



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Requests for
Advisory Opinions Concerning the Conduct
of **Robert Schmidlein**, Member,
City Council, City of Elko, State of Nevada,

Requests for Opinion Nos.: **13-66A**

CONFIDENTIAL

Public Officer. /

CONFIDENTIAL OPINION

I. STATEMENT OF THE CASE

Elko City Councilman, Robert Schmidlein ("Schmidlein"), requested this 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 Chapter 281A of the Nevada Revised Statutes ("NRS"). A quorum¹ of the Commission heard this matter on August 21, 2013. Schmidlein appeared via telephone and provided sworn testimony. Schmidlein was represented during the Commission proceedings by legal counsel, Robert J. Wines, Esq.

Schmidlein sought an opinion from the Commission regarding the applicability of the government contracting prohibitions to his company serving as a subcontractor on public works projects.

After fully considering Schmidlein's requests and analyzing the facts, circumstances and testimony presented by Schmidlein, the Commission deliberated and orally advised Schmidlein of its decision that the Ethics Law does not prohibit him (or a company in which he has a significant pecuniary interest) from serving as a subcontractor on a public works project, but advised him to consider the applicability of other provisions of Nevada Law outside of the Commission's jurisdiction which may otherwise prohibit such a subcontract. The Commission now renders this final written Opinion stating its findings of fact and conclusions of law.

Schmidlein elected to retain confidentiality with respect to the Commission's proceedings. Therefore, the Commission will publish an abstract of this Opinion.

¹ The following Commissioners participated in this opinion: Chairman Lamboley, Vice Chairman Gale and Commissioners Carpenter, Cory, Groover, Lau, Shaw, and Weaver.

The facts in this matter were obtained from documentary and testimonial evidence provided by Schmidlein. For the purposes of the conclusions offered in this Opinion, the Commission's findings of fact set forth below accept as true those facts Schmidlein presented. Facts and circumstances that differ from those presented to and relied upon by the Commission may result in different findings and conclusions than those expressed in this Opinion.

II. QUESTIONS PRESENTED

1. Schmidlein questions whether a construction company in which he has an ownership interest and that employs him as the Qualified Individual/Party may serve as a subcontractor on a bid or contract for a public works project for a State or local agency, including the City of Elko.
2. In particular, Schmidlein questions whether the construction company may serve as the subcontractor for another company from which he recently sold his minority ownership interests and resigned as an officer and employee.

III. FINDINGS OF FACT

1. Schmidlein serves as a member of the City Council ("Councilman") for the City of Elko ("City"). The City Council establishes, controls and supervises City departments; creates and enforces City ordinances; and constructs, maintains, controls, holds, leases, and disposes of all City property. The City Council also considers and approves all public works projects for the City of Elko.
2. Schmidlein recently served as a minority owner, managing member/officer, employee and Qualified Individual/Party for Great Basin Engineering Contractors, LLC, ("Great Basin"), General Engineering A License No. 76063 and General Building B License No. 73606. Great Basin is an engineering/construction company located in Elko and holds a monetary limit on its licenses of \$4.6 million. Great Basin's other managing members include Scott Michael Lattin and Michael Lattin. On August 3, 2013, after he filed this RFO, Schmidlein sold his 12.5 percent ownership interest in Great Basin to the other owners of Great Basin for \$85,000, and resigned as a managing member/officer. Schmidlein also recently resigned his status as the Qualified Individual/Party for Great Basin. According to the Purchase Agreement, the remaining owners of Great Basin include Scott Michael Lattin, a single man, and Michael Lattin and Pamela Lattin as Trustees of the Lattin Family Trust.
3. Schmidlein also serves as a minority owner, officer and employee (manager) of Canyon Construction Company, Inc. ("Canyon"), General Engineering & General Building AB License No. 20539. Canyon is a construction company located in Elko and holds an unlimited monetary limit on its license. Canyon's other officers include Michael Lattin and Pamela Lattin.

