August 31, 1995

Attorney for Former
Employee

Re: Request for Opinion by Former Employee
A.G. file no: 663-96-0048

Dear Counsel:

This will respond to the inquiry you have made on behalf of your client, a former employee. You state that a contractor employed by the employee's agency to manage a state-owned facility has offered him a management position.

Alaska Statute 39.52.180(a) limits the scope of the employment that may be accepted by public officers who leave state service. The limitation lasts for two years from the date of their termination, without a waiver. The statute provides, in relevant part, that

> A public officer who leaves state service may not, for two years after leaving state service, represent, advise, or assist a person for compensation regarding a matter that was under consideration by the administrative unit served by that public officer, and in which the officer participated personally and substantially through the exercise of official action. For the purposes of this subsection, "matter" includes a case, proceeding, application, contract, ...

In summary, the elements of the prohibitions set forth in AS 39.52.180(a), as they apply to your client, are:

1) for two years after leaving state service, your client may not

2) represent, advise, or assist

3) a business (included in the definition of "person" in AS 39.52.960(17))

4) for compensation

5) regarding a contract (specifically included as a "matter")

6) that was under consideration by the administrative unit (the agency)

7) in which your client participated personally and substantially

8) through the exercise of official action. 1993 Inf. Op. Att'y Gen. at 3 (Oct. 28; 661-94-0267).

In carrying out its duties under AS 39.52.250 this office has consistently given the statute the narrow interpretation intended by the legislature, that is, the statute has not been extended beyond its plain meaning. In the sectional analysis prepared by the Department of Law when the Alaska Executive Branch Ethics Act was first reviewed (Bill Review File No. 883-86-0047) the Attorney General recognized that the two-year ban was a compromise between competing interests. The state's interests are set forth in AS 39.52.010(a). The policy underlying the Ethics Act is the advancement of three general goals: (1) to discourage public officials from acting upon personal or financial interests in the performance of their public responsibilities; (2) to improve standards of public service; and (3) to "promote and strengthen the faith and confidence of the people of this state in their public officers." For subsection 180(a) in particular, the first and third purposes are evident. By barring future employment on matters in which the official takes substantial official action, the temptation to take that official action with an eye toward future gain is at least discouraged, if not eliminated. 1986 Inf. Op. Att'y Gen. at 2 (Sept. 24; 663-87-0109).

The competing interest of the employee has at least two forms. The first is the employee's right to be able to continue to use skills and abilities developed outside of state service, and not have a relatively short period of state employment become a barrier to continued professional practice and development. The second, an observation made in our bill review of the Ethics Act, is the clear recognition that the expertise and knowledge one gains in a job are transferable. Employees rightfully take with them skills that enable them to seek more responsible positions.

For the reasons discussed below, the statutory balancing of the competing interests prohibits your client's proposed employment. That proposed employment by our contractor in that management position falls directly within the prohibitions set forth in AS 39.52.180(a), and, unless waived, is not permitted for two years from the date of his separation from his position at the agency.

1. Your client participated personally and substantially through the exercise of official action regarding the contract.

Your client was hired by the agency in 1993, in a middle management position. He reported directly to the agency Director. In early 1994 he was promoted and served in that position until January, 1995, when his resignation was accepted by the new administration.

The management contract was under consideration by the agency during the tenure of your client in his previous management position. You have stated that he sat on the selection committee and the negotiating team. After the contract was executed, you state he "took over responsibility for its administration." A contract is specifically defined as a "matter" in subsection 180(a). "Official action" is defined in AS 39.52.960(14) as "a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction, by a public officer." This employee's responsibilities in both positions, which at a minimum would have involved making recommendations related to expected contract performance, fall within the definition of "official action." 1991 Inf. Op. Att'y Gen. at 4 (Nov. 18; 663-92-0291).

The original contract and Amendment No. 1 specifically list management and engineering positions to be funded, names of incumbents in those positions, and hourly rates to be paid those incumbents. The hourly rates to be paid to incumbents in these positions were discussed at length during the negotiations prior to execution of the original contract. In his previous management position your client was part of the negotiating team and participated in these discussions. The previous agency Director executed the original contract with rates for hourly compensation in place. Soon after your client's promotion, he signed Amendment No. 1 to the contract, which increased the hourly compensation for some of the contractor's management employees. There is no record of any negotiations having occurred prior to this increase being approved. Two additional amendments were executed by your client. He was a very "hands-on" manager, and took a personal and substantial interest in the contractor's performance.

