

MEMORANDUM

State of Alaska Department of Law

TO: The Honorable Frank Rue
Commissioner
Department of Fish and Game

DATE: September 14, 1999

FILE NO: 663-97-0047

TELEPHONE NO: (907) 269-5151

SUBJECT: Applicability of State
Procurement Code to
Exxon Valdez Oil Spill
Council Activity

FROM: Brian Bjorkquist
Assistant Attorney General

INTRODUCTION

The Alaska Department of Fish and Game (Department) requested our advice regarding whether the Department may accept trust funds from the Exxon Valdez Oil Spill Council (Council) and enter into contracts to carry out restoration projects with particular entities that the Council designates without the Department undertaking a further competitive process under the state procurement code (AS 36.30). More specifically, the Department requested advice as to whether the Memorandum of Agreement and Consent Decree, *United States v. State of Alaska*, A91-081 CV (August 28, 1991) (EVOS Agreement) between the state and federal governments constitutes a "cooperative agreement" under AS 36.30.850(d) which would authorize the Department to comply with terms and conditions the Council might impose that conflict with the competitive process requirements of the procurement code.

This memorandum focuses upon two provisions that we conclude, in combination, authorize the Department to implement conditions that the Council expressly imposes in approving a contract but which conflict with the competitive bidding requirements of the procurement code: (1) AS 36.30.850(d) regarding conflicting provisions of a cooperative agreement, and (2) AS 36.30.890 regarding conflicting provisions of a federal statute, regulation, policy, or requirement if the procurement involves the expenditure of federal funds or federal assistance. Numerous statutory and other exemptions to the procurement code might also apply to specific

Council-approved contracts. A non-exhaustive list includes AS 36.30.850 (b), (c), and (d) (lists more than 35 exemptions) and 1988 Inf. Op. Att'y Gen. April 13; 663-88-0413) *quoting* 1988 Inf. Op. Att'y Gen. March 23; 663-88-0314) ("where the end product of goods or services being returned does not result in consideration in the form of goods or services being returned to the state, then the transaction is not a contract and is not covered by AS 36.30."). If a challenge is ever made to a specific Council-approved contract, these other provisions should also be reviewed.

This memorandum only addresses the applicability of procurement code provisions regarding the competitive selection of the contract recipient (*e.g.*, AS 36.30.100 - 36.30.320). Those provisions appear to conflict with the Council's ability to select a recipient for a contract it approves. In administering EVOS contracts, the Department should comply with procurement code provisions that do not conflict with contract conditions expressly imposed by the Council, such as procurement code provisions related to public records (AS 36.30.500 - 36.30.540).

ANALYSIS

Before addressing the two specific statutory provisions regarding the procurement code, we first discuss background information on the Council, EVOS Agreement, and EVOS trust funds that the Council uses to fund contracts it approves.

A. Exxon Valdez Oil Spill Council, Agreement, and Trust Funds

The Department's inquiry relates to trust funds that are jointly owned and administered by the state and federal governments. The EVOS Agreement is a settlement between the state and federal governments respecting natural resource damage recoveries arising from the 1989 *Exxon Valdez* oil spill. The agreement was entered and approved by the United States District Court for Alaska as a consent decree on August 28, 1991. EVOS Agreement at page 21. The agreement settled natural resource damage claims, including those arising under the Clean Water Act (33 U.S.C. §§ 1251-1376). Under that Act, the state and federal governments act on behalf of the public, as trustee of damaged natural resources, in seeking recovery for such damages. 33 U.S.C. § 1321. Amounts recovered may only be used by the state or federal government to restore, replace, or acquire the equivalent of the damaged natural resources. *Id.*

The Clean Water Act contemplates that the state and federal governments may independently seek recovery for natural resource damages. *Id.* In light of the

complexities associated with the *Exxon Valdez* oil spill, the state and federal governments agreed to "act as co-trustees in the collection and joint use of all natural resource damage recoveries." EVOS Agreement at IV.A. Thus, all damage recoveries are placed into the joint trust fund to be used in accordance with the terms of the agreement. *Id.* at VI.A. The Alaska Legislature specifically recognized the trust established by the EVOS Agreement. AS 37.14.400.

