

STATE OF ALASKA

Frank H. Murkowski, Governor

DEPARTMENT OF LAW

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January 4, 2005

CONFIDENTIAL ETHICS ADVICE

[Former State Employee]

Re: Post-State Employment
Our File No. 663-04-0104

Dear Former State Employee,

You have requested advice under AS 39.52.250(a) of the Executive Branch Ethics Act with regards to AS 39.52.180(a), restrictions on employment after leaving state service. Until recently, you worked for a Section of a Department of state government. You retired from state service in April 2003 and you are now employed by Private Firm, Inc. (PF)(A pseudonym). Your firm would like to bid on current and future Request for Proposals (RFPs) being offered by the State of Alaska.

The following is a list of several RFPs that PF intends to respond to and you seek to participate in, and are currently being advertised or that may be advertised before the two year restriction under AS 39.52.180(a) expires:

Project "A"
Project "B"
Project "C"
Project "D"
Project "E"
Project "F"

On December 13, 2004 we provided you with oral advice that you could be involved in Project "A" and Project "B" for the reasons stated below. We reserved judgment on the other projects pending further analysis. We have now concluded that you may be involved in all of the above projects.

This advice is based on information you provided to me in our telephone conversations and in your email dated December 9, 2004. Person 1, Person 2, and Person 3, all with the Department, have verified this information to the best of their knowledge.

If the advice in this letter differs in any respect from our oral advice, this letter controls. This letter first describes the applicable Ethics Act statute, AS 39.52.180, and then analyzes each project.

Post-State Employment Restriction: AS 39.52.180

For two years after leaving state service, AS 39.52.180(a) precludes a former public officer from (1) representing a person (2) for compensation (3) with regard to any matter that (4) was under consideration by the administrative unit of state government in which that officer served and (5) in which the officer participated personally and substantially, (6) through the exercise of official action.

“The Department of Law has consistently read this subsection in accord with the legislature’s intent that AS 39.52.180 be narrowly applied.” 1997 *Inf. Op. Att’y Gen.* (Apr. 30; 663-97-0328)(citation omitted). In order to be disqualified from working on a matter during the two-year post-state-employment bar, your activity must fall within all six subsection .180(a) criteria.

Most of the terms used in AS 39.52.180(a) are defined in the Ethics Act and related regulations. A “public officer” includes any public employee in the classified, partially exempt, or exempt service. AS 39.52.960(20), (21). A “person” includes a business. AS 39.52.960(17). “Compensation” means the receipt of money in return for services rendered to another. AS 39.52.960(7). AS 39.52.180(a) defines “matter” to include a case, proceeding, application, contract, or determination. Whether involvement in a matter is “personal and substantial” depends upon the circumstances of each case. “Official action” is defined as “a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction, by a public officer.” AS 39.52.960(14). We apply these definitions to the RFPs you wish to be involved in as an employee of PF.

Project “A”

You report that this project is for construction of a new facility to replace the existing facility. While you were employed with the Department, a contract for performing a location study was undertaken under the direction of another project manger in the Section. The project was dropped in the late 1990’s and was dormant until after your retirement. You had no involvement with the project, nor with this RFP.

The two-year employment bar of AS 39.52.180(a) applies only to matters in which you participated personally and substantially, and through the exercise of official action. Because you had no involvement with this project or this RFP, you are not barred under the Ethics Act from being involved in Project “A”.

Project “B”

This project is for consulting services on a wide variety of needs under Project “B”. There is no fixed scope to this RFP; the work is as needed and generally consists of small assignments as required. As a project manager at the Department, you had no involvement in formulating this RFP or its predecessor.

Again, the two-year post-state employment restriction in AS 39.52.180(a) applies only to matters in which you participated personally and substantially, and through the exercise of official action. Because you had no involvement at the initial planning stages of the RFP or with its actual offering, you are not barred under the Ethics Act from being involved in Project “B”. Nonetheless, you have informed this office that as of December 13, 2004, your firm is not planning to bid on this project.

Project “C”

Before your retirement, the Section of the Department had a planning grant for a Master Plan for development of this location. The Master Plan document was a large-scale assessment of options that included Project “C”. You were not the project manager for the Master Plan or any other parts of this project. However, at various times you were asked to review some of the planning consultants’ work products on the Master Plan for technical content. This work included checking work product for errors, adding input and considerations, and adding your perspective into overall feasibility of the various proposed projects. The Master Plan had not been completed before you retired. At this juncture, the Master Plan appears to be finished and is scheduled to evolve into an actual RFP for Project “C”. You were not involved in any way with the decision to offer the RFP or in preparing the RFP for this project.

Since the inception of the Ethics Act, this office has held that the term “matter” under subsection .180(a) is to be narrowly applied. A previous Attorney General’s opinion that examined the underlying purposes and goals of the Act concluded that the phrases

“matter that was under consideration” and “the exercise of official action” refer[] to activities that either **involve the discretionary exercise of sovereign power or the distribution of state property** (through grants, contracts, sales, etc.). Those activities do **not** include a wide range of activity...

The Act in general concerns itself with improper influences on official action – actions that determine the rights of others both in governmental regulatory functions and in distributing or allocating state property among the citizenry.

...

But the [two-year post-state employment] bar should not be extended to those types of activities that do not affect the rights of others. To do so would extend the bar unnecessarily, thus compromising the countervailing interests that ameliorate the potential harshness of the restrictions.

1986 *Inf. Op. Att’y Gen.* at 4-5 (Sept. 24; 663-87-0109)(emphasis added).

