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Hooper Bay water project

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I. STATEMENT OF ISSUE AND SHORT ANSWER

You have asked whether the Department of Environmental Conservation (DEC) may compel villages to comply with the state procurement code when those villages spend money received from DEC under the Village Safe Water Act (Act). DEC may do so.

II. ANALYSIS

This issue is answered by AS 46.07.040(a), which is part of the Act.

**Construction of facilities.** (a) The commissioner shall provide for the construction of facilities under this chapter, and is authorized to provide for the construction by contract or through grants to public agencies or private nonprofit organizations, or otherwise. . . . Construction under this section by contract is governed by AS 36.30 (State Procurement Code).

It is clear that DEC has discretion to carry out this program in whatever manner it chooses. While it might simply grant the funds and let grantees proceed with minimal state oversight, DEC may, alternatively, carry out the program by contract or otherwise. DEC has traditionally proceeded by contract. When doing so, the contracting parties must comply with the State Procurement Code. AS 46.07.040(a) will not permit any other interpretation. 1/

A village representative has noted, however, that DEC sometimes tenders a "grant offer," not a contract. The

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1/ This interpretation is supported by the code itself which unequivocally states: "[C]ontracts for construction [of state facilities] are governed by this chapter . . . ." AS 36.30.015(a).

procurement code does not apply to grants. AS 36.30.850(b)(1). The villages argue, therefore, that they do not have to comply with the procurement code if DEC tenders Village Safe Water Act monies in the form of a "grant" rather than a contract.

This interpretation is correct, unless the grant is contingent upon compliance with the procurement code. Nothing in the procurement code prevents a political subdivision from complying with the terms and conditions of a grant. AS 36.30.850(d). Nothing in grant administration statutes or regulations prevents DEC from making compliance with the procurement code a condition of a grant. 2/ Consequently, DEC

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2/ The village representative contended that AS 37.05.315 and *Ellis v. City of Valdez*, 686 P.2d 700 (Alaska 1984), prohibit DEC from making compliance with the code a grant condition. Apparently, this representative was also relying on AS 37.05.318, which forbids administrative imposition of grant requirements not iterated in AS 37.05.315.

AS 37.05.315 does not apply to the specific financing now in question, which involves an appropriation for Hooper Bay. The statute only applies "when an amount is appropriated or allocated as a grant to a municipality" (emphasis added) The money at issue here was appropriated to DEC, not to Hooper Bay. Sec. 163, ch. 96, SLA 1991 at 56, line 16 and at 33, lines 1-5: "The following appropriation items are . . . to the agencies named and for the purposes expressed" (emphasis added) *Cf.* sec. 18 at 4, lines 29-30, which appropriated other monies not at issue here "as a grant under AS 37.05.315 to the City of Hooper Bay . . . ." While DEC would not be free to impose restrictions on the section 18 appropriation, nothing in AS 37.05 prevents it from imposing restrictions on the section 163 appropriation.

Nor does anything in *Ellis* prohibit DEC from conditioning a grant on compliance with the code. In that case, a grant had been made directly to the City of Valdez. Sec. 286, ch. 50, SLA 1985 at 40, lines 7-9 and at 94, line 16. Valdez spent most of the money for part of the purchases anticipated by the legislature and did not have adequate funds to finance remaining purchases. A disgruntled investor sued. The court found that Valdez had broad discretion on how it expended appropriated funds.

Nonetheless, *Ellis* has no bearing on the issue addressed herein. *Ellis* did involve a direct municipal grant while this case does not. *Ellis* involved an airport, not a village safe water facility; the plain language of AS 46.07.040(a) was not implicated. And, importantly, *Ellis* did not even address the

may bring the code to bear on a grantee if it elects to do so.

As a final point, DEC should be aware that the procurement code claims not to reach any "contract between . . . the state and its political subdivisions, or the state and other governments." AS 36.30.850(c). It might be contended that this negates the instructions of AS 46.07.040(a) (construction under this section by contract is governed by AS 36.30). However, basic rules of statutory construction hold that a specific statute preempts a general statute. *City of Cordova v. Medicaid Comm'n*, 789 P.2d 346, 352 (Alaska 1990). While most state agency-municipal contracts might be exempted from the procurement code by AS 36.30.850(c), Village Safe Water Act construction contracts are expressly subjected to the code by AS 46.07.040(a). That specific provision preempts the general language of AS 36.30. Besides, some of the contracts at issue here are between villages and private operators. Nothing in AS 36.30 exempts those contracts from the procurement code.

### III. CONCLUSION

When doling out funds appropriated for Village Safe Water Act projects, DEC may proceed by contract, grant, or otherwise. When proceeding by contract, the procurement code must be followed. When proceeding by grant or otherwise the code may, but need not, be followed.

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