

Abstract of Opinion No. 94-54

BEFORE THE NEVADA COMMISSION ON ETHICS

This Opinion is in response to an opinion request filed with the Nevada Commission on Ethics (Commission) on September 20, 1994, by Requester concerning the conduct of a Facilities Manager (Manager) of a State Agency (Agency) in Nevada. Requester, owner of a window-tinting business, requested the Commission to determine whether Manager violated the Code of Ethical Standards by: (1) Failing to solicit Requester's bid on a window-tinting project in the State office building in which the Agency is housed; and (2) awarding the window tinting contract to a southern California company rather than to a local business in Nevada. The Commission has jurisdiction in this matter pursuant to NRS 281.511(2).

The Commission met on December 9, 1994, in Reno, Nevada, at the South Auditorium of the Washoe County Health Department to conduct a hearing on the opinion request. Manager did not waive his statutory right to confidentiality of the proceedings and the hearing was therefore closed to the public pursuant to NRS 281.511(4). An attorney of the Agency appeared on behalf of Manager who was present, as was Requester. The Commission heard testimony from Requester; Manager; Bidder One; a representative of a local blind cleaning and sales company; the owner of an electrical contracting company in Reno; and Counsel of the Agency. The Commission also received evidence which included sworn affidavits from the Director and Chief of the Administrative Division of the Agency; Facilities Supervisor for the Building and Grounds Division of the Department of Administration; Bidder One, a window-tinting business located in California; Employee, head window tinter of Bidder One; and a cosmetologist employed at a Carson City hair salon.

Immediately after the hearing, the Commission deliberated in executive session. Based upon the foregoing, the Commission makes these Findings and renders the Opinion that follows.

FINDINGS

1. The Commission has jurisdiction over this matter pursuant to the provisions of NRS 281.511(2). Manager is a public employee to whom the Code of Ethical Standards applies.
2. The Agency is located in a State office building in Nevada. Manager is employed as a Building Superintendent, or "Facilities Manager" with the Agency and has been so employed since April 1986. Manager has a small permanent staff of two janitors and temporary staff members who are assigned to jobs on an as needed basis. Manager does not have clerical assistance.
3. Public works projects are not required to be put out for public bidding unless the estimated cost of such project exceeds \$100,000. NRS 338.143. Most Agency projects fall outside of the Public Works Guidelines. Statutory provisions of the State Purchasing Act, including those governing bidding procedure in the procurement of state contracts, apply only to state agencies in the executive department of state government and do not apply to Agency as part of the legislative branch. NRS 333.010 et seq. Except projects for which the estimated cost is over \$100,000, Manager is authorized by his supervisor, Director of the Agency and Chief of the Administrative Division, to determine whether to seek outside bids on Agency's building projects, and, if he does so, to determine the nature and extent of the bidding process.
4. The Agency has no written, internal procedures governing in-house buildings and grounds projects. Agency projects are generally performed by the Division staff because it is a more cost-effective approach to completing projects. Agency's building subcommittee prefers that all work be done in-house where feasible. It is uncommon for an Agency buildings and grounds project to be put out to bid. Prior to March 1994, Manager had not put any Agency

project out for public bid.

5. Prior to commencing an in-house project, Manager examines whether his staff has the ability to perform the work. If there is not enough staff to complete the project, Manager hires temporary laborers or a subcontractor to assist his staff on a "time and materials" basis. Manager is familiar with various contractors located in the area; having used them at one time or another, his selection of a contractor in any particular project is based on past experience, trust, and availability. Because the time frame in which he is required to complete a project is often limited, Manager rarely uses a "fixed contract" that involves a complete set of written specifications or drawings.

6. In August of 1988, at a semi-annual, men's religious retreat, Manager met Bidder One, a window-tinting business located in California, and Employee, a professionally certified window tinter who has been employed by Bidder One as an installer since 1979. Manager has attended the retreats with approximately 30 other men from Nevada and California, twice each year. Since 1988, Bidder One and Employee have also attended these retreats but maintained no other social contacts with Manager between the meetings.

7. Bidder One is the only person in California authorized to franchise a window-tinting business. In its approximately 20-year operation, Bidder One has performed window-tinting work in approximately 400 to 500 commercial buildings.

8. In or around March 1994, Manager became responsible for a project requiring the tinting of Agency windows in the State office building. The square footage of the window area to be tinted in the State office building was approximately 4009 feet. The window-tinting project was budgeted for approximately \$10,000. Neither Manager nor his staff had any experience with window tinting and the project was the first of its kind Manager had supervised.

