CEO 11-24 – December 7, 2011

POST-EMPLOYMENT RESTRICTIONS

DCF FORMER EMPLOYEE EMPLOYED BY ENTITY CONTRACTING WITH DCF

To: Name withheld at person's request (Apopka)

SUMMARY:

Advice is provided to a former employee of the Florida Department of Children and Family Services regarding applicability of Sections 112.313(9)(a)4 and 112.3185, Florida Statutes, to her particular situation and work history. CEOs 11-21, 11-20, 11-10, 09-5, 07-16, 07-10, 06-3, 05-13, and 02-17 are referenced.[1]

QUESTION:

How do the post-public-employment "representation" restriction of Section 112.313(9)(a)4, Florida Statutes, and the post-public-employment restrictions of Sections 112.3185(3), (4), and (5), Florida Statutes, apply to you, a former employee of the Department of Children and Family Services, given your public employment history?

Your question[2] is answered as set forth below.

By your letter of inquiry, materials accompanying the letter, and additional information provided by you to our staff, you relate that you formerly were employed by the Department of Children and Family Services[3] (DCF), having vacated DCF employment on July 22, 2011. Further, you state that you began employment with DCF in 2001 and held various positions there, including your last, the Career Service System position you vacated on July 22, and your next-to-last, a Selected Exempt Service (SES) position [Substance Abuse and Mental Health Program Office (SAMH), Circuit 18, Operations and Management Consultant II], which you held from August 21, 2009 to June 30, 2011. In addition, you relate that you began private employment on July 25, 2011, as Executive Director[4] of Central Florida Cares Health System, Inc. (CFCHS or corporation), a nonprofit, s. 501(c)3 corporation. Additionally, you state that the corporation is seeking the award of a DCF contract to perform managing entity services[5] in DCF's Central Region, specifically for Judicial Circuits 9 and 18.

Regarding the contract, you state that, should it be awarded to the corporation, it likely will be the only contract that the corporation will hold with DCF for approximately the next two years, and that approximately ninety percent of your work for the corporation will involve this contract. Further, you relate that all current DCF contracts (existing contracts, contracts other than the one sought by the corporation) with behavioral health providers will terminate on the day that the managing entity contract starts, and that the managing entity (hopefully, in your view, the corporation) will enter into new contracts (subcontracts) with all of those same behavioral health providers on that same day. Also, you state that you, in your capacity as a DCF employee, did not sign any of the contracts which are terminating, but that you supervised the contract manager who managed some of those to-be-terminated contracts, and that you had no DCF employee role regarding the new contract, as to decision, approval, disapproval, recommendation, rendering of advice, or investigation.

Further, in elaborating on your prospective work for the corporation, you relate that you would be negotiating service contracts with the former DCF contractors and that these negotiations would be only with the

private businesses that formerly held contracts with DCF and would not include any contact by you with DCF or its personnel. However, you also state that Central Region SAMH Program Office personnel would attend negotiations for the corporation which you might have with the DCF SAMH Program Office in Tallahassee. Further, you relate that while you were employed with DCF, you interacted with the Tallahassee SAMH staff to receive technical assistance, to answer assignments, or to collaborate in work groups. Also, regarding your former DCF employment and DCF organizational changes, you write:

> [My three staff and I] were the Circuit 18 SAMH Program Office. My immediate supervisor was the Circuit Administrator who was not a SAMH employee. District 7 SAMH was split in two to create Circuit 18 and Circuit 9 a few years ago. Then, SAMH Circuits 5, 9, 10, 18, and 19 were combined to become the Central Region SAMH office when my position (as well as many others) was eliminated June 30. The Central Region SAMH houses the same functions [as did the former Circuit 18/District 7 SAMH program offices], [but it] now covers more territory as one entity.

And, in response to an information request from our staff regarding the breadth of your interaction within the whole of DCF, you write:

> . . . on occasion we would interact to transfer a client from one area to another, or we would be in attendance at joint management meetings called by the DCF Regional Administrator or by Tallahassee which may have included DCF personnel from other areas in addition to SAMH. Also, I interacted heavily with other DCF management in Circuit 18 while I was there.

Relevant statutes provide:

> An agency employee may not, after retirement or termination, have or hold any employment or contractual relationship with any business entity other than an agency in connection with any contract in which the agency employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation while an officer or employee. When the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection does not prohibit him or her from employment or contractual relationship with the business entity if the employee's participation in the contract was limited to recommendation, rendering of advice, or investigation and if the agency head determines that the best interests of the state will be served thereby and provides prior written approval for the particular employee. [Section 112.3185(3), Florida Statutes.]

> An agency employee may not, within 2 years after retirement or termination, have or hold any employment or contractual relationship with any business entity other than an agency in connection with any contract for contractual services which was within his or her responsibility while an employee. If the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection may be waived by the agency head through prior written approval for a particular employee if the agency head determines that the best interests of the state will be served thereby. [Section 112.3185(4), Florida Statutes.]

> The sum of money paid to a former agency employee during the first year after the cessation of his or her responsibilities, by the agency with whom he or she was employed, for contractual services provided to the agency, shall not exceed the annual salary received on the date of cessation of his or her responsibilities. This subsection may be waived by the agency head for a particular contract if the agency head determines that such waiver

will result in significant time or cost savings for the state. [Section 112.3185(5), Florida Statutes.]

An agency employee, including an agency employee who was employed on July 1, 2001, in a Career Service System position that was transferred to the Selected Exempt Service System under chapter 2001-43, Laws of Florida, may not personally represent another person or entity for compensation before the agency with which he or she was employed for a period of 2 years following vacation of position, unless employed by another agency of state government. [Section 112.313(9)(a)4, Florida Statutes.]

'Represent' or 'representation' means actual physical attendance on behalf of a client in an agency proceeding, the writing of letters or filing of documents on behalf of a client, and personal communications made with the officers or employees of any agency on behalf of a client. [Section 112.312(22), Florida Statutes.]

In order for a former State employee to be restricted by Section 112.3185(3), he or she must have had, in their capacity as a State employee, a personal and substantial role in the development or procurement of the particular contract they will be working in connection with for their private employer. In the situation you present, you will be working with the corporation in connection with the DCF managing entity contract, but you also advise that you had no role as a DCF employee regarding this contract, as to decision, approval, disapproval, recommendation, rendering of advice, or investigation--the development/procurement activities which can implicate the restriction.

Therefore, in view of your work history, we find that you are not subject to the restriction of Section 112.3185(3).[6]

In order for a former employee to be restricted by Section 112.3185(4), he or she must work privately, within two years of leaving State employment, in connection with a particular contract for contractual services, which contract was "within his or her responsibility" while a public employee. In the scenario you put forth, you will be working for the corporation in connection with the managing entity contract and this contract will be for "contractual services." However, we find that this contract will not have been "within your responsibility" because, inter alia, it did not exist (had not been entered into) while you were a DCF employee. See, for example, CEO 02-17 (note 5), in which we found that "within responsibility," a phrase not defined in the Code of Ethics, encompasses a monitoring, managing, or similar role regarding a contract, roles which cannot exist in relation to a contract which has not yet been entered into.

