

October 9, 2012

Former State Employee
Employer

Re: Post State Employment
AGO File No. AN2010100321

Dear Former State Employee:

This letter responds to your October 2012 request for advice regarding the application of the post state employment provision of the Alaska Executive Branch Ethics Act to possible work on certain Department of Transportation & Public Facilities highway projects for your current employer. Our advice is provided in accordance with AS 39.52.250 and is confidential under AS 39.52.240(g). As that confidentiality protects you, you may share this opinion as you need to do so.

You explain that you left state service in April 2011. At the time, you were a Program Coordinator for DOTPF. Your duties included developing and submitting highway projects for consideration as to whether DOTPF should fund and construct particular projects.

You advise that your current employer intends to submit a proposal in response to a DOTPF Request for Proposals that seeks services for three projects. You report that while in state service you were substantially involved in the development of one of those projects, the Mitigation Project, but you were not substantially involved in the other two projects included in this RFP. You understand that you are barred from working on the Mitigation Project under the Ethics Act, but you ask whether you may work on the other two projects.

Prior to leaving state service in 2011, you requested general guidance on the application of the AS 39.52.180(a), the post state employment provision of the Ethics Act. Our advisory letter discusses the interpretation and application of the provision and addressed one potential post state employment project. I direct your attention to the entire general discussion in our letter and will not repeat it here.

Under AS 39.52.180(a), for two years after leaving state service, a former state officer may not “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.” The Department of Law has consistently read this provision in accord with the legislature’s intent that AS 39.52.180 be narrowly applied. The goal is to protect the integrity of state actions but recognize that state employees gain expertise and knowledge on the job that they rightfully take with them when they leave state service. It is intended to prevent improper actions or influence on actions, that is, misuse of office to benefit an officer with respect to future employment.

All of the elements of the statutory language must be present for the bar to apply. We focus initially on the “matter.” The definition of “matter” includes a contract.¹ Then we evaluate whether the identified work for the new employer is a “matter” in which you participated “personally and substantially through the exercise of official action” while in state service and therefore you may not work for another employer on that matter for two years following your state service.

Our research shows that the project review process has multiple steps beginning with data collection, project identification and ranking, Federal Highway Administration eligibility review and approval, and selection of particular projects from those eligible for funding before final design, preparation of requests for proposals, and construction occurs. You advise that although you were substantially involved in developing and nominating the Mitigation Project, at the time you left state service, it had not been selected for funding and you had no involvement in the preparation of the current RFP. With respect to that RFP, you also understand that although grouped together for the purposes of the RFP, the three included projects are distinct and unrelated, they will proceed independently, and they will involve separate accounting. That is, if awarded the contract, your employer’s staff may work on one or more of the projects, but time will bill to each specific project.

¹ “Matter” includes “a case, proceeding, application, contract, determination, proposal or consideration of a legislative bill, a resolution, a constitutional amendment or other legislative measure, or proposal, consideration, or adoption of an administrative regulation.” AS 39.52.180(a).

In these circumstances, we conclude that although you should not be involved in work for your current employer on the Mitigation Project because you were substantially involved in its development, there is no bar to your working on the other two separate projects.

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.

This advisory letter is based on the facts you and your employer provided in addition to our research. The legal protection afforded you by subsection 250(b) does not apply if your factual statements are inaccurate or incomplete. Therefore, you must notify us immediately if our description of the facts is incorrect so that we may reconsider our advice and ensure that you are adequately protected.

If you have questions about the advice in this letter or desire additional advice concerning other situations as they develop during your post-state employment, please don't hesitate to contact this office.

Sincerely,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By:

Julia B. Bockmon
Senior Assistant Attorney General

JBB/nd