

Designated Ethics Supervisor

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Bid proposal to agency
by agency employee
Executive Branch Ethics
Act (AS 39.52)

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Question Presented: Whether a public employee who coordinates computer services for his agency and who owns a computer services business may properly respond to a bid request from his own agency for computer services based on the premise that if his business is awarded the contract the employee will quit.

Facts Presented: A state agency has issued a Request for Proposals (RFP) for computer services. An employee of that agency who coordinates computer services and who operates an outside computer services business is requesting permission to submit a proposal. The employee recommended the RFP to his agency director. The employee's public responsibilities include duties that would be directly affected if not superseded by the services provided under the RFP. However, the employee has announced that if awarded the services contract, he would voluntarily terminate his agency employment. Also, the agency director has stated that, as a result of responding to the RFP, the employee would not participate in the agency's proposal evaluation committee.

Brief Answer: If the employee helped to prepare the RFP, responding to the RFP would be a misuse of official position and could be an improper influence on a state contract. Also, if the employee would serve on his agency's proposal evaluation committee were it not for his submitting a proposal, then submitting a proposal is incompatible or in conflict with the employee's duties. Finally, any personal and substantial participation by the employee in preparing the RFP would for two years after leaving state service restrict him from working under the resulting contract.

Discussion: In general, the Executive Ethics Act allows a state employee to engage in "independent pursuits" so long as there is no interference with the employee's public duties and responsibilities. AS 39.52.110(a). In certain circumstances, however, outside employment is prohibited. The provisions of the Act which apply in this instance include:

- AS 39.52.150 Improper Influence in State Contracts
- AS 39.52.120 Misuse of Official Position
- AS 39.52.170 Outside Employment Restricted
- AS 39.52.180 Restrictions on Employment After Leaving State Service

1. Improper Influence: The general prohibition against improper influence in state contracts is found at AS 39.52.150(a). It provides that a public officer may not attempt to acquire, receive, apply for, be a party to, or have personal or financial interest in a state contract if the public officer may take or withhold official action that affects the award, execution, or administration of the contract. "Public officer" is defined by the Ethics Act to include all public employees. AS 39.52.960(21).

The general prohibition does not usually apply to state contracts competitively bid, such as the one here in question. However, even where a contract is put out for bid, the prohibition applies either (1) when the public official is employed by the administrative unit letting the contract or (2) when the public official takes official action with respect to the award, execution, or administration of the contract. AS 39.52.150(b)(1) and (2).

This prohibition does not apply to former public officials, 1986 Inf. Op. Att'y Gen. at 1 (Dec. 30; 663-87-0273). However, because the official here is employed by the administrative unit letting the contract, the general prohibition contained in section .150(a) applies. The prohibition would also apply if the official took any "official action" with respect to the contract. Determining whether there is "improper influence" regarding a state contract requires close attention to the definitions of key terms.

"Official action" means a recommendation, decision, approval, disapproval, vote, or similar action, including inaction by a public officer. AS 39.52.960(14). "Personal interest" means an interest held or involvement by a public officer in any organization, including a business, from which, or as a result of which, a person or organization receives a benefit. AS 39.52.960(18). "Financial interest" means an interest held by a public officer which includes an involvement or ownership of an interest in a business that is a source of income, or from which, or as a result of which, a person has received or expects to receive a financial benefit. AS 39.52.960(9)(A). "Benefit" means anything that is to a person's advantage or self-interest, or from which a person profits, regardless of the financial gain, including any contract. AS 39.52.960(3).

Based on the facts presented, the employee in this instance would not, as the result of the performance of his public responsibilities, have any direct effect on the award, execution, or administration of the contract being solicited by his agency. On the contrary, the director of his agency has indicated that the employee would have no role whatsoever in reviewing the solicited proposals, should the employee himself submit one. However, the employee may already have had an indirect effect on the contract to be awarded, especially if he had a significant role in the preparation of the RFP. The reason for this is that the employee's influence may be rendered improper if the employee takes or withholds any official action that effects the award of the contract. Keeping in mind that the employee recommended the RFP to his agency director, if the employee as part of his duties made recommendations or decisions that have affected the scope, content, dollar amount, or other significant aspect of the RFP, then the employee has already indirectly affected "the award, execution, or administration" of any subsequent contract.

This conclusion is consistent with an earlier ethics opinion regarding improper employee influence on a state computer contract. An employee whose expertise in computers was relied upon by his agency was prohibited from selling computer software to the agency. Where the employee used other agency employees to test his software, it was "difficult to conceive of the employee

not being in a position to affect either the award or the administration of a contract for use of his own software." 1990 Inf. Op. Att'y Gen. at 3 (July 27; 663-91-0040). In this instance, if the employee who recommended the computer services RFP to his agency director participated to any significant degree in the preparation of the RFP, then it is difficult to conceive of the employee not being in a position to affect either the award or administration of the resulting computer services contract. See 1987 Inf. Op. Att'y, Gen. at 2 (July 10; 663-88-0011) (university custodian was permitted to bid on university contract for custodial services as he was not in a position to affect the award, execution, or administration of the contract).

