

MEMORANDUM

State of Alaska

Department of Law

TO:	Michael A. Nizich Designated Ethics Supervisor Office of the Governor	DATE:	January 11, 1995
		FILE NO.:	663-95-0310
		TEL. NO.:	465-3603
FROM:	Kristen F. Bomengen Assistant Attorney General Human Services Section-Juneau	SUBJECT:	Retention of business interests upon appointment to office (Executive Ethics Act -- AS 39.52)

INTRODUCTION

You have asked whether a department commissioner may retain personal business interests upon appointment to office. You have further inquired about whether the commissioner's spouse's business interests with that department may be affected by the appointment. Finally, you have asked whether the commissioner may remain involved in volunteer service in the community as a board member for a non-profit organization that has a grant from the department.

The answer, in brief, is that the commissioner and spouse may retain personal business interests. The businesses may have to forego certain business opportunities with the department. On the other hand, if the commissioner severs all financial ties with the commissioner's business, the Executive Branch Ethics Act does not restrict the future activities of that business. The commissioner's continued participation as a board member of a grantee agency, however, would be incompatible with the official duties of a department commissioner.

BACKGROUND

Two types of business interests must be examined in order to respond to these concerns. First, the commissioner's spouse owns a firm. Although the department itself does not let contracts related to the firm's activities, some related contracts will be awarded and administered on behalf of the department. The spouse's business generally bids on contracts of this nature. These contracts would not usually be awarded and administered by the Commissioner's Office, but either by the Department of Transportation and Public Facilities (DOT/PF) or an administrative unit within the department.

Second, the commissioner is a partner in a consulting business, which has been involved in a number of consulting projects for the department. These projects concern policy development and planning. One project has just been completed. The contracting officer for this project was an employee of an administrative unit within the department. However, because of the policy considerations within the project, the project was reviewed by two division directors and a

deputy commissioner. In the future, the department will likely let additional contracts that are within the expertise of this partnership. The commissioner is considering severing ties with the business partnership. The commissioner may be interested in returning to consulting after leaving state service.

In addition, the commissioner currently serves as a board member for a non-profit agency that regularly seeks grants from the department. The commissioner is interested in continuing community service activities, but is concerned about potential for conflict under the provisions of the Executive Branch Ethics Act.

APPLICABLE LAW

The applicable provisions of the Executive Branch Ethics Act are as follows:

AS 39.52.150. IMPROPER INFLUENCE IN STATE GRANTS, CONTRACTS, LEASES, OR LOANS. (a) A public officer, or an immediate family member, may not attempt to acquire, receive, apply for, be a party to, or have a personal or financial interest in a state grant, contract, lease, or loan if the public officer may take or withhold official action that affects the award, execution, or administration of the state grant, contract, lease, or loan.

(b) The prohibition in (a) of this section does not apply to a state grant, contract, or lease competitively solicited unless the officer

(1) is employed by the administrative unit awarding the grant, contract, or lease or is employed by the administrative unit for which the grant, contract, or lease is let; or

(2) takes official action with respect to the award, execution, or administration of the grant, contract, or lease.

AS 39.52.170. OUTSIDE EMPLOYMENT RESTRICTED. (a) 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 39.52.960. DEFINITIONS. In this chapter, unless the context requires otherwise,

(1) "administrative unit" means a branch, bureau, center, committee, division, fund, office, program, section, or any other subdivision of an agency;

....

(9) "financial interest" means

(A) an interest held by a public officer or an immediate family member, which

includes an involvement or ownership of an interest in a business, including a property ownership, or a professional or private relationship, 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;

(B) holding a position in a business, such as an officer, director, trustee, partner, employee, or the like, or holding a position of management[.]

The statutes have been clarified by regulations as follows:

9 AAC 52.080. STATE GRANTS, CONTRACTS, LEASES, AND LOANS. (a) For purposes of AS 39.52.150(b), a state grant, contract, or lease is competitively solicited if the grant, contract, or lease

(1) is awarded by competitive sealed bidding under AS 36.30.100 - 36.30.190 or competitive sealed proposals under AS 36.30.200 - 36.30.270; or

(2) is awarded by procedures substantially similar to competitive sealed bidding or competitive sealed proposals and AS 36.30 does not apply to the awarding of the grant, contract, or lease.

