



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request for
Advisory Opinion Concerning the Conduct
of **PUBLIC OFFICER**, Member, Governing
Body, Political Subdivision, State of Nevada,

Request for Opinion No. 10-68A

Public Officer. /

ABSTRACT OF OPINION

A public officer ("PUBLIC OFFICER") requested a confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1) regarding the propriety of his anticipated future conduct as it relates to the Ethics in Government Law ("Ethics Law") set forth in NRS Chapter 281A. PUBLIC OFFICER appeared before a quorum¹ of the Commission on October 4, 2010, and provided sworn testimony.

At the conclusion of the hearing, and after full consideration of the facts, circumstances and testimony presented, the Commission orally advised PUBLIC OFFICER of its

decision that the Ethics Law does not prohibit him from serving as a subcontractor on a public works project, but advised him to seek private legal counsel regarding whether other provisions of Nevada Law may otherwise prohibit such a subcontract. Should he choose to resign from public office to pursue the subcontract, the one-year cooling off period would not apply to his circumstances as presented.

The Commission subsequently issued a letter to PUBLIC OFFICER setting forth its decision. PUBLIC OFFICER elected to retain confidentiality with respect to this proceeding pursuant to NRS 281A.440(1). Therefore, the Commission now publishes this abstract of the letter as its written Opinion.²

¹ The following Commissioners participated in this opinion: Chairman John T. Moran, III, Esq., and Commissioners Erik Beyer, Gregory J. Gale, CPA, Magdalena M. Groover, George M. Keele, Esq., Paul H. Lamboley, Esq., John W. Marvel, and James M. Shaw.

² Section II. Discussion, in relevant form and substance, reproduces the Commission's letter to the requester.

I. QUESTION PRESENTED

Whether the Ethics Law prohibits you from serving as a subcontractor on a public works project for your political subdivision.

II. DISCUSSION

You asked the Commission to determine whether the Ethics Law prohibits you, a member of the governing body of a political subdivision of the State, from serving as a subcontractor on a public works project ("Project") for the political subdivision. The Project involves remodeling and expanding a local public building and property, which includes significant work for which your construction company would like to bid as a subcontractor.

According to the information provided to and relied upon by the Commission, the governing body of the political subdivision planned to open bids for the Project. The general contractor with the lowest bid and meeting certain other criteria to be a qualified contractor will ultimately enter into a contract with the governing body. As a public works project, the provisions of NRS 338 specify that the subcontractor will enter into a separate contract with the general contractor and all rights and responsibilities of the subcontractor will be through the general contractor.

The Commission determined that you may pursue any and all efforts, without limitation, to serve as a subcontractor on the Project, or any other public works or governmental

project, without violating the Ethics Law. Specifically, the Commission found that you would not violate NRS 281A.430 because a subcontractor does not enter into a contract with a governmental entity.

The Commission further determined that bidding on the project or ultimately serving as a subcontractor would not violate the provisions of NRS 281A.020 or subsections 1, 2, 3, 5, 7 or 10 of NRS 281A.400 because you would not in any way be using your position as a member of the governing body to benefit your private interests or influence the bidding process or awarding of the contract. However, the Commission also advised you that any matter that comes before the governing body regarding this Project will require you both to disclose your pecuniary interest in the bid or contract and abstain from participating or voting on the matter pursuant to NRS 281A.420.

While the Commission specifically found that serving as a subcontractor on the Project would not violate the Ethics Law, the Commission refused to interpret or offer advice respecting other provisions of Nevada Law set forth in NRS 281 and 386 which may otherwise regulate such a subcontract. Therefore, the Commission advised you to seek an appropriate legal opinion regarding these provisions.

In the event you are advised to resign your position on the governing body to pursue the subcontract, the Commission determined that the "cooling-off"

provisions of the Ethics Law applicable to former public officers would not apply to your specific circumstances. Specifically, NRS 281A.550(5) prohibits former public officers, for a period of one year, from becoming employed by a person who is awarded a contract from the public entity which the public officer formerly served if the contract was awarded within the 12-month period immediately preceding the public officer's termination and the public officer was in a position to influence the awarding of the contract. The Commission determined that serving as a subcontractor would not constitute employment with the general contractor awarded the contract for the Project. Further, depending on the timing of the public officer's resignation, the contract may not actually be awarded before termination from service.

Notwithstanding this analysis, the Commission noted that the exception set forth in NRS 281A.550(6) would apply to your circumstances and it would not be contrary to best interests of the public, the ethical integrity of the political subdivision and its governing body or the provisions of the Ethics Law for you to pursue a subcontract for the Project.