Therefore, in view of your work history and the chronology of the to-be-awarded managing entity contract, we find that you are not subject to the two-year restriction of Section 112.3185(4). The fact that as a DCF employee you supervised a contract manager who managed some of the current contracts between DCF and behavioral health providers (contracts which you advise will be ending on the same day that the managing entity contract is entered into) does not alter our finding. While we have found that a contract can be "within one's responsibility" when it is within the responsibility of one's public agency subordinate (CEO 07-16), we also find, factually, under the situation you present, that your work for the corporation will not be in connection with these current ("old," soon-to-be-terminated) contracts. Rather, we find that your private work will be in connection with the to-be-awarded managing entity contract and the new subcontracts that you will be involved with negotiating between behavioral health providers and the corporation. See CEO 06-3 (note 6) and CEO 07-10, in which we found that the prohibition of Section 112.3185(4) is specific to particular contracts (that it does not encompass entire programs or subject matters).[7]

In order for a former employee to be restricted by Section 112.3185(5), which restricts the amount of money he or she can be paid by his or her former public agency within the first year after leaving State employment, we have found that the employee must be employed by the former public agency or must contract with the former agency (either as an individual, natural person or through his or her closely-held entity). We have not found that the restriction applies to situations, such as the one you present, where the former employee is privately employed arms-length by a bona fide entity; rather, we have found such situations to merit analysis only under Sections 112.3185(3) and (4). CEO 05-13.

Therefore, we find that you are not subject to the restriction of Section 112.3185(5).

Section 112.313(9)(a)4 prohibits former Selected Exempt Service (SES) public employees, of which you were one until June 30, 2011, and certain other former public employees, from personally "representing" (defined above) another person or entity for compensation before the former employee's former public "agency," for two years following the employee's vacation of his or her SES position or other position covered by the statute.

In view of your DCF SES employment history, which includes your working in DCF's Circuit 18 SAMH Program Office, which has been combined with other Circuit SAMH Program Offices to comprise DCF's current Central Region SAMH Office (with the Central Region SAMH Office housing the same functions as the former Circuit 18 Office), we find that you are restricted by Section 112.313(9)(a)4 from "representation" contact with all of DCF's Central Region, but not with other Regions of DCF,[8] and we find that you are prohibited from "representation" contact with DCF's Tallahassee SAMH Office and Tallahassee SAMH staff.[9] This finding is in accord with our recent decision (CEO 11-10), in which we found that the "agency" of a former Florida Department of Transportation (FDOT) employee was his particular FDOT District, and not the whole of FDOT, and is in accord with CEO 11-21, in which we found that a former FDOT employee had two parts (Districts) of FDOT as his "agency," due to his public employment presence at both. Similarly, you certainly were employed by DCF and your work history reveals that you had a presence at both the SAMH office which is now housed in DCF's Central Region and at the Tallahassee SAMH office. In CEO 11-10, we explained:

> Regarding the two-year ban, it is obvious that it is intended to prohibit a former employee from putting his presence, advocacy, and submissions before the government place he inhabited and the persons who remain there.

In sum, regarding Section 112.313(9)(a)4, we find that you are prohibited for a period of two years from June 30, 2011 from personally having any contact with DCF Central Region, with DCF SAMH Tallahassee Program Office, or with staff of either, within the meaning of "representation,"[10] including but not limited to attending negotiations with Central Region or with the Tallahassee SAMH Program Office, in behalf of the corporation, or in behalf of any other person or entity for compensation.

Your inquiry is answered accordingly.[11]

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 2, 2011 and **RENDERED** this 7th day of December, 2011.

Robert J. Sniffen, *Chairman*

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[1]Prior opinions of the Commission on Ethics may be obtained from its website (www.ethics.state.fl.us).

[2]Herein, we have consolidated the substance of your four numbered questions into one.

[3]Also known as the Department of Children and Families.

[4]You state that neither you nor any relative of yours owns any equity interest in the corporation, that neither you nor any relative of yours is an officer or member of the board of directors of the corporation, and that your only status with the corporation is that of an employee.

[5]You relate that "managing entity services" do not involve provision of direct care but, instead, consist of administration of service contracts for mental health and substance abuse services using State and federal funds, and that managing entity services are "contractual services" within the meaning of Chapter 287, Florida Statutes.

[6]Unlike the restriction of Section 112.3185(4), the restriction of Section 112.3185(3) can apply to contracts not entered into until after one leaves state employment, provided that one had the requisite personal and substantial development/procurement role regarding the

contract. CEO 11-20 (note 5). Also, unlike the restriction of Section 112.3185(4), the restriction of Section 112.3185(3), when all of its other elements are met, can last for more than two years.

[7]Your inquiry mentions the possible "waiver" regarding Sections 112.3185(3) and (4) available under certain circumstances. Such a waiver is not needed under the facts you present. However, such a waiver is the province of the agency head; we cannot grant such a waiver. See the text of the statutes.

[8]DCF's website (http://www.dcf.state.fl.us/samh/) states:

> The Department's SAMH program headquarters are located in Tallahassee. Substance abuse and mental health services are delivered locally through contracts with community substance abuse and/or mental health providers. SAMH services are administered throughout 20 circuits statewide, which are grouped into six regions.

Also, the website identifies six regions: Northwest, Northeast, Central, Suncoast, Southeast, and Southern.

[9]In addition, even if we had not found, as stated below, that the Tallahassee SAMH Office, in addition to DCF's Central Region, is an "agency" of yours for purposes of the statute, apparently in practice the restriction still would apply, inasmuch as your scenario states that the Central Region would have one representative at negotiations handled by Tallahassee SAMH staff, negotiations which presumably also would be attended by you for the corporation. And "representation" would encompass any communications you would have at such negotiations with Central Region personnel.

[10]We have found that "representation" does not include some types of contact necessary to merely carry out or deliver on a contract involving one's former public agency, provided the contact is not for the purpose of trying to get the agency to do something. CEO 09-5. Thus, we find that whether, as stated in your inquiry, "[you] may contact your former agency while performing any actions necessary to operate [the corporation]," or "[you may] contact DCF while carrying out [your] duties as Executive Director of [the corporation]," depends on whether the contact is or is not for the purpose of trying to get your former agency to do something (for example, to award a contract or a contract extension, or to achieve the agency's forgiveness of a possible nonperformance under a contract), as opposed to merely being rote, delivery-type contact. Also, we find that you are not prohibited from contact for the corporation with current DCF contractors, as long as the contact is not with Central Region, the Tallahassee SAMH Office, or personnel of either.

