December 18, 2007

The Honorable Sean R. Parnell
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: Review of 07ANCO Initiative Application
A.G. file no: 663-08-0057

Dear Lieutenant Governor Parnell:

I. INTRODUCTION

You have asked us to review an application for an initiative entitled "An Initiative Creating An Alaska Anti-Corruption Act." We find no legal problems with the bill that warrant denial of certification and so we recommend that you certify the application.

II. SUMMARY OF THE PROPOSED BILL

The bill is comprised of two sections with the stated objective of reducing the appearance of corruption in government. Section 1 is essentially a prohibition on use of public funds for electioneering, repeating the prohibition against the use of public funds in candidate campaigns that appears in AS 15.13.145, and adding a prohibition against the use of public funds to advocate in ballot measure campaigns. The section also supplements penalties for violating prohibitions against government spending in campaigns. Section 2 prohibits contractors on public works construction projects from making contributions to candidates. It also provides for civil and criminal penalties for violations.

Section 1 prohibits the use of tax revenues or public resources for campaign, lobbying or partisan purposes. The law now permits the use of public funds in a ballot measure campaign if the legislature or local legislative body appropriates funds for that purpose but prohibits public spending in candidate campaigns. *See* AS 15.13.145. Section 1 would prohibit any advocacy in a campaign without regard to legislative authorization. This section prohibits the acceptance of contributions of public funds, duplicating a similar provision in AS 15.13.072, which prohibits the solicitation or

acceptance of unlawful contributions. Section 1 also prohibits the use of public funds to lobby. Current law exempts state public officials from the definition of "lobbyist" in recognition of the need for executive and legislative branches to confer on legislation and budget issues. The prohibition probably was not intended to cover this conferral but, instead, was directed at spending for a professional lobbyist. This section provides that a violation of the section is a class A misdemeanor, duplicating AS 15.56.012, which makes a knowing violation of AS 15.13 a class A misdemeanor, and provides the additional remedy of restitution. It also provides that, if a person violates this section more than once, that person is barred from holding public office or employment with the state or any political subdivision for 10 years. There is no administrative remedy or procedure provided in the section, although current law provides an administrative procedure for conduct that already is a violation under AS 15.13. AS 15.13 380.

Subsection (C) of section 1 provides that section 1 does not apply to communications between a legislator and legislative staff or public officer, communications by an elected official with constituents, appearances by a public officer or employee before a public body to provide information, a public employee acting in a personal capacity, or certain public employees who assess the impact of proposals that affect the administration of government. Because communications are not prohibited in the section, it is unclear what subsection (C) means except to ensure that the prohibition against public spending for lobbying is not interpreted to prohibit communication by public officials with legislators and their staff.

Subsection (D) of section 1 contains definitions. The definitions are quite broad. For instance, the "use of tax revenues or any other public resources" is defined such that the prohibition against the use of such funds for campaign, lobbying or partisan purposes encompasses uses of public funds in support of or in opposition to legislation or ballot measures. It would also prohibit incurring any expense for public employee paycheck designations for donations to an organization that engages in lobbying activities, unless such organization is a qualified 501(c)(3) entity under the Internal Revenue Code. This prohibition would need to be reconciled with AS 23.40.220, which requires a public employer, including the state, to deduct from payroll the monthly dues and other fees and pay them to a union when authorized by a public employee.

The definitions section also contains an applicability section extending the applicability of the section to all state and local government in Alaska, as well as their officers, agents and employees.

Section 2 contains a number of prohibitions designed to eliminate the involvement in campaigns of persons who contract with a government entity. Subsection (A) prohibits a person from entering into a government contract if the person employs a current or

former legislator or legislative staff person who is less than two years removed from that position. Violation of this provision is a class A misdemeanor. Additionally, the contract may be forfeited and any amounts paid under the contract returned as restitution. The provision makes an exception for legislators and legislative staff that engaged or were certified in the profession or occupation "within one year" prior to becoming a legislator or legislative staff person. The section does not provide procedures for certification. Because it also fails to authorize regulations, it is unclear how the state would implement the certification provision.

