

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Opinion of RON COOK, Nevada State Senator

This opinion is in response to the request for guidance by Nevada State Senator Ron Cook.^[1] The subject matter of this opinion is whether Senator Cook may contract with agencies of the state of Nevada through his business, Connecting Point Computer Center.

This matter came before the Commission in a meeting of the Commission in Las Vegas, Nevada, on November 12, 1991.

The Commission thereafter met for deliberations in closed session on that same day. Based upon the foregoing, the Commission makes these Findings of Fact and issues the opinion that follows.

FINDINGS OF FACT

1. Ron Cook was elected state senator from District 6 in November 1990. He took office in January 1991.^[2]
2. Senator Cook owns a retail computer business in Las Vegas Nevada, called Connecting Point Computer Center, which markets and sells computer hardware and software for various computer companies. As a private businessman Senator Cook desires to expand his business and seek contracts for the purchase of computer software and hardware from all individuals, businesses and public agencies.
3. Senator Cook sought the opinion of the Legislative Counsel Bureau to determine whether he, through his business, could contract with public agencies for the sale of computer hardware and software. The Legislative Counsel Bureau issued its opinion concerning chapter 218 of the NRS (State Legislative Department) and referred Senator Cook to the Ethics Commission for an additional opinion concerning the provisions of NRS 281 (Ethics in Government). Senator Cook then requested this opinion.

OPINION

I. Generally

Based on the Findings of Fact, the Commission concludes that Senator Cook is a public officer as defined by NRS 281.4365(1) and is a member of the legislative branch of government as defined in NRS 281.4355.

The subject of this opinion is whether Senator Cook may, through his business, Connecting Point Computer Center, contract with public agencies, specifically the independent licensing boards and commissions of the state, the University of Nevada System and the school districts within the state, that may wish to purchase computer hardware and software.

The Legislative Declaration and Findings which express the public policy of the Nevada Ethics in Government Law appear at NRS 281.421:

281.421 Legislative declaration and findings.

1. It is hereby declared to be the public policy of this state that:

(a) A public office is a public trust and shall be held for the sole benefit of the people.

(b) A public officer or employee must commit himself to avoid conflicts between his private interest and those of the general public whom he serves.

2. The Legislature finds that:

(a) The increasing complexity of state and local government, more and more closely related to private life and enterprise, enlarges the potentiality for conflict of interest.

(b) To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.

Consistent with that policy and the specific provisions of the Code of Ethical Standards (NRS 281.481 - 281.511, inclusive), the opinions of the Commission may include guidance to the public official pursuant to NRS 281.521(1):

1. The commission's opinions may include guidance to a public officer or employee on questions of whether:

(a) A conflict exists between his personal interest and his official duty.

(b) His official duties involve the use of discretionary judgment whose exercise in the particular matter would have a significant effect upon the disposition of the matter.

(c) The conflict would materially affect the independence of the judgment of a reasonable person in his situation.

(d) He possesses special knowledge which is an indispensable asset of his public agency and is needed by it to reach a sound decision.

(e) It would be appropriate for him to withdraw or abstain from participation, disclose the nature of his conflicting personal interest or pursue some other designated course of action in the matter.

Reviewing the Code of Ethical Standards, General Requirements found in NRS 281.481, subsection 3 appears to be relevant to the Commission's present inquiry:

...Unless specifically prohibited by law, a public officer or employee, as such, is not precluded from making a bid on a government contract if the contracting process is controlled by rules of open, competitive bidding, the sources of supply are limited, he has not taken part in developing the contract plans or specifications and he will not be personally involved in opening, considering or accepting offers.

The above stated language is similar to the language found in NRS 218.605(2) which the Legislative Counsel Bureau interpreted in its opinion issued to Senator Cook. A copy of that opinion is attached hereto as exhibit A. The language of NRS 218.605 is set forth below:

1. Except as otherwise provided in subsection 2, it is unlawful for any member of the legislature to:

(a) Become a contractor under any contract or order for supplies or any other kind of contract paid for in whole or in part by money appropriated by the legislature of which he is a member for the state or any of its departments, of the legislature or either of its houses, or to be interested, directly or indirectly, as principal, in any

kind of contract so paid.

(b) Be interested in any contract made by the legislature of which he is a member, or be a purchaser or interested in any purchase or sale made by the legislature of which he is a member.