[11]You state in your inquiry that you are aware of two prior situations, "almost identical to [your] situation," which were brought to the attention of our office, and regarding which approval was given for the persons' private employment. Our staff has identified these inquiries, which our staff had responded to. The inquiries were materially different than your situation. One, as to Section 112.313(9)(a)4, had a different outcome than your inquiry, due to the person being eligible for the "grandfather clause" of Section 112.313(9)(a)6, Florida Statutes, because his agency employment began on or before July 1, 1989. The second did not address Section 112.313(9)(a)4; it addressed Section 112.3185, Florida Statutes, regarding which this instant opinion is in your favor.

CEO 07-16 -- June 13, 2007

POSTEMPLOYMENT RESTRICTIONS

DCF FORMER EMPLOYEE PRIVATELY EMPLOYED IN CONNECTION WITH DCF CONTRACT

To: Mr. Stephen Conrad (Jacksonville)

SUMMARY:

Through the application of Section 112.316, Florida Statutes, to the particular facts of this inquiry, a former employee of the Department of Children and Family Services is not subject to the two-year post-public-employment restriction of Section 112.3185(4), Florida Statutes. CEO 05-19, CEO 01-6, and CEO 95-19 are referenced.[1]

QUESTION:

Would Section 112.3185(4), Florida Statutes, prohibit your holding employment or a contractual relationship [after you leave public employment with the Department of Children and Family Services (DCF)] with a company in connection with a contract regarding which you had the limited DCF responsibility described below?

Under the particular circumstances of your inquiry, this question is answered in the negative.

By your letter of inquiry and additional information provided to our staff, we are advised that you are employed by the Department of Children and Family Services (commonly known as the Department of Children and Families or DCF), District 4, as the District Manager for Administrative Services, and that one of the sections you supervise includes contract managers for community based care organizations contracting with DCF. In addition, you advise that because your DCF position is being eliminated with a reorganization of DCF effective July 1, 2007, you have applied for a private position with a community based care provider as its chief operations officer, with the position including your working for the provider in connection with a contract for contractual services between DCF and the provider which expires in February 2009.

Further, you advise that the contract was signed in 2004, that you began your employment with DCF in 2005, and thus that you did not participate personally and substantially through decision, approval, disapproval, recommendation, rendering advice, or investigation regarding the contract. However, regarding the particular contract and similar contracts, you describe your DCF role to include:

- My primary role was to make sure the contract managers had a professional relationship with the community based care providers and the tools and skills to perform their functions.
- Before September 2006, I supervised the contract manager supervisor who supervised the individual contract managers who were by statute assigned to contracts. It was only coincident with the elimination of the contract management supervisor that I became the direct supervisor for contract managers. At the time of my request for an advisory opinion, I had been doing this for six months.
- My position is being eliminated with the reorganization of the Department of Children and Families effective July 1, 2007 and the contract managers will be assigned to another individual and staff element for supervision.
- When I took the position as district manager for administrative services in October 2005, there was another position that supervised the contract managers. This position, contract manager supervisor, reported to me along with the public information officer and the client relations staff. The contract management supervisor had all of the contract managers working for him. I was even further removed than I am today.
- However, as a temporary measure as a result of the budget issues for FY 06/07 for District 4, in September 2006 the position of contract management supervisor was not filled. It also was not deleted. So for the past

six months we have not had a contract management supervisor and the contract managers have reported to me.

- Originally, my task was to ensure that the contract managers, through the contract management supervisor, were doing their jobs. My focus was on assessing their performance functions as contract managers. I continued this focus when the contract management supervisory position was filled.
- The NEW Department of Children and Families reorganization recently approved by the Secretary of the Department of Children and Families has the contract managers assigned to a unit that is not under my purview.
- Contract managers have the responsibility for overseeing contract performance measures for their respective contracts. If a measure needed attention by the provider, it was either the contract manager or the District Administrator that signed a request to the provider for a corrective action plan. I did not sign corrective action plans.
- Contract monitoring is performed by the Department of Children and Families' contract oversight unit. This is not part of my organization. The contract managers take the relevant findings from the contract oversight unit and ask for corrective action plans. Additionally, our zone program office also monitors contract performance and requests that the contract managers request information from the providers relevant to these issues.
- My most substantive role was to ensure that the contract management supervisor position (when filled) and all contract managers worked with their providers in a professional manner and that they had the training and experience to perform their functions.

Section 112.3185(4),[2] Florida Statutes, provides:

> An agency employee may not, within 2 years after retirement or termination, have or hold any employment or contractual relationship with any business entity other than an agency in connection with any contract for contractual services which was within his or her responsibility while an employee. If the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection may be waived by the agency head through prior written approval for a particular employee if the agency head determines that the best interests of the state will be served thereby.

Inasmuch as you have represented that your work after you leave DCF will be in connection with a DCF contract for contractual services,[3] we must determine whether the contract was "within your responsibility" while you were a DCF employee.

We find that the contract was within your responsibility. The relevant scenario that crystallizes from your inquiry is that you (in your DCF capacity) were in the chain of supervision above contract monitors/managers who managed the particular contract with the provider, and that, among other DCF duties of yours concerning the monitors/managers, you saw or reviewed their corrective action plans or related information regarding the contract and the provider. This finding is in accord with our finding in CEO 01-6 construing "within responsibility" to include situations in which one is the supervisor of one who actually participates regarding a matter. Thus, Section 112.3185(4), if applied in isolation, would restrict your post-DCF employment regarding the provider.

However, under the particular circumstances of your inquiry, which include the contract in question having been designed and entered into by persons other than you prior to your employment with DCF, your short tenure as a DCF employee, the responsibilities of the District Administrator and the contract oversight unit, and your not having been the contract monitor/manager of the contract, we believe that it is appropriate to apply Section 112.316, Florida Statutes,[4] thereby negating the restriction that would arise via the literal language of Section 112.3185(4). See CEO 95-19 (former AHCA employee employed by prepaid Medicaid health plan provider contracting with AHCA) in which we observed that "Section 112.3185(4) was designed to prevent State employees from using their public positions to conceive of a need for services, develop a contract to obtain those

services, and then to 'switch sides' and go to work for the entity that was awarded the contract that they conceived and developed while public employees."

Accordingly, under the specific circumstances of your inquiry, we find that you are not restricted by Section 112.3185, Florida Statutes,[5] from working after you leave DCF employment in connection with a contract between your private employer or a related entity and DCF.

ORDERED by the State of Florida Commission on Ethics meeting in public session on June 8, 2007 and **RENDERED** this 13th day of June, 2007.

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Norman M. Ostrau, Chairman

[1]For prior opinions of the Commission on Ethics, go to www.ethics.state.fl.us

[2]We find that Section 112.3185(3), Florida Statutes, would not be violated by your working for the provider in connection with the contract because you represent that you did not have a procurement role as described in the statute and because you represent that the contract was entered into prior to your DCF employment. Section 112.3185(3) provides:

> An agency employee may not, after retirement or termination, have or hold any employment or contractual relationship with any business entity other than an agency in connection with any contract in which the agency employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation while an officer or employee. When the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection does not prohibit him or her from employment or contractual relationship with the business entity if the employee's participation in the contract was limited to recommendation, rendering of advice, or investigation and if the agency head determines that the best interests of the state will be served thereby and provides prior written approval for the particular employee.