(b) If a state grant, contract, lease, or loan is awarded by or for a public corporation, board, or commission within a department but not by or for the office of the commissioner of that department, then an employee of the office of the commissioner in that department is not considered to be employed by the administrative unit awarding the grant, contract, lease, or loan.

(c) For purposes of AS 39.52.150(b)(1), if the public officer was not employed by the administrative unit at the time a state grant, contract, or lease was competitively solicited, the officer's subsequent employment by that administrative unit does not constitute a violation of AS 39.52.150 unless the officer takes or withholds official action with respect to the administration of the grant, contract, or lease.

9 AAC 52.090. OUTSIDE EMPLOYMENT OR SERVICE. For purposes of AS 39.52.170, a public employee's outside employment or service, including volunteer service, is incompatible or in conflict with the proper discharge of official duties if the employee's designated supervisor reasonably determines that the outside employment or service

(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.

ANALYSIS

Spouse's Business

Under AS 39.52.150(a), a public officer or an immediate family member may not have or seek a financial interest in a state contract if the public officer may take or withhold official action that affects the award or administration of the contract. When a contract is competitively solicited, however, the prohibition of AS 39.52.150(a) only applies if the employee is part of the administrative unit awarding the contract or actually takes action on the contract as set out at AS 39.52.150(b).

The commissioner's spouse owns a firm, and may bid on state contracts. Under AS 39.52.150, the firm may bid on any project on which the commissioner could not take official action. Thus, the firm may bid on any project that has no connection with the commissioner's department.

The spouse's firm, however, may wish to bid on projects for work related to the department. We assume for this analysis that the contracts are competitively bid.¹ Thus, the questions are whether the commissioner's "administrative unit" will award the contract, and, if not, whether the commissioner will take official action that affects the award or administration of any such contract.

The award and administration of these projects for the department is usually performed by DOT/PF pursuant to a Reimbursable Services Agreement (RSA) with the department. The department rarely issues these contracts directly, unless a delegation of authority for contracts of a limited dollar amount is received from DOT/PF. The commissioner, however would be the signatory on the RSA to DOT/PF that funds these projects for the department.

In most, if not all, cases, neither the department nor the Commissioner's Office will be the administrative unit that awards the contract. Moreover, the project manager within the department most likely will be from another administrative unit, not the commissioner or an employee within the Commissioner's Office. Under 9 AAC 52.080(b), employees of the Commissioner's Office are specifically excluded from being considered employees of all administrative units of the department.

¹ The competitive nature of such a contract may require further analysis when such a contract is actually let. Under the ethics regulations, such contracts may qualify as competitively solicited for purposes of AS 39.52.150. 9 AAC 52.080(a)(1). However, if in a given case such a contract is not competitively solicited, and the commissioner may take official action that affects that contract, the spouse's firm may not bid on that contract.

Thus, the commissioner's potential conflict will be analyzed under AS 39.52.150(b), not AS 39.52.150(a). The question, then, is not whether the commissioner may take official action, but whether the commissioner will take official action on a project on which the spouse's firm may want to bid.

The commissioner must sign the RSA for funds to be spent on projects that involve significant expenditures. A RSA generally will be signed prior to the award of a contract by DOT/PF, but a contract amendment may involve subsequent RSAs that will be designated for a specific firm. Further, the statutory duties of the commissioner, as principal executive officer of the department, include the management of certain state facilities. Pursuant to these duties, the commissioner should participate in some decisions regarding important facilities for the department. Thus, in the usual case the commissioner will take official action on a contract let on behalf of the department.

The spouse's firm may not bid on contracts on which the commissioner will take official action. AS 39.52.150(b)(2). This conflict may be cured, however, if the commissioner may delegate the commissioner's duties and thereby avoid taking any official action on a particular project.