2. Misuse of Official Position: If the employee helped to prepare the RFP, then submitting a proposal and ultimately receiving the award of a contract could be viewed as a misuse of official position. A public officer may not use, or attempt to use, an official position for personal gain. AS 39.52.120(a). "Gain" includes actual or anticipated gain, benefit, profit, or compensation. AS 39.52.960(10). Neither may a public officer seek other employment or contracts through the use or attempted use of official position. AS 39.52.120(b)(1). Nor may a public officer take or withhold official action in order to affect a matter in which the public officer has a personal or financial interest. AS 39.52.130(b)(4). As noted in the definitions above, "official action" is broadly defined. Similarly, "financial interest" is defined broadly to include a business interest from which one might expect to receive in the future a financial benefit. The critical fact here is the degree of the employee's involvement in the RFP. If he had no involvement, then there would be no opportunity for a misuse of official position. If he had minimal involvement, equivalent to ministerial or clerical duties, then again there would be no opportunity for misuse of official position. But, if on the other hand, the employee participated in any significant way in the preparation of the RFP, then his participation was sufficient to constitute "the use of official position" or the taking of "official action" within the meaning of AS 39.52.120. This is true even though the possibility for "gain" or "financial interest" on the part of the employee is only a future interest or expectation.

3. Outside Employment Restricted: A public employee may not render services to benefit a personal or financial interest or engage in or accept employment outside the agency which the employee serves, if the outside employment or service is incompatible or in conflict with the proper discharge of official duties. AS 39.52.170(a). "Incompatible or in conflict with the proper discharge of official duties" has been defined to mean that such incompatibility or conflict exists when the outside employment (1) takes time away from the employee's official duties; (2) limits the scope of the employee's official duties; or (3) is otherwise incompatible or in conflict with the proper discharge of the employee's official duties. 9 AAC 52.090. The agency director in this instance has stated that as a result of responding to the RFP, the employee would not participate in the agency's proposal evaluation committee. The question is whether the employee would participate in the agency's proposal evaluation committee were he not to submit a proposal. If that is the case, then in essence the employee is limiting the scope of his official duties with his agency. If the expertise that makes the employee a potential contractor could be used by the agency in its proposal evaluation committee, then the employee's prospective outside employment is, in fact, incompatible or in conflict with his current responsibilities as an employee. 1992 Inf. Op. Att'y Gen. at 3 (Dec. 14; 661-93-0376).

4. Post-State Service Restriction: This conflict is not cured by the employee's intent, should he be awarded a contract, of terminating his employment. AS 39.52.180(a) restricts employment after leaving state service. It provides that a public officer who leaves state service may not, for two years thereafter, 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. Purely ministerial participation in a matter does not trigger this restriction. 1992 Inf. Op. Att'y Gen. at 3 (July 1; 663-92-0302). For purposes of this subsection, "matter" includes a contract and "person" includes a business. See AS 39.52.960(17). Therefore, the employee is restricted for a period of two years after leaving state service from working for

or owning a business having a contract that was under consideration by the employee's agency, if the employee participated personally and substantially in the preparation of the RFP. 1993 Inf. Op. Att'y Gen. at 3 (July 30; 663-94-0048).

On the other hand, it should be noted that the term "matter" has been narrowly construed, such that the employee in this instance would not be restricted after state service from bidding on other computer-related contracts from his former agency. 1986 Inf. Op. Att'y Gen. at 5-6 (Sept. 24; 663-87-0109).

AS 39.52.180(b) and (c) provide exceptions to the restriction on employment after leaving state service. However, neither exception applies in this instance. Subsection .180(b) applies when an agency wishes to contract with a former employee. The purpose of the subsection is to establish that a former employee may complete a state project that he or she began as a state employee without violating AS 39.52.180(a). Inf. Op. Att'y Gen. at 2 (Aug. 16; 663-91-0034). This exception does not apply in this instance because the necessary predicate fact, quitting employment, has not occurred. This exception would apply, for example, if the agency needed to contract with the former employee who prepared the RFP for the limited purpose of evaluating the proposals received. But see 1987 Inf. Op. Att'y Gen. at 2 (July 10; 663-88-0011) (the university custodian case, which was decided on other grounds, summarily takes a broader view of the application of .180(b)).

The remaining exception, found at 39.52.180(c), providing for a waiver process initiated by the agency head, does not apply as no waiver has been requested.