4. Schmidlein is not currently the Qualified Individual/Party for Canyon, but he anticipates becoming the Qualified Individual/Party for Canyon as soon as his status as the Qualified Individual/Party for Great Basin is formally dissolved with the State Contractors Board.
5. With the same or similar ownership interests, Great Basin and Canyon regularly share equipment and employees for construction projects. The company in need of the equipment or employee pays fair market rental rates and compensation to the other company.
6. A licensed contractor in Nevada must have the experience and skills necessary to manage the daily activities of a construction business, including field supervision, or be represented by another person with the necessary experience and skills, who serves as the Qualifying Individual/Party. The Qualifying Individual/Party must satisfy the experience and examination requirements for the contractor's license and be listed on the Nevada State Contractors Board records. A Qualifying Individual/Party is required for every classification on each license issued by the Nevada State Contractors Board. The contractor or Qualifying Individual/Party must have had, within the ten years immediately before the filing of the application for the license, at least four full years of experience at a journeyman level, or as a foreman, supervisor, or contractor in the license classification. The Qualifying Individual/Party for a contractor's license must pass the written Business and Law (Construction Management Survey) exam and, depending on the license classification, the trade examinations covering the specific trade, unless he or she meets the requirements for a waiver from the Board.
See <http://www.nvcontractorsboard.com/pdfs/Licensing%20Overview.pdf>
7. Schmidlein understood that his election to the City Council would not affect the ability of Great Basin or Canyon to bid on or enter into public works contracts for State and local agencies, including the City of Elko. He has recently been informed that both entities are prohibited from bidding on or entering into the contract based on his affiliation with these entities and his role as a public officer.
8. The Elko Regional Airport is owned and operated by the City of Elko ("City").
9. The City has published an open and competitive Notice Inviting Sealed Proposals for Elko Regional Airport Reconstruct Terminal Ramp Phase 3 ("Proposed Airport Contract"). The contract will be funded in part by a grant from the Federal Aviation Administration. Bids must be received by the City Clerk, City of Elko before 3:00 p.m. on August 26, 2013, at which time they will be publicly opened and read. Private engineering firm, Kimley-Horn and Associates, Inc., of Reno, Nevada, drafted the Proposed Airport Contract plans and specifications. All bid proposals require a ten percent (10%) bond payable to the City. If the bidder is awarded the contract and does not enter into the contract with the City within ten (10) days, the bidder forfeits the bond to the City. The City will award the contract to the lowest responsive and responsible bidder.

10. Schmidlein understands that Great Basin seeks to bid on the Proposed Airport Contract as the general contractor, and Canyon would like to serve as a subcontractor on the project. Great Basin's interest in pursuing the contract (and other government contracts) was the basis of Schmidlein's decision to sell his interests and divest himself of all ownership and employment relations with Great Basin so that Great Basin would not be prohibited from entering into such government contracts as a result of its affiliation with Schmidlein as a public officer.
11. Schmidlein claims he will not be personally involved in opening, considering or accepting offers related to the Proposed Airport Contract.
12. In addition to the Proposed Airport Contract, Schmidlein anticipates that Great Basin and/or Canyon would like to bid on and enter into other public works contracts for the City of Elko and other State and local agencies as a general contractor and/or subcontractor. In his capacity as a City Councilman, Schmidlein will not participate in any such contract plans or specifications or otherwise participate in the opening, considering or awarding of any contract offers.

IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES; COMMISSION DECISION

A. ISSUES

The Ethics Law prohibits public officers from bidding on or entering into contracts between governmental agencies² and any business entities in which they have significant pecuniary interests unless the contract is subject to open, competitive bidding requirements, the sources of supply are limited and the public officer does not participate in developing the contract plans or specifications or in opening, considering or accepting offers. See NRS 281A.430. Otherwise, effective January 1, 2014, after the date of this RFO, the Nevada Legislature has provided the Commission with discretion to relieve a public officer from the prohibition where such a contract would not be contrary to the best interest of the public, the ethical integrity of the agency affected by the contract, or the provisions of the Ethics Law. See Senate Bill 228, 2013 Nevada Legislative Session, Chapter 551, 2013 Statutes of Nevada.

Schmidlein recently resigned as a minority owner, officer, and employee (Qualifying Individual/Party) of Great Basin, receiving approximately \$85,000 in the sale. However, he still holds a minority ownership interest in Canyon and serves as an officer and employee for Canyon. He also expects to serve as the Qualifying Individual/Party for Canyon. Great Basin and Canyon are both owned and/or operated by the same parties in common, Scott Lattin, Michael Lattin and Pamela Lattin and regularly share equipment and employees on various construction projects.

² Effective January 1, 2014, the Nevada Legislature has limited the applicable governmental entities to State and local governmental agencies. For the purposes of this RFO, the applicable contracts at issue are for State or local agencies.

Both companies compete for various construction projects in and around Elko, including public works projects offered by the City. Given his public position as a City Councilman, Schmidlein questions whether Canyon would be prohibited from serving as a subcontractor for Great Basin on public works contracts, particularly those in Elko, based on the nature of his current and former ownership and employment affiliations with both entities. The Commission concludes that Canyon may serve as a subcontractor on government projects, but Schmidlein must disclose his interests and abstain from voting on all matters related to such projects before the City Council.