Subsection (B) prohibits a legislator, candidate, or public official from soliciting or accepting a campaign contribution from a holder of a government contract. Violation of this provision is a class A misdemeanor. Amounts received in violation of this section must be returned as restitution to the contributor and an equal amount paid as restitution to the state. Repeat violators are barred from holding public office or employment with the state or any political subdivision for two years.

Subsection (C) provides that a person holding "no-bid" government contracts is a "holder of a government contract" (likely meaning that a legislator, candidate, or public official may not receive contributions from them under subsection (B)). Persons holding no-bid government contracts also are contractually bound to stop making or soliciting contributions and to stop making independent expenditures (a term used and defined in AS 15.13) to elect or defeat candidates during the term of the contract and for two years after it terminates. Because the prohibitions appear limited to holders of "no-bid" contracts, presumably, other persons who became public contractors after participation in a bidding procedure, can make contributions and independent expenditures regarding candidates for public office. The provision requires double restitution for violations. Repeat violators are barred from holding public office, entering into a contract, or employment with the state or any political subdivision for a period of three years.

Subsection (D) provides that subsection (C) may be enforced in superior court by anyone, and that such person is immune from any legal action for so doing.

Subsection (E) contains the definitions for section 2. Like the definitions for section 1, they are broad. For instance, the definition of "government contract" also includes a collective bargaining agreement with a labor organization. "Holder" of a government contract includes any person that has a five percent interest in a party to the contract.

The definitions section also contains an applicability section extending the applicability of the section to all state and local government in Alaska, as well as their officers, agents and employees.

Subsection (H) requires the State of Alaska to publish a summary of all government contracts on its website. The summary must contain details of the contract, including the parties, the term, and estimated amount to be paid.

Section 3 provides that if there is existing law that is less protective than this bill, the provisions of the bill will apply.

Section 4 is a severability provision similar to AS 01.10.030.

III. ANALYSIS

Under AS 15.45.070, the lieutenant governor is required to review an application for a proposed initiative and either "certify it or notify the initiative committee of the grounds for denial" within 60 days of receipt. The grounds for denial of an application are that (1) the proposed bill is not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors. AS 15.45.080. We discuss these next.

A. FORM OF THE PROPOSED BILL

The form of a proposed initiative bill is prescribed by AS 15.45.040, which requires that (1) the bill be confined to one subject; (2) the subject be expressed in the title; (3) the enacting clause state, "Be it enacted by the People of the State of Alaska"; and (4) the bill not include prohibited subjects. The prohibited subjects – dedication of revenue, appropriations, the creation of courts or the definition of their jurisdiction, rules of court, and local or special legislation – are listed in AS 15.45.010 and in article XI, section 7, of the Alaska Constitution.

The bill satisfies each of these four requirements. With respect to the requirement that the bill be confined to one subject, we note that the bill proposes restrictions on use of public funds for electioneering, as well as restrictions on participation in campaigns and lobbying by persons with interests in certain government contracts. While these are potentially different subjects, the overall objective of the bill is to reduce corruption in government, and both sets of restrictions are calculated to implement such purpose. We have recently considered the single subject rule in the initiative context, and noted the many cases in which the Alaska Supreme Court has adopted a lenient threshold for determining whether the single subject rule is satisfied. *See* 2007 Op. Att'y Gen. 10-12 (July 18; 663-07-0191). We think that the unifying theme in 07ANCO is government ethics and that all the sections in the bill fairly relate to this subject.

With respect to the remaining requirements, the subject of the bill is alluded to in the title ("creating an Alaska anti-corruption act"). The enacting clause is set out correctly. The bill does not contain any of the prohibited subjects.

While we recommend the initiative be certified, we do note some legal issues with the bill. We raise these issues here.