We have since held that section 180’s two-year employment bar does not “extend to recommendations ... that, in turn, lead to a subsequent specific contract.” 1989 *Inf. Op. Att’y Gen.* (Dec 12; 663-89-0259). That same opinion concluded that members of state management committees who make decisions that later resulted in specific procurement contracts are not precluded from being involved in those specific contracts after leaving state service because the specific contracts are new “matters” under subsection .180. *Id.* Nonetheless, careful consideration must be made to one of the purposes of subsection .180:

to prevent a state employee from ‘directing’ a developing project so that it will be more likely to be awarded to a particular contractor, and then leaving state employment to work for that contractor.

1990 *Inf. Op. Att’y Gen.* (Sep. 6; 663-91-0071).

This RFP is similar to the situation presented in the December 12, 1989 opinion. Here, the Master Plan was not completed and did not ripen into a specific plan before you left state service. Thus, the “matter” at issue here is the specific plan for Project “C” and the actual project itself. You were not involved in the decision to put the project out for RFP, nor did you help prepare it. Furthermore, the involvement you had with this project was subject to the review and approval of other Department staff and project managers both while you were in state service, and after you retired. This lessens the likelihood that this project could be subject to employee specific manipulation so that it will be more likely to be awarded to a particular contractor. Therefore, we conclude that AS 39.52.180(a) does not preclude your involvement in Project “C”.

Project “D”

This project, and your corresponding involvement, is comparable to Project “C”. The Section of the Department had a planning grant for a Master Plan that included Project “D”. At various times, you reviewed some of the planning consultants’ work products for technical content. You were not involved in the Master Plan beyond this review, and the plan had not been completed before you retired. The RFP currently being offered is to design a project to complete Project “D”. You were not involved in the

decision to offer, or in preparing, the RFP for this project. For the same reasons we cite in your request to participate in Project "C", we have determined that you are not precluded from being involved in this project.

Project "E"

While you were with the Department, the Section had a planning grant for a Master Plan that included Project "E". Outside consultants were hired to put together this preliminary Master Plan. At various times, you reviewed their work product. However, the Master Plan could not be finalized due to lack of community support for the preferred alternative and the contract was eventually terminated. The RFP for Project "E" that is currently being offered, or scheduled to be offered, by the Department is a revitalized RFP. You had no involvement in the decision to offer this renewed Master Plan for RFP or in its preparation.

Again, in our opinion, whether you may be involved in this RFP turns on what constitutes the "matter" in this situation. The original RFP, in which you participated, did not culminate in an actual design project and work on the Master Plan ceased. After time, a renewed interest in this project arose and Department staff, without your input or involvement, chose to reissue this RFP. In our opinion, the reissued RFP is a new and separate "matter" for which you had no involvement, and therefore you are not precluded from participation in Project "E".

This conclusion is further supported by other informal opinions. We have permitted former state officials to work for a private employer on a contract where the official had been involved in an early draft of an RFP that was later significantly changed. 1993 *Inf. Op. Att'y Gen.* (Jul 20; 663-94-0048); *see also* 1990 *Inf. Op. Att'y Gen.* (Sep. 6; 663-91-0071)(permitting a former employee who had substantially participated in drafting a work plan for an RFP to work on a contract after leaving state service because the RFP was substantially changed by others, even though the changes were made while he was still in state service.)

While we do not know whether there have been substantial changes in the RFP, the fact that the RFP for Project "E" died and was later reissued without your involvement indicates that the current RFP is a new matter in which you had no personal and substantial involvement. You were not involved in the "matter" at issue here: the *renewed* RFP for the Master Plan. In addition, the review by Department staff of the project both before and after your departure from state service lessens any implication that your actions were designed to direct the project to a particular contractor so you could leave state service and obtain private employment. Therefore, you may work on this project.

Project “F”

This project will design several improvements to an existing facility. The work would cover several projects over a number of years. While in the Section, you were the Project Manager on several previous projects for this location and would have been in line to manage this project. You had some involvement in producing planning level scopes and estimates for the old Master Plan, which is approximately 15 years old. This involvement included identifying and evaluating projects for feasibility, and if feasible, advising another department to take the steps necessary to obtain a state appropriation for the projects. You did no design work for this facility, but instead played a role in ensuring that the financing coincided with the scope of the projects. The actual Project “F” was not started until after your retirement, and you were not involved in the decision to offer, or in preparing, this RFP.

The “matter” for which we are concerned is the RFP and the actual Project “F”. While you were involved in previous location projects and related budgeting for those projects, you were not involved in the decision to offer or in preparing this RFP. Therefore, section .180 of the Ethics Act does not bar you from bidding on Project “F”.

Undisseminated Information

With regards to post-state employment, AS 39.52.140(a) may also apply. That subsection provides:

A current or former public officer may not disclose or use information gained in the course of, or by reason of, the officer’s official duties that could in any way result in the receipt of any benefit for the officer or an immediate family member, if the information has not also been disseminated to the public.

Ethics regulation 9 AAC 52.070 describes when public information is “disseminated.” The prohibition of subsection .140(a) is permanent and does not expire at the end of the two-year employment bar of subsection .180(a). You have not indicated that you hold undissemated information regarding any of the above projects or RFP’s. This information has been confirmed by Person A, Person B, and Person C, to the best of their knowledge. Please be advised, however, that if a situation were to arise with regards to the above RFP’s in which you found that you had gained undissemated information in the course of your state service and were in a position to disclose or use that information to your benefit, you should refrain from any further participation in the matter and contact this office immediately.

Conclusion

By law, this advice is subject to AS 39.52.250(b), which provides:

A former public officer is not liable under this chapter for any action carried out in accordance with the advice of the attorney general issued under this section, if the public officer fully disclosed all relevant facts reasonably necessary to the issuance of the advice.

If you have any questions concerning the advice included in this letter, please do not hesitate to contact me.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By:

Brita Patterson
Assistant Attorney General