

# MEMORANDUM

## State of Alaska Department of Law

TO: The Honorable Michele Brown  
Commissioner  
Department of Environmental Conservation

DATE: September 10, 1999

FILE NO.: 663-00-0018

TELEPHONE NO.: 465-6725

SUBJECT: Grant Eligibility:  
Bonus Payments under  
Ketchikan Local Hire  
Ordinance

FROM: Steven A. Daugherty  
Assistant Attorney General  
Natural Resources Section

### I. Introduction

You requested advice as to whether bonus payments made by the City of Ketchikan pursuant to a Ketchikan local hire ordinance are grant-eligible costs under AS 46.03.030 and 18 AAC 73. Your auditor questioned the eligibility of such costs based on constitutional equal protection issues.

### II. Short Answer

We believe that state reimbursement of bonus payments based on hiring of residents of a single municipality would be prohibited by equal protection provisions of the Alaska Constitution. *See State v. Enserch Alaska Construction, Inc.*, 787 P.2d 624, 631-34 (Alaska 1989).<sup>1</sup> We also believe that, even if constitutional, the payment requested by the City of Ketchikan would be inconsistent with your regulations.

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<sup>1</sup> This opinion addresses only the situation where a grant is made for a limited purpose and grant expenditures are subject to state approval and oversight to ensure that expenditures are for eligible costs; it does not address the expenditure of funds that have been granted to a municipality free of state oversight and spending restrictions.

### III. Analysis

#### A. General Background

The Ketchikan local hire ordinance provides for a bonus payment for public construction contracts based on the percentage of hours expended on a project by residents of the Ketchikan Gateway Borough when that percentage is 85 percent or more. Ketchikan, AK, Ordinances ch.3.14.010 -- 3.14.130 (1987). The ordinance is not applicable to "any contract involving state or federal funds where the terms of the grant or funding source would prohibit such a bonus payment." *Id.* at ch. 3.14.120.

In this case, the City of Ketchikan has already made a number of bonus payments assuming that its local hire ordinance was applicable. ADEC has made all progress payments under the grant pursuant to 18 AAC 73.050, without conducting a detailed review to make sure that all submitted costs were grant eligible. Pursuant to 18 AAC 73.050, ADEC is withholding 10 percent of the grant payment pending an audit to determine actual eligible costs. ADEC's auditors, consistent with ADEC's past practices, have determined that local hire bonus payments are not eligible costs, and you have requested advice as to whether this determination is correct.

Under 18 AAC 73.010(f), grant-eligible costs "include construction, equipment, engineering, legal and administrative expenses that are incurred as a direct result of the project, or that are otherwise directly attributable to the project." Competitive bidding is required for all construction contracts in excess of \$50,000, and where competitive bidding is required, the contract must be awarded to the lowest responsive, responsible bidder. 18 AAC 73.020. Further, under the terms of the grant any procedures for award of construction contracts must be preapproved by ADEC. ADEC Grant Offer # 48177, ¶2 (October 21, 1993). The bonus payments at issue under this grant are for contracts in excess of \$50,000. Further, even if contracts of under \$50,000 were at issue, ADEC did not approve any procedures other than competitive bidding for award of contracts.

#### B. Analysis

##### 1. Constitutional Issues

State reimbursement of a municipal local hire bonus payment would raise serious constitutional equal protection issues. Under article 1, section 1 of the Alaska Constitution, "all person are equal and entitled to equal rights, opportunities and protection under the law." In *State v. Enserch Alaska Construction, Inc.*, 787 P.2d 624, a state statute

providing for a regional local resident hiring preference for 50 percent of certain job classifications in "economically distressed zones" was held to violate the equal protection requirements of the Alaska Constitution. *Id.* at 634.

The Alaska Supreme Court applies a "sliding scale" approach in assessing equal protection claims under the State Constitution; this approach often offers greater protection to individual rights than that provided by the federal constitution. *Id.* at 631; *Laborers Local #942 v. Lampkin*, 956 P.2d 422, 429 (Alaska 1998). Under this sliding scale test, the importance of the individual interest impaired is determined and based on the importance ascribed to it; the state's interest must "fall somewhere on continuum from mere legitimacy to a compelling state interest." *Enserch*, 787 P.2d at 631. The right to engage in an economic endeavor is considered an "important right that the government may impair only if its interest in taking the challenged action is important and the nexus between the action and the interest it serves is close." *Lampkin*, 956 P.2d 430 (citation omitted). However, in *Enserch* the court held that "the disparate treatment of unemployed workers in one region in order to confer an economic benefit on similarly situated workers in another region is not a legitimate legislative goal." 787 P.2d at 634.

Unlike the statute at issue in *Enserch*, the Ketchikan ordinance does not require the hiring of residents of a particular area, but instead provides for bonus payments based on hiring of residents of the Ketchikan Gateway Borough. Nonetheless, the intent is the same, to make more jobs available to residents of the area. The impact is also the same, restriction on the number of jobs available to others, including other state residents, who are not residents of the area. Further, while the statute in *Enserch* required only a 50 percent resident hire preference, under the Ketchikan ordinance, qualification for bonus payments requires a minimum resident hire rate of 85 percent, and maximum bonus payments require a resident hire rate of 95 percent or greater. Thus, it appears that state reimbursement of "local hire bonus payments" would be prohibited under the equal protection provisions of the Alaska Constitution.

## 2. Grant Terms and Regulations

Even if not unconstitutional, we believe that state payment of the Ketchikan "local hire bonus" would be inconsistent with your regulations and the terms of Ketchikan's grant. "Local hire bonus payments" do not appear to fall within the definition of "grant-eligible costs" at 18 AAC 73.010, because such costs are not directly attributable to the project but to an external unrelated ordinance. Further, regardless of whether such payments fall within the definition of "grant-eligible costs" such costs are not grant-eligible where they conflict with grant regulations and grant terms. The local hire bonus payments at issue

involve payments on contracts of over \$50,000. Under 18 AAC 73.020, these contracts must be awarded to the lowest responsible, responsive bidder. No provision for payment of "bonus" payments in excess of the bid amount is provided in the regulations or in the grant. Thus, it appears that the "local hire bonus payments" at issue are not grant eligible under ADEC's regulations and the terms of the grant. We understand that this is consistent with ADEC's past grant administration practices.

#### **IV. Summary**

We believe that state payment of bonus payments based on hiring of residents of a single municipality would be prohibited by equal protection provisions of the Alaska Constitution. *See State v. Enserch Alaska Construction, Inc.*, 787 P.2d 624, 631-34 (Alaska 1989). We also believe that, even if constitutional, the payment requested by the City of Ketchikan would be inconsistent with ADEC grant regulations and the terms of Ketchikan's grant.

Please let us know if you have any further questions.

SAD:mmi