The Commission's decision became effective on October 4, 2010.

Dated this 4th day of April, 2012.

NEVADA COMMISSION ON ETHICS

By: Erik Beyer
Erik Beyer
Chairman³

³ At the time this written opinion was issued, the presiding officer in this matter, then-Chair Moran, no longer served on the Commission. Therefore, current Chair Beyer signed this opinion on behalf of the participating Commissioners.

NRS 281A.020 Legislative findings and declarations.

1. It is hereby declared to be the public policy of this State that:

(a) A public office is a public trust and shall be held for the sole benefit of the people.

(b) A public officer or employee must commit himself or herself to avoid conflicts between the private interests of the public officer or employee and those of the general public whom the public officer or employee serves.

* * *

NRS 281A.400 General requirements; exceptions.

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

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 the public officer's or employee's position to depart from the faithful and impartial discharge of the public officer's or employee's public duties.

2. A public officer or employee shall not use the public officer's or employee's position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for the public officer or employee, any business entity in which the public officer or employee has a significant pecuniary interest, or any person to whom the public officer or employee has a commitment in a private capacity to the interests of that person. As used in this subsection:

(a) "Commitment in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281A.420.

(b) "Unwarranted" means without justification or adequate reason.

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 business entity in which the public officer or employee has a significant pecuniary interest.

* * *

5. If a public officer or employee acquires, through the public officer's or employee's public duties or relationships, any

information which by law or practice is not at the time available to people generally, the public officer or employee shall not use the information to further the pecuniary interests of the public officer or employee or any other person or business entity.

* * *

7. Except for State Legislators who are subject to the restrictions set forth in subsection 8, a public officer or employee shall not use governmental time, property, equipment or other facility to benefit the public officer's or employee's personal or financial interest. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of the public officer's or employee's public duties;

(3) The cost or value related to the use is nominal; and

(4) The use does not create the appearance of impropriety;

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

- If a governmental agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.

* * *

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

NRS 281A.430 Contracts in which public officer or employee has interest prohibited; exceptions.

1. Except as otherwise provided in this section and NRS 281A.530 and 332.800, a public officer or employee shall not bid on or enter into a contract between a governmental agency and any business entity in which the public officer or employee has a significant pecuniary interest.

* * *

4. A public officer or employee, other than a public officer or employee described in subsection 2 or 3, may bid on or enter into a contract with a governmental agency if:

(a) The contracting process is controlled by the rules of open competitive bidding or the rules of open competitive bidding are not employed as a result of the applicability of NRS 332.112 or 332.148;

(b) The sources of supply are limited;

(c) The public officer or employee has not taken part in developing the contract plans or specifications; and

(d) The public officer or employee will not be personally involved in opening, considering or accepting offers.

- If a public officer who is authorized to bid on or enter into a contract with a governmental agency pursuant to this subsection is a member of the governing body of the agency, the public officer, pursuant to the requirements of NRS 281A.420, shall disclose the public officer's interest in the contract and shall not vote on or advocate the approval of the contract.

NRS 281A.550 Employment of certain former public officers and employees by regulated businesses prohibited; certain former public officers and employees prohibited from soliciting or accepting employment from certain persons contracting with State or local government; determination by Commission.

* * *

5. Except as otherwise provided in subsection 6, a former public officer or employee of the State or a political subdivision, except a clerical employee, shall not solicit or accept employment from a person to whom a contract for supplies, materials, equipment or services was awarded by the State or political subdivision, as

applicable, for 1 year after the termination of the officer's or employee's service or period of employment, if:

(a) The amount of the contract exceeded \$25,000;

(b) The contract was awarded within the 12-month period immediately preceding the termination of the officer's or employee's service or period of employment; and

(c) The position held by the former public officer or employee at the time the contract was awarded allowed the former public officer or employee to affect or influence the awarding of the contract.

6. A current or former public officer or employee may request that the Commission apply the relevant facts in that person's case to the provisions of subsection 3 or 5, as applicable, and determine whether relief from the strict application of those provisions is proper. If the Commission determines that relief from the strict application of the provisions of subsection 3 or 5, as applicable, is not contrary to:

(a) The best interests of the public;

(b) The continued ethical integrity of the State Government or political subdivision, as applicable; and

(c) The provisions of this chapter,

- it may issue an opinion to that effect and grant such relief. The opinion of the Commission in such a case is final and subject to judicial review pursuant to NRS 233B.130, except that a proceeding regarding this review must be held in closed court without admittance of persons other than those necessary to the proceeding, unless this right to confidential proceedings is waived by the current or former public officer or employee.

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