

Designated Ethics Supervisor

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Right of board member to
bid on contract;
Executive Branch Ethics
Act (AS 39.52)

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Pursuant to AS 39.52, the Alaska Executive Branch Ethics Act, you have asked us several questions concerning a transaction between the Department of Natural Resources, a soil and water conservation district, and a member of the district board of supervisors who bid on a contract with the district. In accordance with AS 39.52.240(b), verbal advice was provided on January 9, 1992.

BACKGROUND

Our conclusions are based on the following information furnished by the Department of Natural Resources (department) in a memorandum dated December 30, 1991, as well as review of AS 41.10, which relates to soil and water conservation. Additional information was provided telephonically on January 8, 1992.

Under AS 41.10.130, upon the petition of 25 or more land users and on the recommendation of the Alaska Soil and Water Conservation Board, 1/ the commissioner of the department may create soil and water conservation districts. The commissioner may fix the boundaries of the districts, and

supervise the election of, prescribe the duties of, and install a governing body of five land users to be known as district supervisors for each district created, and delegate to the district supervisors powers as the commissioner considers necessary to

1/ AS 41.10.040 establishes the Alaska Soil and Water Conservation Board. AS 41.10.100 prescribes its duties.

accomplish the purposes of [AS 41.10] within the district boundaries.

AS 41.10.130(a). The commissioner has created 10 districts. The "governing body" of a district has come to be called the "board of supervisors."

The department is currently processing a grant to one of the districts for a drainage project. The district has completed the bidding process, but has not yet awarded the contract.

Before putting the contract out for bid, knowing that one of its board members wanted to bid on the contract, the district board of supervisors requested advice from the department's designated ethics supervisor on whether the board member's bid was prohibited under the Ethics Act. After speaking with an assistant attorney general, the designated ethics supervisor advised the board that because its members are not appointed by the governor, they are not "officers of the state" subject to the Ethics Act.

Nonetheless, she also advised the board that it should be guided by the Ethics Act in making its decisions.

The board voted to allow the member to bid on the contract. It has advised the department that he was not involved in board discussions of the bid package or the project specifications prior to submitting his bid.

The board member submitted the low bid. The second lowest bidder has written to the chairman of the board protesting the proposed award of the contract to the board member and alleging various "conflicts of interest," including improprieties under the Ethics Act.

DISCUSSION

The department seeks advice concerning several aspects of this transaction. First, does the Ethics Act apply to the boards of supervisors of soil and water conservation districts? Second, if so, in the event the next lowest bidder wishes to pursue the issues raised in his letter of protest, where may he file an ethics complaint? Third, under the Ethics Act, is there any way for the board member to cure his conflict? And, finally, if the boards do not fall under the Ethics Act, should the department require compliance with the Ethics Act as a condition of any grants to the boards?

- A. The Ethics Act Applies to the Boards of Supervisors of the Soil and Water Conservation Districts

Unless an exception is specifically provided by statute, the Ethics Act applies to all public officers within executive branch agencies, including members of boards or commissions. AS 39.52.910(a). The Act defines "public officer" or "officer" to mean "a public employee" and "a member of a board or commission."

AS 39.52.960(21). "Board or commission" is defined in turn to mean "a board, commission, authority, or board of directors of a public or quasi-public corporation, established by statute in the executive branch, but excluding the Alaska Railroad." AS 39.52.960(4).

Application of the Ethics Act to the members of a particular administrative body turns on whether that body "actually functions like a publicly organized group with statutory responsibilities." 1986 Inf. Op. Att'y Gen. at 1 (Dec. 12; 663-87-0258). Bodies created by state statute, but placed under branches of government other than the executive branch, are not covered by the Ethics Act. Id. at 2.

Under AS 41.10.130, the "governing body" of a soil and water conservation district, whether called the "district supervisors" or the "board of supervisors," is statutorily created.

Whether the boards of supervisors are within the executive branch is not as clear; however, given the department's role in creating the districts and its broad discretion in delegating powers to the boards, we believe the boards should be considered within the executive branch for purposes of the Ethics Act. 1/ Even though the board members are elected by land users, under AS 41.10.130(a), the commissioner of the department not only has the discretion to create the soil and water conservation districts, but also to supervise the election of and install their governing bodies and to prescribe their duties.

2/ See Alaska Commercial Fishing & Agriculture Bank v. O/S Alaska Coast, 715 P.2d 707 (Alaska 1986), recognizing that a statutorily authorized entity may be a state agency for one purpose, but not another.

