

Hon. Paul Fuhs
Commissioner
Department of Commerce and
Economic Development

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Division of Tourism
contracting procedures
for participation in
Taejon International
Exposition

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You requested our opinion whether it would be appropriate to direct a contractor of the division of tourism in the Department of Commerce and Economic Development to perform certain tasks leading to the development of an Alaska State pavilion at Taejon International Exposition. The contractor is Bradley Communications, Incorporated (hereinafter "the prime contractor"). The prime contractor is performing under a contract (ASPS No. 88-0174 A) originally awarded in February 1988 and recently amended in June 1992 to extend until June 1993 (hereinafter "the contract"). The scope of services specified in the contract reads as follows:

The Contractor, Bradley Advertising . . . shall perform services requested by the state which may include, but are not limited to: planning, production, placement and evaluation of Canadian and U.S. national advertising (print, direct mail, television), production of collateral material, the Fall/winter/Spring campaign, market research, overseas marketing, film development office support, all types of promotion activities related to tourism, and the Contractor shall provide general marketing and management counsel when requested.

You propose to direct the prime contractor to produce the state's exhibit for the exposition. This production will consist of design, fabrication, and erection services which will be provided through subcontractors. The prime contractor will be required to prepare decorative props and wall coverings for the pavilion and install them. The props will be designed to promote a greater awareness of Alaska as a travel destination for foreign visitors.

Consistent with a related purpose of tourism promotion, those persons seeking information about Alaska as a tourism destination will become targeted by DCED as a market for state goods and resources. The pavilion will also contain exhibits of a commercial nature giving information about export opportunities for Alaska resources and products. The building housing the state

pavilion will be supplied by the sponsor of the exposition at no cost to the state.

Review of the scope of service set out in the contract discloses no bar to the expenditure of money for the prime contractor's production of a state exhibit for the exposition. This interpretation of the scope of services is based on a review of the entire contract, the original request for proposals, and the prime contractor's responsive proposal. The statement of scope set out in the contract expressly mentions "overseas marketing" and "all types of promotion activities related to tourism." The scope of services describes the tasks that may be performed in a denotive manner; that is, definition of the scope by listing all or some of the things to which the term refers. Reed Dickerson, *The Fundamentals of Legal Drafting* • 7.3 (1965). For this contract, only a partial listing is included. This intent is apparent because the scope of services statement provides that the contractor's performance may "include but are not limited to" the tasks set out there. The implication is that other related activities authorized by law for the division of tourism can be performed under this contract.

You are concerned whether there may be a legal problem if expenditures under this contract also serve to promote international trade of state products and resources. The division of tourism's involvement in the exposition could be characterized as the exercise of its power to conduct and evaluate a "demonstration project for the promotion of the state's visitor industry and the development of new tourism destination markets." AS 44.33.120(b)(4)(I). Additionally, the joint tourism/international trade promotion of the state and its resources would give the division of tourism access to persons, governments, and business enterprises to enable it to perform its assigned function of "analyzing the effect on the state's visitor industry of state land and resource development projects." AS 44.33.120(b)(4)(H). In summary, there appears to be sufficient statutory authority to allow the division of tourism to take part in and expend appropriations for a joint tourism destination and international trade promotion.

A few words of caution are in order concerning the division's plan to solicit donations from business enterprises to help offset the cost of producing the pavilion. The Department of Commerce is authorized to "receive gifts, grants, and other aid that facilitate the powers and duties of the department from . . . private sources." AS 44.33.020(14). However, the manner in which donations are solicited and how access to the state's pavilion is permitted must be consistent with the Execu-

tive Branch Ethics Act (AS 39.52). The division of tourism must be careful not to grant or deny access to the state pavilion in a way that intentionally grants or secures an "unwarranted benefit" or treatment for any person. AS 39.52.120(a). A "benefit" is anything of value that is to a person's advantage or self-interest. AS 39.52.960(3). The division should provide access in a fair and nondiscriminatory manner.

Apparently, the prime contractor was requested to perform some preliminary work on the design of the pavilion before an opinion was requested from this office. To accomplish this design work, the prime contractor subcontracted with another firm resident in Washington State. The subcontractor supplied a conceptual design for the pavilion that is acceptable to the division of tourism. You now want to know if the division of tourism can allow the subcontractor to undertake the fabrication and erection of the pavilion decorations without competitively soliciting offers from other firms. The subcontractor contends that the design contains material proprietary to that firm which cannot be reproduced by others without permission.

As stated above, the scope of the prime contract is broad enough to cover services necessary to produce the state pavilion. There is no requirement in the state procurement code that a prime contractor competitively solicit offers from subcontractors. See AS 36.30.210(a) (subcontractors must be listed by offeror within 5 days after proposal identified as most advantageous to the state). However, by contract, the division of tourism imposed the following requirement:

All subcontracts which are necessary for the execution of this contract will utilize a competitive bid process and favor Alaska vendors to the maximum legal extent. The actual bid process will be specified by the state. The state will approve whether a contract should be subcontracted. All subcontracts will be subject to state approval. In all instances, the contractor will be the project manager.

The director of the division of tourism relates that the prime contractor solicited quotes from a limited number of firms that met certain criteria imposed by the division. These criteria were as follows:

- 1) experience with international exhibition work;
- 2) experience with Alaska subject matter;
- 3) an established office with qualified staff located

in the Orient; and

4) a project office located in the Pacific Northwest or Alaska region.

The director asserts that, based on his knowledge of the available qualified firms, there were no Alaska vendors who met these criteria. The director states that the prime contractor will corroborate his knowledge. The director also relates that he reviewed the quotes obtained by the prime contractor and approved the award. Assuming the existence of these facts, it appears that the literal requirements of the contract have been complied with.

The contract does not require that there be a competitive process equivalent to that imposed by the state procurement code. The contract requires that whatever process the prime contractor uses must be "competitive" and be approved by the state. The director states that he was informed of and helped formulate the competitive process used by the prime contractor and approved it. The approval of the director is within his discretion and upon judicial review, subject to a determination whether there was a reasonable basis for his decision. *Chris Berg, Inc. v. State*, 680 P.2d 93 (Alaska 1984). This is a deferential standard of review, and if the criteria selected have a basis in fact and the director and prime contractor acted in good faith, the decision to subcontract for design, fabrication, and erection should be sustained. The director should make a formal record of the determination made concerning the administration of the contract and preserve it in the contract file.

I hope that this memorandum of advice addresses the concerns you have concerning the administration of the contract by the division of tourism.

JLB:tg