The EVOS Agreement required the governments to establish standards and procedures for the joint use of all damage recoveries for restoration work. EVOS Agreement at VI.A. The Alaska Legislature also directed that the trust be managed according to this EVOS Agreement. AS 37.14.400. The Council adopted procedures for the joint use of trust monies dated August 29, 1996 (superseding previously adopted procedures) (EVOS Procedures). These procedures include a competitive process for the approval of restoration work. EVOS Procedures at 8. The Council annually solicits proposals from public, private, non-profit, and government entities. After conducting an independent scientific review and a policy, budget, agency, and legal review, the Council gives public notice of its proposed work plan. *Id.* Following public review and comment, the Council by unanimous vote may approve a proposal, with or without modification. *Id.* The Department's inquiry questions whether it must conduct an additional competitive process under the state procurement code.

B. At Least Two Statutory Provisions Authorize the Department to Comply with EVOS Council Conditions that Conflict with the Procurement Code

At least two statutory provisions, in combination, authorize the Department to avoid the competitive bidding requirements of the procurement code when it expends money provided by the Council subject to a requirement which imposes a specific term or condition that designates the recipient or otherwise conflicts with the procurement code. The Department may comply with any such term or condition because it would be imposed by either (1) a federal policy or requirement because the procurement would involve the expenditure of federal funds or federal assistance, or (2) a cooperative agreement. AS 36.30.850(c) and AS 36.30.890.

- 1. A term or condition imposed by the Council would be required by federal policy or requirement and involve the expenditure of federal funds or federal assistance.**

The Department is exempt from competitive bidding provisions of the procurement code that conflict with federal restrictions imposed on the expenditure of federal funds. Alaska Statute 36.30.890 provides:

If a procurement involves the expenditure of federal funds or federal assistance and there is a conflict between a provision of this chapter or a regulation adopted under a provision of this chapter and a federal statute, regulation, policy, or requirement, the federal statute, regulation, policy, or requirement shall prevail.

Any "procurement" that includes the expenditure of EVOS trust funds would involve the expenditure of federal funds or assistance. The state and federal governments agreed to settle potential disputes regarding whether the state or federal government should seek, recover, and then use natural resource damages arising out of the *Exxon Valdez* Oil Spill. Under the Clean Water Act, each government could have separately sought recovery. Instead, the governments agreed to act as "co-trustees" in those endeavors. Furthermore, all damage recoveries are placed into the jointly owned trust fund to be used in accordance with the terms of the EVOS Agreement. EVOS Agreement at VI.A. The consequence of this settlement is that the EVOS trust funds are jointly owned and are indistinguishably both state and federal funds. Any expenditure of EVOS trust funds, therefore, will "involve the expenditure of federal funds or federal assistance." See AS 36.30.890 and 1988 Inf. Op. Att'y Gen. March 23; 663-88-0314) (AS 36.30.890 exemption applies where a federal agency selects recipient of grants jointly funded with state and federal monies).

Any "procurement" approved by the Council that imposed a term or condition would also involve either a federal policy or requirement. The state and federal governments "act as co-trustees in the collection and joint use of all natural resource damage recoveries." EVOS Agreement at IV.A. A term or condition imposed by the Council, therefore, would constitute a federal "requirement" (or policy) regarding the expenditure of federal funds or federal assistance.

If the Council imposed a term or condition (*i.e.*, a federal policy or requirement) involving the expenditure of EVOS trust funds (*i.e.*, federal funds or assistance) that conflicted with the competitive bidding provisions of the procurement code, AS 36.30.890 directs that the Council-imposed term or condition "shall prevail." Thus, the Department may comply with such Council imposed terms or conditions in entering into and administering contracts for the expenditure of joint trust funds.

