

## **Abstract of Advisory Opinions No. 99-34 & 99-35**

### **BEFORE THE NEVADA COMMISSION ON ETHICS**

#### **IN THE MATTER OF THE REQUEST FOR AN ADVISORY OPINION OF PUBLIC OFFICERS**

This Opinion is in response to first-party requests for opinion filed with the Nevada Commission on Ethics ("Commission") by Mr. A, City Q's District ("District") Trustee and chief of investment firm Z's branch office in City Q (Opinion Request No. 99-34) and by Mr. E, Director of the District, and Ms. F, Chairman of the Board of Trustees ("Board") for the District, on behalf of the Board (Opinion Request No. 99-35). At the parties' request, the two matters were combined for purposes of hearing and adjudication. A closed hearing was held by the Commission on August 12, 1999, in Reno, Nevada.

At the hearing, two issues were raised. One concerned whether a conflict of interest would prevent Mr. A or his employer from bidding on a bond offering proposal submitted by the District that Mr. A oversees as a Trustee (Opinion Request No. 99-34). The second issue concerned whether a conflict of interest would prevent the Trustees from considering a proposal from an investment firm run by one of the District's Trustees (Opinion Request No. 99-35). The Commission received testimony from Mr. A and Mr. E.

Mr. A and Mr. E did not waive statutory confidentiality, so the proceeding was not open to the public. The Commission now issues the Findings of Fact and Opinion which follow.

#### **FINDINGS OF FACT**

1. The Commission has jurisdiction over this matter pursuant to NRS 281.511(2) because Mr. A and the Board members are public officers as defined by NRS 281.4365.
2. Mr. A is the sole representative for the local branch office of investment firm Z. Mr. A is also serving his second 4-year term as a Trustee for the District.
3. In 1998, the Board decided to fund the construction of a new public facility by issuing bonds. Bond counsel and a financial consulting firm were subsequently hired.
4. Mr. A did not have any involvement in the selection of the financial consulting firm nor has he had any business dealings with that firm on behalf of investment firm Z. The consulting firm came highly recommended by the District's financial director. Furthermore, the chosen firm was experienced and knowledgeable regarding local government finance and bond issues.
5. Upon learning of the Board's decision to go forward on a bond sale proposal, Mr. A spoke with the Board's counsel as to whether he should participate as a Trustee knowing that his firm would be interested in underwriting the bond issue. The attorney advised him to recuse himself from any discussions and voting relating to the bond issue. The remaining Trustees allowed Mr. A to remain on the Board with the understanding that he would refrain from all involvement regarding the bond issue.
6. In June 1999, the voters of City Q authorized the issuance of \$4,405,000 in general obligation bonds for the construction of a new public facility.
7. The financial consultant and bond counsel recommended limiting the bonds to a "negotiated offering" rather than a "competitive offering" in order to ensure participation from the local community. Mr. A was not involved in the discussions that led to the development of the District's philosophy to encourage local purchasing.
8. The Trustees, with the assistance of the bond counsel and the financial advisor, adopted a bond sale resolution and sent out RFP's for underwriting the bonds. Mr. A did not participate in the discussions or decisions regarding the content of the bond sale resolution or RFP.

9. The Trustees received proposals from only two of the thirty to forty investment firms solicited. Investment firm Z submitted one of the two proposals. It was the lowest bid.

10. Between the two proposals, Investment firm Z's quoted costs of issuance for AAA-rated insured bonds was \$3,000 lower than the other bid submitted. Additionally, Investment firm Z's proposal is favorable to the Board because the investment firm has a local sales force whereas the second bidder does not. The availability of a local sales force is important to the Board, in view of its strong desire for local participation.

11. Mr. A is compensated by investment firm Z on a commission basis. Mr. A did not have any input on the preparation of the bid. The bid was prepared by investment firm Z's Midwest office who, in turn, faxed a copy to the District and to Mr. A who in turn forwarded his copy to the District for their review. Mr. A anticipated that any future involvement he may have with the bond sale would be limited to selling them to the investors in the local area. Thus, he would receive an economic benefit if the Board were to choose his investment firm's proposal. Should that happen, Mr. A estimated that he would be compensated by the investment firm in an amount of around two or three thousand dollars.

