

# STATE OF ALASKA



## SMALL PROCUREMENT MANUAL

FOR

## CONSTRUCTION PROJECTS

July 2020 Edition

PREPARED BY

DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES  
(Contracting and Appeals Section)



## Introduction – General Information

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Under AS 36.30.015 and 2 AAC 12.740, the Commissioner of the Department of Transportation & Public Facilities (DOT&PF) delegates the authority to contract for construction related small procurements to the Department's Regional Directors and Contracting Officers, and to certain Delegated Operating Agencies.

AS 36.30.320 establishes limitations for small procurements for construction contracting and places such procurements into categories, each having a monetary limit and its own set of procedural rules. These rules are codified in 2 AAC 12.400, Article 06.

This Manual sets forth the standards, conditions, and guidelines for small procurements (less than \$200,000) that are construction related.

When certain Policies and Procedures (P&P's) are herein referenced, they are to be used in conjunction with this Manual. DOT&PF P&P 10.01.011 Small Procurements is of particular value. For other DOT&PF policies and procedures affecting small procurements (generally, Policy & Procedures Chapters 5 & 10) visit:

[http://dot.alaska.gov/admsvc/pnp/policy\\_and\\_procedures.cfm](http://dot.alaska.gov/admsvc/pnp/policy_and_procedures.cfm)

Refer to the DOT&PF Professional Services Agreement (PSA) Manual for direction in the procurement of professional services.

Refer to DOA Administrative Manual for small procurements that are not construction related.

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### Authority:

Alaska Statute 36.30.320(a);

Alaska Administrative Code 2 AAC 12.400;

Policy & Procedures, Chapter 10, Procurement and Property



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# 1. Solicitation

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## 1.1 Small Procurement Categories

The small procurement thresholds (cost categories) for construction related solicitations are;

- less than \$10,000;
- from \$10,001 to \$50,000; and
- from \$50,001 to \$200,000 (state), or
- from \$50,001 to \$150,000 (federal)

**At any dollar amount, a written contract is required.**

## 1.2 Category Thresholds

An award may not be made in excess of the specific small construction procurement category initially used - this is because each successive monetary level has more stringent solicitation requirements. (See also Chapter 3, section 3.12, "Changes to the Contract")

An accurate project cost estimate is pivotal to the small procurement process. If the estimate is in error, even by a few dollars, it may result in issuing a new solicitation.

## 1.3 The Cost Estimate

The estimated cost of the contract must be initially established so that the proper solicitation process is followed. If the estimate is within 20% of the upper dollar limit for one of the small procurement categories, procedures for the next higher cost category should be used. This will prevent not being able to award the contract because the cost estimate was too low.

*If, after the quotations have been opened and, considering potential change orders, it is possible that the final contract value will exceed \$200,000, the solicitation is best canceled and the project re-solicited as a Competitive Sealed Bid.*

The Agency's cost estimate need not be held confidential unless the disclosure of the estimated cost would adversely affect the State's ability to obtain the best price. There is currently

no regulation, policy or procedure that prohibits a Procurement Agency from divulging its cost estimate before quote opening.

Three acceptable methods of cost estimating are:

- (a) Detailed cost breakdowns (preferred).
- (b) Estimates based upon historic construction cost data.
- (c) Published cost guides

The cost estimate and the process used must be documented in the procurement file. If all quotes received exceed the small procurement limit, this information will be instrumental in documenting reasons for their next step.

### The Detailed Cost Breakdown

Cost out the project as if you were quoting on the work yourself. This involves contacting material suppliers, equipment rental yards, specialty shops, etc.

Also, get a good knowledge of all current labor and supervisory rates of pay (see the Department of Labor and Workforce Development, Labor Standards and Safety Division, Wage and Hour Administration, Publication No. 600 for wage rates). The total of material, rental, subcontractor, and labor costs constitute the best estimate of the construction cost.

Then, your total should generally be multiplied by a factor of 1.15 for overhead, which includes bonds, insurance, home office expenses, loan repayments, etc. The resultant number is again then escalated by a factor of 1.10 to 1.15 for contingencies and profit.

### Historic Construction Cost Data

Past costs for similar projects also give a good indication of the cost of the proposed work. Adjust historical figures for inflation as appropriate.

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## Published Cost Guides

If historical data are unavailable, a published cost guide works well. A quality guide will include instructions and a series of cost adjustment factors for materials, supplies, and labor based on project location. Some upward adjustment to prices may be required for Alaska's remote projects.

## 1.4 Developing Basic Plans and Specifications

The verbal method of explaining plans and specifications should be avoided. A written document helps minimize confusion and protects both parties in a dispute.

The scope statement should clearly define the details and the limits of the proposed effort. Successful construction contract administration is directly related to how well the scope and specifications are written.

The specifications should be clear, concise and unambiguous. Drawings should clearly complement the specifications. All scope, specifications, and drawings should clearly tell the whole picture of the proposed procurement.

## Changes in Project Scope or Specifications during Solicitation

### Scope

If clarifications, changes, or additions to the project's scope arise during the solicitation, the Procurement Agency must ensure that all Offerors are informed.

This can be done verbally, if verbal quotes are solicited, or in writing, when written quotes are being obtained.

The best way of documenting a scope change is by the written solicitation addendum. Remember that any material change in the project scope must also be incorporated into the eventual contract.

## Specifications

Offerors may inquire as to whether their construction methods are acceptable. If the methods are within the guidelines of the specifications, no notification to other Offerors is required.

However, if the specifications must be changed or "loosely interpreted" to allow for an unusual construction technique, then all Offerors must be notified in writing of the allowance.

## 1.5 Special Provisions of the Contract

Special Provisions are specifications designed for a particular purpose, or that are limited in range or confined to a prescribed field of action or operation. The Special Provisions take precedence over the Plans, Standard Specifications, and any Standard Drawings.

The Procurement Agency may decide, within the limitations of the State Procurement Code and the DOT&PF Delegation of Authority (as applicable), to modify or add information to the Standard Specifications as required for a specific project. However, the Special Provisions may not be used to change established solicitation or contract procedures.

## 1.6 Public Advertisement and On-Line Public Notice Requirements

There is no required time for which a solicitation for a small procurement that is construction related must be held open. The time must only be "fair and reasonable."

Posting a notice of solicitation for a small construction related procurement on the On-line Public Notice System is not required.

If a small procurement is advertised on an agency website, an online public notice should also be posted.

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## 1.7 Solicitation Requirements

### Procurements less than \$10,000

Procurement of construction related goods and services estimated to cost:

- (a) Repealed.
- (b) less than \$10,000 do not require extensive documentation. The only requirement is that purchasing Agencies *"use reasonable and adequate procedures and make records that facilitate auditing of the purchasing agency"*<sup>1</sup>.

If quotes are easy to obtain and require only minimal time and effort, then obtaining several quotes would be considered "reasonable."

As the value of the time and effort to obtain the quotes approaches the value of the proposed contract, then obtaining fewer quotes would be considered "reasonable."

### State Purchasing Cards (PCARD)

The use of the PCARD for construction related goods and services are appropriate only when the price is firmly established in advance of the procurement.

For example, the purchase and full installation of a dishwasher for a fixed price, lump sum amount is allowed. However, it is not appropriate to purchase the same dishwasher with installation paid hourly or under a "not to exceed" amount.

### Procurements from \$10,001 to \$50,000

Procurements from \$10,001 to \$50,000 require that at least three potential contractors be contacted for verbal quotes, and that the solicitation process be fully documented.

In advance of soliciting quotes, the Procurement Agency must prepare a written description of the required work to be read to each prospective

Offeror. After each prospective Offeror has been read or otherwise receives the scope of services, the Quote Contact Report (Form SPC-004) is typically filled out and made a record in the procurement file.

If the Agency's project cost estimate exceeds \$25,000 and prevailing wages are required under AS 36.05.010, the Department of Labor and Workforce Development, Labor Standards and Safety Division, Wage and Hour Administration, Minimum Wage Pamphlet No. 600 must be referenced in the solicitation. This pamphlet is available from the Department of Labor and Workforce Development, Wage and Hour Division (see Section 1.11 of this chapter for the addresses of the regional Wage and Hour Administration Offices).

The Procurement Agency must inquire of the Offeror's qualification for the Alaska Offeror's (Bidder's) Preference and of their intended use of Alaska made products. If the Offeror intends to claim a product preference, they must fill out and submit Form SPC-007 (or a similar document) with their quote.

If obtaining quotes by Fax, ensure (by follow up calling) and then document to the file that all Offerors have received the entire Quote Package.

### Procurements from \$50,001 to \$200,000

Procurements from \$50,001 to \$200,000 require that at least three potential contractors be contacted in writing for a written response, and that the results of the solicitation be fully documented.

Note: for federally funded projects, the small procurement threshold is \$150,000.

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<sup>1</sup> 2 AAC 12.990(a)(17) "reasonable and adequate procedures" means procedures that ensure fairness to potential offerors and competition commensurate with the

circumstances of the procurement, considering price, mission requirements, and available competition; "reasonable and adequate procedures" includes contacting only one potential offeror in appropriate circumstances;

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By statute, bid bonds, performance and payment bonds are required for all construction contracts over \$100,000. See sections 1.12 and 2.7.

The Invitation for Quotes (IFQ) (Form SPC-001) and the Small Construction Procurement Notice of Award / Notice to Proceed (Forms SPC-003, SPC-003a) must be used for all procurements from \$50,001 to \$200,000. Forms other than SPC-003 that contain similar information will also suffice.

IFQs are fixed price or lump sum contracts. They should be used when the scope is well defined and the uncertainties inherent in the project are low. Price is the only criterion and the contractor with the lowest quote wins the award.

The Quote Package may be sent and received by Fax. If Faxed, assure and document that all Offerors receive the entire Quote Package.

## Filling Out the Quote Form

The Invitation for Quotes (Form SPC-001) is self-explanatory and prompts the Procurement Agency to fill out all necessary information. However, some additional comments are warranted:

- The "Scope of Work" is the legal explanation of the services sought. Work that is not clearly and completely defined may create frustrations and legal difficulties.
- References in the "Scope of Work" to drawings and specifications that are to be a part of the contract are required. Any special requirements for certificates, licenses, or authorizations must also be explained - for example, proof of a manufacturer's authorized installer, electrical or plumbing fitness card, asbestos worker certification, etc.
- The date or number of days to complete the contract, the project cost estimate and the required insurance coverage's must be specified.

- By statute, Worker's Compensation Insurance coverage is generally required (except for commodities only contracts).

Written quotes under the \$50,000 procurement category may be returned:

- by mail,
- by Fax, or
- hand delivered.

For construction procurements greater than \$50,001 and less than \$200,000, written quotes must be submitted on Small Procurement Quote Submittal (SPC-002).

The State Procurement Code and common sense dictate the following handling procedures are followed on quotes from \$50,001 to \$200,000:

- (a) Upon receipt of a written quote, place on the quote (or envelope if sealed) the date and time of receipt, and initial it.
- (b) If the quote is received by Fax, fold and staple the quote to conceal its contents and place on the exterior of the Fax the date, time and your initials (**Caution** - do not rely on the date and time printed on the Fax itself, as that text is generated at the sending location and is not "receipt" accurate).
- (c) Envelopes marked as a quote must not be prematurely opened. If prematurely opened, the entire quote, including its envelope, should be placed in another envelope, noted as a quote, and sealed. The events surrounding the unintended opening must be documented and made a part of the procurement file.
- (d) All written quotes should be held at a secure location. An observer should be present to witness the opening of quotes. Avoid commingling quotes.
- (e) 2 AAC 12.400 requires a record be kept of entities contacted or that received quote documents. If a contact did not respond, responded late, or was nonresponsive, the

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record must so note. The record must also summarize the quotes received and the apparent low Offeror (see P&P 10.01.011).

## 1.8 Electronic Solicitations and Responses

Electronic Solicitations and solicitation responses are acceptable. Though posting a notice of solicitation for a small procurement on the On-line Public Notice System is not required, that medium may be used, if desired.

## 1.9 Confidentiality of a Response to a Solicitation

The names of firms or persons solicited, the number of offers received, or information regarding the offers must not be released until after award.

## 1.10 Rejection of Quotes

The Procurement Officer (Contracting Officer) is delegated the authority, for procurements under \$200,000, to cancel or reject all quotes.

## 1.11 Department of Labor Notification

Any construction related project award in excess of \$25,000 must be reported to:

The Department of Labor and Workforce Development, Labor Standards and Safety Division, Wage and Hour Administration

State agencies are required to use AK DOL – LSS application portal to file Notice of Award.

## 1.12 Bid Security

In accordance with AS 36.25.010, AS 36.30.120, and 2 AAC 12.810, Bid Bond, Performance Bond and Payment Bond shall be required for all construction contracts over \$100,000.

The Bid Bond, Form 25D-14, must be submitted with the bid. It ensures the Agency that the low bidder will provide the necessary performance and payment bonds – see section 2.7.

## 2. Award

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### 2.1 The Selection Process

Handle all quotes in the same manner. Offerors question an Agency's integrity when they see inconsistency in solicitation procedures.

Use of the forms and letters from Chapter 5 will assist in consistency of practice and serve to provide written documentation when required. These forms are "suggested use" but may be supplemented by other Agency forms that best meet the need, as long as those other forms are in accord with AS 36.30.

#### **Contractor Qualifications**

The need for specialized equipment or training requirements is generally project specific and should be addressed in the project's scope of work.

Confirm that the prospective Contractor is appropriately qualified before making the award.

#### **Determining the Lowest Offer**

Determination of the lowest offer is made in accordance with the provisions stated on the Invitation for Quotes (Form SPC-001), page 2, *Instructions to Offerors*.

Solicitations consisting of a basic quote and alternates must be carefully checked prior to determining the successful Offeror. See Section 2.2 for an understanding of the impact of Additive Alternates.

Remember, preferences must be applied when determining the lowest quote (see Section 2.3).

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### 2.2 Considering Additive Alternates

#### The Impact of Additive Alternates

If the Procurement Agency's estimate for the basic quote plus additive alternates are totaled AND that total exceeds \$200,000, then the small procurement process is invalid - the competitive sealed quote procurement method must be used, as the following examples explain (funding availability is \$195,000):

#### *The Agency's Project Estimate is:*

<i>Basic Quote Amount - Construct Prison Addition as designed</i>	<i>\$175,000</i>
<i>Additive Alt. #1, upgrade security systems, as defined</i>	<i>\$8,000</i>
<i>Additive Alt. #2, upgrade mechanical systems, as defined</i>	<i>\$8,000</i>
<i>Additive Alt. #3, pave parking areas, as defined</i>	<i>\$10,000</i>
<i>Additive Alt. #4, landscaping options, as designed</i>	<i><u>\$10,000</u></i>
<b><i>Estimate Total for the Project</i></b>	<b><i>\$211,000</i></b>

The preceding example project, even if additional funds could be found, CANNOT be solicited under small procurement [AS 36.30.320(a) and 2AAC 12.400(d)] because the estimate exceeds the upper procurement limit.

However, if the project can be scaled back to eliminate the need for two of the additive alternates (any two Additives could be chosen for elimination - let's use paving and landscaping) the estimate would be as follows:

#### *For the Revised Project, the Agency's Estimate is:*

<i>Basic Quote Amount - Construct Prison Addition as designed</i>	<i>\$175,000</i>
<i>Additive Alt. #1, upgrade security systems, as defined</i>	<i>\$8,000</i>
<i>Additive Alt. #2, upgrade mechanical systems, as defined</i>	<i><u>\$8,000</u></i>
<b><i>Estimate Total for the Revised Project</i></b>	<b><i>\$191,000</i></b>

Now assume the scaled back Project has gone through solicitation under the small procurement process and the quotes received appear as follows:

<b><i>Quote (Items of Work)</i></b>	<b><i>Offeror A</i></b>	<b><i>Offeror B</i></b>	<b><i>Offeror C</i></b>
<i>Basic Amount, Construct Prison Addition</i>	<i>\$178,000</i>	<i>\$172,000</i>	<i>\$184,000</i>
<i>Additive Alt. #1, upgrade security systems</i>	<i>\$25,000</i>	<i>\$24,000</i>	<i>\$9,000</i>
<i>Additive Alt. #2, upgrade mechanical systems</i>	<i>\$14,000</i>	<i>\$20,500</i>	<i>\$37,000</i>
<b><i>Total Basic plus all Alternates</i></b>	<b><i>\$217,000</i></b>	<b><i>\$216,500</i></b>	<b><i>\$230,000</i></b>

Prior to the opening of quotes, the methodology of the award and the amount of available funding must be announced publicly. This may be accomplished by providing the information in the quote documents or at the time of a scheduled opening when Offeror's attend. In all cases, the award methodology shall be stated as "the award will be made on the basis of the basic offer plus alternates, in the order listed and to the extent of available funding, and within the limit for Small Procurement established by the State Procurement Code".

