

## Abstract of Opinion No. 95-24

### BEFORE THE NEVADA COMMISSION ON ETHICS

#### In the Matter of the Request for Opinion of PUBLIC OFFICER

This opinion is in response to the request for guidance by a mayor of a city in Nevada who is a general partner in Business A. The Mayor asked the Commission to determine the propriety of City's award of a water line installation contract (contract) to Business A in light of the Mayor's public role in City .The city has postponed the award pending the Commission's resolution of this matter.

The matter came before the Commission in the 2nd floor moot courtroom of the Office of the Attorney General, in Carson City, Nevada, on April 26, 1995. The Mayor was present and testified in the matter. The Commission also reviewed documentary evidence relevant to the issues addressed. The opinion request and hearing were confidential pursuant to NRS 281.511(4), and accordingly, the hearing was not open to the public.

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. The requestor is a mayor of a city in Nevada.
2. The chief executive of a city shall be the mayor. NRS 266.165.
3. In his or her private capacity, the Mayor is a general partner in Business A situated in Nevada. The Mayor has approximately 35 years of experience in the industry.
4. The City Council is authorized under NRS 266.277(1)(b) and (k) to acquire, improve, equip, operate and maintain, convert to or authorize drainage and water projects.
5. In April 1995, the City put out to public bid a contract for the installation of water line for the City's water system to enable two hotel/casino chains to commence construction of their facilities and conduct business in the City .The Advertisement for Bid specifies as follows:

The City is accepting bids to supply 2,960 feet of 16-inch diameter water line to be installed in Phase One and Phase Two of the Water Line Extension Project.

The City is also accepting bids to install the 2,960 feet of 16-inch water line for the same project.

The Specifications and Drawings can be obtained at the City Offices. There is no charge for the drawings and specifications for the pipe supply bid, but there is a \$25 non-refundable fee for the drawings and specifications for the construction portion. The bids will be opened on Tuesday, April 4th, at 4:00 p.m., MST, for both the construction and pipe supply portions. There will be required for the construction bid, a 5% bid bond, and a performance/payment bond will also be required for the successful bidder. The 5% Nevada Preference Law will also be enforced, and the successful bidder must also obtain a business license in the City.

Any questions concerning the project can be directed to...

...Questions concerning obtaining the specifications and drawings can be directed to. ...The City reserves the right to accept or reject any or all bids based on qualifications, experience, budget constraints, and construction schedule.

6. Although not specified in the Advertisement for Bid, the City Engineer determined that an A-19 Nevada contractor's license would be necessary to accomplish the work upon which the bid was based.<sup>[1]</sup>

7. The City imposed the following conditions upon award of the contract:

- Proof of insurance (SIIS)
- Blanket liability coverage
- Active city licenses
- State sales tax permit
- Active State of Nevada Contractors License

8. Business A and Business B, also located in City, were the only two local businesses within ten miles of the city that possessed A-19 contractor's licenses. Business B did not submit a bid for the project.

9. The following four construction companies received specification plans for the waterline extension:

- Business A
- Business C
- Business D
- Business E

10. Business C, a local parts store in City, bid on the materials portion of the contract only.

11. Business E bid on the installation portion of the project only.

12. Business D maintained a post office box in City but operated its business in another city approximately 70 miles from City.

13. After the City determined not to award a contract for the materials portion of the project because it had purchased the pipe itself, the City's only concern was the installation, construction, and labor.

14. Business D and Business A were the only two bidders on the contract. Business D submitted a bid of \$55,570.00, almost twice the amount proposed by Business A of \$28,398.00.

15. The City Manager and City Clerk presided over the bid opening for the contract which matter was posted as a public meeting.

16. Business A did not take part in developing the contract plans and specifications nor were Business A representatives involved in opening, considering, or accepting offers associated with the bid.

17. The Mayor was not entitled to vote in city council meetings except in case of a tie. NRS 266.200(1)(b). The Mayor could veto any matter passed by the council. NRS 266.200(2).

18. Upon the advice of the City Attorney, the City has postponed the award pending a determination of the legal propriety of awarding the bid to Business A because of the potential conflict of interest that existed between the Mayor's partnership interest in Business A and their public duties as the Mayor.

## OPINION

Based upon the foregoing findings, the Commission concludes that the Mayor is a public officer as defined in NRS 281.4365(1).

