 36.30.362.</p> <p>Informal RFP's must weight price no lower than 40% for professional/non-professional services and 60% for supplies, unless department Commissioner approves a waiver in advance.</p> <p>Postings in electronic media may satisfy the notice of award requirement.</p> <p>Protest procedures under 2 AAC 12.695 apply.</p>	<p>A copy of the solicitation, the names of the firms or persons contacted and copies of all written quotations or informal proposals received, notice of award, and justification for award.</p> <p>Copy of contract and any amendments.</p> <p>Written determination if impracticable to solicit three quotes or informal proposals from Alaska vendors only.</p> <p>Written determination if awarding to a nonresident (AS 36.30.362).</p> <p>RAP if used.</p>

SAMPLE CURE LETTER

CERTIFIED MAIL NO. _____
RETURN RECEIPT REQUESTED

Date

Contractor

Address

City, ST ZIP

Attn: _____

RE: Contract # _____ - Potential Default Action

Dear Mr./Ms. _____:

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

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

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

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

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

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

Sincerely,

T. Boone Purchaser
Procurement Officer

AN ANTITRUST PRIMER FOR PROCUREMENT PROFESSIONALS

AUTHOR

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ABSTRACT

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

FEDERAL ANTITRUST ENFORCEMENT.

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

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

BID RIGGING, PRICE FIXING, AND OTHER TYPES OF COLLUSION

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

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

Price fixing among competitors can take many forms. For example, competitors may take turns being the low bidder on a series of contracts, or they may agree among themselves to adhere to published list prices. It is not necessary that all competitors charge exactly the same price for a given item; an agreement to raise present prices is enough to violate the law. Other examples of price fixing include: (1) agreements to establish or adhere to uniform price discounts; (2) agreements to

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

TYPICAL ANTITRUST BID RIGGING VIOLATIONS

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

- **Bid Suppression** - In "bid suppression" or "bid limiting" schemes, one or several competitors (who would otherwise be expected to bid or who have previously bid) refrain from bidding or withdraw a previously submitted bid, so that a competitor's bid will be accepted.
- **Complementary Bidding** - "Complementary bidding" (also known as "protective" or "shadow" bidding) occurs when competitors agree to submit token bids that are too high to be accepted (or if competitive in price, then on special terms that will not be acceptable). Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine bidding. Having multiple bidders can lead a purchaser to believe that prices are competitive when this may not be the case, as collusive complementary bids have been arranged.
- **Bid Rotation** - In "bid rotation," all vendors participating in the scheme submit bids, but by agreement take turns being the low bidder. A strict bid rotation defies the law of chance and suggests collusion.

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

- **Subcontracting** - Subcontracting is another area for attention. If losing bidders or non-bidders frequently receive subcontracts from the successful low bidder, the subcontracts (or supply contracts) may be a reward for submitting a non-competitive bid or for not bidding at all.
- **Market Division** - Market division schemes are agreements to refrain from competing in a designated portion of the market. Competing firms may, for example, allocate specific customers or types of customers, so that one competitor will not bid (or will submit only a complementary bid) on contracts let by a certain class of potential customers. In return, his competitors will not bid on a class of customers allocated to him. For example, a vendor of office supplies may agree to bid only on contracts let by certain Federal agencies, and refuse to bid on contracts for private companies.

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

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

CHECKLIST FOR POSSIBLE COLLUSION

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

SUSPICIOUS STATEMENTS

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

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

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

CONDITIONS FAVORABLE TO COLLUSION

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

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

WHAT YOU CAN DO

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

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

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

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

*Assistant Attorney General
Civil Division, Commercial & Fair Business
Department of Law
1031 W 4th Ave, #200
Anchorage, AK 99501*

SAMPLE PROTEST RESPONSE LETTER

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

Dear Mr. Doe:

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

ISSUE

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

RULE

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

(a) Bids received after the bid due date and time indicated on the invitation to bid may not be accepted unless the delay was due to an error of the contracting agency.

APPLY

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

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

CONCLUSION

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

Sincerely,
T. Boon Procurer

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

Dear Mr. Doe:

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

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

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

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

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

After considering the information submitted the commissioner will decide:

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

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

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

Sincerely,

J. Smith Procurer
Contracting Manager

GUIDE TO SMALL PROCUREMENT PROTESTS

FIRST STEP

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

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

SECOND STEP

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

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

Protest must contain:

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

THIRD STEP

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

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

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

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

CLASS EXERCISES

RESPONSIVENESS CASE STUDY #1

OAH No. 08-0123-PRO

Case:

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

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

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

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

Questions:

1. Should DNR accept Kalen's proposal? Why or why not?
2. What public procurement principle is in question?
3. Should DNR consider DHL's assurances to Kalen that the proposal would be delivered by noon in their decision?