The amount of available funding must always be announced as the smaller of the available funds, or the maximum permitted under the solicitation process. Given the preceding, the award must be made to Offeror C, whose combined total quote within the small construction procurement monetary limit is \$193,000 (covering the basic + Alt. #1). Alternate #1 cannot be skipped over, as this would displace the low Offeror.

Similarly, the award could not be made to Offeror "B" based solely on the amount of the basic amount, since it is a requirement that, "award will be made on the basis of the basic offer plus alternates, in the order listed and to the extent of available funding,." Only an award to Offeror "C" satisfies all of the requirements.



## 2. Award

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### 2.3 Alaska Bidder and Related Preferences

#### State Funded Projects

State funded small procurements are subject to applicable Alaska Bidder and related preferences as set out in AS 36.30, and 2 AAC 12.260(e).

**Bidders must claim a preference in order for it to be applied.**

This section contains a list of the applicable preferences. Before any preferences are applied, the procurement officer must determine that the quote or proposal is responsive.

#### *Alaska Bidder Preference*

AS 36.30.321(a), AS 36.30.990(25)

A bidder claiming this preference shall provide with their bid an Alaska Bidder Preference Certification (Form 25D-19), certifying they qualify as an Alaska bidder eligible for Alaska Bidder Preference according to AS 36.30321(a), AS 36.30.990(25).

If the bidder qualifies as an Alaska bidder, a five percent (5%) preference will be applied to the quote price, for evaluation purposes only.

#### *Alaska Veterans Preference*

AS 36.30.321(f)

A bidder claiming this preference shall provide an Alaska Veteran Preference Certification (Form 25D-17), certifying they qualify as an Alaska bidder eligible for Alaska Veteran preference according to AS 36.30.

If a bidder qualifies as an Alaska bidder and is a qualifying entity, an Alaska Veteran Preference of 5 percent shall be applied to the quote price. The preference may not exceed \$5,000.

#### *Alaska Product Preference:*

AS 36.30.328, AS 36.30.332, 2 AAC 92.090

A bidder claiming this preference shall complete and sign the Alaska Product Preference Worksheet (Form 25D-20), according to the

worksheet instructions, and submit the completed worksheet with their quote.

Except for timber, lumber and manufactured lumber products used in the construction project under AS 36.30.322(b), an Alaska products preference will be given as required under AS 36.30.326 - 36.30.332 when the bidder designates the use of Alaska products.

The bidder must carefully prepare the Alaska Product Preference Worksheet in accordance with the instructions. If the successful bidder proposes to use an Alaska product and does not do so, a penalty will be assessed against the successful bidder according to AS 36.30.330(a).

Each Alaska product declared on the Alaska Product Preference Worksheet must have an "Approval" date on the Alaska Product Preference Program List, that is on or before the bid opening date for this contract, and that does not expire before the bid opening date for this contract.

#### *Disability Preference*

AS 36.30.321

The Division of Vocational Rehabilitation, Department of Labor and Workforce Development, keeps a list of qualified employment programs, a list of individuals who qualify as persons with a disability, and a list of persons who qualify as employers with 50 percent or more of their employees being persons with disabilities.

A person must be on this list at the time the quote is opened in order to qualify for a disability preference.

#### **Federal Funded Projects**

The Federal Highway Administration (FHWA) requires that nondiscriminatory bidding (quote) procedures be afforded to all qualified Bidders (Offerors) and forbids the application on federal-aid projects of any provisions of state laws or regulations that are discriminatory [23 CFR



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Chapter 1, Subpart A, 635.112(d)]. Bidder and product preferences are considered by the FHWA to be discriminatory.

State mandated preference programs may not be applied when federal funds are involved, unless CFRs, supplementing federal documents or other federal document(s) specifically allow such programs.

### 2.4 Responsive / Responsible Quotes

A response to a solicitation is generally declared "nonresponsive" when it lacks required information. Verbal quotations should seldom be found "nonresponsive". If the Procurement Agency asks for and receives all the required information, the verbal quote is responsive.

A written response to a solicitation is nonresponsive if it is late, incomplete, modified, conditioned, or contains material oversights.

Examples of material oversights that automatically render a response as "nonresponsive" are:

- (a) failure to acknowledge addenda that are determined to have a more restrictive effect on time, quality, or cost of performance, or impose a technical requirement.
- (b) the project specific requirements, due at the time of submission, were absent (e.g., evidence of manufacturer's certification or required licenses were not submitted).

#### Modified Responses

Modified or conditioned responses are those that unilaterally alter the contract, such as changing the completion time or reducing or increasing the project scope. Modified or conditioned quotes, unless expressly requested, will not be considered.

#### Errors and Omissions

Responses that contain errors or omissions that affect time, quality, quantity, or cost are also nonresponsive and will not be considered.

Errors or omissions that clearly demonstrate the Offeror's intentions and that can be accepted include:

- (a) conflicting "unit" vs. "extended" amounts;
- (b) missing "unit" amounts, but only if the "extended" amount clearly demonstrate what the intended unit price was (i.e., \$200 for 100 units yields \$2 / unit);
- (c) missing or incorrect "extended" amounts or totals;
- (d) missing or incorrect data such as address, phone number, EIN or SSN; or the
- (e) the failure to acknowledge addenda that do not affect time, price, or contract performance.

#### Determining Responsibility

In determining responsibility, consider the list found in 2 AAC 12.500, "Standards of Responsibility," and the requirements for:

- Insurance;
- Bonding (when applicable);
- Certified Wages; and
- Other project specific requirements, such as specialized equipment or training.

### 2.5 Business / Contractor's Licensing Requirements

A State of Alaska Business License is required, regardless of the dollar amount, on all projects that are construction related.

The Procurement Code requires for all "sealed bids", that business licenses must be provided upon award of the contract. While this is not required for small procurements, which are not "sealed bids"; it is a good practice to apply this

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to small procurements also. Although vendors submitting bids for small procurements should not be held non-responsive for want of a business license.

### State & FHWA Funded Projects

Each Offeror must be licensed and, if applicable, registered to perform the work of the contract prior to the award of the contract.

36.30.110(b) reads:

*A bidder for a construction contract shall also submit proof [EVIDENCE] of the bidder's registration under AS 08.18 before the contract may be awarded.*

Ask for copies of an Offerors business license and applicable registrations, or verify the existence of these documents with the Department of Commerce and Economic Development, Occupational Licensing Division, before awarding the contract.

### 2.6 Insurance Requirements

The General Conditions of the Small Procurement Construction Contract (Form SPC-003), Section 8, give the required insurance coverages. More insurance can be required, dependent on the work and conditions to be encountered. Indemnification language, Workers Compensation, and General Liability and Automobile insurance are always required, regardless of the contract dollar amount.

### Worker's Compensation - Employer's Liability

AS 23.30.045(d) requires the Procurement Agency to evidence, prior to contract award, either a certificate of self-insurance, a "Workers' Comp" policy, or to obtain a statement that the Offeror is an, *"independent contractor providing services without the benefit of employees."*

If a Contractor fails to timely file insurance certificates or statements, the Notice of Intent to Award should be rescinded.

### Increased coverages

On occasion, a project may involve work that could present a serious impact to the health and safety of State employees or the public. On these projects, consult with the Division of Risk Management to determine if specific limits and coverages are necessary.

If specific limits and coverages are needed, they should be announced in the scope of work.

Generally, projects that require additional insurance coverage include those:

- valued in excess of \$ 80,000;
- that involve modifications to a structural component, elevators or escalators, or life and safety systems; and those
- that involve airport runways, highways, or other areas where the construction is immediately adjacent to the traveling public.

### 2.7 Bonding

Bid surety, payment and performance bonds shall be required for small procurement construction contracts exceeding \$100,000 (AS 36.25.010; AS 36.30.040; AS 36.30.120; 2 AAC 12.810). For small procurement construction contracts less than \$100,000, bonds are at the discretion of the Procurement Officer. When a project estimate exceeds \$80,000, the Procurement Officer must consider bid surety, payment and performance bonds.

If Payment and Performance Bonds are to be required, Payment Bond (Form 25D-12) and Performance Bond (Form 25D-13) must be used. Confirm that the Contractor and Surety have properly executed the bonds.

### 2.8 Debarred Contractors

Prospective Offerors cannot quote if they have been debarred or suspended from contracting with the State (AS 36.30.040 & 2 AAC 12.260).

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For the list of Parties Excluded from Federal Procurement Programs go to System for Award Management:

<https://www.sam.gov/portal/public/SAM/>

The Department of Labor and Workforce Development, Labor Standards and Safety Division, also lists debarred contractors in the Laborer's and Mechanic's Minimum Rates of Pay Pamphlet.

### 2.9 Final Selection

The process for selecting the responsive and responsible offeror is detailed in the Instructions to Offerors (Form SPC-001). It notes that responsive quotes will be compared and the lowest will be the winner. It also discusses what to do if there is a discrepancy between the unit price amount listed and the extended amount: the unit price will be the accepted price. Additionally, conditional quotes will not be accepted. An example of a conditional quote would be one that stated the price was only good if no weather delays occurred.

### 2.10 The Contract Award

#### Notice of Award / Notice to Proceed

##### (Contracts from \$10,001 to \$50,000)

The Notice of Award and Notice to Proceed (Forms SPC-003, & SPC-003a), though not technically required on awards between \$10,001 and \$50,000, should be used.

##### (Contracts over \$50,000)

A copy of the initial Notice of Award and the Notice to Proceed documents, or similar documents, must be provided to all individuals who submit a response to a solicitation that was estimated to be in excess of \$50,000 (2 AAC 12.400(d)(2)(B) & (3).

The Notice of Award document serves a dual purpose of informing unselected Offeror's of their protest rights. The Award notice may be

sent by Fax or email if confirmation of receipt to each party is kept in the project file.

To ensure that the Department of Labor is aware of the procurement, it must be reported as soon as the Notice to Proceed (Form SCP-003) is issued.

#### Contractor Acknowledged Receipt of Award

The Contractor must sign and date the "acknowledged receipt" blank at the bottom of the Notice of Award and return it to the Procurement Agency.

The Contract becomes effective upon final signature and date of the Procurement Officer. The Contractor shall not proceed with any Contract work until receipt of a copy of the executed Award document and the issuance of the Notice to Proceed (Form SPC-003a).

#### Notification to the Concurrent Review Engineer

All construction projects, as defined by AS 36.30.990(7), are subject to the procedures outlined in P&P 05.01.050, Table #1, "Concurrent Review Elements".

P&P 05.01.050, Table 1 shows the small procurement procedures and documents that must be reviewed. Reporting requirements to Concurrent Review for small construction procurements are substantially less than that of larger projects. 20 percent of federally funded projects shall receive documentation and procedural reviews of selected items. Delegated Operating (i.e., Sister) Agency projects under \$250,000 are not reviewed by Concurrent Review.

Concurrent Review will audit:

- project backup materials;
- payment and other associated documents;
- directives and change orders;
- Federal document submittals (as applicable); and

## 2. Award

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- the final estimate review report.

### 2.11 “Little Davis Bacon Act”

Contractors working on certain public construction projects are allowed to file bi-weekly versus weekly-certified payrolls to the Alaska Department of Labor and Workforce Development (DOLWD), **and** it levies filing fees.

The primary contractor working on public construction projects with an amount of \$25,000 or more must file a Notice of Work and pay a one percent fee based on the estimated value of work performed by the prime contractor and one percent of the value of each subcontractor’s price. The maximum fee is \$5,000.00. The notice and fees must be filed with the DOLWD before work commences on the project.

Upon completing a public construction project, the primary contractor must file a Notice of Completion (NOC) and make payment of any additional fees due to increases in the contract amounts due the primary contractor. The Notice of Work and Notice of Completion forms are available at:

<http://www.labor.state.ak.us/lss/lssforms.htm>

Contractors have 14 days after work begins to pay fees and file the Notice of Work on an emergency response project.

#### Certified Payrolls

**State Funded Projects** - Prime Contractors working on State funded public construction projects are now allowed to file certified payrolls every other week. Social Security Numbers must not be listed on any Contractor certified payroll for a State funded project.

**Federally Funded Projects** - Federal weekly payroll filing requirements under 29 CFR 5.5 (a)(3) are not changed by this law. And, Social Security Numbers must be provided on certified payrolls on all construction projects that are Federally funded.

This legislation also requires the DOLWD to provide for filing certified payroll reports by secure online electronic filing.

#### Synopsis and additional information:

The prime Contractor working on any public construction project of \$25,000 or more must file a Notice of Work with the DOLWD. A one percent fee based on the estimated value of work to be performed by the prime contractor, and one percent of the value of each subcontractor’s price must be paid by the prime Contractor to the DOLWD before work on the project may commence

(Note - it may take up to ten (10) days for the DOLWD to process the paperwork). The maximum fee is \$5,000.00. Amounts paid to owner/operators who do not use employees are exempt from these fees.

Projects from \$2,000 to \$25,000 are exempt from the filing and contract value fees, but the Contractor **MUST** timely file the Notice of Work (NOW) and the Notice of Completion (NOC) forms with the DOLWD.

- The Notice of Work and payment of associated fees must be made to the DOLWD before work may commence on the project. The Contractor must show the Contracting Agency a copy of the Notice of Work form that has been date stamped as received by the DOL before the Contracting Agency will issue the Notice to Proceed.
- Initial contracts that do not have a known dollar amount will be monitored by DOLWD - when such contracts exceed \$25,000, fees will be applied retroactively.
- AS 36.05.070 identifies the items that must be included in the advertised specifications for a construction project under Title 36.

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- The Contractor must file a Notice of Completion with the DOLWD when work is completed. The Contracting Agency will not perform the “close-out for final project completion” until receipt from the DOLWD that they have processed the Contractors Notice of Completion form.

DOLWD envisions that the Notice of Completion form will ultimately eliminate the need for the Title 36 Clearance Request process that many contracting agencies have adopted. Under the new law, the primary contractor will be required to file a Notice of Completion when work on the contract is completed.

DOLWD's approval of the Notice of Completion will serve as a Title 36 clearance that the contractor could submit to the contracting agency. DOLWD has up to 30 days to complete the NOC.

For further information on the administration of these statutory changes, contact Wage and Hour.

### **2.12 Federal Contract Provisions**

All Federal-Aid Contracts must contain the applicable Federal Contract Provisions.

### **2.13 Buy America**

Buy America provisions are applicable to all Federal Highway Administration (FHWA) funded projects and Federal Transit Administration (FTA) funded projects. A solicitation must include the applicable Buy America Provision and Forms.

### **2.14 Buy American**

Buy American provisions are applicable to all Federal Aviation Administration (FAA) funded projects. A solicitation must include the applicable Buy American Provisions and Forms.

## 3. Contract Administration

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### 3.1 General Information

A good understanding of the information in this chapter is imperative for the proper administration of the small procurement construction contract. These sections provide guidance for the pre-construction meeting discussion and overall contract administration.

#### Contract Administration Documents

Small procurement contract administration documents include:

- agenda for pre-construction meetings;
- delegation memos;
- memos of approval or denial;
- change documents;
- inspections;
- project "close-out" reports; and
- warranty related correspondence.

Chapter 5 provides use documents and gives examples of notification letters that may be modified to meet the circumstance.

### 3.2 The Pre-Construction Meeting

Generally, pre-construction meetings are held on projects that are over \$50,000, or that are complex. The pre-construction meeting should be held prior to the Contractor beginning any contract work.

The Procurement Agency should keep all necessary file records, and all project personnel should be familiar with the construction requirements before the pre-construction meeting. Much of the information suggested to be shared with the Contractor at pre-construction discussions in this chapter is at the discretion of the Procurement Agency.

Technically, the Contractor may begin mobilization operations, place orders for materials and equipment, acquire necessary permits, and begin scheduling the overall

construction process only upon the actual Award of the contract.

#### Notification and Attendance Requirements

Written notification of the pre-construction meeting must be given to all affected parties (i.e. the Contractor, code enforcement agencies when special conditions warrant their involvement and the Procurement Agency's project staff) at least 48 hours in advance of the meeting. A longer notification period may be warranted in certain circumstances.

The notice of the pre-construction meeting should include:

- The meeting time and date;
- The location (sometimes preferably at the project site);
- The names of the parties required to be in attendance;
- A brief agenda; and
- A listing of any items or documents that each participant should bring.

The Contractor submits the following documents (as applicable) prior to or at the meeting:

- Progress schedule;
- List showing anticipated dates for procurement of materials and equipment;
- List showing all subcontractors and material suppliers;
- Construction Phasing Plan;
- Storm Water Pollution Prevention Plan and a Hazardous Materials Control Plan; and,
- Letter designating the Contractor's Superintendent and defining that person's responsibility and authority;

#### Topics for Discussion

The pre-construction meeting is usually the first face-to-face contact between the Procurement



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Agency and the Contractor - and it is the time to fully discuss project limitations, requirements, and procedures, and to answer final questions. It is prudent to record the meeting, provide a copy of the recording to the Contractor and, in follow-up, answer in writing any questions not resolved during the meeting.