[3] In correspondence with our staff following your letter of inquiry, you and an officer of the umbrella organization you plan to work for suggested that perhaps the restriction of Section 112.3185(4) could be avoided by your being employed by an entity within their organization that does not have a contract with DCF, with the entity then subcontracting with the organization's entity that is the DCF provider for you to provide services as the chief operations officer of the entity that is the DCF provider. We find that this would not eliminate the restriction. The statute encompasses employment or a contractual relationship with "any business entity," if the work is in connection with a contract for contractual services which was within one's public agency employee responsibility.

[4]Section 112.316 provides: CONSTRUCTION - It is not the intent of this part, nor shall it be construed,to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his or her duties to the state or the county, city, or other political subdivision of the state involved.

[5]By telephone, you stated that your position with DCF is a Selected Exempt Service (SES) position. SES positions are among the positions subject to the two-year restriction of Section 112.313(9)(a)4, Florida Statutes, regarding lobbying or "representation" after leaving a covered public position. However, your making contact with DCF regarding the provider's delivering on the particular contract would not, in and of itself, constitute representation; nevertheless, contact other than that concerning delivery (for example, contact to secure another contract) could constitute prohibited representation. CEO 05-19 (note 5). Thus, govern yourself accordingly regarding Section 112.313(9)(a)4 and your contact with DCF within two years of leaving DCF; and note the broad definition of "represent" or "representation" codified at Section 112.312(22), Florida Statutes.

CEO 03-8 – June 10, 2003

POST-EMPLOYMENT RESTRICTIONS

FORMER STATE TECHNOLOGY OFFICE EMPLOYEES EMPLOYED BY VENDORS WHOSE INVITATION TO NEGOTIATE RESPONSES WERE REVIEWED BY THE EMPLOYEES

To: Name withheld at person's request

SUMMARY:

Section 112.3185(3), Florida Statutes, does not prohibit former State Technology Office ("STO") employees, who serve as technical evaluators of one of four categories of responses to prospective vendors' Invitation to Negotiate ("ITN"), from accepting subsequent employment with a vendor in connection with a contract awarded as a result of the ITN, inasmuch as their participation in the procurement of the contract would not be "substantial."

Under the circumstances presented, without additional information about the services and/or commodities provided under the specific ITN contract, about when the contract came into existence, and about the duties and responsibilities of the STO technical evaluator relative to the specific contract, no conclusion can be reached regarding the applicability of Section 112.3185(4), Florida Statutes.

QUESTION:

Would the Code of Ethics for Public Officers and Employees be violated were former employees of the State Technology Office ("STO") to become employed by vendors whose Invitation to Negotiate ("ITN") responses were evaluated by the former STO employees while they were employed by the STO where the evaluations were based on fixed criteria which required them to "objectively compare the vendors' technical responses?"

Under the circumstances presented, your question is answered in the negative.

In your letter of inquiry, you advise that the Legislature authorized the STO to implement the transition of the State's information and technology infrastructure through the MyFlorida Enterprise initiative.[1] Consequently, on May 5, 2003 the STO issued an Invitation to Negotiate ("ITN") for the development and operation of "MyFloridaNet," "a critical component of MyFlorida Enterprise" designed to replace the State's "vast SUNCOM communication network" and provide the State with a "comprehensive, reliable and robust communication infrastructure," you write.[2]

The ITN mechanism, you advise, was created by the Legislature as a tool to allow agencies to "obtain the 'best value' for the State through a competitive process which involves negotiations for the procurement of commodities or contractual services.[3] Unlike other competitive bid processes set forth in Chapter 287, Florida Statutes, where the respondent's bid scores alone determine the successful vendor, the ITN statute allows an agency to negotiate among several top respondents and select the successful vendor based on which vendor, after negotiation, offers the best value to the State, you write. Therefore, you advise, the award under the ITN here will include the STO's evaluations of the respondents' ITN replies based on the ITN's fixed criteria, followed by negotiations with at least two of the top-ranked respondents. Based on the negotiations, the STO then will choose one or more vendors with whom to enter into a contract for the service areas defined in the ITN.

You advise further that each vendor's responses will be scored during the evaluation process on a "total scale of 0 to 100." Points will be awarded for each ITN category, you advise, as follows: (1) 40% for "Business Relationship," which includes the vendor's history and experience, its "proposed strategic partnering plan" with the STO, and its proposed price structure; (2) 40% for "Technical Solutions," which is based on the technical requirements set forth in the ITN, including "functionality, customer service and daily operational management"; (3) 10% for "One Florida Initiative," which is based upon the respondent's use of "diversity" in performing services; and (4) 10% for "Company Qualifications," which relates to the "company's background and other information relevant to its qualifications."

In order to assure that the best-qualified persons review the ITN responses, you write, the STO will designate "highly qualified and proficient" STO employees to serve as "technical evaluators" with respect to the Technical Solutions category of the replies. The evaluations, you advise, will be based on "fixed criteria" which require the STO to objectively compare technical responses. In order to perform these technical evaluations, STO employees ("STO technical evaluators") will be provided with a "pool of questions" relating to each requirement in the ITN against which to measure the responses, you write.

However, beyond scoring vendor replies based upon fixed criteria, no STO technical evaluator will be making any decisions or participating in any decision-making relative to the awarding of a contract to a particular vendor, you write. Nor will he or she otherwise approve, disapprove, recommend, render advice about, or investigate any prospective vendors in connection with the ITN contract award process. His or her participation in the contract procurement process will be strictly limited, you advise, to applying a "subset of fixed criteria" to the vendors' Technical Solutions responses and submitting his or her scores to the STO. Furthermore, none of the STO technical evaluators have participated in the development of the ITN. Nor will they either be a part of the negotiation team or participate in any aspect of the negotiation phase of the process, you write. Each STO technical evaluator also will be required to sign an affidavit indicating that he or she neither has a contract for employment or contractual services nor has entered into negotiations for such a contract with an entity that could be awarded a contract under the ITN, you advise.

Because of the "highly technical nature" of the MyFloridaNet Enterprise, you write, the STO's use of the most qualified and experienced STO employees to evaluate and score ITN respondents' Technical Solutions replies is imperative. However, if the application of the

Code of Ethics will preclude them from future employment in connection with the ITN awarded contracts procuring MyFloridaNet services, they will not wish to serve as technical evaluators. As a practical matter, due to the breadth in both geographic and technical scope and the significant duration of contracts awarded under the ITN, STO technical evaluators, upon leaving employment with the STO, will likely be pursuing private sector employment relating to communication technology services procured under the ITN.

