

## Abstract of Opinion No. 94-24

### BEFORE THE NEVADA COMMISSION ON ETHICS

This Opinion is in response to a request filed with the Nevada Commission on Ethics ("Commission") in June 1994. The subject matter of this Opinion is whether the award of a jail improvement project by a County Board of Commissioners to an employee of the County ("Employee") constituted a violation of the Nevada Ethics in Government Law.

A hearing on the merits of the request was held on June 23, 1995, in Reno, Nevada, at which time the Commission heard testimony from Requestor, Employee, and several present and former Commissioners. Testimony was also provided by the County Sheriff and Building Clerk of the County Building Department. The opinion request and hearing were confidential pursuant to NRS 281.511(4) and accordingly, the hearing was not open to the public. Based on the foregoing, the Commission makes these Findings of Fact and issues the Opinion that follows.

#### FINDINGS OF FACT

1. At the time the opinion request was filed, Employee was a part-time employee of the County Building Department as an assistant building inspector.
2. In his private capacity and on his own time, Employee operates a Construction Company. Employee is a general building contractor who possesses a classification B license.<sup>[1]</sup>
3. The County Jail is located in a City in Nevada. The physical location of City has made it difficult for County to obtain bids and contractors for projects in City. The jail was constructed in 1992 by contractors located in Utah who specialized in building jails for small counties and cities. The budget for the jail had been \$1 million, but the county still owed the contractor \$550,000 for its construction because the money originally allocated for the jail was insufficient as a result of some additional federal requirements.
4. In 1993 and 1994, building defects were discovered in the jail that needed correction. Included among these defects was the absence of a roof or cover over the jail's air conditioning system, which was situated upon a concrete slab on the north side of the building. When snow melted off the roof of the jail, it drained onto and over the system. By the spring of 1993, County had already paid in excess of \$3,000.00 per unit for repairs. The Board could not afford to postpone a roofing project. The original contractor was unwilling to correct the problems due to the geographic location of and underground mine activity in City.
5. In the spring of 1993, the Sheriff discussed his concerns about the air conditioning system cover with the County Building Inspector. Sheriff proposed the construction of a carport type of roof over the air conditioning system to protect it because ventilation requirements necessitated that the sides of the cover be left open.
6. When the County Board of Commissioners ("Board") learned that the county would be required to secure an outside exercise area for inmates, the Board decided to incorporate that project with the roofing project. The delay in resolving the problem, however, was due to the County's budget constraints.
7. In October of 1993, the Sheriff contacted every contractor in County who was licensed by both the state of Nevada and County to obtain cost estimates for the jail improvement construction. At that time there were three contractors who could meet those requirements: one in County, the other two in a neighboring county. Sheriff did not provide any of the contractors with any blueprints, specifications, or other written information concerning the project. Instead, he provided only oral overviews of the project to each of the contractors, asking them the amount each

would charge for such a project to give him an idea of how much the project would cost. Employee appeared to be the only contractor interested in the job.

8. After Employee gave Sheriff his cost estimate of \$9,867.32, the sheriff gave this figure to the Board.

9. During Board budget proceedings conducted prior to its October 5, 1993, meeting, the Board approved \$9,867.32 for the upgrading of the jail.

10. At the Board's meeting of October 5, 1993, Sheriff presented Employee's cost estimate of \$9,867.32 for the jail improvement project. Employee proposed to furnish all the materials and perform all the labor necessary for the completion of a fence and roof around the inmate exercise yard, the cutting and hanging of a door into the exercise room from the yard, and the construction of a porch-type roof over the air conditioning units on the north side of the building. Because Employee worked on a "short" budget and needed funding to purchase materials for the project, the Board's approval included a \$3,000.00 advance.

11. After funding for the project had been approved, Sheriff did not contact any of the proposed contractors other than Employee.

12. Legal advice to the Board is provided by the County District Attorney. The district attorney at the time of commencement of the project advised the Board that it would be appropriate to proceed on the project with only one bid being submitted. Although the Board expressed concern that Employee was also a county employee, the district attorney informed the Board that because the Board considered the situation at the jail to be an emergency and because Employee was a part-time employee who did not receive insurance benefits, it would be acceptable for him to work on and be paid by the county for the jail improvement project.