9. Manager's Superior had personally suggested tinting the windows of the State office building in an effort to make working conditions more comfortable for her employees. At that time, only the office of another employee had tinted windows. Manager's Superior asked Manager to investigate the feasibility of tinting the remainder of the windows in the building, informing him that the other employee's windows were too darkly tinted and that she did not like the slivers of light that came through the gaps between the film and the window edges. Manager's Superior also explained to Manager that because it was not a common practice for members of the public to frequent the State office building, and that because many documents in the offices were confidential, it was imperative that the contractor to whom the project was awarded be of trustworthy character. Manager's Superior cautioned Manager that she owed a legal obligation to maintain the confidentiality of the work product contained in Agency offices, and as a consequence, Manager was required to "vouch" for the credibility of the workers present on the window-tinting project. Manager's Superior explained to Manager that although she desired quality work at the lowest price, and as quickly as possible, it was necessary that the element of trust play a major role in the criteria Manager was directed to apply in making the hiring decision.

10. Manager decided to solicit outside bids for the window-tinting project. At that time Manager was also overseeing approximately 10 to 12 other state projects and did not have the time or expertise for him to do to the window-tinting project in-house.

11. Those engaged in the practice of window-tinting do not comprise a licensed specialty of professionals who are regulated by the State of Nevada, as a result there is no state listing of potential window-tinting contractors available to bid on a given project.

12. At a spring retreat attended by Manager on or about March 1994, Manager asked Bidder One and Employee whether they would be interested in bidding on the window-tinting project in Carson City. They responded that they would be interested in such a project.

13. Manager also called Anderson Glass in Sun Valley, Nevada, with whom he had done business previously, to obtain references for local window tinters. Representatives from Anderson Glass were unable to recommend any specific window-tinting company.

14. In early April 1994, Manager telephoned Facilities Supervisor to inquire whether he could recommend a window-tinter for the Agency project. Facilities Supervisor has been employed by the Buildings and Grounds Division of the Department of Administration for approximately 19 years. Facilities Supervisor recommended Bidder Two located in Carson City, Nevada. Manager also solicited and received a bid from Bidder Three located in Carson City, Nevada.

15. On or about April 5, 1994, Manager telephoned Bidder Two to arrange an appointment to meet with him in the State office building to discuss Manager's solicitation of a bid proposal and allow Bidder Two the opportunity to examine the windows.

16. On April 5, 1994, Manager sent Bidder One and Employee a formal invitation for Bidder One's submission of a bid for the tinting of windows in the, State office building. Manager included pictures of the exterior of the building and a specification list documenting the dimensions of all the windows to be tinted. The bid invitation instructed as follows:

You are invited to submit a proposal or the tinting of windows in the State office building in Nevada. Enclosed are pictures of the building and dimensions of all the windows to be tinted.

The objective of this project is to reduce the solar heat load within the building. The glass panes are two layer sealed thermal panes with approximately 112" of dead air space between the panes. In order for the project to qualify for a rebate from Sierra Pacific Power Company, the film must be warranted for five years and have a shade coefficient of less than .45. In addition, a one-year installation warranty is required of the installer.

Proposals must be received not later than May, 1, 1994 and the project must start by June, 1, 1994.

17. On or about April 17, 1995, Bidder Two went to the State office building to inspect its windows. Manager orally instructed Bidder Two regarding the substance of what was contained in his written specifications directed to Bidder One. Manager stated that gaps between the window film and the glass edge would not be tolerated, and if such occurred, redos would result. Manager explained that he did not like gaps for aesthetic reasons. As a consequence of these directions Bidder Two figured into his bid the increased labor and materials costs that would be necessary to achieve the result that would most closely meet Manager's instructions. Accordingly, Bidder Two added an additional \$500.00 to his proposed bid, the total of which was submitted on April 18, 1994, in the amount of \$10,450.08. Bidder Three's bid was approximately \$300.00 higher than the bid submitted by Bidder Two.

18. Manager had reviewed the yellow pages of two local area telephone directories for potential window-tinting bidders. Requester was one of approximately 15 listings under window-tinting in the phone book. Requester had operated the window-tinting business in Carson City for six and one-half years, and had worked on numerous office buildings in the area. Manager had no knowledge of Requester's business. Requester was not solicited to bid on the project and did not submit a bid.

