



2004-2005

CHAIR

Patricia H. Wittie
Ste 1100
818 Connecticut Ave, NW
Washington, DC 20006
(202) 496-3493

CHAIR-ELECT

Robert L. Schaefer
12333 W Olympic Blvd
Los Angeles, CA 90064-1021
(310) 893-1609

VICE-CHAIR

Michael A. Hordell
Hamilton Square 6th Fl
600 14th St, NW
Washington, DC 20005-2004
(202) 220-1232

SECRETARY

Patricia A. Meagher
311 California St, 10th Fl
San Francisco, CA 94104-2695
(415) 956-2828

BUDGET AND FINANCE OFFICER

Carol N. Park-Conroy
7404 Rippon Rd
Alexandria, VA 22307-1944
(703) 681-8507

**SECTION DELEGATE AND
PREVIOUS PAST CHAIR**

Mary Ellen Coster-Williams
717 Madison Pl, NW, Ste 612
Washington, DC 20005-1086
(202) 219-9574

IMMEDIATE PAST CHAIR

Hubert J. Bell, Jr.
Ste 2600 Harris Tower
233 Peachtree St, NE
Atlanta, GA 30303-1530
(404) 582-8027

COUNCIL MEMBERS

Peter D. Balch
PO Box 1027, MS 108-108
Moorestown, NJ 08057-0927

Ross W. Branstetter, III
7100 Defense Pentagon
Washington, DC 20301-7100

Robert A. Burton
725 17th St, NW, Ste 9013
Washington, DC 20503

Mark D. Colley
2099 Pennsylvania Ave, NW, Ste 100
Washington, DC 20006-6800

David G. Ehrhart
99 A Duncan St
Bolling AFB, DC 20031-7460

Helaine G. Elderkin
3170 Fairview Pk Dr, M/C 203A
Falls Church, VA 22042-4516

Paul B. Haseman
16800 CentreTech Pkwy
Aurora, CO 80011

Thomas E. Hill
3100 Bk of Amer Plz, 901 Main St
Dallas, TX 75202-3714

Karen L. Manos
1299 Pennsylvania Ave, NW, 5th Fl
Washington, DC 20004-2400

John J. Pavlick, Jr.
575 7th St, NW, Concourse Level
Washington, DC 20004

Richard P. Rector
1200 19th St, NW, 6th Fl
Washington, DC 20036-2412

Angela B. Styles
655 15th St NW, Ste 900
Washington, DC 20005-5799

EDITOR, PUBLIC CONTRACT

LAW JOURNAL

Carl L. Vacketta
Washington, DC

EDITOR, THE PROCUREMENT LAWYER

Mark E. Langevin
Los Angeles, CA

BOARD OF GOVERNORS LIAISON

Pamela J. Roberts
Columbia, SC

SECTION DIRECTOR

Marilyn Neforas
321 N Clark St
Chicago, IL 60610-4714
(312) 988-5596
Fax: (312) 988-6033

Suite 1100
818 Connecticut Avenue, N.W.
Washington, DC 20006
Phone: (202) 496-3493
Fax: (202) 293-6111
pwittie@obblaw.com

April 21, 2005

VIA FACSIMILE AND FIRST CLASS MAIL

The Honorable Frank H. Murkowski
Office of the Governor
State of Alaska
Box 110001
Juneau, AK 99811

The Honorable Ben Stevens
President
Senate
State of Alaska
State Capitol, Room 111
Juneau, AK 99801-1182

The Honorable John Harris
Speaker
House of Representatives
State of Alaska
State Capitol, Room 208
Juneau, AK 99801-1182

Re: Senate Bill 160 and House Bill 257

Gentlemen:

On behalf of the Sections of Public Contract Law and State and Local Government Law (the "Sections") of the American Bar Association (the "Association"), we are submitting comments on the above-referenced matter. Our Sections consist of attorneys and associated professionals in private practice, industry and Government service. Our Sections' governing Councils and

substantive committees have members representing these three segments, to ensure that all points of view are considered. In this manner, both Sections have sponsored the Model Procurement Code Project for over thirty years, and seek to improve the process of public contracting for needed supplies, services, and public works.