#### 3.3 Procurement Officer's Authority

The General Conditions portion of the Notice of Award (Form SPC-003) confers to the Procurement Officer the construction authority over many areas. Much of this authority can be delegated to staff for day-to-day operations. P&P 01.01.050 prohibits the further delegation of the Procurement Officer's authority to:

- 1) Sign or terminate construction contracts.
- 2) Issue a Procurement Officer's Decision.
- 3) Adjudicate bid protests.
- 4) Issue the letter of Final Project Acceptance.

#### 3.4 Contract Clarification

Regardless of how precise the design, questions will arise on the "intent" of the Contract Documents. Discuss the scope of the work, drawings, specifications, and relevant contract language and issues at the pre-construction meeting, and at any time a question arises.

Any request for clarification that will require a modification to the Contract Documents must be handled as a contract change order.

#### 3.5 Acquiring Permits

If the work requires additions or alterations to a building's structural system, electrical circuitry, plumbing, etc., or if the work exceeds a monetary threshold established by local jurisdiction, a building permit or plan review may be required. Confirm this with the local

municipal authority having jurisdiction over the project.

It is best to clarify, in the Contract Documents, whose responsibility it is to obtain all necessary permits. The Procurement Agency should ensure that plan reviews and building permits are timely secured, regardless of whose responsibility it is to obtain them.

If the project requires that the Contractor pay permit fees, the amount of such fees should be identified in the project's "description of work" on the Invitation for Quote form. Include such fees in the project cost estimate.

#### 3.6 Certified Payrolls

In general, all small procurement construction projects (except commodity purchases) in excess of \$25,000 (including projects that have been increased by over \$25,000 by change order) are subject to the wage rate determinations published by the State of Alaska, Department of Labor and Workforce Development, Labor Standards and Safety Division, Wage & Hour Administration (see Chapter 1, Section 1.11).

The only projects over \$25,000 that are exempted are those with a "scope of work" that closely parallels the type of work specifically exempted by the Wage & Hour Administration.

When the prime Contractor's contract exceeds \$25,000, then each subcontract is subject to the Alaska Department of Labor's certified wage requirement. And, each affected subcontract must contain applicable language as found in the Department of Labor and Workforce Developments packet titled "*Laborers' & Mechanics' Minimum Rates of Pay.*"

At the pre-construction meeting, the Procurement Agency must inform the Contractor:

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- 1) of the "applicability" of certified payroll requirements, if any;
- 2) of the Agency requirement to withhold a portion of the Contractor's payments "as is necessary to pay the rates of wages required by the contract"; and
- 3) to contact the local Department of Labor representative to answer any additional questions.

#### 3.7 Subcontract Approvals

Should the work require subcontract services, item four of the *General Conditions* (Form SPC-003) require the Procurement Officer's approval of the subcontract prior to the start of the work.

When reviewing subcontracts verify that all "subcontract employees" are covered either under the Workers' Compensation Insurance requirements of AS 23.30.045, or as an "Independent Contractor".

#### 3.8 Storage of Equipment and Materials

When relevant, discuss where and how materials are to be stored. Require the Contractor to show evidence of General Liability Insurance (see Chapter 2, Section 2.6) - if it was not done at the time of contract Award - and then authorize in writing the storage site and its associated limitations.

Advance payment on stored materials should be avoided.

#### 3.9 Approval of Materials, Shop Drawings, and Product Substitutions

Give all approvals in writing. On federal-aid highway projects, under the Federal-aid Project

Oversight Responsibility Agreement between the Federal Highway Administration and the Alaska Department of Transportation and Public Facilities, <sup>1</sup> the State may use its' own procedures.

Consult the design engineer if you are unfamiliar with the construction materials or shop drawings.

The Procurement Officer may establish appropriate approval materials, shop drawings and product substitution procedures. When doing so, the Procurement Officer must establish procedures that ensure:

- 1) All proposed products meet the requirements of the Project.  
*Consider limiting the number of substitute submittals, as they can be time consuming. In some cases, the opportunity to provide a substitute is controlled by the technical specifications. Check for this restriction.*
- 2) Shop drawings conform to the "intent" of the original design.  
*Construction details that differ from the construction documents must be closely examined by the procurement Agency.*
- 3) Overall component dimensions are those identified in the Contract Documents.  
*Leave verification of field measurements and less critical dimensions to the Contractor.*

#### 3.10 Contractor Schedules

The Contractor should be directed to furnish the following schedules:

##### Progress or Work Schedules

A simple bar graph that is chronologically synchronized to graphically show the work

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<sup>1</sup> This "Agreement" can be found by going to the DOT&PF Statewide Design and Engineering homepage and downloading the Preconstruction Manual, Appendix "A".



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phases or segments and the time in which each will occur is adequate. The schedule should also show time associated with reviewing, ordering, and shipping materials.

#### Materials Submittal Schedules

When required, the submittal schedule will identify the material or product, its technical specification reference, the anticipated date(s) that product literature on individual material will be submitted, and the time when the material's approval (or denial) is desired.

#### 3.11 Procurement Agency Inspections

Use of the standardized contract change and inspection documents (Forms SPC-020 through -033 or similar documents) should be on all small procurement construction contracts exceeding \$10,000. The Procurement Agency may also define other procedures and schedules that best fit the circumstance.

In this segment of the pre-construction conference, also discuss the jurisdictional authority of all Inspectors (i.e. the Procurement Agency, a State inspector, or a local / city inspector), and the responsibilities of the parties for inspection notifications, inspection attendance requirements, and the preparation and distribution of inspection reports.

#### Site Visits and Documentation

On-site inspection should occur frequently as they serve to inform the Contractor:

- (a) whether the work is meeting the requirements of the contract,
- (b) of deficiencies in materials or workmanship;
- (c) of unsafe working conditions; or
- (d) to stop work on a specific item of the contract.

Inspections also help determine "if and how much" to pay for work performed (i. e. progress payments).

Exhaustive inspection reporting is not required, but a brief record of what occurred and was said during all inspections is necessary. The following forms serve to record project activities - their use can be invaluable in a legal proceeding (e.g., if the Contractor has kept records and the Agency has not, the Contractor's records of an event stand to prevail):

- Inspection Report (Form SPC- 030);
- Daily Report - Labor, Equipment, and Materials for Time and Materials Work (Form SPC-031);
- Project Report (Construction Related) (Form SPC-032).

Inspections that reveal work done contrary to the contract requirements, or that may lead to a dispute, must immediately be brought to the attention of the Contractor and documented. Likewise, the Contractor must bring specific concerns over items of work to the Agency's attention for resolution.

Any discussion pertaining to trouble areas should be summarized in the Inspector's Diary. The summary should include a description of the Agency's findings (what was wrong and why), what was communicated to the Contractor, and the Contractor's reply. If the project work was modified verbally by both parties, it must be noted. If the modifications are substantial (i.e. changes that affect contract price, time, or delivery), a change order must be issued.

File in the project records all documents of the inspector's observations or findings (i.e. reports, diary entries, photos, test results, etc.).

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#### Inspections by Others

"Inspections by others" are generally done when there is an occupancy permit, a test for quality control, or as a condition to issuing a manufacturer's warranty.

When an inspection is to be done by a party other than those who are signatories to the contract, the Procurement Agency must oversee that:

- 1) the Contractor has properly arranged for the inspection;
- 2) the independent Inspector is present at the inspection; and
- 3) copies of his eventual report, and any follow up inspection reports are given to the Procurement Agency and the Contractor.

#### Substantial Completion Inspection

The "substantial completion inspection" identifies work remaining to be done as well as work that has not been properly completed. The date of substantial completion also "starts the clock" on warranty periods, unless otherwise specified. The Procurement Agency typically performs the substantial completion inspection at the Contractor's request.

The Procurement Officer may have design personnel assist in the "substantial completion inspection". This is especially important if the project incorporates technical or specialized work.

A list of deficiencies (i.e. the "punch list") must be prepared by the Procurement Agency or its representative and a copy given to the Contractor. Any revised list must also be given to the Contractor. All listed deficiencies must be corrected before the project is accepted as complete.

The "substantial completion inspection" often delineates when control over the project is transferred from the Contractor to the Agency. Use the Certificate of Substantial Completion (Form SPC-033) or similar documents, to notify the Contractor of duties and responsibilities that remain as an obligation to the Contractor and those that transfer to the Agency.

Typically covered in this form are the issues of:

- 1) continuation of insurance coverage;
- 2) payment of utilities;
- 3) security of the work site; and
- 4) reiteration of the effective dates for items covered under warranty.

The Certificate of Substantial Completion (Form SPC-033) is good to give with the inspection "punch list," or the revised punch list.

#### Final Completion Inspection

The "final completion inspection" marks the end of all physical work required by the Contract. Like the "substantial completion inspection," the "final completion inspection" occurs by request of the Contractor.

The Agency inspects for completeness of the work and the correction of any "punch list" deficiencies. Operation & Maintenance manuals, "as built" drawings, occupancy permits, and warranties are also items of work under the contract that must be considered in this final review.

The Procurement Agency may send a representative or a team to conduct the final inspection. If deficiencies are found, a second "punch list" is developed and distributed.

Issue the following or similar forms when all work has been satisfactorily completed:

- Certificate of Final Estimate (Form SPC-040)

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- Completion Report (Form SPC-041)
- Contractor's Release (Form SPC-042)

#### 3.12 Changes to the Contract

##### Change Orders

Generally, the following three conditions must be met for a change to qualify as a change order. When a proposed change does not meet all of the following conditions, the use of a Supplemental Agreement needs to be considered:

- 1) There must be a compelling reason to add the work item.
- 2) The additional work must be within the same general Scope of Work as was contracted (or must have been contemplated as an element of the original design - usually as an alternate add-on).
- 3) The work must be within the project limits. Project limits are the property limits of the facility on which the project is located, and any associated utility connections or road improvements.

An example of a change order that could occur apart from the above criteria is a revised payment schedule as may occur on a lump sum contract where a request is made during the course of the work for a partial (progress) payment.

Generally, contract changes (i.e. amendments) may be made under Procurement Agency approval authority as long as the aggregate of all increases, including the initial contract cost, does not exceed \$200,000 (see 2 AAC 12.400 and 2 AAC 12.485(c), and Chapter 1, Category Thresholds for exceptions to the \$200,000 Procurement Limit, Section 1.2 and Chapter 5 Waivers).

All change documents, including waivers, must be fully executed before the Procurement Agency can allow work to proceed.

##### Change Order Forms

Changes within the scope of the project are typically made by using one or all of the following forms:

- Directive - Small Procurement contract - Construction Related (Form SPC-020)
- Request for Change Order Proposal (Form SPC-021)
- Change Order (Form SPC-022)
- Change Order Support Information (Form SPC-022A)

##### Unilateral Change Orders

Change orders are most often bilateral. However, "unilateral change orders" may be issued to significantly add work to the contract at contract unit prices, where the added work is essentially the same in character as the original work.

Whenever there is any chance that a Contractor may consider claiming additional compensation for work performed under a "unilateral change order", the Procurement Agency should keep complete and accurate records of all labor, equipment and materials used on that work.

Any time a "unilateral change order" is issued, the Procurement Agency should record the delivery of the document to the Contractor.

### 3. Contract Administration

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**CAUTION**

While the use of a "Time and Materials" or "Hourly Rate" change order is permitted under the State Procurement Code, its' use is not recommended.

If a "Time and Materials" or "Hourly Rate" change order is executed, the Procurement Agency must closely monitor the daily activities and costs to ensure that the combined value of the original contract and the daily costs do not exceed the monetary limits of the solicitation process used to obtain the initial services.

If the combined value reaches the contracts monetary limits, all remaining work under the change order must be stopped.

#### **Constructive Change Orders**

Be careful - any conduct by an authorized official that has the effect of requiring a Contractor to perform work different from the original terms of the contract constitutes a "constructive change order," entitling the Contractor to relief under the Changed Conditions clause. Such Agency conduct may be in the form of an affirmative act, a failure to act, or a "*course of conduct*". This action may be in writing, or it may be oral.

A "constructive change order" may be casual or informal (i.e. words such as "order" or "directive" need not have been used).

If such action by the Agency is not quickly followed by a written directive and subsequent change order document, the Agency's failure to correctly advise the Contractor of the change action leaves it open to a potential claim.

#### **Supplemental Agreements**

Supplemental Agreements cover any type of change to the contract that is outside the scope of work. If the proposed work is less than

\$10,000, that work may be given to the project Contractor by Supplemental Agreement.

If the proposed work is estimated between \$10,001 and \$200,000, use Single Source Procurement (AS 36.30.300) method or Emergency Procurement (36.30.300 & 310) method (see Chapter 5), and remember to:

- 1) Prepare the Waiver Request for Alternate Procurement Methods (Form 25D-026); and
- 2) fully define, in writing, the extent of the proposed additions with a cost estimate and verification of current funding availability.

It is only upon **approval** of the "Waiver" that the continuation of this process can occur:

- 1) Prepare the Request for Change Order Proposal (Form SPC-021) and;
  - a. negotiate with the Contractor an amount acceptable to both parties;
  - b. submit Form SPC-021 to the Contractor for completion and signature.
- 2) Prepare (as applicable) the Supplemental Agreement (Form SPC-023).
- 3) Encumber funds.
- 4) File the executed agreement and support documents in the project file.

#### **3.13 Early Contract Termination**

The termination of a Contract, whether due to poor performance by the Contractor, or for the convenience of the Procurement Agency, should occur only as a last resort.

There are no standard documents for giving a contract termination notice. Each instance must be reviewed by the Attorney General's Office prior to action.

### 3. Contract Administration

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#### Termination for Cause

A Termination for Cause is done when the Contractor performs poorly, has abandoned the work, or otherwise refuses to continue under the contract.

Efforts to remedy poor quality or defective work and work abandonment should be pursued under the provisions of the Contract. If the Agency takes control of the project and has the work performed under a separate entity agreement, the cost of such work is then deducted from the Contractor's remaining payment(s).

Where the work is abandoned - and the project is under a Performance Bond - the continuation of the project becomes the responsibility of the Surety.

The Surety has the option of:

- performing the work on behalf of the Contractor;
- paying the Agency for the costs of completing the work under another Agency contract; or,
- paying the penal sum under the contract.

Specific steps must be taken to ensure that the Contractor has been given "due process" and proper notice. Extensive documentation must be made by the Procurement Agency of notices, cure letters, change documents, and general correspondence to establish the Agency's position - consultation with the Attorney General's office early on is prudent.

#### Termination for "the Convenience of the Procurement Agency"

This situation generally arises when the Procurement Agency terminates a contract because of a funding cut, changes in a program, or other justifiable reason.

Costs the Agency will incur under a Termination for Convenience are typically those of:

- canceling materials "on order" or in transit;
- restocking charges;
- prepaid or return freight charges; and,
- charges for insurance and bonds.

Again, early consultation with the Attorney General's Office is advised to limit legal exposure.

#### 3.14 Warranty Performance

As small procurements generally do not require Payment or Performance Bonds, an Agency's leverage to obtain warranty work is greatly reduced.

If a warranty clause is stipulated in the Contract Documents, discuss its requirements and repercussions with the Contractor at the pre-construction meeting.

Reduce the likelihood that warranty work will be required by ensuring that the project is carefully designed and the work is frequently inspected. At the time of substantial completion, insist that all components of the project be started and tested. When final payment is made, little recourse for getting performance is left.

If the warranty work has not been accomplished within the established time frame, the Procurement Agency must again notify the Contractor to "cure" the problem. This notification must be provided in writing stating what work remains to be done, the time period in which to do the work, and the consequences to the Contractor should the work not be done. If the Contractor will be dropped from future consideration on small procurement contracts, also state that in the "cure" letter.

### **3. Contract Administration**

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It is an acceptable practice to document a Contractor's lack of performance and use this record to evaluate a Contractor on future contracts, or as a basis for no further contact because of poor performance history.

If the work has not been accomplished by the end of the "cure" period, the Agency may proceed to have the work done on its own.

#### **3.15 Other "Project Impact" Considerations**

Discuss the Contractor's use of premises, utilities, facility security, and care of existing property. Be sure to cover site access, building access, construction time constraints, and public safety requirements.

##### **Facility Security and Care of Property**

At the pre-construction meeting, discuss concerns and requirements of this topic and, if complicated, provide a written description of "dos" and "don'ts".

Expect to check each day for security and property damage. Immediately bring any deficiencies to the Contractor's attention. Repeat offenses should be documented in writing by the Procurement Agency and remedial action taken as required.

#### **3.16 Project and Contract Close-Out**

Project close-out occurs when the Contractor, Project Manager, the Inspectors, and the Procurement Agency complete all necessary paperwork, clearances, and documentation of the contract. Only issues of warranties and claims occur after this point.

Examples of contract close-out forms are presented in Chapter 8.

When necessary, notify the appropriate Concurrent Review Engineer that the project is

being completed (see Chapter 2, Section 2.9). In some instances, the Concurrent Engineer's approval signature is required on the close-out documents.