2. Any member of the legislature may:

(a) Sell or enter into a contract to sell, to the state or any of its departments any item, commodity, service, or capital improvement, if:

(1) The sources of supply for the item, commodity, service, or capital improvement are limited;

(2) The contracting process is controlled by rules of open competitive bidding;

(3) He has not taken part in developing the plans or specifications for the sale or contract; and

(4) He will not be personally involved in opening, considering, or accepting any bids for the sale or contract.

(b) Receive, as direct salary or wages, compensation for which the original source was a legislative appropriation to any governmental entity or a private entity not owned or controlled by the legislator.

(c) Receive, for services as an instructor or teacher from any county school district or the University of Nevada System, compensation for which the original source was a legislative appropriation to any governmental entity or a private entity not owned or controlled by the legislator.

3. Any contract made in violation of subsection 1 may be declared void at the instance of the state or of any other person interested in the contract except the member of the legislature prohibited in subsection 1 from making or being interested in the contract.

4. Any person violating subsection 1 is guilty of a gross misdemeanor and forfeits his office.

The opinion of the Legislative Counsel Bureau focused on the determination of whether the agencies with whom Senator Cook desired to contract, were: 1) funded through appropriations of the legislature; and 2) were departments of the State. That opinion clearly interprets the language of the governing statutes in NRS 218.605. Those two phrases are the key to the interpretation of the statute. The difficulty arises due to the inconsistency in language between NRS 218.605 and the governing language in NRS 281.481.

In NRS 281 the language merely reflects a prohibition against a public officer or employee bidding on a **government contract**, unless certain criteria were satisfied. "Government contract" is an undefined term in NRS 281. The Commission looks to the plain meaning of the words within the statute when interpreting the intent. "Government" is defined in Webster's New Collegiate Dictionary, as "The organization, machinery, or agency through which a political unit exercises authority and performs functions..." "Contract" is defined in the same dictionary as "A binding agreement between two or more persons or parties." This language is much broader than the prohibition in NRS 218.605. This prohibition in NRS 281 against a public officer or employee bidding on a government contract is not conditional on the origins of the monies as an appropriation.

Contracts with the University of Nevada System, as well as contracts with the licensing boards and commissions of the state and school districts within the state are "government contracts" within the prohibition of NRS 281. Neither the University of Nevada System, the licensing boards and commissions, nor the school districts have any authority granted to them to conduct public business outside the grant of authority found in the Nevada Constitution and statutes, with respect to the University of Nevada System and the statutes creating the boards and commissions and the school districts. They each perform functions of the government based upon these grants of authority. There can be no other interpretation.

The Commission notes that exceptions to the prohibition against a public officer or employee entering into these contracts found in NRS 281.481 are specifically restrictive. Each criterion must be satisfied on the facts if the public officer or employee is allowed to participate in the contracting process. The criteria are similar to the criteria set forth in NRS 218.605:

1. The contracting process is controlled by the rules of open, competitive bidding,
2. The sources of supply are limited,
3. The employee or officer has not participated in developing the contract plans or specifications, and
4. The officer or employee will not be personally involved in opening, considering or accepting offers.

Each of the criteria must be analyzed in light of the specific facts of a specific contract. In the instant matter, no specific contract is before the Commission for consideration; therefore, the criteria cannot be applied to a specific contract. Generally, however, it appears that three of the criteria lend themselves to general application: 1) if the contract is governed by open, competitive bidding; 2) if the officer has not participated in developing the contract specifications; and 3) if the officer or employee is personally involved in opening, considering or accepting offers. The troublesome criterion is whether the sources of supply are limited.

Senator Cook through his business, Connecting Point Computer Center, can contract with the State of Nevada only through its agencies, the University of Nevada System, the school districts within the state, or the licensing boards and commissions of the state if the following conditions are satisfied: 1) any contract between Senator Cook's business, Connecting Point Computer Center, and the state is governed by open, competitive bidding; 2) Senator Cook does not participate in developing the contract specifications; 3) Senator Cook is not personally involved in opening, considering or accepting offers; and 4) Senator Cook can demonstrate that there is a limited supply of the product his business will be supplying.

Generally, based upon the evidence presented to it at the hearing, the Commission does not find that there is a limited supply of the product.

DATED: May 29, 1992.

NEVADA COMMISSION ON ETHICS

By: /s/ THOMAS R. C. WILSON, Chairman

[1] This opinion is advisory in nature. It is based solely on the facts presented. Given other facts and circumstances, the opinion of the Commission may differ.

[2] Senator Cook resigned from his office effective February 4, 1992.