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OPINION
OF
HAL STRATTON
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Opinion No. 89-34

BY: Elizabeth A. Glenn
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TO: The Honorable Leonard Lee Rawson
State Representative
1681 Alta Vista Place
Las Cruces, New Mexico 88001

QUESTION:

1. May a company whose sole shareholder is a state legislator bid on state construction projects as the general contractor?

2. May the company bid on state construction projects as a subcontractor to a contractor in which the legislator has no financial interest?

3. May the company bid on material or supplies through the state purchasing sealed bid process?

4. Do the limitations apply only to the New Mexico state government and its agencies, or do they extend to local governments, such as school districts, cities and counties, and government contractors like community action agencies or municipal housing authorities?

5. May the company continue to sell products on an open account status or COD basis to the State of New Mexico, local governments, agencies or other government contractors?

6. Is any potential conflict of interest affected if a contract or project is funded with local bond issues rather than state money?

CONCLUSION

1. Yes, as long as the bids comply with the Conflict of Interest Act and the projects were not authorized by any law enacted during the legislator's term.

2. Yes, but the company may be subject to the same limitations set forth in the answer to question 1.

3. Yes, subject to the same limitations set forth in the answer to question 1.

4. See analysis.

5. Yes, as long as the purchases are $1,000 or less and were not authorized by any law enacted during the legislator's term.

6. No.

ANALYSIS:

1. Contracts between businesses owned by state legislators and the state are subject to limitations imposed under art. IV, §28 of the New Mexico Constitution and the New Mexico Conflict of Interest Act, NMSA 1978, §§10-16-1 to -15 (Repl. Pamp. 1987 and Cum. Supp. 1989). The constitution provides that a member of the legislature shall not "during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law during such term." N.M. Const. art. IV, §28. Section 10-16-9 of the Conflict of Interest Act provides:

> A state agency shall not enter into any procurement contract for services, construction or items of personal property with a legislator or with a business in which the legislator has controlling interest, in excess of one thousand dollars ($1,000), where the legislator has disclosed his controlling interest unless the contract is made after public notice and competitive sealed bidding or competitive sealed proposal in accordance with the provisions of the Procurement Code.

NMSA 1978, §10-16-9 (Cum. Supp. 1989).

N.M. Const. art. IV, §28 applies to contracts authorized by law during a legislator's term in which he or she has a direct

or indirect interest. The New Mexico Supreme Court has held that a general appropriations bill does not authorize a contract for purposes of the constitution, State ex rel. Baca v. Otero, 33 N.M. 310, 267 P.68 (1928), and that amendments to a statute do not authorize a contract if the unamended statute would have permitted it. State ex rel. Maryland Casualty Co. v. State Hwy. Comm'n, 38 N.M. 482, 35 P.2d 308 (1934). According to one student commentator, those cases suggest the following test for determining whether a contract was authorized during a legislator's term:

> The test would be whether the contract could have been entered into by the state if the act in question had not been passed. If the answer is "yes," the act had no bearing on the contract and did not authorize it. If the answer is "no," the act made the formation of the contract possible. It permitted and therefore authorized the contract within the meaning of the provision.

Note, Legislative Bodies - Conflict of Interest - Legislators Prohibited From Contracting With State, 7 Nat. Res. J. 296, 302 (1967) (emphasis in original). See also AG Op. No. 88-20 (1988) (quoting same test for categorizing permissible employment contracts between legislators and school districts for purposes of N.M. Const. art. IV, §28).

A legislator may not contract with the state for work on a construction projects authorized by law during his term if he is directly or indirectly interested in the contract. Courts generally have found that public officials who hold shares of a company contracting with the state or other government unit have the kind of interest prohibited by conflict of interest laws. See, e.g., Parkin Printing & Stationery Co. v. Arkansas Printing & Lithographing Co., 234 Ark. 697, 354 S.W.2d 560 (1962) (corporation whose major stockholder was a member of state highway commission could not enter into government contract); Thomson v. Call, 38 Cal. 3d 633, 645, 214 Cal. Rptr. 139, 146, 699 P.2d 316, 323 (1985) ("where the public officer is a stockholder in a corporation making such a contract, the contract will be adjudged void under the conflict of interest statutes"), cert. denied, 474 U.S. 1057 (1986); People v. Simpkins, 45 Ill. App. 3d 202, 208, 3 Ill. Dec. 969, ___, 359 N.E.2d 828, 832 (1977) ("indirect interest" refers to "the interest of the official, such as ownership of stock"); Wilson v. Iowa City, 165 N.W.2d 813, 824 (Iowa 1969) (members of city council who owned shares of corporations which had an interest in proposed project area had a conflict of interest); Thompson v. District Bd. of School Dist. No. 1, 252 Mich. 629, 632, 233 N.W. 439, 440 (1930) (most common violations of statute prohibiting a school officer from being personally

interested in any school contract include "those incident to contracts with corporations in which the school officer is shareholder"). Accordingly, N.M. Const. art. IV, §28 permits only those construction contracts between the state and a legislator-owned company which are not authorized by law during the legislator's term or within one year of the legislator's departure from state service.