##### **Required Contractor Submittals**

The Procurement Agency generates the Certificate of Final Estimate (Form SPC-040) and the Contractors Release (Form SPC-042), with the notice of final completion. These forms, when signed by the Contractor, certify the final pay estimate and attest that all subcontractors and suppliers have been paid.

The Contractor must complete and return the forms, or similar ones, along with the request for final payment and all other required submittals.

##### **Obtaining Required Clearances**

Prior to final payment and close-out, the Department of Labor and Workforce Development, Labor and Safety Standards Division, Wage and Hour Administration, and the Department of Revenue must clear all construction contracts for payroll and tax encumbrances.

Letters requesting clearances must be sent to both of these entities by the Procurement Agency. Clearance approval can be long in coming, so make these requests shortly after issuing the final completion notice (see Chapter 1, Section 1.11 for addresses and phone numbers for Wage & Hour. Contact your local Revenue office for the name and address of the person to whom to send the release request for tax purposes).

If you receive a notice from Labor or Revenue to not release final payment, notify the Contractor (written form is suggested) that the final contract payment is being withheld by (Agency name) and that the Contractor must resolve the issue with that Agency. Final payment must not

### **3. Contract Administration**

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be made until Labor's or Revenue's denial is rescinded, in writing.

#### **Partial and Final Payment to the Contractor**

Periodic payments should not be necessary on small procurement contracts. On occasion however, the Contractor may request partial payment for materials purchased and stored on the site, or for partial work completed.

When approving a partial payment request, compensate the Contractor for only that portion of work that has been satisfactorily and fully completed.

#### ***Final payment is authorized following the review of:***

- 1) the signed request for payment (the original invoice) from the Contractor;
- 2) a completed and executed:
  - a. Certificate of Final Estimate (Form SPC-040 or similar form);
  - b. Completion Report (Form SPC-041 or similar form); and
  - c. Contractor's Release (Form SPC-042).
- 3) an acceptable Department of Labor clearance.
- 4) an acceptable Department of Revenue clearance.
- 5) as applicable, the completion of the final review and close-out process through the Concurrent Review section per P&P 05.01.050.



## 4. Protests and Contract Claims

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### 4.1 Protests

Protests of construction related small procurements are handled at the Agency level. 2 AAC 12.695 and P&P 10.01.011.

An interested party must attempt to informally resolve a dispute on a solicitation or award with the Procurement Officer. If the attempt is unsuccessful, the party may protest under 2 AAC 12.695.

The protest is to be answered by the official one step above the person who acted as the Procurement Officer on the contract being protested.

There are no provisions for the protest appeal of a construction related small procurement to the DOT&PF Commissioner. If the protester is not satisfied with the decision of the Agency, the protester may proceed directly to the courts.

Copies of all construction related protests of small procurements and a report of the actions taken by the Procurement Agency must be sent to the DOT&PF Chief Contracts Officer within fifteen (15) days of the final administrative decision on the protest.

### 4.2 Disputes and Claims

#### The Contract Claim

An aggrieved Contractor must file a contract claim with the Procurement Officer of the Procurement Agency and must certify that:

- it is made in good faith;
- supporting data are accurate and complete to the best of the Contractor's knowledge and belief; and
- the amount requested accurately reflects the adjustment for which the Contractor believes the Procurement Agency is liable.

A claim must be filed within ninety (90) days after the Contractor becomes aware of the basis of the claim or should have known the basis of the claim, whichever is earlier.

If the dispute or claim cannot be resolved by agreement, the Contractor may seek a remedy by requesting a written Procurement Officer's Decision (POD). The decision is due within ninety (90) days after receipt of all necessary information from the Contractor.

The time for issuance of the decision may be extended for good cause, if the claim amount is in excess of \$ 50,000 (AS 36.30.620).

All Procurement Agency Procurement Officers' Decisions must be immediately copied to the DOT&PF Chief Contracts Officer.

The Procurement Officer furnishes a copy of the decision to the Contractor by certified mail or other method that provides evidence of receipt. The decision must include a:

- 1) description of the controversy;
- 2) reference to the pertinent contract provisions;
- 3) statement of the agreed upon and disputed facts;
- 4) statement of reasons supporting the decision; and a
- 5) statement in the closing letter of transmittal substantially as follows:

*"This is the final decision of the Procurement Officer. This decision may be appealed to the Commissioner of the Department of Transportation and Public Facilities. If you appeal, you must file a written notice of appeal with the commissioner within 14 days after you receive this decision."*

#### The Contract Claim Appeal

The Contract Claim Appeal process is:

- 1) An Appeal of the POD by the Contractor (now known as the Appellant) must be filed with the DOT&PF Commissioner within 14 days after receipt of the decision (AS 36.30.625).
- 2) The DOT&PF Commissioner (or designee), within fifteen (15) days after receipt of the



## 4. Protests and Contract Claims

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appeal, may adopt the POD as final without a hearing or direct the matter for a hearing (AS 36.30.630(b)).

- 3) If held, the hearing must occur "promptly" (AS 36.30.670). There is no specific timeframe in which the hearing is to start or end. The hearing is usually expedited to the extent agreed to by both parties.
- 4) After hearing, the hearing officer issues a recommended decision in accordance with AS 36.30.675. The DOT&PF Commissioner (or designee) may affirm, modify, or reject the hearing officer's recommendation.
- 5) In accordance with AS 36.30.680, the DOT&PF Commissioner issues a written decision within ninety (90) days after all aspects of the hearing have been concluded.
- 6) Final decision by the DOT&PF Commissioner may be appealed to superior court within thirty (30) days of the receipt of the decision, in accordance with AS 36.30.685 and the Alaska Rules of Appellate Procedure.

## 5. Waivers, Alternate and Innovative Procurement Methods, and Public Interest Finding

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### 5.1 General Information

#### Alternate Procurements

Alternate Procurements are defined as those that are:

- Emergency;
- Single Source; or
- Limited Competition

#### Innovative Procurements

Absent a statutory or regulatory definition for "innovative procurements," we look to the dictionary definition of the key word. As innovative is "a new idea, method...", consider the term "innovative procurement" to mean a procurement method other than one specifically defined in statute.

In accord with AS 36.30.308, the Commissioner of the Department of Transportation and Public Facilities must determine in writing:

*"that it is advantageous to the State to use an innovative competitive procurement process in the procurement of new or unique requirements of the State, new technologies, or to achieve best value" (reference 2 AAC 12.575 and 2 AAC 12.577).*

#### Requests to Use Alternate or Innovative Procurement Methods

All small procurement construction related alternate procurements require the completion and approval of the DOT&PF Waiver Request for Alternate Procurement Methods, Form 25D-026, before solicitation. Waiver Requests are processed in accord with P&P 10.01.040.

The Waiver Request is approved by either the Procurement Agency official or the DOT&PF Commissioner, depending on the circumstance.

- If the Commissioner approved the initial contract Waiver, any increase in project costs must be approved by the

Commissioner via an additional Waiver request.

- If the initial contract did not require the Commissioner's Waiver approval, amendments of the initial small procurement contract may be made under Agency approval authority, as long as the aggregate of all increases, including the initial contract cost does not exceed the small procurement threshold.

Innovative Procurements requests must be submitted via memo to the Chief Contracts Officer. If approved, a Procurement Plan is then submitted by the Procurement Officer to the Department of Law for review and approval.

### 5.2 Waiver Request Approval Authorities - Single Source Procurements

#### Alaska Marine Highway System Approval Authority

The review and approval authority for small procurement construction related Waiver requests generated by the Alaska Marine Highway (AMHS) is the Deputy Commissioner.

#### Maintenance & Operations Approval Authority

The Maintenance and Operations (M & O) group approval authority falls under the respective Regional Director.

#### Design & Engineering Services Approval Authority

The Chief Engineer, Statewide Design & Engineering Services signs as the approval authority on all small procurement construction related Waiver requests.

#### International Airports Approval Authority

The International Airport Director or designee has approval authority on all small procurement construction related Waiver requests.

## 5. Waivers, Alternate and Innovative Procurement Methods, and Public Interest Finding

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### Agencies with Construction Delegation Authority

The head of the Agency has approval authority for small procurement construction related Waivers up to the \$200,000 limit. When this responsibility is sub-delegated, a written notification of the delegation must be submitted to and approved by the CCO.

### 5.3 Considering State's Best Interest <sup>1</sup>

There is no single or comprehensive definition established by statute or code for the term "*in the State's best interest*." Nor is there a specific form that is filled out when making and requesting support of a "best interest" determination. Small procurement "*best interest*" determinations are required for:

- Public Interest Findings (P&P 05.01.070).
- Single Source procurements.
- Design/Build (D/B) procurements.
- Contract dispute resolutions.
- Claims settlements.
- Contract terminations.
- Support of conduct that is a departure from a normal operating procedure.

#### Establishing "Best Interest"

The basis for a "*best interest*" recommendation must contain specific and significant evidence to support the finding. The written record must address (as applicable to the situation):

- 1) the applicable statutes, regulations, and policies on which the issues are based;
- 2) facts that are material to the determination;

- 3) how the recommendation can be found to be reasonable or practicable; <sup>2</sup>
- 4) the sound fiscal reason for the recommendation (a fiscal consideration may not always be considered as a "*best interest*" factor);
- 5) whether an affirmative determination will avoid injustice to a person;
- 6) the reasonable and foreseeable effects of the decision;
- 7) the duration of the determination effectiveness; and,
- 8) any other pertinent information upon which the determination can be made.

#### When a "*Best Interest*" Recommendation Cannot Be Used

The application of "*best interest*" with the intent to circumvent statute, code, policy, procedure, or ethical conduct is obviously inappropriate and could be unlawful.

#### Can a Determination of "*Best Interest*" be Delegated?

In certain circumstances, "*best interest*" determinations may be delegated - confirm with your Contracting Officer.

When in doubt, send the "*best interest*" recommendation to the DOT&PF Commissioner, via the Chief Contracts Officer, for review/approval.

#### False Statements Made In Determinations

The official making the "*best interest*" determination must independently examine the material facts of the procurement and independently determine whether the

competition commensurate with the circumstances of the procurement, considering price, mission requirements, and available competition; "reasonable and adequate procedures" includes contacting only one potential Offeror in appropriate circumstances.

"Practicable" - What may reasonably be accomplished or applied.

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<sup>1</sup> The terms "best interest," "best interest of the public," "best interest of the State", "best interest of the department," and "advantageous to the State" (or similar sentence structure) are considered synonymous. In **2 AAC 12.415**, within the context of Single Source procurements, the definition given for "*in the state's best interest*" is: ".....a determination that is reasonable

<sup>2</sup> "Reasonable and Adequate Procedures" - Means procedures that ensure fairness to potential Offerors and

## 5. Waivers, Alternate and Innovative Procurement Methods, and Public Interest Finding

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procurement is eligible for the procurement method requested (AS 36.30.300 - .315).

### 5.4 The Public Interest Finding

A Public Interest Finding (PIF) is the typical document and permanent record used to satisfy a "State's best interest" or "findings-of-fact" requirement (see P&P 10.02.013). There is no standard form for requesting a PIF determination.

It must clearly show that the best interest of the public and State have been achieved. It must address applicable regulations, material facts, the reasonableness or practicality of the recommendation, the cost effectiveness, the reasonable and foreseeable effects of the decision, how long it will be effective and other pertinent information

If a Waiver is required and it addresses the PIF, there is no reason to issue a separate PIF.

All Public Interest Finding requests must be routed through the Agency Procurement Officer who signs the "Approval Recommended" portion of the PIF.

PIFs are not required when the funding source is a municipality or other entity and is not reimbursable with state or federal funds or when the work is maintenance on a non-capital project or when procuring routine, minor quantities of materials, supplies and proprietary products for the maintenance of a utility operation.

For DOT&PF projects and purchases, the DOT&PF Chief Contracts Officer, makes the final determination on public interest, based on the submittal of a complete analysis of the facts.

With the Delegated Operating Agencies that receive DOT&PF Construction Delegation of Authority, the final signature approval rests with the Agencies Purchasing Officer.

### 5.5 Emergency Procurement

Procurements may be made under emergency conditions only when one of the following conditions applies:

- There exists a threat to public health, welfare, or safety.
- Procurement through competitive means is impracticable or contrary to the public interest (Type 2).
- There is the immediate need to protect public or private property.

#### Emergency Procurement Procedures

##### ***When action is required within 72 hours:***

The Agency official or Procurement Officer must make a written determination of emergency, stating the factual basis for the finding. Upon completion of the emergency procurement, the written determination must be promptly forwarded to the CCO (2 AAC 12.460).

##### ***When action is not required within 72 hours:***

Using Form 25D-026, provide a written determination of emergency stating the factual basis for the finding, and submit it to the CCO for review and approval by the **DOT&PF Commissioner** in accordance with the procedures listed in P&P 10.01.040.

The Type 2 Emergency waiver request requires a statement of competition practical under the circumstances. Sometimes you can call local contractors and sometimes you can do a shortened advertisement on the OPN.

***The intent of this waiver authority is to take care of the emergency. This authority cannot be used to continue to procure commodities or services once the emergency has terminated. Procurement officials are encouraged to obtain competitive prices whenever it is possible.***

## 5. Waivers, Alternate and Innovative Procurement Methods, and Public Interest Finding

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### 5.6 Single Source Procurement

A Single Source Procurement is the restriction of the purchase of supplies, services, or professional services to one potential vendor or contractor because no other source is suitable or acceptable to meet the need (AS 36.30.300, 2 AAC 12.410).

The head of the Procurement Agency, or the applicable Director is the approval authority on small procurement construction related Single Source Waivers. Single Source Procurements may be made only when:

- It is not practicable to award a contract by competitive sealed bidding, competitive sealed proposals, or limited competition; and
- Award of the contract is in the "State's best interest".

The Waiver Request for Alternate Procurement, Form 25D-026, Single Source, must cite the specific and significant interests that justify not using a competitive method (For information on "Considering State's Best Interest," see Chapter 7, Section 7.5 of this Manual and P&P 10.023.013).

The written justification for a Single Source procurement must include evidence consisting of material facts sufficient for independent examination and verification, and must be structured substantially as follows:

- *"It is not practicable to award a contract by a competitive process because ....."*
  - (Cite the specific reasons why a competitive process is not practicable);
- *"Awarding a contract as a Single Source is in the State's best interest because ....."*
  - (Cite specific, significant interests that justify not using a competitive process);

- *"Per AS 36.30.300 and 2 AAC 12.410, we are requesting a Single Source determination to establish the aforesaid contract."*
- *"The contract will expire on (date)."*

The procurement official negotiates with the Single Source supplier on price, delivery, and terms, to the extent practicable. A copy of the finalized Waiver is to be sent to the CCO.

### 5.7 Limited Competition Procurement

A Limited Competition Procurement is a procurement restricted to two or more potential contractors or when competitive sealed proposal processes are impractical or contrary to the public interest (see P&P 10.01.040).

The head of the Procurement Agency, or the applicable Director is the approval authority on small procurement construction related Limited Competition procurements.

The Waiver Request for Alternate Procurement, Form 25D-026, Limited Competition, must include findings of fact that support the determination per AS 36.30.305 and 2 AAC 12.430. A copy of the finalized Waiver is to be sent to the CCO.

### 5.8 Multi - Year (Term) Procurement

The small procurement method may be used for multi-year (Term) contracts, if the aggregate dollar amount for all years of the projected term does not exceed the \$200,000 small procurement limit.

A Term procurement contract fulfills present and future needs by furnishing stated quantities of supplies or services continuously for a set term, at specified prices. At the end of the first year, the Procurement Agency may, if funds are unavailable, cancel the remaining contract years. However, if the contract is cancelled prior to full

## 5. Waivers, Alternate and Innovative Procurement Methods, and Public Interest Finding

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extension, the contractor may be entitled to compensation for authorized costs.

### 5.9 Brand Name Materials

A Brand Name material requirement does not require a Waiver approval. Though the article may appear to be from a single source (i.e. only one manufacturer makes the product), its purchase and placement is not a Single Source procurement. This is because a number of competitors can compete for the contract - the Agency is not limiting the award to a single contractor, it merely requires the bidders to factor into their bids the only brand of material acceptable for a particular application.

A Brand Name contract requirement must be approved by the DOT&PF Chief Contracts Officer's, for Federal Highway Administration (FHWA) funded projects, via submittal of the Public Interest Finding (PIF) (see P&P 10.02.050).

### 5.10 Purchasing Construction Related Supplies and Materials

When considering the purchase of materials for a construction project, in advance or independent of it, follow 2 AAC 12.760 - the procurement Agency must make a written determination of "States best interest" prior to such a purchase. The determination may cite economic, scheduling, practicality or other related factors as the basis. With such purchases they must be:

- (a) **Incorporated into a specific construction project** and not simply used as inventory.
- (b) **Physically attached to the facility**, either structurally, mechanically, or electrically (i.e., a portable dishwasher that is simply plugged into an outlet and attached to a hose bib is not acceptable, nor is an area rug or modular furniture. But a "built-in" dish washer, wall-to-wall carpeting, and "demountable" full height partitions are.)