13. During the Board's meeting of October 19, 1993, (which district attorney did not attend), the Board Chairman stated that the Nevada Association of Counties (NACO) had advised her that the prison project should go out for three more bids and that there may be a conflict of interest due to Employee's status as a county employee. She stated that there may be a need to advertise for the work at the jail. The county building inspector said that someone at the Attorney General's Office had informed him that it would be legal to accept the bid of Employee's Construction Company. Consequently, Board Chairman stated at the meeting that she would "take Building Inspector's word for it that it is legal, the job is under \$10,000.00 and the Sheriff did try to get bids."

14. On October 19, 1993, the Board agreed to allow the jail improvement project to proceed and approved the cost estimate of Employee's Construction Company. On the same day, it issued a check to Employee in the amount of \$3,000.00 for start-up costs.

15. From October 1993 through January 1994, Employee performed the work on his own time, working for an hourly wage. He designed the project based on Sheriff's oral specifications.

16. Employee did not take part in developing the contract plans or specifications and was not personally involved in opening, considering or accepting offers.

17. The jail improvement project was the first project for which Employee had worked for County in his capacity as a private contractor.

18. Employee was issued a check from County in the amount of \$4,000.00 dated December 7, 1993, and a check issued in the amount of \$2,867.32, dated February 1, 1994.

## OPINION

Based on the Findings of Fact, the Commission concludes that Employee was a public employee as provided by NRS 281.436 during all relevant times concerning this matter. The Commission has jurisdiction over this matter pursuant to NRS 2811.511(2).

The Code of Ethical Standards (NRS 281.481 *et seq.*) provides the general guidelines and express prohibitions governing the conduct of public officers and employees. Public policy dictates that public officers and employees owe an undivided duty to the public and are not permitted to be in a position that will create conflicting duties or cause the public officer or employee to act other than for the best interest of the public. See NRS 281.421.

The questions raised by this opinion is whether Employee was prohibited from seeking and accepting employment by the Board as a private contractor for a county jail improvement project, whether County Commissioners were prohibited from offering the project to Employee, and whether County Sheriff and Building Inspector engaged in prohibited conduct in connection thereto, all under the provisions of NRS 281.481(1), (2), (3) and (5).

NRS 281.481(1), (2), 3), and (5) provide as follows:

(1) A public officer or employee shall not seek or accept any gift, service, favor, employment engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties.

(2) A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any member of his household, any business entity in which he has a significant pecuniary interest, or any other person.

(3) A public officer or employee shall not participate as an agent of government in the negotiation or execution of a contract between the government and any private business in which he has a significant pecuniary interest.

(5) If a public officer or employee acquires, through his public duties or relationships, any information which by law or practice is not at the time available to people generally, he shall not use the information to further the pecuniary interests of himself or any other person or business entity.

Regarding a public employee's bidding on a public contract, NRS 281.505(1) mandates that "...a public officer or employee shall **not** bid on or enter into a contract between a governmental agency and any private business in which he has a significant pecuniary interest." (Emphasis added.) Notwithstanding such a pecuniary interest, NRS 281.505(4) provides an "escape valve" if:

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

Similarly, NRS 281.230(4) provides an exception to the law prohibiting any interest in a contract between a government employee or officer and his governmental employer. It provides in pertinent part as follows:

A public officer or employee...may bid on or enter into a contract with a governmental agency 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 personally be involved in opening, considering or accepting offers.

The standards provided in NRS 332.035 and NRS 332.055 are also relevant to the Commission's present inquiry. NRS 332.035 provides:

1. Except as otherwise provided by specific statute:
  - (a) A governing body or its authorized representative in a county whose population is less than 100,000 shall advertise all contracts for which the estimated amount required to perform the contract exceeds \$10,000.
  - (b) Such a governing body or its authorized representative may enter into a contract of any nature **without advertising** if the estimated amount required to perform the contract is **\$10,000 or less**.
  - (c) If the estimated amount required to perform the contract is more than \$5,000 but not more than \$10,000, **requests for bids must be submitted to two or more persons capable of performing the contract, if available**. The governing body or its authorized representative shall maintain a permanent record of all requests for bids and all bids received. [Emphasis added.]<sup>[2]</sup>

In this case, the cost of the improvements were less than \$10,000, but exceeded \$5,000.00. Therefore, pursuant to NRS 332.035(c), requests for bids needed only to have been submitted to two or more persons capable of performing the contract, if available. The County Sheriff testified that he had personally contacted three contractors to obtain cost estimates on the project, and Employee appeared to be the only contractor interested in the job.

