

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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January 18, 2005

[Former State Employee]

Re: Post-State Employment
Our File No. 665-05-0117

Dear Former State Employee:

You have requested advice under AS 39.52.250(a). Until March of 2004, you worked for a Department of state government. You are now employed by Private Consulting, Inc. (PCI)(a pseudonym).

The advice provided below is based on your e-mails of January 5, 2005 and January 7, 2005 and my telephone conversations with Mr. Doe of the Department on January 6, 2005 and January 10, 2005.

The Department has requested a proposal from your current employer, PCI, to review responses to the Department's comments on an assessment and survey report for Site A. Your portion of this project is to review the response to comments on the assessment.

In 2002, before you left state service, you assisted Mr. Doe with reviewing resumes from several term contractors for the Department related to the Site A project. You and Mr. Doe were looking for a contractor with requisite experience to evaluate issues related to the assessment and survey report for Site A and activities undertaken at the site. Mr. Doe was the lead on the Site A project. As a result of the resume review, you and Mr. Doe determined PCI's staff had the education and experience that fit the Department's needs. The 2002 RFP was then sent to PCI, which was subsequently issued a notice to proceed on the Site A project.

Your recollection is that the 2002 RFP included the initial review and provision of comments on the documents that are referenced in the current 2005 RFP. You do not recall participating in development of the 2002 RFP, review of the 2002 RFP, or having further involvement with the project after reviewing the resumes of the term contractors and deciding with Mr. Doe that PCI would be issued the notice to proceed. At the time

you helped to choose PCI for the Site A work, you had neither decided to leave state service nor been contacted by PCI concerning prospective employment with that firm.

Mr. Doe advised this office that, while work was proceeding under the 2002 RFP, the subject of the report alleged that its actions, although not entirely consonant with the Department's plan of action, met the Department's standards. The subject was to provide documentation to this effect and PCI, as part of the original contract, was to review the subject's draft assessment to determine whether it met the Department's standards. PCI made comments on the subject's draft assessment, but the subject did not respond to them. As a result, Mr. Doe terminated further work under PCI's contract. The subject has now responded to PCI's comments and it is this response that is the subject of the current RFP.

We first describe AS 39.52.180 and then analyze the project in which you wish to be involved.

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 section 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 contract. AS 39.52.960(1) defines "administrative unit" as "a branch, bureau, center, committee, division, fund, office, program, section, or any other subdivision of an agency." "Agency", in turn, includes an executive branch department.

Whether involvement in a matter is "personal and substantial" depends upon the circumstances of each case. However, general formulation of policy, routine processing of documents, general supervision of employees without direct involvement in a matter,

and ministerial functions not involving the merits of a matter do not constitute “personal and substantial” involvement. 9 AAC 52.100(b). “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).

The 2005 RFP

Whether you may be involved in the 2005 RFP turns on whether it is the same “matter” as the 2002 RFP in which you were involved as a state employee. If it is the same “matter,” then you are precluded from being involved in the 2005 RFP because you otherwise meet the section 180 criteria set out above.

In an earlier letter to you concerning a different RFP, we advised you that, under the narrow application rule of AS 39.52.180(a), with some exceptions, each contract is treated as a separate contract and, therefore, a separate matter for the purpose of determining whether the two-year employment bar applies. 1997 *Inf. Op. Att’y Gen.* (Jun. 24; 663-96-0576); 1997 WL 1089545 (Alaska A.G. 1997). In our opinion, the 2005 RFP falls within one of the exceptions to our general analytical approach to section 180.

Where an original contract expires and is extended without modifying the scope of work, we have held that the second contract is the same “matter” as the first. 2000 *Inf. Op. Att’y Gen.* (Dec. 13; 663-01-0104); 2000 WL 34246954 (Alaska A.G. 2000). We have also held that where two contracts are “merely installments of a continuing data collection effort,” then they are the same “matter” for purposes of applying section 180(a). 1989 *Inf. Op. Att’y Gen.* (Feb. 1; 663-89-0287), 1989 WL 439765 (Alaska A.G. 1989).

In this case, if the 2005 RFP is issued to PCI, the review that PCI will conduct will be the same review contemplated under the first contract. Work was halted under the first contract only because the subject of the report was slow to respond to PCI’s original comments. Now that the subject has submitted its response, PCI is being asked to complete its review of the assessment. The current RFP is similar to the RFP at issue in our 1989 opinion, *i.e.*, an additional installment of work product that was originally contemplated under the first contract. Therefore, we conclude that the 2005 RFP is the same “matter” for the purposes of section 180. You may not work on this contract for PCI.

Waiver

The head of the affected agency may waive the post-state employment bar of AS 39.52.180(a) if the agency head finds that the waiver is not adverse to the public interest

and the attorney general approves that determination. AS 39.52.180(c). You may request a waiver by writing to the Commissioner of the Department.

PCI is not disqualified from acting on the RFP

Although you may not work on the project related to the 2005 RFP, PCI is free to respond to and work on the matter so long as you are not involved in the project on PCI's behalf.

AS 39.52.140

As we explained in our earlier letter, you should be careful to avoid revealing to PCI any undissemated public information or information that is confidential by law concerning this RFP or the subject of this RFP.

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

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By:

Paul R. Lyle
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