The Conflict of Interest Act applies to all contracts between state agencies and a business in which a legislator has a controlling interest. NMSA 1978, §10-16-9 (Cum. Supp. 1989). As used in the statute, a "controlling interest" is "an interest which is more than twenty percent." NMSA 1978, §10-16-2(C) (Repl. Pamp. 1987). A legislator who owns all of the shares of a company, therefore, has a controlling interest in the company. The Conflict of Interest Act does not prevent a company owned by a legislator from bidding on state construction contracts, provided that for contracts in excess of $1,000, public notice and the requisite bidding procedures precede execution of the contract.

Thus, in answer to the specific question, a legislator's company can bid as general contractor on state construction projects only if the project was not authorized during, or within one year of, his service in the legislature. If the contract the legislator's company bids on is one authorized by statutes enacted more than one year before his service in the legislature and is worth more than $1,000.00, then he must give public notice of his bid and the state agency must comply with the special procedures contained in the Conflict of Interest Act.

2. If a business owned by a legislator bids on a contract with the state as a subcontractor and is a party to the contract, then the business is subject to the same limitations that apply when it acts as general contractor. If, however, the business only contracts with the general contractor and does not enter into any contract with the state, then the restrictions of Section 10-16-9 of the Conflict of Interest Act no longer control. Those restrictions apply only when state agencies "enter into any procurement contract...with a legislator or with a business in which a legislator has a controlling interest."

Even though a subcontractor may not be subject to the Conflict of Interest Act, it still may be indirectly interested in a state contract and subject to N.M. Const. art. IV, §28. The object of conflict of interest provisions like the one contained in the constitution is to ensure that officials carry out their public duties free of any personal influence. See, e.g., Stigall v. City of Taft, 58 Cal. 2d 565, 569, 25 Cal. Rptr. 441, 443, 375 P.2d 289, 291 (1962) (en banc) (conflict of interest statutes applicable to city officials "are concerned with any

interest, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interest of the city"); Norbeck & Nicholson Co. v. State, 32 S.D. 189, 197-98, 142 N.W. 847, 849-50 (1913) (legislator stands in a fiduciary and trust relation towards the state and his private interest should not become antagonistic to his public duty).

Based on those principles, courts generally have concluded that an official who acts as a subcontractor on a public project or supplies materials to the prime contractor has a sufficient interest in the contract to give rise to a conflict of interest when the subcontractor knows a contractor will bid on a project and either knows that the contractor will or likely will use the subcontractor's supplies or services. For example, in United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961), the United States Supreme Court held that a government official had an impermissible indirect interest in a contractor's agreement. The official represented the government during the preliminary contract negotiations, and at that time he was an officer and executive of a company he knew was likely to be hired to secure the financing for the project if the contract was awarded to the group of sponsors ultimately chosen. See also People v. Deysher, 2 Cal.2d 141, 40 P.2d 259 (1934) (county supervisor violated conflict statutes where evidence showed that he, as supervisor, contracted with a corporation for roadwork in his district knowing that the corporation would obtain supplies and equipment for the jobs from a copartnership in which he was an equal partner); State v. Holovachka, 236 Ind. 565, 142 N.E.2d 593 (1957) (city controller and president of city board of public works informed contractors that they should bid on public construction projects and assign the contracts to a company he owned); City of Northport v. Northport Town Site Co., 27 Wash. 543, 68 P. 204 (1902) (mayor of city had understanding with contractor that, should the contractor's bid on city improvements be accepted, company of which mayor was shareholder and manager would provide lumber to the contractor for the project).