- (c) **In compliance with Davis-Bacon wage provisions when installation services are included.** Services are subject to Davis-Bacon when the combined value of the goods and services exceeds \$ 25,000.

If the materials are proprietary, or only one vendor can provide them, an approved Waiver Request for Alternate Procurement Methods - Single Source, is required (See Chapter 5 and P&P 10.01.040).

***Construction related materials or supplies that are not project specific must be solicited by the DOA solicitation procedures.***

### 5.11 "As-Needed" (indefinite-quantity) and the "Requirements" Procurement

Many so-called "as-needed" contracts are in actuality a "requirements" contracts - a confusing issue of language that can complicate your procurement. Recognize that in the purchasing field, the contract phrase "as-needed" is recognized as being synonymous with "indefinite-quantities."

Small procurement statutes and regulations apply to "as-needed" and "requirements" procurements **if** the dollar amount for each contract year does not exceed the \$200,000 small procurement limit. These two types of contracts may also be set up as Term procurements.

#### **The "As-Needed" (indefinite-quantities) Procurement**

An "indefinite-quantities" procurement provides that the Contractor furnishes an indefinite amount of specific supplies or services within a fixed time, with deliveries made after an order by the Procurement Agency. In most instances, a required minimum must be ordered. There is no obligation to place orders above the stated minimum.



## 5. Waivers, Alternate and Innovative Procurement Methods, and Public Interest Finding

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Under the "indefinite-quantities" procurement, the Procurement Agency is not liable for costs if the Contractor is idled by lack of an order.

The use of a limited form of the "indefinite-quantities" agreement, where the Procurement Agency is not to be held to the implied obligation to secure minimums, is permissible. Such procurements are typically used when the Agency wants the freedom to do some of the work with its own personnel.

It is imperative that under such procurements, the Agency ensure that its' intent is clearly communicated in the solicitation and in the resulting contract documents.

### **"Requirements" Procurement**

The "requirements" procurement allows the use of services or the acquisition of goods in quantities as may be needed.

The "requirements" solicitation usually includes a realistic estimate of the total quantity anticipated. However, this estimate is not to be construed as a representation that the estimated quantity will be required or ordered, or that the conditions affecting the requirements will be stable or normal.

When the Contractor promises to furnish services or supplies under a "requirements" procurement, the contract is enforceable because it contains the essential elements of mutuality, i.e., one party has agreed to furnish, and the other party agrees to accept and pay for the quantity needed.

Without restrictive language to the contrary, the Agency must order all of its identified needs from the Contractor during the term of the contract. If the needs stated at the time the contract is executed persist, the Agency cannot augment its own forces and do the work without liability. To use Agency forces to do work promised under a "requirements" contract is a breach.

When extending the term of an "indefinite-quantities or "requirements" contract, a new contract along with a new Notice of Award / Notice to Proceed, Form SPC-003, or similar form, is required.

### **5.12 "Design – Build" Procurement**

The "design-build" procurement is one in which the resulting design and construction of a project is assigned to a single contractor who develops and implements the project design and performs the construction of the work based on end result parameters and design criteria provided by the Procurement Agency.

Because design is an integral part of the work, these procurements are solicited as professional service agreements.

See P&P 10.02.021, Requesting Design/Build Procurement Approval, for process information.

When providing information in support of a "design-build" procurement, always give a projection of the cost and of the time savings to be realized.

## 6. Records Keeping

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### 6.1 General Information

It is imperative to keep appropriate file records on all construction related small procurements. Generally, the documents that are important to keep on file include:

- (a) agenda for the pre-construction meeting;
- (b) delegation memos;
- (c) memos of approval or denial;
- (d) change documents;
- (e) inspections;
- (f) project "close-out" reports; and
- (g) warranty related correspondence.

### 6.2 Required Small Procurement Records

All small procurement "*records that facilitate auditing*" must be placed in the construction project files (see AS 36.30.500 through 540, 2 AAC 12, and P&P's 10.01.011 and 10.01.040).

The file record must include:

- a list of the contractors from whom quotes were solicited;
- the Procurement Agency's project cost estimate;
- the quotes received;
- any notable exceptions; and
- the Project Manager's recommendation regarding award, including approval or disapproval of the Procurement Agency.

#### Alternate Procurement Records

A record of all Alternate Procurements must also be maintained in the Procurement Agency's procurement file. These records are typically:

- the written determination approving the procurement;
- copies of all purchasing documents and quotations or informal proposals received; and
- a completed Procurement Report (Part 6 of the DOT&PF Waiver Request for

Alternate Procurement Methods, Form 25D-026).

The Waiver Request, Part 6 reporting is made to the DOT&PF Chief Contracts Officer and must occur within five days after completion of the procurement.

All Single Source, Limited Competition and Emergency Procurements, regardless of cost, must be reported annually (by Oct. 31 of each year) by submission of a Procurement Report to the DOT&PF Chief Contracts Officer.



## 7. Miscellaneous Topics

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### 7.1 Professional Services Agreements

Use the Professional Services Agreement (PSA) Manual for guidance in preparing PSA solicitations and contracts. The PSA Manual is available on the DOT&PF Procurement web page or can be obtained by calling the Central Region PSA Coordinator.

### 7.2 Federal Recognition of Alaska's Small Procurement Code

When any federal funding is involved, procurement solicitations are not restricted to beginning with those firms that just have offices in Alaska. Potential Offerors outside the State may be contacted at the same time as contact is made with Alaskan providers.

#### Federal Highway Administration (FHWA)

The FHWA recognizes and approves of the State's small procurement procedures and dollar limits. Most FHWA federally funded projects are under the Federal-aid Stewardship and Oversight Responsibility Agreement and do not require prior approval from that agency.

#### Federal Aviation Administration (FAA)

The FAA has not classified the DOT&PF as "Self-Certified" and does not currently recognize the State's small procurement regulations as controlling.

Frequently refer to the FAA applicable Code of Federal Regulations (CFRs) and agency bulletins and circulars for the FAA's current position.

### 7.3 Disadvantaged Business Enterprise (DBE)

The DOT&PF promotes opportunities for socially and economically disadvantaged individuals to participate on federally funded highway and aviation projects through the Disadvantaged Business Enterprise Program (DBE).

The DOT&PF Civil Rights Office (CRO) ensures statewide compliance with the Department's

federal non-discrimination and affirmative action obligations as a condition of continued federal funding for highway and airport construction.

The CRO has determined that construction related projects of less than \$150,000 are free of DBE project goals.

The DBE Civil Rights Office can be contacted at 269-0851, or toll free 1-800-770-6236.

### 7.4 Art in Public Places

Though AS 35.27.020(d) states that a building or facility with an estimated construction cost of less than \$250,000 is exempt from the "Art in Public Places" requirement, AS 44.27.060(b) requires that;

The commissioner of a department responsible for the design and construction of a building or facility shall deposit into the art in public places fund one percent of the construction cost of a building or facility if the building or facility is exempt from the requirements of AS 35.27 and the exemption is because:

- (1) the estimated construction cost of the building or facility is less than \$250,000; or,
- (2) the building or facility is not designed for substantial public use.

See P&P 05.02.010, "Procurement of Artwork for Public Buildings and Facilities".

### 7.5 An Expiring Contract

All contracts, regardless of the amount, must be renewed or extended PRIOR TO THEIR EXPIRATION DATE. If the contract has expired, it cannot be renewed or extended (even if renewal options were available) unless, depending on the circumstances, a Waiver Request for Alternate Procurement Methods, Single Source (Form 25D-026) is approved.

## 7. Miscellaneous Topics

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A retroactive change order to extend or renew an expired contract is prohibited.

### **The exception to this is:**

If both parties continue to act as if the contract was renewed, and the contract provisions would have allowed the renewal (had it been done in a timely manner), then it can be considered an administrative oversight. Both parties (by their actions) have agreed to the renewal and have continued to operate under the contract, therefore, the late renewal is issued (after-the-fact) to memorialize this agreement.

### **7.6 Investigating Suspected Procurement Code Violations**

It is the policy of the DOT&PF to investigate and report all suspected contract or procurement violations that occur within the Department and by those Agencies with a construction delegation of authority.

P&P 10.02.023, "Investigating Suspected Procurement Code Infractions," establishes procedures for the investigation and reporting of a suspected contract or procurement violation. If the procurement authority falls under the Department of Administration (DOA), the procedures in the State Administrative Manual (Section 81.300 – 81.350) apply.

When a procurement or contract violation is suspected, the DOT&PF Chief Contracts Officer, must be immediately notified. The person who discovers a possible contract or procurement violation, regardless of their employment position, contacts the DOT&PF Chief Contracts Officer who determines the next procedural step.

Violations of procurement statutes, regulations, or the State Administrative Manual may be cause for revocation of purchasing authority, disciplinary action up to and including dismissal, and/or prosecution under AS 36.30.315.

## 8. Definitions

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Words and phrases are construed according to the rules of grammar and their common and approved usage. However, often by legislative or legal intent, those 'thought to be' common terms and expressions can take on a certain meaning. Construction contract language is no exception. This document has been created to provide a commonly accepted definition of words and terms often used in construction contracts.

**Addenda (Addendum)** – All clarifications, corrections, or changes issued graphically or in writing after the advertisement but prior to the opening of quotes.

**Advertisement** – The public announcement, as required by law, inviting responses for work to be performed or materials to be furnished.

**Alaska Administrative Code (AAC) Regulations** – These 'codes' amplify or give direction to statutes [where more than one regulation applies, the more restrictive prevails].

**Alaska Bidder** – A person who:

- (A) holds a current Alaska business license;
- (B) submits a bid for goods, services, or construction under the name 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, or is a partnership and all partners are residents of the state; and
- (E) if a joint venture, is composed entirely of ventures that qualify under (A) - (D) of this subsection.

**Alaska Procurement Code** – The Alaska Procurement Code, AS 36.30, was enacted in 1987 to provide a comprehensive statutory system for the regulation of the procurement of goods and services for the State of Alaska. It is based upon the premise that the procurement of goods and services should be through competitive bidding in order to promote competition and the best interests of the State.

In recognition that competitive bidding would not be either possible or desirable in all procurements, the code provides for exceptions to this general rule. Single Source procurement is one such exception.

**Alaska Product** – A product of which not less than 25 percent of the value, as determined in accordance with regulations adopted under AS 36.30.332(a), has been added by manufacturing or production in the State.

**Alternate Procurements** – Procurements made by means other than Competitive Sealed Bid or Competitive Sealed Proposal, which includes procurements such as Single Source, Limited Competition, and Emergency.

**Ambiguity** – Generally recognized in contract law as being when more than one plausible explanation of a bidder's intent can be found.

**Appeals Officer** – The Commissioner of the DOT&PF or designee assigned to administratively adjudicate appeals that come before the Department.

**Approved or Approval** – Written approval by the Procurement Officer or authorized representative.

**Arbitrary & Capricious** – A decision or action that is willful and unreasonable without consideration or in disregard of facts or law or without determining principle.

## 8. Definitions

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**As-needed Contract** – The same as an 'indefinite-quantities' contract. "As-needed" contracts are often confused or misapplied with the "requirements contract." Many of the termed "as needed" contracts are found to actually be "requirements contracts."

**Authorized** – Authorized by a written delegation under 2 AAC 12.740 by the head of an agency that has a delegation of procurement authority based on a written determination of capability under AS 36.30.015.

**Award** – The acceptance of the successful bid by initiating the contract.

**Best Interest of the State** – See "In the State's Best Interest".

**Bid Schedule** – A written tabulation of the bids received in the order from lowest to highest, excluding bids that were non-responsive or non-responsible.

**Bid Tabulation** – The listing of all bids received on the project including the Engineer's cost estimate. It is released shortly after bid opening.

**Bidder** – Any individual, firm, corporation or any acceptable combination thereof, or joint venture submitting a bid (or quote) for the advertised work.

**Bonding** – Bonding is grouped into three basic classifications:

- A **Bid Bond** is the form of guarantee consisting of a bond, certified check or negotiable instrument that is submitted with the bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified. The Department, in the contract, determines the amount of the bid bond for the contract. If a Bidder/Offeror is selected to receive the contract and fails to negotiate, or fails to deliver a fully executed contract after award / negotiation, the bid bond will usually be immediately forfeited to the State. Bids / offers submitted without a bid bond, when it is called for, must be rejected.
- A **Performance Bond** is a bond executed in connection with a contract to assure fulfillment of all the Contractor's obligations under the contract.
- A **Payment Bond** is a bond executed in connection with a contract to assure payment, as required by law, to all persons supplying labor and material in the execution of the work provided for in the contract.

**Business License** – A license required under the Alaska Business License Act (AS 43.70) by the division of occupational licensing and, for a person engaging in a business subject to licensing provisions of a regulatory nature, a license, certificate, permit, registration, or similar evidence of authority issued for an occupation by competent legal authority.

**Calendar Day** – Every day shown on the calendar, beginning and ending at midnight.

**Certification** – A process through which the Department determines that an individual meets the mandatory training, experience, and continuing education standards established for a particular discipline, position, etc.

**Change Document** – Any written document executed by the Procurement Agency that changes the contract terms.

**Change Order** – A written order signed by the procurement officer, directing the Contractor to make changes that the changes clause of the contract authorizes the procurement officer to order.

## 8. Definitions

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**Chief Contracts Officer (CCO)** – Under the general administrative direction of the Commissioner of DOT&PF, has the responsibility for establishing policy standards and methodologies and ensuring compliance with all state and federal requirements governing the procurement of construction services and materials.

**Code of Federal Regulations (CFR)** – When Federal funding is involved, these regulations prevail over State policies & procedures.

**Competitive Sealed Bidding** – The procedure under AS 36.30.100 - 36.30.190.

**Competitive Sealed Proposal** – See AS 36.30.200 and 2 AAC 12.260.

**Computation of Time** – Time is based on calendar days and is computed by excluding the first day and including the last. If the date due of a submittal falls on a weekend or holiday, the following business day applies.

**Concurrent Review** – A process of review of construction project records to assure that such records are in accordance with contract requirements and established procedures and are adequate to support payments to Contractors.

**Conditioned Bid** – A bid containing unauthorized alterations or additions to the bid documents. 2 AAC 12.840

**Conditions of the Contract** – Those portions of the Contract Documents that define the rights and responsibilities of the contracting parties and of others involved in the work. The Conditions of the Contract include General Conditions, Supplementary Conditions, and other conditions.

**Conformed Contract** – The bound contract documents containing the plans and specifications, the fully-executed contract, payment and performance bonds, EEO forms, and a completed bid schedule.

**Construction** – "Construction" or any derivation means construction, reconstruction, alteration, improvement or major repair. There are significant differences between construction and non-construction procurements in terms of delegated authority levels, certification/warrant requirements, competitive levels, public notices, forms, procedures, and reports.

DOT/PF contracts Officer Bulletin 03-006 <http://www.dot.state.ak.us/procurement/bulletins/index.shtml> for a detailed explanation of these differences.

"construction" means the process of building, altering, repairing, maintaining, improving, or demolishing a public highway, structure, building, or other public improvement of any kind to real property other than privately owned real property leased for the use of agencies; it includes services and professional services relating to planning and design required for the construction; it does not include the routine operation of a public improvement to real property nor does it include the construction of public housing. AS 36.30.990(7)

**Constructive Change Order** – Any conduct by a Contracting Officer or other authorized official that is not a formal change order, but that has the effect of requiring a Contractor to perform work different from that prescribed by the original terms of the contract, constitutes a *constructive change order* - entitling the Contractor to relief under the changed conditions clause of the contract.

Such conduct may be in the form of an affirmative act, a failure to act (an "omission"), or what has been termed a "course of conduct." It may be in writing, or it may be oral. It may be casual or informal (i.e. words such as "order" or "direct" need not be used). In short, it may be anything that, in practical effect, constitutes a requirement by an authorized State official that the Contractor perform work not originally specified in the contract.

## 8. Definitions

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If a Contracting Officer directs a Contractor to perform work in accordance with an interpretation of the contract specifications that differs from the Contractor's interpretation, and the Contracting Officer's interpretation is erroneous, the Contracting Officer's action constitutes a constructive change order entitling the Contractor to appropriate relief.

A Contractor may not realize that a constructive change order has in effect been given until after work on it has progressed for a considerable time. However this is not fatal to the Contractor's claim, as the situation is one that has been created by the State and by the State's failure to advise the Contractor correctly regarding the nature of the action, and such delay in claiming does not preclude the Contractor from receiving just compensation.

**Consultant** – The person, firm, or corporation retained directly to prepare Contract Documents, perform construction administration services, or perform other Project related services.

**Contract** – All types of State agreements, regardless of what they may be called, for the procurement or disposal of supplies, equipment for the State fleet, services, professional services, or construction.

**Contract Documents** – The Contract form, Addenda, the bidding requirements and Contractor's bid (including all appropriate bid tender offers), the bonds, the Conditions of the Contract and all other Contract requirements, the Specifications, and the Drawings furnished to the Contractor, together with all Change Orders and documents approved by the Contracting Officer, for inclusion, modifications and supplements issued on or after the effective date of the contract.