Moreover, NRS 332.055 provides that "[i]f the chief administrative officer or the governing body of the local government determines that an emergency exists affecting the public health, safety or welfare, a contract or contracts necessary to contend with such emergency may be let without complying with the requirements of this chapter. The chief administrative officer must report any emergency action to the governing body at its next regularly scheduled meeting. An "emergency" is defined as a situation which: "(a) Results from the occurrence of a disaster such as, but not limited to, fire, flood, hurricane, riot, power outage or disease; or (b) **May lead to impairment of the health, safety or welfare of the public if not immediately attended to**." (Emphasis added.)

Where, as here, a conflict exists between statutes addressing the same or similar topics, resort must be made to the rules of statutory construction. Courts favor statutory constructions that harmonize statutes relating to the same subject and attempt, if reasonable, to effectuate the intent of each. "[C]onstrue the statutory provisions in such a manner as to render them compatible whenever possible." *Weston v. County of Lincoln*, 98 Nev. 183, 185, 643 P.2d 1227 (1982). In *Laird v. Nevada Public Employees Retirement Board*, 98 Nev. 42, 45, 639 P.2d 1171 (1982), the court held that "[w]here a general and special statute, each relating to the same subject, are in conflict and they cannot be read together, the special statute controls. Applying these rules to the bidding statutes at issue produces the following result: NRS 332.035 and 332.055 control the situation because they are specific statutes that supersede the general prohibitions in NRS 281.230 and NRS 281.505.

Here, the record indicates that the Board believed that the condition of the jail, in a fast approaching winter environment, presented emergency conditions that precluded the commissioners from taking more time to advertise for or solicit qualified contractors. The Board's main concern was to complete the covering work on the cooling system before winter weather was manifest. Thus, the Board found, and we agree, that the "emergency" exception in NRS 332.055 had been met.

Even in the absence of the emergency, however, the Board also had found it difficult to obtain contractors who

would work in City. Not only had the statutory requirements of NRS 332.035 for the jail improvement project been met based on Employee's estimated contract price of \$9,867.32 (where two other prospective contractors were solicited by the sheriff for cost estimates), but even if they had not, the emergency circumstances as existed in County operated independently to render the open and competitive bidding statutes inapplicable. The Commission reasons that the information obtained by the sheriff relative to the cost of the project would be considered cost estimates rather than "bids." Finally, the record establishes that the Board's final decision to award the contract to Employee's company was made in good faith reliance upon advice obtained from the district attorney's office.

### **CONCLUSION**

The Commission concludes that neither Employee nor Board members nor Sheriff and Building Inspector violated the contracting prohibitions set forth in NRS 281.281.230 and NRS 281.505, or the more general provisions of the Code of Ethical Standards at NRS 281.481, subsections (1), (2), (3) and (5). Because the amount of the estimated contract for the jail improvement project was more than \$5,000 but not more than \$10,000, and two persons had been solicited to submit "bids," the provisions of NRS 332.035 were satisfied. Alternatively, because it was reasonable for the Board to believe that winter conditions in a geographically inaccessible town constituted a true emergency that relieved its compliance with otherwise applicable competitive bidding requirements, the provisions of NRS 332.055 were satisfied.

### **COMMENT**

It is specifically noted that the foregoing Opinion applies only to these specific facts and circumstances. The statutory provisions quoted and discussed above must be applied on a case-by-case basis with results which may vary depending on the specific facts and circumstances involved.

DATED: December 26, 1995.

NEVADA COMMISSION ON ETHICS

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

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[1] NAC 624.160 provides that the state contractors' board will grant to qualified applicants, a class B license in the branch of general building. A class B license holder may perform the work described in NRS 624.215(3), which sets forth the definition of a general building contractor as a contractor whose principal contracting business is in connection with any structures built, being built, or to be built, for the support, shelter and enclosure of persons, animals, chattels or movable property of any kind, requiring in its construction the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.

[2] Contrary to representations made by the County District Attorney's Office, NRS 332.035 makes no distinction between full-time and part-time employees.