The issue presented in this matter is whether a business in which the Mayor is a partner, namely Business A, may contract with the City to install a water line. NRS 281.481 is relevant to this issue and provides in pertinent part as follows:

A code of ethical standards is hereby established to govern the conduct of public officers and employees:

...

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.

...

10. A public officer or employee shall not seek other employment or contracts through the use of his official position.

NRS 268.384(1), which specifically addresses the conduct of city officials, is also of consequence in the Commission's determination and provides:

***Except as otherwise provided in NRS 281.555***, it is unlawful for any city officer to be interested in any contract made by him, or to be a purchaser or interested, directly or indirectly, in any purchase of a sale made by him in the discharge of his official duties. (Emphasis supplied.)

NRS 281.555, to which the above statute refers, provides for a "sole source exception II with regard to the purchase of goods or services by a local government:

The purchase of goods or services by a local government upon a ***two-thirds vote*** of its governing body from a member of the governing body ***who is the sole source of supply within the area served by the governing body*** is not unlawful or ethical if the public notice of the meeting specifically mentioned that such a purchase would be discussed. (Emphasis added.)

Thus, pursuant to NRS 268.384(1), if the Mayor's private business was the "sole source of supply II of the goods or services needed within the area served by the City Council, then their interest in the contract between Business A and the City would be permissible.

"Sole" is defined as being "the only one." WEBSTER'S NEW WORLD DICTIONARY, 3d ed. (1988). "Within the area served by the governing body" is reasonably defined as that area over which the governing body has authority. The corporate powers of an incorporated city are vested in the city council or other governing body of such city pursuant to NRS 268.005. The remainder of NRS ch. 268 enumerates the powers and duties of cities. The II area served by the governing body II is therefore that area over which the city council has power: the incorporated city.

The plain language of "within the area II must mean that the source of supply was already in the area, not that the supply was capable of being shipped into the area. This interpretation protects the local business community and is consistent with legislative intent to avoid requiring small rural communities from having to contract for goods or services outside their communities when those goods or services would otherwise be available locally from civic-minded business people who become city officials. The "sole source" rule allows a person to run for public office

even though he or she is the sole source of a service or commodity within a community. (See Hearings on AB 325 Before the Committee on Government Affairs, 64th Legislative Session (March 17 & 25, 1987); Hearings on Government Affairs, 64th Legislative Session (April 10, 20, & 22, 1987).

NRS 268.384(1) would seem to conflict with NRS 281.230 and NRS 281.505, two general ethical statutes applicable to **all** public officers and employees.<sup>[2]</sup> As has already been discussed, NRS 268.384(1) would allow the Business A contract if Business A was the "sole source of supply" of the contracting services within the city limits. On the other hand, NRS 281.230(4) and NRS 281.505(4) are more liberal because both permit a public officer to bid on or enter into a contract with a governmental agency if the contracting process was controlled by rules of competitive bidding, the sources of supply were **limited** (rather than "sole"), the public officer had not taken part in developing the contract plans or specifications, and the public officer would not be personally involved in opening, considering, or accepting offers.

The rules of statutory construction can be used to resolve the conflict between NRS 268.384 and NRS 281.230 and 281.505. Courts favor utilizing rules of statutory construction to harmonize statutes relating to the same subject and if reasonable, to effectuate the intent of each." [C]onstrue 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). "Where a general and a special statute, each relating to the same subject, are in conflict and they cannot be read together, the special statute controls." *Laird v. Nevada Pub. Employees Retirement Ed.*, 98 Nev. 42,45, 639 P.2d 1171 (1982).

NRS 268.384 is a specific statute dealing with conduct of city officers and allows a city officer to have an interest in a contract made in the discharge of the officer's official duties if the public officer is the **sole source of supply within the area served by the governing body**. This specific exception must supersede the general prohibitions in NRS 281.230(1) and NRS 281.505(4) in any case involving a contract with a city officer. Consequently, notwithstanding the general applicability of NRS 281.230 and NRS 281.505, the determinative statutes to apply in the instant case are NRS 268.384 and NRS 281.555, which provide for the "sole source" exception to a city officer's prohibited interest in a city contract.