Relevant to your inquiry are the following provisions of the Code of Ethics for Public Officers and Employees, which provide as follows:

> **CONTRACTUAL SERVICES.—**
>
> (1) For the purposes of this section:
>
> (a) "Contractual services" shall be defined as set forth in chapter 287.
>
> (b) "Agency" means any state officer, department, board, commission, or council of the executive or judicial branch of state government and includes the Public Service Commission.
>
> * * * *
>
> (3) No agency employee shall, after retirement or termination, have or hold any employment or contractual relationship with any business entity other than an agency in connection with any contract in which the agency employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation while an officer or employee.
>
> (4) No agency employee shall, within 2 years of retirement or termination, have or hold any employment or contractual relationship with any business entity other than an agency in connection with any contract for contractual services which was within his or her responsibility while an employee.
>
> [Section 112.3185, Florida Statutes.]

Section 112.3185(3), Florida Statutes, restricts the employment that the STO technical evaluators may seek after leaving employment with the STO by prohibiting them from becoming employed by a business entity in connection with a contract in which they participated personally and substantially through "decision, approval, disapproval, recommendation, rendering of advice, or investigation." In CEO 83-8, we limited our interpretation of this list of activities to the procurement process. Similarly, Section 112.3185(4) prohibits the technical evaluators from becoming employed in a non-agency capacity in connection with any contract for contractual services[4] which was within their

responsibilities as STO employees during the two-year period following their vacating their positions. Generally speaking, these provisions were adopted to prohibit State employees from being able to create a position with a private employer through influencing the award of a contract with that employer or mismanaging their responsibilities over that contract, and then leaving public employment to take that private position, and to prohibit the appearance of same.

In CEO 82-67, we noted that Section 112.3185(4) differs from Section 112.3185(3) in three ways. First, it is more limited as to the time period it governs--specifically, a two-year period following resignation or termination. Secondly, it is more general as to what activities of a former agency employee are prohibited. Thirdly, it applies only to contracts for contractual services.[5]

In CEO 88-32 we also observed that Federal law provides a similar limitation on former officers and employees of the executive branch of the United States Government. Under 18 U.S.C. Section 207(a), for example, a former Government employee is prohibited from representing any other person before, or with the intent to influence from making any oral or written communication on behalf of any other person to, the United States in connection with any particular Government matter involving a specific party in which matter such employee participated personally and substantially as a Government employee. See 5 CFR Section 2637.201(a). For purposes of implementing this prohibition, the Office of Government Ethics regulations state:

> To participate 'personally' means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. *"Substantially," means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial. [5 C.F.R. Section 2637.201(d)]* [E.S.]

Although we find that the STO technical evaluators' participation in the process would be "personal," we do not find that it would be "substantial" for purposes of finding that Section 112.3185(3) would prohibit their subsequent employment with a vendor in connection with a contract awarded as a result of the ITN. The STO technical evaluators did not conceive of the ITN. They will not have the ability to target potential vendors for the contracts inasmuch as their roles in the process will be limited to scoring the vendors' Technical Solutions responses of the ITN by applying a "subset of fixed criteria" to those responses. Furthermore, the scores that the STO technical evaluators give to the ITN potential vendors' Technical Solutions category of their ITN responses will be only equivalent to 40% of the total scores that the respondents' ITN responses receive, and those scores, rather than determining which vendor

will receive a contract, only determine which vendor(s) will be invited to negotiate further with the STO. Moreover, no STO technical evaluator will be making any decisions or participating in any decision-making relative to the awarding of a contract to a particular vendor, including being part of the negotiation team or part of the negotiation process, you have advised. Nor will he or she otherwise approve, disapprove, recommend, render advice about, or investigate any prospective vendors in connection with the ITN contract award process.

As in CEO 02-17, where we found that a former employee of the Florida Department of Transportation ("FDOT") was not prohibited by Section 112.3185(3) from working with a firm contracting with FDOT, under these circumstances we also find that the STO technical evaluators' proposed "limited involvement in the procurement process, the multi-stage [or faceted] nature of the process, [and] the subordinate nature of [their] [prospective] roles in the process to that of others" would render Section 112.3185(3) not applicable. See CEO 87-8 (former FDOT employee's limited involvement in a contract with an engineering firm through his distribution of an "advanced notification" for the project study was not so "substantial" as to preclude his subsequent employment with the firm), CEO 95-19 (former AHCA employee's role in reviewing language in Medicaid prepaid health plan provider applications, comparing the language in the applications to the required language, and requesting supplementation when necessary, was not "substantial" so as to prohibit her employment with a health management company), and CEO 00-6 (former Governor's Office and FDOT employee's participation in the first phase of the Fast Track Grant process was not "substantial," that is, it was not of much significance in the Fast Track Selection Committee's recommendation of the Consortium's proposal to the FDOT Secretary for funding or in that of the FDOT Secretary or the Governor's Office or in the Legislature's approval of the Consortium's proposed Cross-State Rail Study project, so as to prohibit his employment as Executive Director of the Consortium. His role was limited to acting as a facilitator, at most, in the first phase in the process.)

Section 112.3185(4) also would prohibit the STO technical evaluators from becoming employed in a non-agency capacity in connection with any contract for contractual services which was within their responsibilities as STO employees during the two-year period following their vacating their positions with the STO. At this time, we do not have sufficient information regarding the ITN contracts or the duties and responsibilities of the STO technical evaluators to definitively opine on the applicability of this provision to their post-STO employment with a possible vendor.

In CEO 94-40, we responded to an inquiry from a former Department of Management Services' Telecommunications Systems Consultant concerning the applicability of Sections 112.3185(3) and (4) to his acceptance of a position as an Area Tele-Link Representative with a "world-wide company involved in providing telephone and communications systems" to the State. There, we opined that the Department's electronic key telephone contract was not a contract for "contractual services," as that term is defined at Section 287.012(9), Florida Statutes. Similarly, it is possible that the contracts awarded here as a result of the ITN may not be contracts for "contractual services," the existence of which is necessary for Section 112.3185(4) to apply.

We also have indicated that the non-existence of a contract for contractual services or the award of a contract after an employee terminates his or her employment with an agency would negate the existence of a possible Section 112.3185(4) violation because the contract could not possibly be within an employee's responsibilities if it did not exist. See CEO 00-6. Thus, this would be a factor in determining whether an STO technical evaluator's future employment were to be prohibited by Section 112.3185(4).

Finally, while we have concluded that a contract would be within one's responsibility where one's duties involved monitoring the services provided under the contract, we also have found that incidental contact with the contractor as part of one's public duties does not make the contract within the employee's "responsibility." See CEO 93-2, CEO 87-8 and CEO 85-57. Consequently, additional information about the services and/or commodities provided under the specific contract, about when the contract came into existence, and about the duties and responsibilities of the STO technical evaluator relative to the specific contract would be required before we could opine on how or if Section 112.3185(4), Florida Statutes, applies.