B. RELEVANT STATUTES

1) Public Policy

NRS 281A.020(1) provides:

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.

2) Prohibited Contracts with Governmental Agencies; Exceptions³

NRS 281A.430(1) and (4) provide:

1. Except as otherwise provided in this section and NRS 281A.970 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.

³ Effective January 1, 2014, after the date of the hearing in this matter, the provisions of NRS 281A.430 became applicable only to contracts with state and local governmental agencies, and the Commission may grant relief from the strict application of the provisions where not contrary to the best interests of the public, ethical integrity of the agency or provisions of NRS 281A. See Senate Bill 228 of the 2013 Nevada Legislative Session, Chapter 551, 2013 Statutes of Nevada.

→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.

3) Disclosure

NRS 281A.420(1) provides:

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:

(a) Regarding which the public officer or employee has accepted a gift or loan;

(b) In which the public officer or employee has a pecuniary interest; or

(c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity with respect to the interests of another person,

→ without disclosing sufficient information concerning the gift, loan, interest or commitment to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the public officer's or employee's pecuniary interest, or upon the person to whom the public officer or employee has a commitment in a private capacity. Such disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which makes decisions, the public officer or employee shall make the disclosure to the chair and other members of the body. If the public officer or employee is not a member of such a body and holds an appointive office, the public officer or employee shall make the disclosure to the supervisory head of the public officer's or employee's organization or, if the public officer holds an elective office, to the general public in the area from which the public officer is elected.

4) Abstention

NRS 281A.420(3) and (4) provide:

3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:

(a) The public officer's acceptance of a gift or loan:

(b) The public officer's significant pecuniary interest; or

(c) The public officer's commitment in a private capacity to the interests of another person.

4. In interpreting and applying the provisions of subsection 3:

(a) It must be presumed that the independence of judgment of a reasonable person in the public officer's situation would not be materially affected by the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to the public officer, or if the public officer has a commitment in a private capacity to the interests of another person, accruing to the other person, is not greater than that accruing to any other member of any general business, profession, occupation or group that is affected by the matter. The presumption set forth in this paragraph does not affect the applicability of the requirements set forth in subsection 1 relating to the disclosure of the acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person.

(b) The Commission must give appropriate weight and proper deference to the public policy of this State which favors the right of a public officer to perform the duties for which the public officer was elected or appointed and to vote or otherwise act upon a matter, provided the public officer has properly disclosed the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person in the manner required by subsection 1. Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, the provisions of this section are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person.

5) "Commitment in a private capacity" defined.

NRS 281A.065 provides:

"Commitment in a private capacity," with respect to the interests of another person, means a commitment, interest or relationship of a public officer or employee to a person:

1. Who is the spouse or domestic partner of the public officer or employee;
2. Who is a member of the household of the public officer or employee;
3. Who is related to the public officer or employee, or to the spouse or domestic partner of the public officer or employee, by blood, adoption or

marriage or domestic partnership within the third degree of consanguinity or affinity;

4. Who employs the public officer or employee, the spouse or domestic partner of the public officer or employee or a member of the household of the public officer or employee;

5. With whom the public officer or employee has a substantial and continuing business relationship; or

6. With whom the public officer or employee has any other commitment, interest or relationship that is substantially similar to a commitment, interest or relationship described in subparagraphs 1 to 5, inclusive.

C. COMMISSION DECISION

NRS 281A.430 governs the Ethics Law prohibition against public officers and employees bidding on or entering into contracts between governmental agencies and business entities in which a public officer or employee has a significant pecuniary interest. However, the statute provides an exception to the general prohibition where the contract is the subject of an open competitive bidding process, the sources of supply for the contract are limited, and the public officer did not participate in developing the contract plans or specifications and will not participate in the opening, considering or accepting of the offers. Further, the Commission has previously held that a public officer, or a business in which the public officer has a significant pecuniary interest, may serve as a subcontractor on a government contract without violating NRS 281A.430, because the governmental contract is between the general contractor and the governmental entity, and the subcontractor contracts directly with the general contractor. *See In re Public Officer*, Comm'n Opinion No. 10-68A (2012) (Member of local governing body owned construction company seeking to bid on public project offered by local governing body as a subcontractor and Commission determined that a subcontractor has a contractual relationship, rights and responsibilities with the general contractor, not the governmental agency).

In this case, the City of Elko is requesting bids from construction companies for an incredibly lucrative public works contract at the Elko Regional Airport, the Proposed Airport Contract, funded primarily by federal grants. The City Council has authorized the bids through an open, competitive bidding process, and Great Basin is interested in submitting a bid for the project as the general contractor with Canyon serving as one of its subcontractors. Schmidlein questions whether Canyon is prevented from submitting a bid to serve as a subcontractor for Great Basin (as the general) on the project due to his current and former ownership and employment interests in the companies.