2. A term or condition imposed by the Council may arise from a "Cooperative Agreement."

The Department may comply with terms of a cooperative agreement that conflict with provisions of the procurement code. Alaska Statute 36.30.850(d) provides, in relevant part:

Nothing in this chapter or in regulations adopted under this chapter prevents an agency or political subdivision from complying with the terms and conditions of a . . . cooperative agreement

"Cooperative agreement" is not defined in either the state procurement code or the Model Procurement Code from which AS 36.30.850(d) was taken verbatim. The official comment to the corresponding Model Procurement Code section provides one example of a contract (such as a lease) entered into between a state and private party that included provisions for the design, construction, or utilization of a facility. The Model Procurement Code for State and Local Governments, commentary to Sec. 1-104(2) (American Bar Ass'n 1979). Based upon this example, we have opined that it would be appropriate for a state agency to allow its lessee to contract for permanent improvements to an airport. 1989 Inf. Op. Att'y Gen. July 1; 663-89-0383. This application of "cooperative agreement" indicates that certain state contracts (such as the EVOS agreement) would constitute a cooperative agreement for the purposes of AS 36.30.850(d).¹

¹ Federal law defines a "cooperative agreement" as the legal instrument by which the U.S. government contracts with state or local governments when the principal purpose of the relationship is to carry out a public purpose (not acquire goods or services for the federal government) and substantial involvement is expected between the governments. 31 U.S.C. §6305. The EVOS Agreement is clearly a "cooperative agreement" under that definition. The EVOS Agreement is a contract that established a trust under which the state and federal governments "act as co-trustees in the collection and joint use of all natural resource damage recoveries." EVOS Agreement at IV.A. Operating under that agreement, the state and federal governments cooperatively fulfill their respective trust duties regarding natural resource damage recoveries under the Clean Water Act.

The EVOS Agreement, however, does not itself appear to impose any term or condition that might conflict with the state procurement code. Instead, in order to carry out its mandate under the EVOS Agreement, potentially conflicting terms or conditions might be imposed by the Council on an ad hoc, case-by-case basis. We believe that in the proper circumstances the terms or conditions the Council might impose would be considered as arising from a "cooperative agreement" so that AS 36.30.850(d) would apply. The EVOS Agreement established a trust under which the state and federal governments cooperatively act to expend EVOS trust funds on natural resource restoration projects. The agreement and procedures adopted to implement the agreement contemplate that in order to further restoration purposes the Council may select contract recipients. *See* EVOS Procedures at pages 14-15 ("Professional Services Contracts" paragraph 1). The Department may not select a different contract recipient; it may only recommend that the Council approve another recipient the Department believes would better serve the restoration program. *Id.*

Significantly, the Alaska Legislature expressly recognized the establishment of this EVOS trust and directed that it be managed as provided in the EVOS Agreement. AS 37.14.400. Thus, any action taken by the Council would reflect a cooperative agreement between the state and federal governments approved by the Alaska Legislature.

The Department, however, could encounter some difficulty if it relied exclusively upon AS 36.30.850(d) because its application will arise on an ad hoc basis. Comments to the Model Procurement Code indicate that public agencies may not enter cooperative agreements for the purpose of circumventing the procurement code. 1994 Inf. Op. Att'y Gen. April 4; 663-94-0464. If the Department were to rely exclusively upon AS 36.30.850(d), it could be compelled to defend challenges regarding whether the Council imposed a term or condition for purposes of circumventing the procurement code. The Council should therefore fully explain its non-procurement code bases for selecting a contract recipient to assist the Department in any challenge that might arise under the procurement code. The Department should also rely upon the exemption arising under AS 36.30.890 discussed in section B(1) above.

CONCLUSION

Our conclusion is that the Department may comply with an express term or condition imposed by the Council that strictly requires a contract be awarded to a specific entity. The Department, however, should not infer such an intent. If the Council fails to

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expressly impose the condition that a contract be awarded to a specific entity, then the Department must comply with competitive process requirements of the procurement code regarding the selection of the contract recipient. The Department should also comply with any other provision of the procurement code that does not conflict with an express term or condition the Council imposes.