

Abstract Of Advisory Opinion No. 99-27

BEFORE THE NEVADA COMMISSION ON ETHICS In the Matter of the Request for Advisory Opinion of PUBLIC OFFICER

This Opinion is in response to a first-party request for opinion filed with the Nevada Commission on Ethics ("NCOE") by a rural county ("R County") Commissioner ("Mr. A") regarding propriety of Mr. A's widget company ("W Company") bidding on certain government contracts preferred by the R County Commission. A closed hearing was held by the NCOE on June 10, 1999, in Reno, Nevada. Mr. A did not waive statutory confidentiality, so the proceeding was not open to the public. After receiving testimony and evidence, the NCOE issued the Findings of Fact and Opinion which follow.

FINDINGS OF FACT

1. The NCOE has jurisdiction over this matter pursuant to NRS 281.511(2) because Mr. A is a public officer as defined by NRS 281.4365.
2. Mr. A is President of W Company. A trust owns 100% of the stock and he is the surviving trustee. He receives approximately \$36,000 a year in salary from the corporation. As President, he oversees the day-to-day operations, accounting and administrative functions.
3. The contract for bids in question are controlled by the rules of open competitive bidding. The contracts require supplying R County with different kinds of widgets. The contracts are for the duration of one year and are awarded per area within the county. Typically, the R County Commission chooses the lowest bid from each one of the areas within the county. In the particular area of the county in which Mr. A lives, his bid is usually the lowest for that area due to the lower transportation costs, etc.
4. W Company owns the only type C widget manufacturing in the area of the valley that encompasses the southern portion of R County. Other nearby widget manufacturers are located approximately 25 to 30 miles away. Furthermore, not all of W Company's competitors outside the area manufacture the type C widgets that the county might require for a specific project. Thus, companies other than W Company need to import the widgets from other sources.
5. W Company does not manufacture the only type B widgets for its area.
6. W Company has historically bid on R County projects and has been awarded contracts with R County in the past. Presently, R County has a contract with W Company that was awarded prior to Mr. A becoming a county commissioner.
7. At the time of the hearing in this matter, Mr. A prepared a bid for an R County type C widget contract on behalf of W Company. No decision had been made with regard to awarding that contract.

ANALYSIS AND OPINION

Mr. A specifically asked the NCOE to advise whether W Company is forbidden by the provisions of the Ethics in Government law from bidding on projects with R County, the R County Regional Transportation Commission and other political subdivisions.

The NCOE is guided by NRS §§ 281.230 and 281.505 for their determination in this matter.

Regarding a public officer'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 a pecuniary interest, NRS § 281.505(4) provides an exception that allows a public officer to bid on or enter into a contract with a governmental agency 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 officer and his governmental agency. In pertinent part, it states:

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 or 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 NCOE determined that Mr. A was not barred from bidding on contracts offered outside R County or on projects offered by the state as long as R County would not be in any way interested or affected, directly or indirectly, by those contracts. See NRS 281.230(1).

The remainder of this opinion pertains to bids for future projects by and for R County, including its political subdivisions.

The testimony elicited at the hearing revealed that three of the four exceptions enumerated in NRS 281.230(4) and 281.505(4) were satisfied: the bidding process was open and competitive; Mr. A would not be involved in opening, considering or accepting of offers and he would not be involved in developing contract plans and specifications. Thus, the issue ultimately turned on whether the sources of supply were limited.

Two types of contracts between R County and W Company were reviewed: contracts for manufacturing type B widgets and contracts for manufacturing type C widgets. Each contract type was analyzed for limitations on the sources of supply as follows.

W Company operates the only type C widget manufacturing plant in a 30-mile radius. Therefore, the NCOE concluded that sources of supply for type C widget manufacturing companies are limited and W Company should be allowed to bid on contracts for supplying type C widgets within R County.

On the other hand, local competition for type B widget manufacturing exists and therefore the sources of supply are **not** limited. Thus, W Company may not bid for contracts with R County for supplying type B widgets unless W Company is supplying a particular grade of widgets that is limited in availability. However, the NCOE wishes to make it clear that design specifications in the Request for Proposal cannot be tailored to fit W Company's needs.

In order to avoid the prohibitions provided by NRS 281.230 and NRS 281.505 and allow W Company to bid on R County contracts for type B widget supply and other contracts where the source of supply is not limited, Mr. A must both remove himself completely from the operations of the company and not receive any type of compensation, direct or indirect, from W Company while he is an R County Commissioner. This must be done in order to avoid the

appearance of impropriety and avoid compensation, which would be created by a contract between Mr. A's company and the county in which he sits as a commissioner.

The NCOE advises Mr. A that he must, in instances where W Company bids on type C widget contracts, remove himself from the contracting process, disclose his business interest in W Company when the matter comes before the R County Commission and abstain from voting and from all discussion regarding the contract process. See NRS 281.501(3) for abstention and disclosure requirements.

We commend Mr. A for acting with forethought and professionalism by seeking the advice of his counsel, acknowledging the potential for conflict and taking the appropriate steps to alleviate any such potential conflict by seeking this advisory opinion. With regard to the pending contract bid submitted to the R County Commission prior to this hearing, we advise that Mr. A must disclose that he prepared the bid and abstain from any involvement with regard to the remainder of the contract process in accordance with NRS 281.501 (3).

CONCLUSION

Based upon the record, the NCOE concludes that Mr. A must comply with the above directives outlined in the above opinion and in accordance with NRS 281.230 and 281.505 when W Company is interested in bidding on R County's or its political subdivision's contracts. Further, he must comply with the disclosure and abstention requirements of NRS 281.501 (3).

COMMENT

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

DATED: May 8, 2000.

NEVADA COMMISSION ON ETHICS

By: /s/ MARIO RECANZONE, Vice Chairman