**Contract Modification** – A written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of a contract accomplished by mutual action of the parties to the contract.

**Contract Price** – The total moneys payable by the Department to the Contractor under the terms of the Contract Documents.

**Contract Time** – The number of Calendar Days or the date specified in the construction Contract and authorized extensions that identify how much time the Contractor is allowed to achieve Final Completion.

**Contract (Procurement) Officer** – The person authorized by the Commissioner, or designee, to enter into and administer the Contract on behalf of the Department. This entity has authority to make findings, determinations and decisions with respect to the Contract and, when necessary, to modify or terminate the Contract. The Contract Officer is identified in the construction Contract. The term Contract Officer is synonymous with Procurement Officer.

**Contract Officer's Decision (COD)** – In a protest, this is the written decision the Contract Officer issues, containing the basis of the decision after a protest has been filed. The acronym for Contract Officer's Decision is COD. This is synonymous with Procurement Officer's Decision (POD).

**Contractor** – The Contractor, including subcontractors, performing work necessary to facilitate public construction.

**Contracts Officer Bulletins (COB)** – Bulletins issued by the DOT&PF Chief Contracts Officer that are intended to impart guidance or directives on certain construction contract matters. The bulletins are "interpretive" in nature and serve to inform and direct. They reflect the Department's policy on the issue being addressed. If a conflict between a bulletin and a statute or a formally adopted regulation is found to exist, the law/regulation takes precedence.

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**Controlling Item** – Any feature of the work considered at the time by the Contracting officer as essential to the orderly completion of the work and which, if delayed, will delay the time of Final Completion of the Contract (such as an item of work on the critical path of a network schedule).

**Cost Analysis** – The evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.

**Cost Data** – Information concerning the actual or estimated cost of labor, material, overhead, and other cost elements that have been actually incurred or that are expected to be incurred by the Contractor in performing the contract.

**Cost Effective** – The efficient use of labor, equipment, materials, and supplies to assure the lowest overall cost.

**Cost of Construction** – Includes, in addition to costs directly related to the project, the sum total of all costs of financing and carrying out the project. These include, but are not limited to, the costs of all necessary studies, surveys, plans and specifications, architectural, engineering or other special services, acquisition of real property, site preparation and development, purchase, construction, reconstruction, and improvement of real property and the acquisition of machinery and equipment as may be necessary in connection with the project; an allocable portion of the administrative and operating expenses of the grantee; the cost of financing the project, including interest on bonds issued to finance the project; and the cost of other items, including any indemnity and surety bonds and premiums on insurance, legal fees, fees and expenses of trustees, depositaries, financial advisors, and paying agents for the bonds issued as the issuer considers necessary.

**Cost Plus Fixed Fee** – Contractors are paid for all allowable costs plus a predetermined fixed fee. Such contracts have been found to be beneficial for research and development work.

**Cost Plus Incentive Fee** – A tentative fee based on estimated costs and an established target price. If actual costs fall below estimated costs, the Contractor and State share in the savings. The Contractor can lose all or part of the fee, but he/she must be paid for all costs.

**Cost Plus Percentage of Cost** – Under this type of contract, the Contractor receives payment for costs of performance plus a specified percentage of such actual costs as a fee. These contracts provide no incentive for efficient and economical Contractor performance and must not be used. These contracts are prohibited by statute.

**Days** – "Days" are calendar days unless otherwise specified.

**Defective** – An adjective that refers to work that is unsatisfactory, faulty or deficient, or does not conform to the Contract Documents, or does not meet the requirements of any inspection, reference standard, test or Approval referred to in the Contract Documents, or has been damaged prior to the Department's approval.

**Department** – In the context of this Manual, means the Alaska DOT&PF.

**Departmental Policy** – Policy of the Alaska DOT&PF.

**Design-Build Construction Contract** – A construction agreement where the design and construction of a project is assigned to a single Contractor who develops and implements the project design and performs the construction of the work based on end result parameters and design criteria provided by the DOT&PF. See the Design-Build Manual at: <http://dot.alaska.gov/stwddes/dcspubs/index.shtml#manuals>

**Directives** – Those written communications from the engineer to the Contractor concerning topics that are within the scope and language of the contract. Directives can be issued in the form of a letter to the Contractor



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and can be used to: clarify contract terms; suspend and resume work; document directions or instructions given to the Contractor; reject non-specification materials or work; and initiate work on contingent sum pay items.

**Disability Preferences** (AS 36.30.321) – The Division of Vocational Rehabilitation in the Department of Labor and Workforce Development keeps a list of qualified employment programs, a list of individuals who qualify as persons with a disability, and a list of persons who qualify as employers with 50 percent or more of their employees being persons with disabilities. A person must be on this list at the time the bid is opened in order to qualify for a preference.

**Disaster** – The occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or man-made cause, including: (A) fire, flood, earthquake, landslide, mudslide, avalanche, wind-driven water, weather condition, tsunami, volcanic activity, epidemic, air contamination, blight, infestation, explosion, riot, or shortage of food, water, fuel, or clothing; (B) the release of oil or a hazardous substance, if the release requires prompt action to avert environmental danger or damage; and (C) equipment failure, if the failure is not a predictably frequent or recurring event or preventable by adequate equipment maintenance or operation.

**Disaster Emergency** – The condition declared by proclamation of the Governor or declared by the principal executive officer of a political subdivision to designate the imminence or occurrence of a disaster.

**Drawings** – The drawings show the character and scope of the work to be performed and are furnished by the Department or the Department's Consultant and are typically, by reference, made a part of the Contract Documents.

**Effective Date of the Contract** – The date on which the Contract is fully executed by both the Contractor and the Department.

**Equal Employment and Disadvantaged Business Enterprises** (DBE) – Requirements relating to minority and women hiring goals by the contractor and DBE subcontracting goals on federally-funded DOT&PF projects. These requirements are defined and enforced by the DOT&PF Civil Rights Office. DBEs are small disadvantaged businesses with majority ownership by women or minorities.

**Electronic Signature** – An "Electronic Signature" is an encoded transmittal that ensures that electronic business can be transacted between certain parties that is binding. The "signature" code is established in a data base with the recipient in a way that prohibits unauthorized use. Due to the progressive evolution of electronic mail and the Internet, the electronic interchange of DOT bid advertisements, bid documents and bid proposals may soon become a reality.

**Emergency Repairs** – Those repairs, including necessary preliminary engineering (PE), construction engineering (CE), and temporary traffic operations, undertaken during or immediately after a natural disaster or catastrophic failure (1) to restore essential travel, (2) to protect remaining facilities, or (3) to minimize the extent of damage.

**Employer Identification Number** – The Federal Social Security number used on the Employer's Quarterly Federal Tax Return, U.S. Treasury Department Form 941.

**Encumbrance** – An amount of money set aside in the Alaska State Accounting System (IRIS Financial) to meet a financial obligation to a contractor, consultant, or equipment supplier.

**Federal Funding Agreements** – Every construction project that receives federal funds for a portion of the construction will include a federal funding agreement. The agreement outlines the cost accounting of the

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project that must be accomplished at the project level. There are two types of federal funding agreements: 1) the Project Agreement Estimate for Federal Highway Administration (FHWA) funded highway construction projects and 2) the Grant Agreement for Federal Aviation Administration (FAA) funded aviation construction projects.

**Federal Highway Administration (FHWA)** – Agency under the U.S. Department of Transportation for which the State receives project funding.

**Final Acceptance** – The Department's written acceptance of the work following Final Completion and the performance of all Contract requirements by the Contractor, via the Letter of Final Acceptance to the contractor.

**Final Completion** – When the Project (or specified part thereof) has progressed to the point that all required work is complete as determined by the Contracting Officer.

**Firm Fixed Price** – The most common and easiest contract to administer. A fixed price contract is one that obligates the Contractor to performance at a specified price.

**Force Account Construction** – The direct performance of construction work by a State highway agency, a county, a railroad, or a public utility company by use of labor, equipment, materials, and supplies furnished by them and used under their direct control. P&P 10.02.012.

**Good Faith** – Good Faith is an intangible and abstract quality with no technical meaning or statutory definition - it encompasses an honest belief of the absence of malice and the absence of design to defraud or to seek unconscionable advantage.

**Highway** – Includes a highway, road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof and further includes a ferry system.

**Impossibility to Perform** – To be entitled to relief under the argument of "impossibility to perform," the Contractor must prove that the performance of the contract was, in fact, either actually or practically impossible to carry out.

### Actual Impossibility

Actual impossibility exists when the Contractor or any other producer cannot perform the contract according to its terms, either.

In other words, the impossibility must be objective (impossible to all) – rather than subjective (impossible only to the Contractor because of his own shortcomings, such as a lack of know-how). Actual impossibility exists when a contract's performance requirements cannot be met. It can also exist when the contract's specifications are erroneous.

### Practical Impossibility

Practical impossibility is *"such commercial impracticability as to be the equivalent of legal impossibility."* Thus, even if it may be actually possible to meet specifications, the Contractor may receive relief if the contract requirements are impracticable *"because of extreme and unreasonable difficulty, expense, injury or loss involved"* in meeting them.

Generally, practical impossibility means, *"not possible within the basic objectives contemplated by the parties - as evidenced by the contract itself and the surrounding circumstances."*

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Practical impossibility is difficult to prove. Even in cases where the Contractor, in order to properly perform, incurs costs far in excess of the contract price, mere hardship or excessive cost, or even exorbitant cost is not enough to prove impossibility.

**Incentive/Disincentive for Early Completion** – A contract provision that compensates the Contractor a certain amount of money for each day identified critical work is completed ahead of schedule and assesses a deduction for each day the Contractor overruns the incentive/disincentive time. Its use is primarily intended for those critical projects where traffic inconvenience and delays are to be held to a minimum. The amounts are based upon estimates of such items as traffic safety, traffic maintenance, and road user delay costs.

**Indefinite-Quantities Contract** – A contract that provides that the Contractor furnish an indefinite amount of specific supplies or services within a fixed time, with deliveries made after receipt of an order from or call by the State. In most instances there is a required, stated minimum that must be ordered. There is, however, no obligation to place any orders above the stated minimum. Under the "indefinite-quantities" contract, the State is not liable for costs of the Contractor if he/she is idled by lack of order. "Indefinite-quantities" contracts are often used when the desire for goods or services in a particular area exceeds the capacity of any one Contractor.

**Independent Contractor** – A Contractor employed to perform a task without being subject to control except as to the final results. An "independent contractor" generally:

- (1) has made a significant investment in the facilities used by him to perform services for another;
- (2) is in a position to realize profit or suffer a loss because of this service;
- (3) makes his services available to the general public; and
- (4) cannot end a contractual relationship without incurring liability nor be dismissed from the contract so long as the work performed is acceptable.

In most cases a "mom/pop" or "father/son" operation can only be considered an "independent contractor" when both members are joint owners of the firm.

**Install** – To build into the work, ready to be used in complete and operable condition and in compliance with the Contract Documents.

**Interested Party** – An actual or prospective bidder or offeror whose economic interest may be affected substantially and directly by the issuance of a contract solicitation, the award of a contract, or the failure to award a contract; whether an actual or prospective bidder or offeror has an economic interest depends on the circumstances (AS 36.30.699). Alaska's definition of "**interested party**" is similar to the federal definition.

Under 31 USC § 3551(2), "*interested party...means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.*" Subcontractors are not interested parties within the meaning of 31 USC § 3551(2) and have no standing to protest or appeal procurement decisions.

**In the State's Best Interest** – The term "in the State's best interest" has come to mean certain things in particular circumstances. There is no single or comprehensive definition established by statute or code that fits every occasion, every time.

In 2 AAC 12.415, within the context of Single Source procurements, the definition given for "in the State's best interest" is: "*...a determination that is reasonable under the circumstances and is neither arbitrary, capricious, or prompted by corruption.*"

## 8. Definitions

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The terms "best interest," "best interest of the public," "best interest of the State," "best interest of the Department," and "advantageous to the State" (or similar sentence structure) are considered to be synonymous terms.

**Invitation for Quotes** – Documents soliciting quotes for the work to be performed.

**IRIS** – IRIS is an integrated software system used for the state's accounting, finance, procurement, payroll and human resources management processes.

**Latent Defect** – An item of construction that was defective when installed but whose defective nature and the consequences of the defect do not become apparent until after the passage of time.

**Liquidated Damages** – The daily amount set forth in the contract to be deducted from the contract price to cover additional costs incurred by the State because of the Contractor's failure to complete the contract work within the number of calendar days or workdays specified. The term may also mean the total of all daily amounts deducted under the terms of a particular contract. The amount of actual damages is determined on a project by project basis. The amount is based on certain background information that is set out in the contract documents. If the Contractor fails to adequately perform in accordance with the contract agreement, the State will usually begin to collect liquidated damages on the date specified in the contract and will continue to collect them until some other determined time or action.

**Maintenance** – The preservation of each type of highway, roadside structure and facility as nearly as possible in its original condition as constructed, or as subsequently improved, and the operation of highway facilities and services to provide satisfactory and safe highways.

**Material** – A requirement in the specifications should be presumed to be material and good reasons must exist for finding that a deviation is not material. Matters that relate to cost are usually material. Because of the advantage accruing to the bidder who deviates from specifications and the obvious disadvantages accruing to the other bidders who submitted their bids based on specifications, one should be reluctant to waive provisions that deviate from specifications.

**Materially Unbalanced Bid** – A bid that generates a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost.

**Mathematically Unbalanced Bid** – A bid containing lump sum or unit bid items which do not reflect reasonable actual costs, plus a reasonable proportionate share of the bidder's anticipated profit, overhead costs, and other indirect costs.

**May** – In some degree, is likely to do something. Generally, "may" indicates that a choice or action is permissive but not mandatory. Indicates a judgement, usually dependent on interpretation of unique circumstances.

**Memorandum of Agreement (MOA)** – A project specific document that sets forth an agreement between the State and recognized governmental entity / Agency (usually a municipality) on how that construction project is to be passed to them and administered.

**Memorandum of Understanding (MOU)** – A general agreement document (usually with an established term) that sets forth conditions between the State and recognized governmental entity / Agency (usually a municipality) on how a program or general activities relating to delegated responsibilities will be handled.

**Minor Informalities** – Matters of form rather than substance that are evident from the bid document, or are insignificant matters that have a negligible effect on price, quantity, quality, delivery, or contractual conditions and that can be waived or corrected without prejudice to other bidders. 2 AAC 12.990(a)(8)

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**Misrepresentation** – A false or misleading statement of material fact or conduct intended to deceive or mislead concerning material fact, whether it succeeds in deceiving or misleading.

**Must** – Commanded or required to do something; synonymous with "shall."

**Non-responsive** – A bid or proposal that does not conform in all material respects to the solicitation. 2 AAC 12.990(a)(9)

Bids are considered non-responsive and often rejected for:

- a. Failure to sign the bid.
- b. Failure to submit the bid at the place and time required in the solicitation.
- c. Failure to submit amendments requiring acknowledgement.
- d. Failure to submit any required bid bond/security.
- e. Failure to provide product literature, brochures, or a letter of clarification when specifically required by the Invitation to Bid.
- f. Specifying a delivery time in excess of the delivery time required in the ITB (a conditioned bid).

**Notice of Intent to Award** – A Notice of Intent to Award does not constitute a formal award of a contract. After the completion of contract negotiations (as applicable to the bid type) the procurement officer usually issues a written Notice of Intent to Award (NIA) and sends copies to all offerors. The NIA sets out the names and addresses of all offerors and identifies the proposal selected for award. The scores and placement of other offerors is not a part of the NIA. The NIA must include:

- (1) a statement of the bidder's right under AS 36.30 to protest the award, including the time within which the protest must be received; and
- (2) the name of the successful bidder.

**Notice to Proceed** – A written notice to the Contractor to begin the work and establishing the date on which the contract time begins.

**Plans** – All approved drawings in the contract that show the details of the project.

**Policies & Procedures** – Written directives that provide guidance in accordance w/law & regulations. [http://www.dot.state.ak.us/admsvc/pnp/policy\\_and\\_procedures.shtml](http://www.dot.state.ak.us/admsvc/pnp/policy_and_procedures.shtml)

**Practicable** – What may reasonably be accomplished or applied.

**Practical** – Has the meaning given "practicable" in this document.

**Preconstruction Conference** – Held prior to the beginning of any construction project. This is a formal conference in which general items and items specifically related to the construction project are discussed by all interested parties.

**Pre-qualification** – *"an advance act or requirement that is used for determining a bidder's/offerator's eligibility or ineligibility to participate in the ITB/RFP process"*. In this context, neither statute nor code allows for an action of 'pre-qualification.'