19. Manager did not obtain more than three bids for the project. At the time Bidder One submitted its bid on April 25, 1994, it had not performed an on-site inspection of the State office building. Based solely on the specifications and photographs provided by Manager, Bidder One prepared a bid in the amount of \$9,978.47 on April 18, 1994, and submitted it with a letter dated April 25, 1994, to Manager. Its bid was reduced to \$9,607.56 after Manager informed

Bidder One that the State of Nevada is exempted from imposition of a sales tax. At no time did Manager indicate to Bidder One or Employee that they would be given a preference nor did he guarantee that such company would be awarded the job. Bidder One and Employee understood that they would be bidding competitively on the project.

20. On June 3, 1994, Bidder One was informed by Manager that it had been awarded the window-tinting job at the State office building. On June 27, 1994, Bidder One commenced work on the window-tinting project, which was completed within five days.

21. The completed project contained gaps between the window film and the glass because gaps had been impossible to prevent. Although Manager had attempted to impose, in a written manner, the same specifications regarding gaps on Bidder One that he had orally described to Bidder Two, he had subsequently accepted Employee's technical explanation of why gaps would nevertheless occur in the tinting process.

OPINION

Manager is a public employee as defined by NRS 281.4365.

The issue in this matter is whether Manager used his position in state government to benefit another, namely Bidder One, in violation of the Nevada's Code Ethical Standards.

The provisions of NRS 281.481(2) are relevant to this inquiry and provide the following:

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.

The language in NRS 281.481(2) reflects a prohibition against a public officer using his governmental position to secure unwarranted advantages for himself or any other person. Manager did not use his position of authority as Agency Facilities Manager to secure or grant any unwarranted privilege, preference, exemption or advantage for either himself or Bidder One.

Requester had the approval of his supervisor, the Director of the Agency and Chief of the Administrative Division, to determine whether to put a building project out to bid, and, if so, to determine the nature and extent of the bidding process. Because the Agency had no internal, written procedures governing the manner in which in-house projects were to be handled, in cases where it had been determined that projects could not be sufficiently performed by Agency staff, Manager relied upon the reputation of contractors in the community with whom he had worked previously as a basis for making his hiring selections. The lack of Manager's personal knowledge and familiarity with window tinting and his staff's inexperience in the area prompted Manager to solicit bids for the project.

Manager's basis of contractor selection for the window-tinting project rested upon the criteria established by his Superior. While Manager's Superior directed that he consider such factors as quality, price, and speed of the work, her primary emphasis rested upon the contractor's reputation for *trustworthiness*. Consequently, Manager sought to obtain a work crew that had integrity and whom he could trust to work unsupervised in a professional office building, without breaching the confidentiality of the materials contained within the attorneys' offices.

Manager solicited three bids -- two of which were local: the proposals of Bidder Two and Bidder Three, both in Carson City. Manager obtained three bids in attempt to assure that the process was fair. By this bidding process Manager went beyond any legal obligations he had in soliciting outside bids on the window-tinting project.

Manager did not intentionally *exclude* Requester's window-tinting business from bidding on the project but had no obligation to *include* Requester in the bidding process.

Agency has no internal written *objective standards, priorities, and procedures* governing in-house projects. The absence of such a policies and procedures puts a public officer or employer at risk in his decision making because there are no guidelines subject to scrutiny except his subjective decision making process which is more vulnerable to challenge of bias than are decisions made with objective criteria. Even if it were Manager did not violate the Code of Ethical Standards by hiring Bidder One to perform the window-tinting project for Agency. It is important to have written policy or guidance in place to protect both the public officer and/or employee as well as promote the public' s trust in the integrity and impartiality of those who serve the general public.

Requester also requested an opinion on whether Manager appropriately awarded a window-tinting contract to a California company rather than to a Nevada based company in light of the executive order issued by Governor Bob Miller mandating state agencies to give preference to Nevada businesses when awarding state projects to private parties. Nevada contractors are also given a five-percent preference on bids. However, executive orders are not applicable to Agency contracts.

Had Agency had a policy for the operation of the Agency projects with guidelines on future bidding practices and objective standards to evaluate contractor competence, the problems raised by Requester in his request to the Commission may have been prevented or minimized.

CONCLUSION

Based upon the administrative record developed in this matter, there is no evidence of a violation of the Code of Ethical Standards in connection with Manager's failure to solicit a bid from Requester or decision to award the state contract for the tinting of windows in the Agency office building to Bidder One.

COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific circumstances, and may not apply to other circumstances. The provisions of NRS 281.481(2) quoted and discussed above must be applied on a case-by-case basis, with results which will vary depending on the specific facts and circumstances involved.

DATED: October 3, 1995.

NEVADA COMMISSION ON ETHICS

By: /s/ Thomas R. C. Wilson, Chairman