Whether the commissioner may delegate the commissioner's duties requires a case-by-case analysis that must be performed by the commissioner's designated ethics supervisor. If the matter includes a traditionally delegated function, it may be reasonable to conclude that the commissioner will take no direct action on the matter. For example, contracts for small dollar amounts for minor modifications traditionally have been delegated to a person in another administrative unit within the department. On more significant matters, the designated ethics supervisor, once concluding that there is a potential for a violation under AS 39.52.210, may make a reassignment of duties in order to cure the conflict, or direct the commissioner to divest the financial interest that poses the potential violation.

In summary, the spouse's firm may bid on any state contracts that clearly do not involve the potential for action by the commissioner of this department. This may include some contracts awarded by DOT/PF on behalf of the department. The spouse's firm may not seek state contracts that require official action by the commissioner of this department.

The Commissioner's Business Partnership

As discussed above, under AS 39.52.150, a public officer may not seek a contract or hold a financial interest in a contract if the officer may take or withhold official action concerning that contract. If the contract is competitively solicited, these restrictions apply only if the public officer is an employee of the administrative unit that awards the contract, or if the public officer takes official action with respect to the contract. The commissioner's consulting business involves outside employment or the rendering of services that will benefit a financial interest. Accordingly, AS 39.52.170, which prohibits outside employment that is incompatible with performance of state duties, also applies.

If the commissioner retains a financial interest in the consulting business, we believe that the consulting business should not bid on state contracts with the department. First, these contracts involve matters of policy and agency discretion, and the Commissioner's Office has been directly involved in previous contracts obtained by this partnership. Under AS 39.52.150(b), the commissioner may not retain a financial interest in the consulting business unless these policy decision are delegated to another official.

Moreover, under AS 39.52.170, outside employment or financial interests are restricted if the employment or interest is incompatible or in conflict with the proper discharge of official duties. Under 9 AAC 52.090, an incompatibility with the discharge of official duties may arise with outside employment or service, including volunteer service, if a determination is made that it limits the scope of the employee's official duties or demonstrates another conflict. We believe that the commissioner's designated ethics supervisor would find that a delegation of policy-making authority would not be consistent with the expectation that a commissioner will perform the planning and policy formulation duties of the position.

The commissioner has indicated that the business and financial interest in the partnership will not be retained. The commissioner has asked, however, whether the commissioner's former business associate would be precluded from continuing in the business and seeking contracts from the department. The answer is that the Executive Branch Ethics Act does not prohibit a former business partner from continuing the activities of the business, including seeking contracts from the department.²

Community Service as a Board Member

The commissioner serves on a board of a volunteer organization that obtains grants from the department. The restrictions on outside employment in AS 39.52.170 also apply to volunteer activities. 9 AAC 52.090. These services may be incompatible or in conflict with the proper discharge of the employee's official duties if conflicting interests may arise in the course of performing these duties. A board member must act in the best interests of the non-profit agency. A commissioner must act in the best interests of the department. The interests of a grantee may not be fully compatible with the interests of the department. For example, a board member may become involved in problems encountered in the grant or a petition to the department; the department commissioner may have to make a final determination that will impact the grantee or respond to a petition. The conflict would not exist if the non-profit agency has grants from other departments, but a serious potential for conflicts exists when the non-profit agency is a grantee of the same department. Consequently, the commissioner is advised to resign from the board of the grantee agency.

² Regarding the additional concern about returning to the business after state employment, for the first two years following state employment, the restrictions on the appointee's business activities are addressed under AS 39.52.180, and must be evaluated in light of the specific "matter" with which a former employee proposes to become involved.

CONCLUSION

In summary, the commissioner's spouse's business interests do not present a potential for a violation of the Executive Branch Ethics Act, except that the spouse's firm will be precluded from seeking contracts from the department if the commissioner is likely to take official action on the contract. The commissioner's business partnership will present a potential for a violation of the Executive Branch Ethics Act if the commissioner retains a financial interest in the partnership. However, if the financial interests in the partnership are severed, there is no restriction on the continuation of the former partner's business activities with the department. Finally, the ongoing presence of the commissioner on the board of a non-profit agency that has a grant from the department will be incompatible with the appointee's official duties. The commissioner is advised to resign from the board.

KFB/bap