Based upon the findings of fact, the Commission concludes that because Business A is the only company in the City that possessed the A-19 Nevada contractor's license which was necessary to accomplish the job specifications contained in the City's April 1995 Advertisement for Bid, Business A is the "sole source" of such services within the meaning of NRS .281.555. The only other contractor within the area served by the City's City Council was Business B, which did not submit a bid for the contract. Therefore, as long as the purchase of Business A 's service by the City was approved by two-thirds vote of the City's City Council following a duly noticed public meeting, the Mayor was not prohibited by NRS 281.555 from having a private interest in that contract.

The Commission notes that the factual findings in this case would likewise support the same result were the prohibitions in NRS 281.230 and 281.505 applied. Since Business A was the "sole source" of the services desired by the City, it would, by definition, constitute the source of a limited supply of such services within the meaning of both NRS 281.230(4) and NRS 281.505(4). Further, because the contracting process was controlled by the rules of open, competitive bidding, because the Mayor did not participate in developing the contract plans or specifications, and because the Mayor did not personally open, consider, or accept any of the offers, the requirements necessary to establish an exception to the general rule barring contracts in which a public officer has an interest are met.

The Commission issued a similar, but not factually identical opinion in the *Opinion Request of Ron Cook* (Opinion Request [91-09](#)). In that case, the Commission applied the "limited source of supply" rule under NRS 281.481 and the legislature-specific statute, NRS 218.605, to determine whether Mr. Cook, a state legislator, could contract with the state. In this case, however, the narrower and specific provisions of NRS 268.384, with respect to the sole source of supply, specifically apply to the Mayor.

## CONCLUSION

Based upon its finding that Business A is the "sole" source of a service desired by the City, the Commission concludes that as long as the purchase of Business A's service is approved by a two-thirds vote of the City's City Council following a duly-noticed public meeting, the Mayor, as general partner of Business A, is not prohibited from contracting with the City nor is the City prohibited from accepting Business A's bid for and granting it the contract that is the subject of this opinion request. As a consequence of the foregoing, determination, the Commission concludes that the relationship between the Mayor's public office and their private, pecuniary interest in Business A's award of the City contract are not in violation of either NRS 281.481(3) or 281.481(10).

## COMMENT

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

DATED: December 5, 1995.

NEVADA COMMISSION ON ETHICS

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

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[1] The Nevada State Contractors Board issues contractors' licenses in various classifications based on specific qualifications demonstrated by applicants. NRS 624.214- 624.220; NAC 624.140-624.150. The Board may limit the field and scope of the operations of a licensed contractor to those areas in which it is classified and qualified to engage. NRS 624.220.

General engineering contractor licenses are granted to contractors whose principal contracting business is in connection with fixed works, including irrigation, drainage, water supply, water power, flood control, harbors, railroads, highways, tunnels, airports and airways, sewers and sewage disposal systems, bridges, inland waterways, pipelines for transmission of petroleum and other liquid or gaseous substances, refineries, chemical plants and industrial plants requiring a specialized engineering knowledge and skill, power plants, piers and foundations and structures or work incidental thereto. NRS 624.215(2).

Under Nevada law and regulation, a class "A" license entitles a licensee to engage in general engineering contracting work. NRS 624.215; NAC 624.140. A class "A" licensed general engineering contractor who holds a subclassification "A-19" license is authorized to perform work related to **pipeline and conduits**. NAC 624.150. Such work is defined as follows:

PIPELINE AND CONDUITS (subclassification A-19): The fabrication and installation of electrical conduits only, and pipelines including the trenching, boring, shoring, backfilling, compacting, paving, surfacing and application of protective coatings necessary to complete only the installation of the pipes and conduits. A person who holds a subclassification A-19 may perform any of the work authorized for the following subclassifications:

- (a) Water (subclassification A-19a)
- (b) Gas (subclassification A-19b)

[2] NRS 281.230(1) provides in pertinent part as follows:

Except as provided in this section and NRS 218.605, the following persons shall not, in any

manner, directly or indirectly, receive any commission, personal profit or compensation of any kind resulting from any contract or other transaction in which the employing state, county, municipality, township, district or quasi-municipal corporation is in any way interested or affected:

(a) State, county, municipal, district and township officers of the State of Nevada....

Similarly, but specifically with regard to a public officer or 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." Even if a public officer has a "significant pecuniary interest" under NRS 281.505(1) or an otherwise prohibited interest under NRS 281.230(1), NRS 281.505(4) allows an "escape valve" where the following conditions are satisfied:

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