Accordingly, while we are unable to opine on the applicability of Section 112.3185(4) at this time, we find that the participation of former STO employees who serve as technical evaluators of only the technical category of prospective vendors' ITN responses, would not be "substantial" and therefore find that Section 112.3185(3) would not prohibit their subsequent employment with a vendor in connection with a contract awarded as a result of the ITN.

ORDERED by the State of Florida Commission on Ethics meeting in public session on June 5, 2003 and **RENDERED** this 10th day of June, 2003.

_____

Patrick K. Neal
Chair

[1]You write that MyFlorida Enterprise is a "comprehensive communications system" intended "to provide a robust enterprise communication structure for the State of Florida."

[2] Pursuant to the ITN, the STO will award contracts to one or more vendors for implementation and operation of the MyFloridaNet system, you write.

[3] See Sections 287.012(17) (definition of "Invitation to negotiate") and 287.057(3)(a), Florida Statutes (2002).

[4] For purposes of Section 112.3185(4), "contractual services" is defined as set forth in Section 287.012(9), Florida Statutes, to mean

> the rendering by a contractor of its time and effort rather than the furnishing of specific commodities. The term applies only to those services rendered by individuals and firms who are independent contractors, and such services may include, but are not limited to, evaluations; consultations; maintenance; accounting; security; management systems; management consulting; educational training programs; research and development studies or reports of findings of consultants engaged thereunder; and professional, technical, and social services. "Contractual service" does not include any contract for the furnishing of labor or materials for the construction, renovation, repair, modification, or demolition of any facility, building, portion of building, utility, park, parking lot, or structure or other improvement to real property entered into pursuant to chapter 255 and rules adopted thereunder.

[5]The subject of CEO 82-67 was a former District Grants Specialist for DHRS who was employed as a fiscal manager by a corporation which was under contract with the Department. Because the former employee's private employment was not in connection with any contract in which he "substantially participated" while employed by the Department, and because the former employee's private employment was not "in connection with" any contract for contractual services which was within his responsibility while a State employee, we found that no prohibited conflict of interest existed.

CEO 01-6 -- March 20, 2001

POST-EMPLOYMENT RESTRICTIONS

FORMER DCF DISTRICT ADMINISTRATOR EMPLOYED BY PRIVATE PROVIDER WHOSE CONTRACT SHE APPROVED

To: Frances H. Gibbons, Former District Administrator, Department of Children and Families (Lehigh)

SUMMARY:

A former DCF District Administrator who was employed by DHRS, the predecessor of DCF, prior to 1989, is not prohibited from representing a provider of social services, whose contract she ultimately approved in her capacity as District Administrator, before the Department of Children and Families, including her former District, for a period of two (2) years following the termination of her employment with the Department. Section 112.313(9)(a)6a and b applies to exempt her from the prohibition of Section 112.313(9)(a)(4), which prohibits agency employees from representing another person or entity for compensation before the agency with which they were employed for a period of two years following vacation of their positions.

Because the former District Administrator's employment by the provider would not be "in connection with" any existing contract between the provider and the District, or "in connection with" any contract that she was involved in the procurement or development of as District Administrator, neither Section 112.3185(3) nor Section 112.3185(4), Florida Statutes, prohibits her from becoming employed as Regional Director of the provider.

QUESTION:

Would the Code of Ethics for Public Officers and Employees be violated were you, a former District Administrator with the Department of Children and Families, to become employed by a social services provider whose contract you approved as District Administrator?

Under the circumstances presented, your question is answered in the negative.

In your letter of inquiry, you ask whether the Code of Ethics prohibits you, a former District Administrator with the Department of Children and Families ("DCF") from becoming employed as Regional Director for Family Preservation Services, Inc. ("provider"), a private provider contracting with your former DCF district. You advise that you became employed by the Department of Health and Rehabilitative Services in 1976 and were promoted over the years to District Administrator of DCF District 8. As District Administrator, you advise, you supervised the delivery of services in a seven (7) county area that included two (2) major

institutions and 2,750 employees.[1] You also write that you administered a budget in excess of $150 million.

You advise further that DCF contracts with private providers for the delivery of many of its services. Consequently, as District Administrator, you signed hundreds of contracts for services. However, you claim that, notwithstanding your signing the contracts, District staff determined which services to purchase and from whom they would be purchased. You neither chose the provider nor the services to buy, you write.

As required by law, DCF continues to privatize the delivery of children's services, you write. However, authority over these matters now has been transferred to newly formed community alliances which will make all future decisions about service delivery to children. You relate that, as a member of the newly formed alliances representing DCF, you had not met with any of the alliances by September 13, 2000, when you were notified by the Secretary of DCF that your services were no longer needed. You advise further that a new District Administrator was appointed to replace you prior to any meeting being held by the alliances.

We are advised that the subject provider, a private social services agency that operates in fifteen states, is relatively new to Florida. You write that it is in the process of reorganization and will hire a Regional Director for Southwest Florida, a position that you are interested in.[2] You advise that, in addition to supervising a staff of approximately 40 employees, the primary responsibilities of the Regional Director will include the following:

< Managing and administering the provider's services, including needs assessments, program development, grant writing, implementation and monitoring in accordance with the provider's policies and procedures and ensuring that the provider's services meets the needs of the local community;

< Ensuring program quality assurance by, among other things, ensuring compliance with the provider's quality improvement plan and policies and procedures, and ensuring compliance with state contract requirements and other standards set forth by other programs and other funding sources;

< Expanding the services that the private provider currently offers by working with all agencies in the area to increase referrals;

< Developing relationships with other area providers to ensure the maximum availability of services, as well as initiating strategic alliances;

< Working with community and governmental agencies to develop new services to meet identified needs;

< Providing leadership for the development, implementation and coordination of all aspects of the provider's division's/region's public relations, including building and maintaining good community relations on behalf of the provider and promoting a positive image of the

provider in the community, and participating in the solicitation of funding from individuals and other sources; and

< Negotiating contracts and making proposals and presentations to funding sources on behalf of the provider.

You also advise that within the past two (2) years, the provider began delivering services to children with developmental disabilities and children in need of mental health and substance abuse services.[3] Although Medicaid reimburses the provider for many of the services it renders, some of its services are purchased through contracts with DCF and other government agencies. You have provided us with a list of five contracts between the provider and the District that originally were entered into while you served as District Administrator. If the contracts were not signed by you, they were signed for you by an acting District Administrator, you advise.