Under established administrative law, the commissioner may delegate to the district supervisors only those powers granted him, no more. Moreover, the commissioner may delegate only those powers which he considers necessary to accomplish the purposes of AS 41.10 within the district boundaries, no more. See, e.g., City of Cordova v. Medicaid Rate Comm'n, 789 P.2d 346, 351-53 (Alaska 1990), holding that specific statutes relating to the delegation of authority are controlling over AS 44.17.010, which authorizes the delegation of functions by department commissioners to subordinate officers; 73 C.J.S. Public Administrative Law and Procedure • 58 at 518-22 (1983) (administrative officers and agencies are without power to exceed the authority conferred on them by statute). AS 41.10.110 spells out the powers of the commissioner with respect to soil and conservation matters. The boards of supervisors acquire no additional powers, duties, or functions by virtue of the fact that their members are elected; all their powers derive from delegation by the commissioner and are limited to those powers which the commissioner has under AS 41.10.110 and which he considers necessary to accomplish the purpose of AS 41.10. Thus, the boards of supervisors, which are created statutorily, are within the executive branch and subject to the Ethics Act. 1/

1. The Ethics Act prohibits a board member from bidding on a contract let by the board on which he serves

3/ Apparently, in providing earlier verbal advice on this matter, there was some confusion on our part as to the nature of the governing body of the district and its role in putting the contract out for bid. This written advisory opinion supercedes our previous verbal advice. To the extent the Department of Law may have contributed to the present predicament, we apologize to those involved.

Under the Ethics Act, a public officer may not be a party to a state contract if he may take or withhold official action that affects the award, execution, or administration of the contract. AS 39.52.150(a). A member of the district board of supervision clearly may take or withhold such official action, and thus the prohibition applies. AS 39.52.150(b) provides an exception for competitively solicited contracts:

The prohibition . . . does not apply to a state . . . contract . . . competitively solicited unless the officer

(1) is employed by the administrative unit awarding the . . . contract or is employed by the administrative unit for which the . . . contract . . . is let; or

(2) takes official action with respect to the award, execution, or administration of the . . . contract

In a previous ethics opinion, we found that while board members are not technically 'employed' by the boards on which they serve, the appropriate application of AS 39.52.150(b) is to deem them so employed. 1990 Inf. Op. Att'y Gen. at 2 (Feb. 20; 663-90-0228). A board member may not bid on any contract let by the board on which he serves so long as he remains on the board. See id.; see also 1986 Inf. Op. Att'y Gen. (Sept. 3; 663-87-0090). Therefore, under the Ethics Act, board members are barred from bidding on the drainage project and from contracting with the district.

B. Procedure for Filing Complaints Under the Ethics Act

Under the Ethics Act, any person may file a complaint regarding the conduct of a public officer with the attorney general. The complaint must be in writing, signed under oath, and contain a clear statement of the details of the alleged violation. AS 39.52.310(b).

C. Can The Board Member Correct This Problem?

To correct the problem found under AS 39.52.150, the board member may withdraw his bid. See AS 36.30.160(b). If he

does not wish to voluntarily withdraw his bid, then the district must reject his bid and award the contract to the next lowest bidder otherwise qualified under the procurement laws. Alternatively, the district may reject all bids and begin the procurement process anew. See AS 36.30.350. Based on our previous opinion in a 1986 memorandum of advice concerning the contracts provision of the Ethics Act, AS 39.52.150, depending on the circumstances, the latter approach may be unfair to all the other firms that have submitted bids. 1986 Inf. Op. Att'y Gen. at 4 (Sept. 3; 663-87-0090).

In any event, the board member must refrain from participating in any way on further action by the district with respect to this contract. Id.

You have also asked, if the district elects to begin the procurement process over again, can the board member resign from the board and submit a new bid? Two provisions of the Ethics Act potentially apply. First, AS 39.52.180(a) would restrict the board member for a period of two years following his resignation from bidding on the drainage project contract, if he has "participated personally and substantially through the exercise of official action" with regard to the contract. The extent of the board member's participation is a factual matter which requires further investigation. A thorough examination of the entire circumstances surrounding this contract, not simply the board discussions of the bid package and the project specifications, is required. Under AS 39.52.180(c), the chairman of the board may waive the two-year prohibition after determining that allowing the board member to bid would not be adverse to the public interest. The waiver must be in writing and must be submitted to the attorney general for approval.

Second, AS 39.52.140, which restricts the improper use of information by former public officers, may preclude the board member from submitting a new bid. In preparing a new bid, he could not use any information gained in the course of or by reason of his official board duties, if that information has not also been disseminated to the public. Nor may he use, without appropriate authorization, confidential information. AS 39.52.140. Whether the board member has available information regarding this project that was not disseminated to the public is a factual question which again requires a thorough investigation of the entire circumstances of his involvement with this project.

D. Advisability of Grant Provision Requiring Compliance With
Ethics Act

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The law imposes on public officers the obligation to meet high standards of ethical conduct in attending to the public's business. While it is thus not necessary for the department to include a provision in its grant agreements requiring ethical conduct on the part of the boards of supervisors, the department may wish to do so.

Such a provision should be drafted to require board members to comply with "all applicable standards of ethical conduct, including the Ethics Act, AS 39.52." For those public officers whose conduct is governed by the Ethics Act, all applicable standards include not only the provisions of the Ethics Act, but also applicable criminal statutes and "any other state law that imposes a stricter standard of ethical conduct on public officers." AS 39.52.910(b). If the department decides to include an ethics provision in its grant agreements, please do not hesitate to contact us for assistance in drafting this provision.

MS:bga