12. As of the date of the hearing, the Board had not yet selected the underwriter nor had they begun the process of negotiations. They decided to await a decision from this Commission before making their choice.

### **ANALYSIS AND OPINION**

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.

Thus, the questions raised by the two requests for opinion are whether NRS 281.481(l), (2), (3) and (5) prohibit Mr. A or his employer from bidding on a bond issuance contract offered by the Board of which Mr. A is a member as a Trustee and whether NRS §§ 281.505 and 281.230 prohibit the Board from considering a proposal from the local investment firm run by Mr. A.

The Commission determined that Mr. A did not violate any provision of the Ethics in Government law and the District was not prohibited by NRS §§ 281.230 and 281.505 from selecting Mr. A's employer's bid for underwriting the bond offering for the reasons stated below.

The testimony provided at the hearing confirmed that Mr. A had taken the appropriate steps to segregate himself from all bond issuance deliberations, thereby preventing any undue influence he might have made on the Board's decisions regarding the wording of the RFP and the choice of the bond counsel, financial consultants and investment firm. Thus, this Commission found Mr. A did not violate NRS §§ 281.481(1), (2), (3) and (5), because he did not (a) engage in any activity which would tend to cause him to depart from the "faithful and impartial discharge of his public duties" (NRS § 281.481(1)); (b) "use his position in government to secure or grant" an "unwarranted" privilege, preference, exemption or advantage for himself or his employer (NRS § 281.481(2)); (c) "participate as an agent" of the citizens of City Q and the District in the negotiation of the potential contract between the Board and investment firm Z (NRS § 281.481(3)); or (d) use "any information which by law or practice is not at the time available to people generally" in order to further his or his employer's pecuniary interests (NRS § 281.481(5)).

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 such 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.

From the beginning, the District took great pains to avoid soliciting Mr. A's help with the bond issuance process. With the exception of Mr. A providing definitions for investment-related terminology, Mr. A refrained from any involvement in the process. Mr. E testified that at each step of the process he sought advice from the bond counsel to make sure there was no conflict of interest or appearance of impropriety.

Furthermore, the Board and Mr. A managed to meet all the requirements of NRS 281.230(4) and 281.505(4), thereby allowing the Board to consider and accept investment firm's bid. The contracting process was controlled by the rules of open competitive bidding, the sources of supply were limited, Mr. A refrained from participation in contract plans or specifications and he abstained from opening, considering or accepting offers.

The issue ultimately turned on whether Mr. A was directly or indirectly involved in the discussions that led to the development of the District's philosophy to encourage local purchasing and require a negotiated offering which ultimately limited the number of investment firms interested in bidding on this project. The Commission was satisfied that neither Mr. A nor anyone else on the Board attempted to tailor the requirements of the proposal in order to benefit Mr. A or his firm. The specifications of the RFP were made with the advice of the bond counsel and the financial consultant. Neither Mr. A nor his firm had any previous dealings with the bond counsel or financial consultant. Thus, there was no evidence of a *quid pro quo*.

We appreciate and acknowledge the Board's conscientiousness as evidenced by their willingness to seek our advice before making their final selection regarding the investment firm best suited to underwrite their bond project. Similarly, 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 scrupulously avoiding any involvement on the bond project.

### **CONCLUSION**

Based upon the record, the Commission concludes that neither Mr. A nor the Board violated the contract bid prohibitions set forth in NRS §§ 281.230 and 281.505. Furthermore, Mr. A did not violate the more general provisions of the Code of Ethical Standards at NRS § 281.481 subsections (1), (2), (3) and (5).

### **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: February 24, 2000.

NEVADA COMMISSION ON ETHICS

By: /s/ PETER BERNHARD, Chairman