The contract for "Supervised Visitation" services, which was listed by you, already has ended, you write. You advise that the contract for "Caregiver Home Studies" services, which was scheduled to terminate on June 30, 2001, has been terminated. Similarly, the contract for "Foster Care Licensing Home Studies" services, which was scheduled to terminate on June 30, 2001, has been terminated. You advise that the contract for "Adoption Home Studies" services also has ended. Therefore, the only remaining contract between the District and the provider that was entered into while you served as District Administrator, you advise, is for the provision of "Adult and Family Substance Abuse" services. You advise that the contract originally was funded for $140,091.00 but that its funding subsequently was increased by $21,000.00. You also advise that as of February 6, 2001, only $11,488.93 remained to fund the contract until its termination on June 30, 2001. Thus, out of a total of $328,341.00 that the provider contracted with the District to receive under the five (5) contracts, only $11,488.93 remains to fund the one (1) remaining contract that was entered into while you served as District Administrator.

We also are advised that in addition to the one remaining contract discussed above, the provider serves Developmental Services clients under a Medicaid Waiver program. It also bills the Medicaid program of the Agency for Health Care Administration ("AHCA") for ITOS (Intensive Mental Health Services) for children, you advise. It contracts with the Lee County School District for the provision of additional children's services at approximately $3,000.00 per month. It has entered into a "small" contract with Lehigh Elementary School for the provision of non-Medicaid mental health services, and it has a entered into discussions with the Lake Trafford Elementary School relative to a services contract. Lastly, you advise that the provider bills DCF for the provision of supervised visitation services at approximately $2,500.00 per month.

Relevant to your inquiry are the following provisions of the Code of Ethics for Public Officers and Employees, which provide as follows:

> POSTEMPLOYMENT RESTRICTIONS; STANDARDS OF CONDUCT FOR LEGISLATORS AND LEGISLATIVE EMPLOYEES.--
>
> (a)1. It is the intent of the Legislature to implement by statute the provisions of s. 8(e), Art. II of the State Constitution

relating to legislators, statewide elected officers, appointed state officers, and designated public employees.

2. As used in this paragraph:

a. 'Employee' means:

(I) Any person employed in the executive or legislative branch of government holding a position in the Senior Management Service as defined in s. 110.402 or any person holding a position in the Selected Exempt Service as defined in s. 110.602 or any person having authority over policy or procurement employed by the Department of the Lottery.

. . . . .

4. No agency employee shall personally represent another person or entity for compensation before the agency with which he or she was employed for a period of 2 years following vacation of position, unless employed by another agency of state government.

5. Any person violating this paragraph shall be subject to the penalties provided in s. 112.317 and a civil penalty of an amount equal to the compensation which the person receives for the prohibited conduct.

6. This paragraph is not applicable to:

a. A person employed by the Legislature or other agency prior to July 1, 1989;

b. A person who was employed by the Legislature or other agency on July 1, 1989, whether or not the person was a defined employee on July 1, 1989;

c. A person who was a defined employee of the State University System or the Public Service Commission who held such employment on December 31, 1994;

d. A person who has reached normal retirement age as defined in s. 121.021(29), and who has retired under the provisions of chapter 121 by July 1, 1991; or

e. Any appointed state officer whose term of office began before January 1, 1995, unless reappointed to that office on or after January 1, 1995. [Section 112.313(9)(a), Florida Statutes.]

CONTRACTUAL SERVICES.--

(1) For the purposes of this section:

(a) 'Contractual services' shall be defined as set forth in chapter 287.

(b) 'Agency' means any state officer, department, board, commission, or council of the executive or judicial branch of state government and includes the Public Service Commission.

. . . . .

(3) No agency employee shall, after retirement or termination, have or hold any employment or contractual relationship with any business entity other than an agency in connection with any contract in which the agency employee

> participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation while an officer or employee.
>
> (4) No agency employee shall, within 2 years of retirement or termination, have or hold any employment or contractual relationship with any business entity other than an agency in connection with any contract for contractual services which was within his or her responsibility while an employee. [Section 112.3185, Florida Statutes.]

For purposes of Section 112.3185(4), "contractual services" is defined as set forth in Section 287.012(7), Florida Statutes, to mean

> the rendering by a contractor of its time and effort rather than the furnishing of specific commodities. The term applies only to those services rendered by individuals and firms who are independent contractors, and such services may include, but are not limited to, evaluations; consultations; maintenance; accounting; security; management systems; management consulting; educational training programs; research and development studies or reports of findings of consultants engaged thereunder; and professional, technical, and social services. 'Contractual service' does not include any contract for the furnishing of labor or materials for the construction, renovation, repair, modification, or demolition of any facility, building, portion of building, utility, park, parking lot, or structure or other improvement to real property entered into pursuant to chapter 255 and rules adopted thereunder.

SECTION 112.313(9)(A) 4, FLORIDA STATUTES

Section 112.313(9)(a)4, Florida Statutes, prohibits agency "employees," as that term is defined at Section 112.313(9)(a)2, Florida Statutes, from representing another person or entity for compensation before the agency with which they were employed for a period of two years following vacation of their positions, unless their employment falls within the terms of an exemption contained in Section 112.313(9)(a)6, Florida Statutes. In CEO 94-34, we interpreted the 1994 amendments to Section 112.313(9)(a)6 to permit an employee who was not in a defined position on July 1, 1989, for example, a Selected Exempt Service ("SES") or Senior Management Service ("SMS") position, but who was otherwise employed by an agency on that date, to later accept a defined position with that agency after July 1, 1989 and continue to be exempt upon leaving the defined position. This is in contrast to the situation presented in 94-20[4], where we refused to conclude that any public employment prior to July 1, 1989 amounted to a lifetime exemption from the post-employment restrictions of Section 112.313(9). Rather, we linked the exemption in Section 112.313(9)(a)6 to the employment that gave rise to the potential "revolving door" prohibition. See also CEO 00-1.

Inasmuch as you were employed by DHRS, the predecessor of DCF, prior to 1989 and served continuously thereafter, we are of the opinion that Sections 112.313(9)(a)6a and 6b apply to exempt you from the prohibition of Section 112.313(9)(a)(4). We conclude that you are not prohibited from representing the provider before DCF, including the District, for a period of two (2) years following the termination of your employment with DCF.

SECTIONS 112.3185(3) AND (4), FLORIDA STATUTES

Section 112.3185(3), Florida Statutes, also restricts the employment that you may seek after leaving employment with DCF by prohibiting you from becoming employed by a business entity in connection with a contract in which you participated personally and substantially through "decision, approval, disapproval, recommendation, rendering of advice, or investigation." See CEO 83-8, in which we limited our interpretation of this list of activities to the procurement process. Similarly, Section 112.3185(4) prohibits you from becoming employed in a non-agency capacity in connection with any contract for contractual services which was within your responsibility as a DCF employee during the two-year period following your vacating your position.