The closest the procurement code comes to 'pre-qualifying' a bidder/offerator is by the two step bidding or proposal process afforded under AS 36.30.190 and AS 36.30.265. These statutes allow the issuance of requests for unpriced technical offers, and then follow up with an ITB/RFP to those who are determined to have the

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technical merit and qualifications under the criteria set out in the first solicitation. Though this process may at first appear to be a 'pre-qualification' act, it differs in the significant aspect that it does not preclude the inherent right of the bidder/offeror to be preliminarily considered eligible to perform a function or service.

**Price Analysis** – The evaluation of price data, without analysis of the separate cost components and profit as in cost analysis that may assist in arriving at prices to be paid and costs to be reimbursed.

**Price Data** – Factual information concerning offered or proposed selling prices, historical selling prices, and current selling prices, including profit, for supplies, services, or construction substantially similar to those being procured.

**Prime Contractor** – A person required to be registered under AS 08.18 who has a contract with the State or a political subdivision of the State to provide materials or services, other than as an employee, for a public construction or public works project.

**Procurement** – Buying, purchasing, renting, leasing, or otherwise acquiring supplies, equipment for the State fleet, services, or construction; it also includes functions that pertain to the obtaining of a supply, equipment for the State fleet, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

**Procurement (Contracting) Officer** – A person authorized to enter into and administer contracts for an agency and make written determinations with respect to them; it also includes an authorized representative of a procurement officer acting within the limits of authority. The term Procurement Officer is synonymous with Contract Officer.

**Procurement Officer's Decision (POD)** – In a protest, this is the written decision the Procurement Officer issues, containing the basis of the decision after a protest has been filed. The acronym for Procurement Officer's Decision is POD. This is synonymous with Contract Officer's Decision (COD).

**Produced or Manufactured** – Processing, developing, or making an item into a new item with a distinct character and use through the application within the State of materials, labor, skill, or other services.

**Product** – Materials or supplies not including gravel and asphalt.

**Professional Services** – 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. Construction services include professional services related to planning and design required for the construction project. Consequently all design services and other professional service contracts that relate to construction projects fit into that definition. Examples other than the obvious design services would be services such as aerial photography to assist in project development or a real estate appraisal to acquire land for a construction project. Professional services not related to construction would be services such as economic analysis, marketing services, wildlife studies. These services would be procured under DOA's procurement authority. DOT&PF's Contracts Officer Bulletin 03-006 discusses these definitions of construction related services in more detail.

**Project** – The total construction, of which the work performed under the Contract Documents is the whole or a part, where such total construction may be performed by more than one Contractor.

**Project Costs** – Includes, in addition to costs directly related to the project, the sum total of all costs of financing and carrying out the project including, but not limited to, the costs of all necessary studies, surveys, plans and specifications, architectural, engineering, or other special services, acquisition of real property, site preparation



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and development, purchase, construction, reconstruction and improvement of real property and the acquisition of machinery and equipment as may be necessary in connection with the project; an allocable portion of the administrative and operating expenses of the grantee; the cost of financing the project, including interest on bonds issued to finance the project; and the cost of other items, including any indemnity and surety bonds and premiums on insurance, legal fees, fees and expenses of trustees, depositaries, financial advisors, and paying agents for the bonds issued as the issuer considers necessary.

**Project Manager** – The authorized representative of the Contracting Officer who is responsible for administration of the Contract.

**Proper Billing** – An original invoice or certified copy of an original invoice that includes

- (1) the contract number, purchasing document reference number, an itemized description of the goods or services provided, prices for each item or increment of service, extended prices;
- (2) the goods or services seller's valid taxpayer identification number, if the goods or services provided are of a type that is required to be included on a United States tax information return as described in 26 U.S.C. 6041, 6041A, 6042(a), 6044, 6045, 6049(a), 6050A, or 6050N (Internal Revenue Code); and
- (3) (3) any other documentation required by the contract or purchase order.

**Protestor** – An actual or prospective bidder, offeror, or contractor who is aggrieved concerning the solicitation or the award of a contract and who files a protest with the Procurement Officer.

**Public Construction or Public Works** – The on-site field surveying, erection, rehabilitation, alteration, extension or repair, including painting or redecorating of buildings, highways, or other improvements to real property under contract for the State, a political subdivision of the State, or a regional school board.

**Public Interest Finding** – The typical document and permanent record used to satisfy the 'findings-of-fact' requirement of AS 19.10.170 (b). P&P 10.02.013 explains when and how to use the Public Interest Finding.

**Purchase Order** – A document authorizing a seller to deliver goods or services with payment to be made later and includes an advertising order, delivery order, field purchase order, or State transportation request.

**Qualified** – Someone who possesses the requisite education, training, skills, or experience to perform the work.

**Reasonable and Adequate Procedures** – Procedures that ensure fairness to potential Offerors and competition commensurate with the circumstances of the procurement, considering price, mission requirements, and available competition; "reasonable and adequate procedures" includes contacting only one potential offeror in appropriate circumstances.

**Recycled Alaska Product** – An Alaska product of which not less than 50 percent of the value of the product consists of a product that was previously used in another product, if the recycling process is done in the State.

**Regulation** – AS 44.62.640(3) provides in part:

*"regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that regulates only to the internal management of a state agency; "regulation" includes "manuals," "policies," "instructions," "guides to enforcement," "interpretive bulletins," "interpretations," and the like, that have the effect of rules, orders, regulations, or standards of general application, and this and similar phraseology may not be used to avoid or circumvent this chapter; whether a regulation,*



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*regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public;*

**Regulatory Requirements** – Laws, rules, regulations, ordinances, codes and/or orders.

**Reimbursable Services Agreement (RSA)** – The contract which is entered into between the Department and another governmental entity, under which the Department performs contract services for the entity and is reimbursed by them. Normally, the requesting Department is the agency to start the procedure by filling out the form.

**Repair** – As a general guideline, the Alaska Court has defined;

*"repair" to include the excavation of mudholes and potholes, the hauling and placing of any additional material or fill on the roadway, the grading or reshaping of newly added materials, and the correction or replacement of damaged culverts, fences, or guardrails. On the other hand, we believe that the grading or smoothing of an existing roadway surface, the straightening or reshaping of shoulders, slopes, and ditches, and the unplugging or cleaning of culverts are merely "maintenance" activities and would not independently be subject to the Little Davis - Bacon Act unless otherwise "substantially related" to ongoing construction or repair."*

**Request for Quote (RFQ)** – Synonymous with the Invitation for Quote (Form 02).

**Requirements Contract** – A contract that allows for the State to use services or acquire goods in whatever quantities as may be needed. The solicitation for these goods or services usually includes a realistic estimate of the total quantity anticipated.

**Resident** – A person who establishes residency under AS 01.10.055.

**Responsible Bidder or Offeror** – One who is capable financially and competent to complete the job for which he/she is bidding or providing a proposal. A responsible bidder/offeror is one who is not only financially responsible, but who is possessed of a judgment, skill, ability, capacity, and integrity requisite and necessary to perform a public contract according to its terms. (Black's Law Dictionary). To be responsible means to have a satisfactory record of performance, be competent to complete the job, qualify legally to contract with the State, supply all requested information regarding responsibility, and demonstrate availability of necessary financing, equipment, facilities, expertise, and personnel.

The unreasonable failure of a bidder or offeror to promptly supply information to an inquiry with respect to responsibility is grounds for a determination of nonresponsibility (AS 36.30.360). Standards for assessing the responsibility of a prospective contractor are found in 2 AAC 12.500.

**Responsive Bid or Proposal** – A responsive bid or proposal is one that materially conforms to the requirements of the solicitation. A nonresponsive bid or proposal will generally be rejected if the bid or proposal is late or not signed; it is missing any required certifications; it fails to meet project specific requirements or is incomplete or modifies those same requirements unless this is specifically allowed in the solicitation; or it contains errors and omissions that affect price, quantity, quality, or delivery. There is more leeway for not immediately rejecting non-responsive proposals as this environment is generally more complex and subject to mis-interpretation of requirements. Proposers are usually given the opportunity to correct omissions and to clarify proposal intent.

**Responsive Bidder or Offeror** – A firm or person who has submitted a bid or proposal that conforms in all material respects to the solicitation, i. e. it directly answers all questions and provides all submittals as directed by the bid or proposal.

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Alternate bids or proposals are nonresponsive unless the solicitation states that such bids or proposals may be accepted (2 AAC 12.830).

**Retainage** – Money withheld from the Contractor until completion of a contract or satisfaction of other contingency as evidenced by approval of the applicable pay estimate.

**Schedule of Values** – The Department's document, submitted by the Contractor and reviewed by the Contracting Officer that shall serve as the basis for computing payment and for establishing the value of separate items of work which comprise the contract price.

**Services** – 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. DOT&PF Contracts Officer Bulletin 03-006 identifies services that are considered construction procurements. Examples of construction services are maintenance, repair, or replacement of a facility's boiler or roof; painting; heavy equipment rental; clearing and grubbing related to a construction project; removal of material related to demolition; carpet replacement; installation of security systems; building caulking, and elevator, fire alarm and sprinkler maintenance contracts. Non-construction services would include security guard services, cable tv services, etc. Routine maintenance and repair contracts are handled a little differently than other service contracts. They meet the statutory definition of construction procurement but can be issued under either DOT&PFs or DOAs contractual authority. Either way, the small procurement limit is still \$200,000.

**Scope of Work** – The Scope of Work is the product sought by the solicitation as defined in the signed contract documents. This application of using the signed contract documents applies especially in the context of a proposal. Often, when negotiations have been completed on a proposal, the Scope of Work as advertised has attained greater definition. This "greater definition" is important as the basis for what is and is not the scope of work when questions of additional work come into play.

**Shall** – Synonymous with "must." Used to express a command; mandatory; generally, used in context of directing to do something.

**Shop Drawings** – All drawings, diagrams, illustrations, schedules and other data that are specifically prepared by or for the Contractor to illustrate some portion of the work, and all illustrations, brochures, standard schedules, performance charts, instructions, diagrams and other information prepared by a Supplier and submitted by the Contractor to illustrate material, equipment, fabrication, or erection for some portion of the work.

**Should** – Should is normally used in an advisory sense; no sanctions or penalties can be used to enforce it.

**Single Source Procurement** – Authority to utilize/approve the Single Source Procurement method, without formal advertisement is provided to the Commissioner of the Department of Transportation and Public Facilities under AS 36.30.300(a). 2 AAC 12.410 explains the conditions for use of Single Source Procurement.

**Small Procurement** – A procurement for supplies, services, or professional services that does not exceed an aggregate dollar amount of \$100,000; construction that does not exceed an aggregate dollar amount of \$200,000; or lease of space that does not exceed 7,000 square feet may be made in accordance with regulations adopted by the Commissioner for small procurements.

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

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**Solicitation** – A request for bids, proposals, or quotations. At the Small Procurement Dollar level, solicitations for Professional Services are Competitive Sealed Proposals where a contractor’s qualifications are equal to or possibly more important than the price. Contracts for professional services are normally fixed price contracts for small procurements but can be cost reimbursement contracts if the effort is complex and not well defined.

Construction procurements at the small dollar level, under \$200,000 are fixed price contracts using an Invitation for Quotes (IFQ) process. Over the small dollar threshold, most of the construction procurements are fixed price using an Invitation for Bid process. As procurements become more complex, proposals instead of bids may be used. Such is the case in a Design Build procurement. Also, cost reimbursement contracts with ceilings called Time and Material contracts are often used in emergency situations where the scope of the effort is unknown initially and time is of the essence.

**Specification** – A description of the physical or functional characteristics, or of the nature of a supply, service, professional service, or construction project; it may include requirements for licensing, inspecting, testing, and delivery.

**Specification** – can also mean the written contract documents that govern the methods and materials to be used by the Contractor to construct the project, and that contain the methods of measurement and basis of payment for contract pay items.

**Standard Overhead Rate** – A charge established for services from an agency that is designed to compensate the agency for administration and support services incidentally provided with the services contracted for.

**Subcontractor** – A person at any level, other than a prime contractor, who provides materials or services, other than as an employee, to be used in a public construction or public works project.

**Substantial Completion** – Although not fully completed, the work (or a specified part thereof) has progressed to the point where, in the opinion of the Contracting Officer, as evidence by the Department's written notice, it is sufficiently complete, in accordance with the Contract Documents, so that the work (or specified part thereof) can be utilized for the purposes for which it is intended.

**Substantially** – Essentially; without material qualification; in substance; materially; in a substantial manner. About, actually, competently, and essentially.

**Substantive** – An essential part or constituent or relating to what is essential.

**Supplemental Agreement** – The written agreement to the contract covering a modification to the contract that is outside the scope of the original contract.

**Supplementary Conditions** – The part of the Contract Documents that amends or supplements the General Conditions.

**Supplies and Materials** – 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. Supplies and materials that are used in construction projects meet the statutory definition of construction and thus can be procured under DOT&PF’s delegated authority. Examples include building materials, lumber, aggregate, paint, etc. and items attached to a facility by means of a hard connection such as a built-in dishwasher. Supplies and materials not directly related to a construction project fall under the State Department of Administration’s delegated authority for non-construction procurements. Examples would be items such as office equipment and supplies used to provide construction documents for a work site.

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**Surety** – The corporation, partnership, or individual, other than the Contractor, executing a bond furnished by the Contractor.

**Surety Deposit** – A surety deposit is usually submitted in lieu of a performance bond, and is an irrevocable letter of credit or cash. The amount of the surety deposit must be as listed in the contract bid/proposal documents. The substitution of a surety deposit must be approved by the Commissioner of the Department of Transportation and Public Facilities prior to its submittal. An Offeror's failure to provide the surety deposit within the required time is grounds for the State to reject the proposal.

**Termination for Cause** – Termination of a contract when there is evidence of misconduct, unethical behavior, or blatant disregard of procurement regulations.

**Termination of the Contract for Default** – If the project director determines that the Contractor has refused to perform the work or has failed to perform the work with such diligence as to ensure its timely and accurate completion, the State may, by providing written notice to the Contractor, terminate the Contractor's right to proceed with part or all of the remaining work.

**Time** – For tracking of time, the time for various submittals/responses is in calendar days. The 'clock' begins on the date of receipt of the correspondence (i.e. protest, appeal, report, notice, etc.). In accordance with AS 01.10.080, Computation of time: time is computed by excluding the first day and including the last. If the date due falls on a weekend or holiday, the response is due the following business day.

**Time And Materials Contracts** – In addition to a fixed labor rate, these contracts include separate costs for materials used under the contract. The Contractor is reimbursed on the basis of labor and equipment hours and materials expended, according to a formula established in the specifications. Time and materials is a last resort method of change order.

**Transfer of Responsibility Agreement (TORA)** – The arrangements between the DOT&PF and a local governmental entity on an agreement for transfer of construction responsibility is set out in the contractual document referred to as a TORA. Essentially, a TORA allows the DOT&PF to provide State funding of projects to the local governmental entity without cumbersome administrative involvement in the project. The DOT&PF has the discretion to negotiate for the inclusion of all or portions of the State Procurement Code in a TORA.

**Unauthorized Commitment** – An agreement that is not binding, solely because the person who made it, lacked the authority to enter into that agreement.

**Unit Price Work** – The work to be paid for based on unit prices.

**Wages** – Includes fringe benefits.

**Warrant Certificate** – The Warrant Certificate is a part of the DOT&PF Construction Contracting Warrant System - a program that implements the Department policy to formalize the delegation authority for construction related procurements to the lowest possible level to ensure expedience and competence in the construction related procurement and contract administration activities. The Warrant certifies that the holder has met the requirements for procurement authority at a certain level of training, but it does not delegate which procurement activities a warrant holder is authorized to perform (i.e. it does not replace the need for the individuals delegation of authority document).

The Warrant System applies to all employees in the Department who are responsible for encumbering the department via the procurement of professional services and construction related activities, including the construction of ferries and related equipment. Additionally, the Warrant System applies to those employees of

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Delegated Operating Agencies who are acting under a delegated authority from the DOT&PF for construction activities for their agencies.

**Waiver Request** – (Form 25D-026) A Waiver Request is used when requesting a procurement action that falls under the definition of an Alternate Procurement. Procedures for use of the Waiver Request are set out in P&P 10.01.040.

**Work** – The act of, and the result of, performing services, furnishing labor, furnishing and incorporating materials and equipment into the Project and performing other duties and obligations, all as required by the Contract Documents. Such work, however incremental, culminates in the entire completed Project, or the various separately identifiable parts thereof.

**Working Day** – A calendar day during which construction operations could proceed for a major part of a shift, normally excluding Saturdays, Sundays, and State-recognized legal holidays.

## 9. Questions and Answers

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This chapter will be periodically updated.

**1. When three contacts must be made for a small procurement solicitation, does that also mean that at least three quotes must be received?**

No. While you must contact at least three contractors for quotes, it is not required that all three contractors respond to the request. However, it is in the best interest of the Procurement Agency to receive multiple quotes as they provide a good basis for a determination on having accomplished receipt of the best responsive and responsible quote. It is important that you document, for the file, who was contacted.