RESPONSIVENESS CASE STUDY #1

OAH No. 08-0123-PRO

Answers:

1. No. Late is late – the procurement code does not provide a contracting agency with discretion to disregard the time set for receipt of proposals in the request for proposals unless the contracting agency itself makes an error. There was no error on behalf of the contracting agency in this case.
2. Responsiveness. The proposal did not meet the state’s acceptability requirements.
3. No. Again, unless the late delivery was caused by the contracting agency, there is no method under procurement code to accept a late proposal.

RESPONSIVENESS CASE STUDY #2

OAH No. 10-0258-PRO

Case:

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

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

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

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

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

Questions:

1. Is CMI's failure to use the new bid schedule for Lot 2 a basis for a determination of non-responsiveness?
2. Can the procurement officer waive this failure as a minor informality?
3. Is DOTPF's horsepower specification "material"? If so, in what way?

RESPONSIVENESS CASE STUDY #2

OAH No. 10-0258-PRO

Answers:

1. Yes. Because CMI provided no cost at all for the additional equipment required on the new Lot 2 bid schedule, this omission affects price and therefore is a basis for a determination of non-responsiveness. Because Lots 1 and 2 were to be combined for evaluation, CMI was found non-responsive in both lots.
2. No. Minor informalities are those that do not affect price, quality, quantity, delivery, or contractual conditions. The failure by CMI to include pricing for two required items directly affects price.
3. Yes. DOTPF showed a reasonable need for the horsepower specifications as written. CMI did not demonstrate that the specifications were unduly restrictive or that it was an abuse of discretion for the procurement officer to conclude that CMI's bid was non-responsive for failure to comply with the specifications. This particular specification relates to "quality".

RESPONSIVENESS CASE STUDY #3

Case:

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

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

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

Questions:

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

RESPONSIVENESS CASE STUDY #3

Answers:

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

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

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

REQUEST FOR LEVEL I PROCUREMENT CERTIFICATION

Course Location

Course Date

I request credit for this course towards completing the Level I Alaska Procurement Officer Certificate. I certify:

- I attended the entire course.
- I understand the course topic information presented in this course as follows:
 1. Define basic purchasing principals and legal requirements needed to conduct small procurements. Course topics include:
 - Contracting for small procurements in accordance with AS 36.30, 2AAC 12, AAM Chapters 81 and 82, and agency policies and procedures
 - Applying statutes and regulations regarding source selection and exemptions
 - Identifying and applying preferences
 - Avoiding artificial fragmentation
 - Applying statutes and regulations regarding informal proposals and quotations using standard State procurement forms
 - Including requirements/specifications for small procurements
 - Ensuring legal competition at the appropriate level
 - Evaluating quotes and proposals and awarding contracts
 - Recording, documenting and managing contract administration with regard to small procurements
 - Adhering to statutes and regulations regarding alternate procurements, protests, appeals, and violations
 - Adhering to Alaska Statute Title 39.52, Code of Ethics in performing all procurements
 - Define the need and procedures for handling small procurement protests
 2. Define the need and procedures for procurements situations requiring an alternate procurement
 3. Define the need and procedure for handling purchasing violations
 4. Recognize the concepts and identify the regulations required to legally conduct procurements up to \$50,000
 5. Demonstrate legal, ethical, and competent performance on the job when conducting small procurements, alternate procurements, adhering to the critical path of handling protests, avoiding purchasing violations, and adhering to the administrative manual policy and procedures when investigating purchasing violation incidents.
- I recognize the importance of the concepts presented.
- I understand I am now accountable for competent, effective, legal, and ethical interpretation and application of this information.

We want your feedback! Please help us improve by answering the following questions:

	<i>Poor</i>			<i>Great</i>
1. What was your overall satisfaction with this course?	1	2	3	4
2. Was the course content clear and easy to understand?	1	2	3	4
3. Was the course length and pace appropriate for the topic?	1	2	3	4

Additional comments?

SIGNATURE	PRINTED NAME	DATE

Please note that if you feel unable to demonstrate competent performance on the job in this subject matter area, do not sign this Course Completion Sheet. You may register for this course again in order to learn the course material and become competent to apply the information. There is no charge to your agency to re-take this course within the next year.

Please sign and email to lois.lemus@alaska.gov.

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