In CEO 82-67, we noted that Section 112.3185(4) differs from Section 112.3185(3) in three ways. First, it is more limited as to the time period it governs--specifically, a two-year period following resignation or termination. Secondly, it is more general as to what activities of a former agency employee are prohibited. Thirdly, it applies only to contracts for contractual services.[5]

In CEO 88-32 we observed that Federal law provides a similar limitation on former officers and employees of the executive branch of the United States Government. Under 18 U.S.C. Section 207(a), for example, a former Government employee is prohibited from representing any other person before, or with the intent to influence by making any oral or written communication on behalf of any other person to, the United States in connection with any particular Government matter involving a specific party in which matter such employee participated personally and substantially as a Government employee. See 5 CFR Section 2637.201(a). For purposes of implementing this prohibition the Office of Government Ethics Regulations state:

> To participate 'personally' means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. 'Substantially,' means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial. [5 C.F.R. Section 2637.201(d)] [E.S.]

Because we find that your involvement with the last remaining contract was direct, that is, you personally signed the contract, and because your participation in the process by signing the contract was highly significant, that is, the contract could not become executory unless and until it was approved by you or by an assistant district administrator on your behalf, we find that your participation in the procurement of the contract was both "personal" and "substantial." Therefore, if we determine that your employment with the provider is "in connection with" the one remaining contract, then we are of the opinion that Section 112.3185(3) would prohibit you from being employed by the provider in connection with that contract.

We also find that if your employment with the provider is "in connection with" the one remaining contract, then Section 112.3185(4) also would operate to prohibit your employment with the provider, because we are of the opinion that the subject contract was within your responsibility as District Administrator. As with CEO 88-32, our finding here is buttressed by our reference to the United State Code and the Code of Federal Regulations ("CFR").

The term "official responsibility," which is not defined in the Code of Ethics, is defined at 18 U.S.C. 202 as, "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve or disapprove, or otherwise direct Government actions." The Office of Government Ethics Regulations, at 5 CFR Section 2637.202(b)(2), provides further assistance in determining whether a particular matter comes within an employee's "official responsibilities." It reads as follows:

> Determining official responsibility. Ordinarily, the scope of an employee's 'official responsibility' is determined by those areas assigned by statute, regulation, Executive Order, job description or delegation of authority. All particular matters under consideration in an agency are under the 'official responsibility' of the agency head, and each is under that of any intermediate supervisor having responsibility for an employee who actually participates in the matter within the scope of his or her duties.

Thus, notwithstanding the fact that you may not have directly managed the subject contract by monitoring the provision of services, because it was subject to your approval and could not have become executory without your signature or without someone signing it on your behalf, and because you ultimately were responsible for the provision of all services provided by the District either directly or indirectly through contracts, we are of the opinion that the contract was within your "official responsibility" as District Administrator.

However, we do not find that your employment by the provider would be "in connection with" the one remaining contract between the provider and the District. Neither Section 112.3185(3) nor Section 112.3185(4) strictly prohibits a former State employee from going to work for an entity that has contracted with his or her agency. Instead, the statutes prohibit that employment only if it is "in connection with" the contract. Generally speaking, these provisions were adopted to prohibit State employees from being in a position to create a position with a private employer through influencing the award of a contract with that employer or mismanaging their responsibilities over that contract, and then leaving public employment to take that private position, or to prohibit the appearance of same.

Clearly, your employment would encompass a great deal more than the subject contract, which itself is winding down. For example, you would be responsible for managing and administering the provision of all of the provider's services in the region. This would include not only the provision of Adult and Family Substance Abuse Services under the subject contract, but the provision of services to the Lee County School District and to one or two elementary schools, the provision of intensive mental health services for children outside of any contract for the purchase of services that you were involved in as District Administrator, and for which Medicaid is billed,[6] the provision of services to DCF Developmental Services clients under a Medicaid Waiver program[7] outside of any contract for the purchase of services that you were involved with,[8] and the provision of supervised visitation services which is billed to DCF, and which is provided outside of any contract that you were involved in as District Administrator. Furthermore, your position would encompass expanding the services provided by the provider in the region, seeking additional contracts and sources of funding for the provider, and supervising 40 employees, one of whom presumably would be responsible for managing the one remaining contract between the District and the provider.

Accordingly, because your employment by the provider would not be "in connection with" any existing contract between the provider and the District, or "in connection with" any contract that you were involved in the procurement or development of as District Administrator, we are of the opinion that neither Section 112.3185(3) nor Section 112.3185(4) Florida Statutes, prohibits you from becoming employed as Regional Director of the provider.

ORDERED by the State of Florida Commission on Ethics meeting in public session on March 15, 2001 and **RENDERED** this 20th day of March, 2001.

Howard Marks
Chair

[1] The Legislature at Section 20.19(5)(a) 10 and 11, Florida Statutes, created Subdistrict A of DCF District 8. It consists of Sarasota and DeSoto Counties. Charlotte, Lee, Glades, Hendry and Collier Counties make up Subdistrict B.

[2] Comprising the Southwest region will be Charlotte, Lee, Collier, Hendry, and Glades Counties, you write.

[3] You advise that the provider also serves two (2) DCF districts on Florida's east coast and one in Southwest Florida.

[4] CEO 94-20 was appealed to the First District Court of Appeal, which affirmed the opinion by a "Per Curiam Affirmed" decision, as Anderson v. Commission on Ethics, 651 So. 2d 1198 (Fla. 1st DCA 1995).

[5] The subject of CEO 82-67 was a former District Grants Specialist for DHRS who was employed as a fiscal manager by a corporation which was under contract with the Department. Because the former employee's private employment was not in connection with any contract in which he "substantially participated" while employed by the Department, and because the former employee's private employment was not "in connection with" any contract for contractual services which was within his responsibility while a State employee, we found that no prohibited conflict of interest existed.

[6] You advise that one of the criteria employed by the AHCA to certify a provider for payment of Medicaid funds is that the provider has a contract with DCF for the provision of mental health services. Although you write that the provider has used the Adult and Family Substance Abuse Services, contract which you signed and which it refers to as a "mental health" contract as the basis for qualification for the payment of Medicaid funds, you advise that you were not involved with any such existing mental health services contract between the provider and DCF.

[7] According to Rule 59G-8.200, F.A.C. [Home and Community-Based Waivers], Florida obtained waivers of federal Medicaid requirements to enable the provision of specified home and community-based (HCB) services, such as services that can be provided by the provider, to persons at risk of institutionalization. Through the administration of several different federal waivers, Medicaid reimburses enrolled providers for services that eligible recipients may need to avoid institutionalization. Under the Developmental Services Medicaid Waiver program, participants must be (1) clients of the DCF Developmental Services Program; (2) eligible for admission to an intermediate care facility for the mentally retarded-developmentally disabled (ICF/MR-DD);and (3) have elected to receive services in the community rather than in an ICF/MR. In addition, the HCB waiver services must be designed to allow the recipients to remain at home or in a home-like setting.

[8] Although you advise that you signed a Developmental Services Medicaid Waiver agreement in February 2000, that allowed Independent Support Coordinators to choose the provider for the provision of services to DCF Developmental Services clients (See CEO 93-20 for a discussion of how the Medicaid Waiver program operates relative to Independent Support Coordinators), it did not commit the District to either the expenditure of any funds or to the purchase of services from the provider.