**2. I have solicited for quotes and advertised on the Online Public Notice. I received responses from three firms before the date to receive all quotes. Can I award early because I have received the minimum three quotes?**

No. If an Online Public Notice advertisement has been run, it has the potential of reaching parties unknown to the Procurement Agency. Unless an amendment is issued to foreshorten the date for response, with notification given in the same manner as the initial solicitation, the "date for receipt of quotes" cannot be changed because adequate numbers of quotes were received before the due date and time. To change a date for receipt of quotes without proper notification would be unfair to potentially interested parties.

**3. Though not required for quotes under \$200,000, I want to advertise for a small procurement using the Competitive Sealed Bid (or Competitive Sealed Proposal) procedure. Am I bound by the rules of advertisement for competitive sealed bidding or competitive sealed proposals even though it is a small procurement?**

Yes. You can use the more formal advertising procedures as explained under AS 36. 30.110, 130, and 210. These procedures are different from solicitation requirements for small procurements. If the Competitive Sealed Bid or Competitive Sealed Proposal procurement method is used, you must abide by the conditions set forth in their applicable statute and code. Don't forget that 2 AAC 12.130, PUBLIC NOTICE, (this includes the requirement of posting notice "On-Line") and the Notice of Intent to Award (2 AAC 12.210 or 310) requirements are then in effect.

**4. The work of the contract I want to advertise for is on a State owned building. Do I use the Small Procurement Manual for Construction Projects and its forms or is there another manual I should use?**

The Small Procurement Manual for Construction Projects also applies to building construction related procurements that are under \$200,000. However, the forms in the Manual may not meet requirements to manage all contracts, such as work on a building facility. There is another DOT&PF manual used internally that is titled the "DOT&PF Facilities Construction Manual," with forms applicable to building projects. This manual is an internal document that is maintained by and available from the DOT&PF Central Region Facilities Manager.

**5. What is a "responsive and responsible" quote?**

**Responsive Offeror** - A Responsive Offeror is a firm or person who has submitted a quote that conforms in all material respects to the solicitation. The quote must directly answer all questions and provide all submittals as directed by the solicitation.

Alternate quotes are nonresponsive unless the solicitation states that such quotes are acceptable.

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**Responsive Quote** - A Responsive Quote is one that materially conforms to the requirements of the solicitation.

A quote that is conditioned upon receiving award of both the particular contract being solicited and another Agency contract is nonresponsive unless conditioned quotes are specifically authorized in the invitation to quote.

**Responsible Offeror** - One who is capable financially and who is competent to complete the job for which he/she is quoting. A Responsible Offeror is one who is not only financially responsible, but who is possessed of a judgment, skill, ability, capacity, and integrity requisite and necessary to perform a public contract according to its terms.

The unreasonable failure of an Offeror to promptly supply information to an inquiry with respect to responsibility is grounds for a determination of being nonresponsible.

2 AAC 12.500 provides helpful standards for assessing the responsibility of a prospective contractor.

**6. We only request quotes from contractors that have proven themselves or come with high recommendations. Is this acceptable procurement procedure?**

Yes. Direct contact with known or reputable contractors is acceptable. However, if an interested party becomes aware of the solicitation and asks to participate, he/she cannot be prohibited from submitting a quote.

**7. If a vendor appears on the Vocational Rehabilitation List, what does it mean to a small construction related procurement? Does this preference apply to Requests for Quotes (RFQ's)? And, does it apply to federally funded contracts?**

If the project is State funded, the disability preference applies (AS 36.30.321), regardless of the procurement method used.

The State cannot apply an employment program or disability preference to federal aid projects. See Chapter 2. The only exception to this would be if CFRs, supplementing federal documents, or other federal document(s) specifically allow such programs.

**8. Is a Payment or Performance Bond required on small procurement construction contracts?**

Yes. Payment and Performance Bonds are required for all construction projects exceeding \$100,000. For all contracts less than \$100,000, bonds are at the discretion of the Procurement Officer. The operative statutes and regulations for bonds are AS 36.25.010, AS 36.30.040, AS 36.30.120, and 2 AAC 12.810.

**9. Our small construction procurement solicitations and award process usually occur in less than ten (10) days. This makes it difficult to receive a protest prior to the deadline for the receipt of quotes if the Contractor is allowed ten (10) days to protest from the final date of the solicitation. Must we hold on making the award until the ten (10) period has passed after the deadline for receipt of quotes?**

Under 2 AAC 12.695(c), *"If protesting the award of a small procurement of no more than \$50,000, the protest shall be filed within 10 days from the date of the solicitation or award, whichever is later."* and, 2 AAC 12.695(d) *"If protesting the award of a small procurement contract greater than \$50,000, a protest shall be filed within 10 days from the date that notice of award is made."*



## 9. Questions and Answers

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The key word in the above is "or award". The award may proceed under the guidelines as set forth in AS 36.30.575.

### 10. Can a contract for janitorial services be solicited for under the Small Procurement Manual for Construction Projects?

Yes, if the contract falls within the small procurement limit of \$200,000. The DOT&PF is delegated procurement authority for janitorial related projects for services within a State owned facility (If the building is leased, contact the DOA or the Lessor to ascertain authorities) that are directly related to:

- cleaning;
- sanitizing;
- snow removal, or
- day-to-day routine care of the facility.

The DOT&PF Maintenance & Operations section in each region administers DOT&PF janitorial contracts.

### 11. Is it a legal requirement that an employee be professionally licensed and registered as an Engineer in order to serve in responsible charge of a State funded building construction project, regardless of the project cost?

See AS 08.48 - There must be a registered professional in responsible charge of certain construction projects, except where specific exemptions are granted. Buildings or structures whose primary use is public occupancy are not projects where exemption from the professional licensing requirements is made. A field representative need not be licensed as a professional in the respective discipline - this subordinate employee is specifically exempted from professional licensing requirements as long as he is reporting to a registered professional who is in responsible charge (articles (4) and (5) of AS 08.48.331).

A Sister Agency who has an unregistered person inspect or oversee building (and certainly, other types) construction must have an agreement with a qualified consultant, or the DOT&PF to provide a registered professional engineer who assumes overall project responsibility.

### 12. Davis- Bacon Wage Rate Requirements are often confusing. Please explain when they apply on small procurements?

To say that every activity precedent to a public works construction project is subject to Davis-Bacon wages would be too broad. In general, all construction related small procurements in excess of \$25,000 (total of labor & materials), including projects that have been increased to over \$25,000 by change order, are subject to the wage rate determinations of the State of Alaska, Department of Labor and Workforce Development, Wage and Hour Division.

Activities precedent to the project should be reviewed for possible coverage under the act. As an example: An emergency spill response necessary to contain and control the situation does not apply to Davis-Bacon. However, the later remedial actions to repair, recover, or rehabilitate the affected area do require the payment of Davis-Bacon wages.

Procurement Agencies may request a waiver from certain wage requirements by contacting the Wage and Hour Division (See Chapters 1 & 2 of the Manual). If there is a question on Davis-Bacon applicability, contact the Dept. of Labor, Wage & Hour Division for guidance.

### 13. Is an "electronic signature" acceptable for a quote response?

## 9. Questions and Answers

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Yes. An "electronic signature" is not synonymous with a "Faxed signature." However, both are acceptable forms of signature submittal for a quote response.

### **14. May a Canadian entity quote on a State of Alaska construction related project, even when Federal funds are involved?**

Yes, as long as competitive solicitation procedures are followed. But, when a Canadian firm or government entity wants to quote on one of our solicitations, they must obtain a State of Alaska Business License (see Chapter 2, section 2.5 on business license requirements), and, if incorporated, they must register with the Division of Corporations. All standard insurance requirements would also apply.

Prices quoted must be in U.S. funds and include applicable federal duty, brokerage fees, packaging, and transportation cost to the FOB point so that upon transfer of title the commodity can be utilized without further cost. And, although exempt from most state and federal taxes, we are subject to the Canadian GST.

### **15. I want to erect a temporary trailer at a job site for our Project Manager. What procurement authority does this fall under?**

This procurement, though of a temporary facility, requires that construction related procurement procedures be followed if a foundation is installed. If it is a "roll-on, roll-off" temporary facility, DOA procurement guidelines apply.

Contact DOA or the DOT&PF contracts section if there is a question on facility type.

### **16. How does a potential contractor get on the State, or the DOT&PF's Offerors (Bidders) List?**

The DOT&PF does not have nor utilize a statewide list of potential Offerors for construction related projects. Rather, it is expected that potential Offerors will find the information they need on construction related commodities, services, and professional services contracts by looking:

- on the State of Alaska On-Line Public Notice System, and/or
- on the DOT&PF Procurement and Contracting page

### **17. Are we to use petroleum price adjustments in our small construction related procurement contracts?**

The DOT&PF does not have a statewide policy on price petroleum adjustments on asphalt or other related products used in construction projects. However, the Procurement Agency may add such provisions in their contract Special Provisions, independent of the DOT&PF Commissioner's prior approval.

### **18. If a term (multi-year) contract is assigned to another entity by the "award" Contractor, must that term contract be readvertised after the completion of the contract year in which it was reassigned?**

No. If the contract was properly executed in its transference, the new Contractor accrues all rights and obligations of the previous Contractor to the contract. (See 2 AAC 12.480 Novation or Name Change for process to follow.)

### **19. Is there a specific form(s) to use to terminate a Contractor for non-performance on a contract?**

Contact your Agency's attorney prior to any termination action.

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There is no specific form for terminating a contractor for poor or non-performance. However, there is example correspondence (see Chapter 8) that addresses such communiqués. Remember, the contractor must be afforded due process (i.e. the right to perform the work, rebut the allegations, the right to defense, etc.). Look to 2 AAC 12.620 for the form, notice, and time that must be given.

It is helpful to look to section 108-1.08 Default of Contract, of the Standard Specifications for Highway Construction for a good systematic process to follow.

### 20. What does it mean to "repudiate a contract"?

You don't have to wait until someone fails to perform under a contract before acting. If you have reasonable ground for belief that a contractor will be unable to perform, you can demand adequate assurance of performance. The contractor's failure to respond to your request, or failure to provide a reasonable response, can be considered a repudiation of the contract. The Agency may then terminate the contract and recover damages (AS 45.02.609).

### 21. In response to a solicitation, an Offeror extends a 10% discount if payment is made within 15 days. Can the discount be considered?

It depends on the language of the solicitation. If there is no such qualifying language, the answer is no because there is no guarantee that payment will be made in time to get the discount. And, be careful - a response such as this might be considered a "conditioned quote" depending on the language used by the offeror.

### 22. In awarding a contract to a firm outside Alaska who will perform services wholly outside the State, is the contractor required to have Alaska Workers' Compensation Insurance?

Yes. Even if the firm does not intend to physically place an employee in Alaska to perform any part of the work, AS 23.30.045 requires that Alaska State Workers Compensation Insurance be provided by an insurance company authorized to transact the business of workers' compensation insurance in Alaska. Such proof of Alaska Workers Compensation Insurance is required before award of the contract.

### 23. Can the Workers' Compensation Insurance requirement be waived?

Yes. In instances where the contractor is a sole proprietor (i.e., no employees), he/she, as the principal, can sign a waiver as part of the contractual agreement removing the State of Alaska from any liability for waiving the insurance requirement. See AS 23.30.045 on Employer Liability for Compensation.

### 24. What procurement method is to be followed when purchasing construction related materials, such as crushed aggregate, that will be stockpiled for long term use?

As long as the material is for a specific construction project(s), the procurement method falls under the DOT&PF construction related procurement procedures. Therefore, the \$200,000 small procurement limit process covered in this manual may be utilized. However, if the materials are to be used for routine maintenance, the DOA non-construction procurement procedures and small procurement threshold must be used.

### 25. It is anticipated that because of the type of service being sought, there may not be an Alaska Offeror capable of quoting. Do I need prior approval above the Agency Procurement Officer to solicit quotes from out-of-state vendors?

## 9. Questions and Answers

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No. Prior approval to make contacts with out-of-state vendors or to invite out of state quotes is not required. Even if the anticipated amount of the contract is near the \$200,000 threshold, and the Procurement Agency seeks to use the Competitive Sealed Bid (AS 36.30.100 - 190) or Competitive Sealed Proposal (AS 36.30.200 - 270) route for advertising, approval to solicit outside Alaska is not required.

Even when a solicitation is made within just the State, if a prospective out-of-state Offeror asks for a quote package, he/she must be provided one and the quote submittal accepted when timely submitted.

### **26. Is it permissible to disclose information on vendors during the small procurement solicitation process?**

It is "best practice" to not divulge names of vendors contacted. Vendor lists may be distributed upon request of an interested party, but a vendor list is different than a contact or recipient list. After the Notice of Intent to Award, recipient or contact lists may be divulged.

Look to DOA Procurement Information Message #59 for additional guidance, as the DOT&PF has found this PIM particularly helpful for guidance on all categories of procurements.

## 10. Forms and Correspondence

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### SOLICITATION AND AWARD DOCUMENTS

DOT&PF WAIVER REQUEST FOR ALTERNATE PROCUREMENT METHODS	-	-	-	-	-	-	-	-	25D-026
INVITATION FOR QUOTES FOR A SMALL PROCUREMENT	-	-	-	-	-	-	-	-	SPC-001
SMALL PROCUREMENT QUOTE SUBMITTAL	-	-	-	-	-	-	-	-	SPC-002
NOTICE OF AWARD	-	-	-	-	-	-	-	-	SPC-003
NOTICE TO PROCEED	-	-	-	-	-	-	-	-	SPC-003A
SMALL PROCUREMENT - QUOTE CONTACT REPORT	-	-	-	-	-	-	-	-	SPC-004
BID BOND (REQUIRED FOR CONTRACTS GREATER THAN \$100,000)	-	-	-	-	-	-	-	-	25D-14
PAYMENT BOND (REQUIRED FOR CONTRACTS GREATER THAN \$100,000)	-	-	-	-	-	-	-	-	25D-12
PERFORMANCE BOND (REQUIRED FOR CONTRACTS GREATER THAN \$100,000)	-	-	-	-	-	-	-	-	25D-13
ALASKA BIDDER PREFERENCE CERTIFICATION	-	-	-	-	-	-	-	-	25D-19
ALASKA PRODUCTS PREFERENCE WORKSHEET	-	-	-	-	-	-	-	-	25D-20
ALASKA VETERANS PREFERENCE CERTIFICATION	-	-	-	-	-	-	-	-	25D-17
OFFERORS QUESTIONNAIRE	-	-	-	-	-	-	-	-	SPC-008
QUOTE RESULTS	-	-	-	-	-	-	-	-	SPC-009

### CHANGE DOCUMENTS

DIRECTIVE	-	-	-	-	-	-	-	-	SPC-020
REQUEST FOR CHANGE ORDER PROPOSAL - SMALL CONSTRUCTION									
PROCUREMENT CONTRACT	-	-	-	-	-	-	-	-	SPC-021
CHANGE ORDER	-	-	-	-	-	-	-	-	SPC-022
SUPPORT INFORMATION / BACKUP	-	-	-	-	-	-	-	-	SPC-022A
SUPPLEMENTAL AGREEMENT	-	-	-	-	-	-	-	-	SPC-023

### INSPECTION AND PAYMENT PROCESS DOCUMENTS

INSPECTION REPORT	-	-	-	-	-	-	-	-	SPC-030
DAILY REPORT - LABOR, EQUIP. AND MATERIALS FOR TIME AND MAT'LS WORK									SPC-031
PROJECT CONSTRUCTION REPORT	-	-	-	-	-	-	-	-	SPC-032
CERTIFICATE OF SUBSTANTIAL COMPLETION	-	-	-	-	-	-	-	-	SPC-033

### PROJECT CLOSE OUT DOCUMENTS

CERTIFICATE OF FINAL ESTIMATE	-	-	-	-	-	-	-	-	SPC-040
COMPLETION REPORT	-	-	-	-	-	-	-	-	SPC-041
CONTRACTOR'S RELEASE	-	-	-	-	-	-	-	-	SPC-042

### EXAMPLE CORRESPONDENCE

#### NOTICE CORRESPONDENCE

- TRANSMITTAL LETTER: CONTRACT AWARD (OPTIONAL FOR USE W/ SPC-003)
- PRECONSTRUCTION MEETING AGENDA
- RE-DELEGATED CONTRACTING OFFICER'S AUTHORITY

## **10. Forms and Correspondence**

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### **APPROVAL AND DENIAL CORRESPONDENCE**

SUBCONTRACTORS [AND] SUPPLIERS  
SHOP DRAWINGS [AND] MATERIALS  
SUBSTITUTE PRODUCT [AND] METHODS  
CONTRACTOR'S PAY REQUEST

### **WARRANTIES AND UNSATISFACTORY PERFORMANCE**

REQUIRED WARRANTY WORK  
CURE LETTER  
LACK OF PERFORMANCE LETTER

### **PROJECT CLOSE OUT**

NOTICE OF FINAL COMPLETION  
REQUEST FOR CLEARANCE OF TAXES  
REQUEST FOR CLEARANCE OF WAGES  
LETTER OF PROJECT ACCEPTANCE