Subsections 2(B) and (C) of the bill impose a ban on certain political contributions by holders of government contracts. As we have previously observed, the U.S. Supreme Court is vigilant with respect to protecting First Amendment rights in the campaign finance context. 2007 Op. Att'y Gen. 1-2, (Aug. 8; 663-07-0191). Although the Alaska Supreme Court has upheld a number of contribution bans in *State v. Alaska Civil Liberties Union,* 978 P.2d 597, 607-633 (Alaska 1999), the bans proposed here (particularly with regard to the bans on campaign spending by persons holding small public contracts) are quite broad and may not pass muster. We are particularly concerned about the prohibitions on campaign expenditures (defined in AS 15.13), which the courts have been extremely careful to protect. Although the constitutionality of this bill's ban on political contributions by holders of government contracts could be challenged at some point, courts in Alaska will not entertain such challenges until after the measure has been enacted by the people. *See Alaskans for Efficient Government, Inc. v. State,* 153 P.3d 296, 298 (Alaska 2007) (constitutional issues not identified as prohibited subjects may only be considered after initiative becomes law).

We also note that section 1 prohibits the use of public funds for on a ballot measure campaign. As a constitutional matter, the legislature may appropriate money for any public purpose. Alaska Const. art. IX, § 6. While our courts have not ruled on whether an appropriation for such purposes is for a public purpose, the courts have adopted a fairly broad test. *See DeArmond v. Alaska State Dev. Corp.,* 376 P.2d 717, 721 (Alaska 1962) (public purpose is what legislature says it is unless arbitrary and without basis in fact). Thus, it is conceivable that if this ballot measure were enacted, the legislature could, consistent with the constitution, appropriate funds in violation of this provision. We doubt that the courts would enforce against the legislature a statute that restricts the constitutional power of appropriation. Acceptance of such appropriated funds, however, could expose the recipient to criminal and civil sanctions.

We also note in this regard, that the Alaska Constitution prohibits an initiative from repealing an appropriation. Alaska Const. art. XI, § 7. This measure does not repeal an existing appropriation—it merely seeks to prevent the legislature from using its appropriation power for certain purposes in the future. Thus, we do not think that this provision violates the restriction against initiatives repealing an appropriation. And, as just noted, we doubt that such provision would be enforceable against the legislature.

B. THE FORM OF THE APPLICATION

The form of an initiative application is prescribed in AS 15.45.030, which provides:

> The application must include the
>
> (1) proposed bill;
>
> (2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached; and
>
> (3) designation of an initiative committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

AS 15.45.030. The application meets the first and third requirements as well as the latter portion of the second requirement regarding the statement on the signature page. With respect to the first clause of the second requirement, the Division of Elections within your office determines whether the application contains the signatures and addresses of not less than 100 qualified voters.

C. NUMBER OF QUALIFIED SPONSORS

The Division of Elections within your office will determine whether there are a sufficient number of qualified sponsors.

IV. PROPOSED BALLOT AND PETITION SUMMARY

We have prepared the following ballot-ready petition summary and title for your consideration:

INITIATIVE PROHIBITING PUBLIC FUNDS FOR ELECTION CAMPAIGNS; ALSO PROHIBITING CAMPAIGN CONTRIBUTIONS BY HOLDERS OF GOVERNMENT CONTRACTS

> This bill would ban the use of public funds for political campaigns and lobbying. Funds could not be used to support or oppose a ballot measure. The bill would limit political involvement in government contracts. It would ban political contributions by holders of government contracts. It would ban legislators and their staff from being employed by holders of government contracts for two years after leaving state service. The bill has criminal and civil penalties.
>
> Should this initiative become law?

This summary has a Flesch test score of 57.1. We believe that the summary meets the readability standards of AS 15.60.005.

V. CONCLUSION

For the above reasons, we find that the proposed bill is in the proper form, and therefore recommend that you certify this initiative application.

Please contact me if we can be of further assistance to you on this matter.

Sincerely,

TALIS J. COLBERG
ATTORNEY GENERAL

By:
Michael A. Barnhill
Senior Assistant Attorney General

MAB/rca

cc: Whitney Brewster
Director of Division of Elections
Office of the Lieutenant Governor