The Sections are authorized to submit these comments under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.¹ The Association's position is contained in the 2000 ABA Model Procurement Code for State and Local Governments ("ABA Model Code"). In submitting these comments, we have consulted with members of the Alaska State Bar.

We appreciate the opportunity to comment on legislation pending in the Alaska State Legislature - Senate Bill 160 and House Bill 257. Among other things, the legislation authorizes the Department of Administration to conduct state procurements under its jurisdiction through a person from the private sector. The legislation exempts that person from any requirement to follow the procurement procedures established in Chapter 36 of the Alaska Statutes except for certain preferences.

The legislation, recently amended, would add a new Section 36.30.093 to read in part as follows:

- (a) The department may enter into a program under which the department contracts with a person from the private sector to provide procurement services. . .
- (b) Notwithstanding any other provision of this chapter, all state departments and instrumentalities of the state may participate in the program authorized by (a) of this section.
- (c) A procurement conducted by the person selected under (a) of this section is not subject to this chapter. However, the procurement is subject to (d) – (o) of this section.

¹ This letter is available in pdf format at <http://www.abanet.org/contract/federal/regsgcomm/home.html> under the topic "State and Local Government."

- (d) Except as provided in (e) - (i) of this section, the program contractor shall award a contract based on solicited bids to the lowest responsive and responsible bidder after an Alaska bidder preference of five percent, an Alaska products preference as described in (k) of this section, and a recycled products preference under (l) of this section have been applied.

To put our interest in the legislation in perspective, Alaska Statutes Chapter 36 was enacted in 1988 and is based in substantial part on the ABA Model Code. The Code was the product of a cooperative effort between state and local procurement officials and attorneys specializing in state, local, and public contract law matters. Our two ABA Sections, Public Contract Law and State and Local Government Law, were in charge of the overall drafting process. Seventeen states, including Alaska, have adopted large portions of the Code into law, and many other states and local jurisdictions have enacted pieces of it.

Management and use of public funds, whether for procurement or otherwise, involves particular fiduciary duties and responsibilities. The Code, as enacted by the Alaska Legislature in 1988, implicitly and explicitly recognizes those duties and responsibilities by establishing procurement procedures that permit transparency and accountability in Alaska public procurements. It also is intended to raise the public's confidence in the fairness of the procurement process and the integrity of those dealing with public funds. The Alaska Code is thus consistent with the Principles of Competition in Public Procurements, approved by the ABA's House of Delegates, representing all of the state bar associations in the country. The ABA Competition Principles are set out in full in Attachment 1 hereto. Additionally, the Model Procurement Code enunciates many of those same critical principles first approved by the ABA House of Delegates in 1979. It does so in its introductory section as set out in full in Attachment 2 hereto.

Our Sections take no position on the policy issues involved in outsourcing the State's procurement function, including whether procurement at some level involves an inherently governmental function, but the provisions in these two bills are troublesome. They would divorce the procurement process from all statutory and regulatory requirements (including those pertaining to oversight, accountability and transparency) and constitute, in our view, a radical departure from long-established norms in public procurement such as those reflected in the Code. Should the Alaska Legislature choose to enact one of these bills, it would appear that its analysis in doing so should, at a minimum, include an express determination that the State intends to abandon its own public procurement policies and procedures, as they are expressed in the States' procurement code. Alternatively, the bills could be amended to require vendors to follow and comply with those

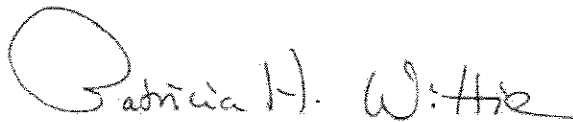
The Honorable Frank H. Murkowski
The Honorable Ben Stevens
The Honorable John Harris
April 21, 2005
Page 4

policies and procedures. Ideally, the State of Alaska could use the enthusiasm which has developed for improvement in procurement process to examine the most recent version of the Model Procurement Code and consider whether some or all of its provisions should be used by whoever is chosen to exercise this public authority within the State.

