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January 12, 1994

661-94-0387

269-5159

Authority of DCRA to make
grants from capital
appropriations; review of
Calista grants

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INTRODUCTION

In your November 8, 1993 memorandum, you requested an opinion on the ability of the Department of Community and Regional Affairs (DCRA) to expend capital appropriation, even though the appropriations are not otherwise designated as grants. Your memorandum also expressed concern about whether a grant may be made to a private for-profit interest. Finally, you asked that we review an existing grant with the Calista Corporation (Calista) for an airborne magnetic survey of the Bethel Basin, and a proposed grant with Calista for the Bethel-Nyac transmission line intertie study.

We believe that DCRA must have specific statutory authority to expend capital appropriations as grants. Such grants may be made to private for-profit interests if there is a direct public benefit. DCRA currently does not have the statutory authority to make grants from capital appropriations. We recommend, therefore, that, with respect to the existing and proposed grants to Calista, DCRA seek specific authority from the legislature to make these grants to Calista as a named grant recipient under AS 37.05.31. If DCRA does not seek legislative authority to make these grants, we recommend that it terminate the existing grant agreement and proceed under the State procurement code, AS 36.30.050 -- 36.30.860.

Background

In the FY 94 capital budget act (the "Act"), page 60, lines 30-33, ch. 79, SLA 1993, the following items are listed under the heading for the Alaska Energy Authority (AEA):

Bethel-Airborne Magnetic Survey of the Bethel Basin	\$175,000
Bethel-Nyac Transmission Line Intertie Design Study	\$60,000

These appropriations were transferred to DCRA under ch. 18, SLA 1993, a bill that transferred operating authority for rural energy programs from the AEA to DCRA. The effective date of chapter 18 was August 11, 1993.

On September 14, 1993, DCRA entered into a "grant agreement" with Calista to perform an airborne magnetic survey of the Bethel Basin. You indicated in your memo that work is not scheduled to begin on the survey until spring 1994.

DCRA has contemplated, but not yet entered into, a grant agreement with Calista for a Bethel-Nyac transmission line intertie study.

Discussion

a) Capital Appropriations as grants

According to your memo, the AEA has, in previous years, converted capital appropriations into project-specific grants to local utilities. This "precedent" led to making the grant to Calista for the airborne magnetic survey.

It is difficult to use previous AEA practices as precedent for current DCRA practices because AEA operated under quite broad authority, as set out in AS 44.83.080. See 1988 Inf. Op. Att'y Gen. (Feb. 24; 661-88-0348). Although DCRA is authorized to make specific grants under the provisions of ch. 18, SLA 1993 (for example, grants for utility improvements under AS 42.45.180 and grants from the Southeast Energy Fund under AS 42.45.040), the broad authority of the AEA to make grants under AS 44.83.080 was not transferred to DCRA.

Because DCRA lacks the specific authority to make grants from capital appropriations, we look to whether these particular appropriations are otherwise designated as grants. The term "grant" is defined in AS 36.30.990(11) as follows:

"Grant" means property furnished by the state, whether real or personal, designated by law, including an appropriation Act, as a grant.

The appropriations for the "Bethel-Airborne Magnetic Survey" and the "Bethel-Nyac Transmission Line Intertie Design Study" do not specify Calista or any other entity as the recipient

of the funds. In fact, if one were to construe the appropriations language as specifying a recipient, it might arguably be the city of Bethel.

These appropriations are not referred to in the Act as grants. The fact that these appropriations are located on the same page of the bill with other items that are specifically referred to as grants does not support the view that they too were intended to be grants. Neither is there any statement of legislative intent, either committee reports or minutes, that refer to these appropriations as grants. Therefore, we believe that DCRA lacks authority to make grants from either of these appropriations.

b) Grants to Private For-Profit Interests

You have also expressed concern regarding whether a grant may be executed with a private, for-profit interest, such as Calista. The Department of Law has previously stated that grants may be made to private entities provided that the public funds are used in the proper fashion, i.e., consistent with the public purpose section of the Alaska Constitution article IX, section 6. 1983 Inf. Op. Att'y Gen. (Oct. 28; 663 84 0174). The administering agency must determine whether the grant will directly benefit the public. The private interest may benefit indirectly, for example, from information gathered primarily for public benefit. However, the private interest may not benefit directly, with only an indirect benefit going to the public. 1992 Inf. Op. Att'y Gen. (July 1; 883-92-0141). These guidelines would apply to the grants that are the subject of this memo.

Grant to Calista for Airborne Magnetic Survey of the Bethel Basin

In light of the above, we reviewed the existing grant agreement between DCRA and Calista for the airborne magnetic survey.

As we stated, we believe that DCRA must have specific statutory authority to expend capital appropriations as grants. Because no such authority exists, we believe that the existing grant agreement is invalid.

Though lacking authority to enter into the agreement, DCRA may nonetheless have liability to Calista for expenses incurred under the agreement. See 1 McBride and Wachtel, Government Contracts § 4.90 (1993). Accordingly, we recommend

that DCRA terminate the grant agreement, as provided under the termination for convenience clause.¹ We also recommend that DCRA notify Calista to make no expenditures under the agreement in order to minimize DCRA's potential liability for expenditures by Calista prior to termination.

If DCRA prefers that the funds be granted to Calista to perform the airborne magnetic survey, it must seek legislative authority by having these funds reappropriated to Calista as a named recipient grant. In this manner, DCRA may also deal with Calista's expenditures prior to termination. In the past we have approved reimbursement for expenses incurred before an appropriation has become effective or a grant agreement has been signed. However, there must be clear legislative intent regarding reimbursement. See 1985 Inf. Op. Att'y Gen. (Aug. 7; 366-527-85) and 1986 Inf. Op. Att'y Gen. (Mar. 24; 663-86-0412).

Proposed Grant to Calista for Bethel-Nyac Transmission Line Intertie Design Study

¹The grant agreement specifically authorizes the Division of Energy to unilaterally terminate it for the convenience of the Division or for cause. Article 2 provides in part:

2(a) Grounds for Termination. This contract may be terminated for the convenience of the Division of Energy or for cause. . . .

2(b)(ii) Termination for the Convenience of the Division of Energy. The Grantee shall not reimburse the Division of Energy for funds expended prior to the date of termination and shall be made whole with respect to all expenditures prior to the date of termination. The Grantee shall be entitled to reimbursement for any expenditures it has made, including matching funds, up to the date it is notified of termination. However, prior to making any claim or demand for such reimbursement, the Grantee shall use its best effort to reduce the amount of such reimbursement through any means legally available to it.

You also asked that we advise you on entering into a proposed grant agreement with Calista for the Bethel-Nyac intertie design study.

In our opinion, for the same reasons discussed above, DCRA lacks authority to make a grant for the Bethel-Nyac intertie design study. With respect to the study, we believe that expenditures from this appropriation, as currently designated, should properly be made under the provisions of AS 36.30.050 -- 36.30.860, the State procurement code.² If DCRA wishes to disburse these funds as a grant to Calista, it should seek reappropriation of these funds by the legislature as a grant to Calista as a named recipient under AS 37.05.316.

We hope this memorandum answers your questions.

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² AS 36.30.850(b) states that, except for specifically enumerated items:

This chapter applies to every expenditure of state money by the state, acting through an agency, under a contract