Schmidlein testified that he recently sold his ownership interest in Great Basin and resigned from his position as an officer, employee and Qualified Individual/Party to relieve Great Basin of its restriction from serving as a general contractor on Elko contracts because of Schmidlein's role as a member of the City Council. Accordingly, Schmidlein suggests that he no longer has a significant pecuniary interest in Great

Basin such that the provisions of NRS 281A.430 are no longer applicable to him with regard to Great Basin's bidding prospects with governmental entities, including the City of Elko. However, Schmidtlein continues to serve as a minority shareholder, employee and Qualified Individual/Party of Canyon, and he questions whether that status prohibits Canyon from serving as a subcontractor for Great Basin on governmental contracts.

As articulated in its prior decision, the Commission finds that bidding on government contracts as a subcontractor results in a contract with the general contractor and not the governmental entity. *Id.* Accordingly, the prohibitions against government contracting by public officers are not applicable in a subcontracting environment and Canyon may serve as a subcontractor for Great Basin or any other general contractor on a government contract. Schmidtlein must disclose his significant pecuniary interests as a potential or existing subcontractor on any contract under consideration by the City Council and abstain from voting on the matter. Moreover, Schmidtlein's affiliation with Canyon and Great Basin via the substantial and continuing business relationships between the two entities and their owners requires Schmidtlein to also disclose his relationships and abstain from voting or participating on any other matter before the City Council that involves Great Basin or Canyon.

Great Basin is owned and operated by the same individuals who own and operate Canyon - members of the Lattin family. Although Schmidtlein no longer has significant pecuniary interests in Great Basin since divesting his interests, he nevertheless maintains a substantial and continuing business relationship with the Lattin Family, as his business partners in Canyon. The interests of the Lattin family extend to Great Basin. Further, Schmidtlein testified that the two companies regularly share equipment and employees for various projects. Therefore, even if Great Basin is no longer prohibited from bidding on or entering into contracts with governmental entities because Schmidtlein no longer has a significant pecuniary interest in the entity, Schmidtlein has a continuing duty to disclose his commitment in a private capacity to the interests of his business partners, which include the interests of Great Basin, and abstain from voting on matters before the City Council which materially affect those interests. To the extent Great Basin is interested in a contract before the City Council, the interests of his business partners, the Lattin Family, are reasonably and materially affected by the matter before the City Council, even if that contract does not involve Canyon as a subcontractor. Accordingly, he must disclose his relationships and abstain from voting on any matters which involve contracts and other matters of interest to Great Basin.

The Commission will not construe outside statutory prohibitions or limitations on government contracting by public officers provided in NRS Chapters 338 and 245.

V. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Schmidtlein was a public officer as defined by NRS 281A.160.

2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. Schmidtlein would not violate NRS 281A.430 if Canyon serves as a subcontractor on any public works contract, on behalf of Great Basin or any other general contractor, for a governmental entity, including the City of Elko. A subcontractor does not enter into a contract with a governmental entity and instead enters into a separate contract with the general contractor wherein all rights and responsibilities of the subcontractor are recognized through the general contractor.
4. Pursuant to NRS 281A.430, Schmidtlein must disclose his significant pecuniary interests in and abstain from voting on any contract under consideration by the City Council which involves a subcontract in which Canyon has submitted any bids. He must also disclose his commitment in a private capacity to the interests of his business partners, the Lattin Family, and abstain from voting on any matter before the City Council which involves the interests of the Lattin Family, including the interests of Great Basin.

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law hereafter construed to constitute a Finding of Fact, is hereby adopted and incorporated as such to the same extent as if originally so designated.

The Following Commissioners Participated in this Opinion:

Dated this 1st day of July, 2014.

NEVADA COMMISSION ON ETHICS

By: /s/ Paul H. Lamboley
Paul H. Lamboley
Chairman

By: /s/ Gregory J. Gale
Gregory J. Gale
Vice-Chairman

By: /s/ John C. Carpenter
John C. Carpenter
Commissioner

By: /s/ Magdalena Groover
Magdalena Groover
Commissioner

By: /s/ Timothy Cory
Timothy Cory
Commissioner

By: /s/ Cheryl A. Lau
Cheryl A. Lau
Commissioner

By: /s/ James M. Shaw
James M. Shaw
Commissioner

By: /s/ Keith A. Weaver
Keith A. Weaver
Commissioner