In 2002, the ABA approved a major revision of the Model Procurement Code, which was completed with significant input from both buyers and sellers of goods and services in the public sector. The revised Code and regulations provide for a simplified treatment of certain issues, and also provide significant new structure in support of emerging best practices in the area of public infrastructure procurement and privatization. We would strongly urge that Alaska consider these widely reviewed and accepted improvements to its procurement system as an alternative to entrusting public funds to private disposition without public policy or procedural direction.

We have assisted other states and public entities in their consideration of policy and process improvements and identification of best practices in public procurement. Last year we provided consultative services for the State of California, Department of General Services, and more recently for the California Performance Review, a comprehensive look at state functions and organization. The State of Oregon recently proposed changes to its procurement laws, based on the Model Procurement Code. We have also consulted with a variety of local jurisdictions, including the City of Atlanta, Georgia. We are prepared to assist you in any way you deem appropriate, including visiting and consulting with your experts as you weigh the matters raised in this letter. You may contact us as follows: Patricia H. Wittie, (202) 496-3493, pwittie@obblaw.com.

Sincerely,



Patricia H. Wittie
Chair, Section of Public Contract Law



Terrence S. Welch
Chair, Section of State and Local
Government Law

The Honorable Frank H. Murkowski
The Honorable Ben Stevens
The Honorable John Harris
April 21, 2005
Page 5

cc: The Honorable Tom Anderson
The Honorable Ethan Berkowitz
The Honorable John Coghill
The Honorable Lesil McGuire
The Honorable Con Bunde
The Honorable Johnny Ellis
The Honorable Lyda Green
The Honorable Gary Wilken
Deborah O'Regan
Scott A. Brandt-Erichsen
Robert L. Schaefer
Michael A. Hordell
Patricia A. Meagher
Carol N. Park-Conroy
Hubert J. Bell, Jr.
Mary Ellen Coster Williams
Council Members
Co-Chairs of
the Model Procurement Code Committee
David Kasanow

Attachment 1

**ABA PRINCIPLES OF COMPETITION
IN PUBLIC CONTRACTING**

RESOLVED, that the American Bar Association urges that any public acquisition at the federal, state, local, and territorial level adhere to the following principles of competition in obtaining supplies, services, and construction:

1. Use full and open competition to the maximum extent practicable.
2. Permit acquisitions without competition only when authorized by law.
3. Restrict competition only when necessary to satisfy a reasonable public requirement.
4. Provide clear, adequate, and sufficiently definite information about public needs to allow offerors to enter the public acquisition on an equal basis.
5. Use reasonable methods to publicize requirements and timely provide solicitation documents (including amendments, clarifications and changes in requirements).
6. State in solicitations the bases to be used for evaluating bids and proposals and for making award.
7. Evaluate bids and proposals and make award based solely on the criteria in the solicitation and applicable law.
8. Grant maximum public access to procurement information consistent with the protection of trade secrets, proprietary or confidential source selection information, and personal privacy rights.
9. Insure that all parties involved in the acquisition process must participate fairly, honestly, and in good faith.
10. Recognize that adherence to the principles of competition is essential to maintenance of the integrity of the acquisition system.

Attachment 2

MODEL PROCUREMENT CODE (excerpt)

§1-101 Purposes, Rules of Construction.

- (1) Interpretation. This Code shall be construed and applied to promote its underlying purposes and policies.
- (2) Purposes and Policies. The underlying purposes and policies of this Code are:
 - (a) to simplify, clarify, and modernize the law governing procurement by this [State];
 - (b) to permit the continued development of procurement policies and practices;
 - (c) to make as consistent as possible the procurement laws among the various jurisdictions;
 - (d) to provide for increased public confidence in the procedures followed in public procurement;
 - (e) to ensure the fair and equitable treatment of all persons who deal with the procurement system of this [State];
 - (f) to provide increased economy in [State] procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds of the [State];
 - (g) to foster effective broad-based competition within the free enterprise system; and
 - (h) to provide safeguards for the maintenance of a procurement system of quality and integrity.