2. Your client's proposed employment would require him to assist or advise regarding the contract.

You and your client assert that his duties in the proposed employment would involve only the day-to-day operations of the contractor and would have nothing to do with the administration of the contract. These assurances were given in a reasonable attempt to build a wall between, on the one hand, the performance of the contractor's duties under the contract, its amendments, and any subsequent negotiations between the agency and the contractor to extend or modify it and on the other, performance of subsequent contracts to be performed by the contractor.

We agree that employment on a new matter is not prohibited even if the new matter is related to a matter on which the former employee participated while a state employee. *See, e.g.*, 1994 Inf. Op. Att'y Gen. (Dec. 13; 663-94-0462). Here, however, the wall between management and the contractor's compliance with terms of the contract is non-existent or, at best, porous. In our view, employment in the proposed position will inevitably require your client to interpret, implement, and advise about the contract, even if his general day-to-day duties concern only work under other contracts.

The contractor cannot comply with the plain terms of the contract without performing very specific tasks. The lead paragraph of the contract states that "reliable, cost effective, and quality performance is the state's goal for the contract. The incumbent in the

position contemplated by your client would be directly in charge of day-to-day work, and as a result would be directly involved in assisting the contractor in performing the contract.

Further, the effectiveness of the day-to-day operations of the state facility will have a significant effect on the measures by which the agency will evaluate the contractor in the performance of its duties agreed to under the contract. The defense of that performance will necessarily involve the day-to-day operations of the facility because operations are a substantial part of what the contractor has agreed to do under the contract. As a result, the duties of the proposed position do not isolate your client from the statutory prohibition of rendering assistance to the contractor, for compensation, regarding the contract that was under consideration by the agency during his tenure there. It is, in fact, direct assistance to the contractor in meeting the state's expectations under the contract, and such management level work constitutes "assistance regarding" the contract.

Further still, a provision of the contract establishes and maintains a "facility sinking fund" for future capital repair and improvements to the facility. The amount of money to be deposited in the sinking fund is directly related to the continuing success of the contractor in performance of the contract. As a result, the state's goal of re-establishing the facility as a viable enterprise for years to come will be fulfilled only if credible work is performed, and that is directly dependent on the revenue generated by the work of the manager in the position for which your client is being considered.

Another example involves environmental concerns. Paragraph X.X of the contract states that the prevention of direct or indirect damage or injury to public or private property through compliance with environmental laws is a responsibility of facility operation. Your client would be directly responsible for assisting the contractor in meeting this contractual requirement.

Finally, your client's participation in the negotiation of salaries under the contract also precludes his subsequent employment under that contract. We understand that neither the original contract nor any subsequent amendment lists the position contemplated by your client. Your client told me that another position is presently vacant. Apparently the intention is to combine the duties of the other position with some of the work performed by the more expensive employees, so that your client's significant technical skills could be effectively used. Assuming this new position was agreed to by the agency and reduced to an amendment to the contract, it still would not withstand the limitations of AS 39.52.180. Your client's substantial participation in setting the salaries for the contract in general, and for the positions on which his subsequent salary will be based, precludes his employment under this contract for two years from the date he left state service.

You state that your client believes he should be able to work at the facility as a manager "just as he should be able to work there in one of a number of capacities for which he is capable and qualified." Yet, in our view, to the extent these positions are defined, created, or otherwise significantly affected by the contract, your client could not work for the contractor at this state facility in these capacities for two years after termination of his state employment.

Conclusion

The two-year ban is a reasonable compromise that protects the state's interests but does not unfairly or excessively restrict an officer's ability to work in the private sector after leaving state service. 1986 Inf. Op. Att'y Gen. (Sept. 24; 663-87-0109). Although a wide range of employment following state service would not trigger the two-year ban, the employment offered to your client falls precisely within the narrow scope of AS 39.52.180(a). Unless the restriction is waived, he is prohibited from being employed by the contractor in their operation of the facility, under their contract as amended, for a period of two years following his termination from state service.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

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THD/bap