The corollary principle is that where no express or implied agreement existed between the entity contracting with a public body and a public official before or at the time the contract was awarded, there is no impermissible conflict if the prime contractor subsequently agrees to purchase materials or services from the public official or a company he owns. Thomson v. Call, 38 Cal. 3d 633, 645, 214 Cal. Rptr. 139, 145, 699 P.2d 316, 322 (1985). See also Kerr v. State ex rel. McDaniel, 65 Ind. App. 102, 116 N.E. 590 (1917) (absent evidence of any interest in contract or agreement with contractor when the contract was made, city councilman could sell building materials to contractor); Commonwealth ex rel. Vincent v. Withers, 266 Ky. 29, 33, 98 S.W.2d

24, 26 (Ct. App. 1936) (mere fact that a person contracting with a municipal board, absent inculpatory circumstances and without previous arrangement or agreement, buys material or supplies from a member of the board does not ordinarily mean the board member has to forfeit his office); Fredericks v. Borough of Wanaque, 95 N.J.L. 165, 112 A. 309 (1920) (contractor permitted to purchase lumber from member of city commission where there was no evidence of a corrupt agreement between the contractor and commission member). Some courts also have focused on whether, under these circumstances, the subcontractor was paid in the ordinary course of business or whether payment to the subcontractor depended on action by the public board of which the subcontractor was a member. Compare James v. City of Hamburg, 174 Iowa 301, 156 N.W. 394 (1916) (conflict arose under agreement by contractor to assign to council member's bank funds it received from city in payment for work because payment to bank depended city's acceptance of the work) with O'Neill v. Town of Auburn, 76 Wash. 207, 135 P. 1000 (1913) (mere fact that contractor purchased cement from corporation in which mayor had an interest, without prior agreement, did not produce conflict where payment was made in the usual course of business and did not depend on payment by the city to the contractor).

As discussed above, N.M. Const. art. IV, §28 prohibits only those contracts in which a legislator is interested and which were authorized by law during the legislator's term. Given that, the case law shows that whether a state legislator's business may bid on state construction projects as a subcontractor depends on the circumstances. If the bid or agreement to provide materials and services to the contractor is entered into before or at the same time the contractor's agreement with the state is executed, there is a conflict of interest. A conflict also arises if payment to the legislator's business is contingent on the state making payment to the contractor in situations where the legislator potentially is in a position to influence decisions about whether to pay the contractor. For example, a conflict would exist if the legislator's company acted as subcontractor on a state project, was paid only if the contractor received payment from the state, and if payment to the contractor depended on acceptance of the work by the legislature. In most instances, the potential conflict will not be obvious and will require the legislator to evaluate carefully the facts and circumstances involved before entering into a subcontract.

If, on the other hand, a legislator's business simply supplies materials or services to the contractor after the prime contract is executed and is paid in the ordinary course of business, there is no conflict under the Constitution. Again, however, the legislator should evaluate each situation to ensure that, because of his relationship with the contractor or otherwise, he

is not vulnerable to charges that he had an express or implied agreement with the contractor at the time the contract with the state was executed.

3. The Conflict of Interest Act allows a state agency to enter a contract for supplies and materials with a business owned by a legislator if "the contract is made after public notice and competitive sealed bidding or competitive sealed proposal in accordance with the provisions of the Procurement Code." NMSA 1978, §10-16-9 (Cum. Supp. 1989). Unless otherwise prohibited by N.M. Const. art. IV, §28, therefore, a company owned by a legislator may bid on contracts to supply state agencies with materials and supplies under the competitive bid process set forth in the Procurement Code, NMSA 1978, §§13-1-28 to -117 and 13-1-118 to 199 (Repl. Pamp. 1988 and Supp. 1989).[1]

4. a. N.M. Const. art. IV, §28.

The limitations of N.M. Const. art. IV, §28 expressly apply to contracts between an interested legislator and the state or any municipality. This office has suggested that counties are not included within the provision, AG Op. No. 6530 (1956) (legislator may be employed as a deputy county assessor), and we continue to agree with that opinion. Cf. Albuquerque Metro. Arroyo Flood Control Auth. v. Swinburne, 74 N.M. 487, 495, 394 P.2d 998, 1003 (1964) (constitutional debt limitations apply only to particular subdivisions named in the respective inhibiting provisions). Our research of similar constitutional provisions in other states reveals that they generally prohibit contracts between state legislators and the state or identified subdivisions. Compare Neb. Const. art. 3, §16 (prohibiting conflict of interest in

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1 Under the Procurement Code, employees of state agencies and local bodies are not allowed "to participate directly or indirectly in a procurement when the employee knows that the employee or any member of the employee's family has a financial interest in the business seeking or obtaining a contract," NMSA 1978, §13-1-190 (Supp. 1989). Employees participating in the procurement process also are prohibited from being employed "by any person or business contracting with the governmental body by whom the employee is employed." Id. §13-1-194 (Repl. Pamp. 1988). These provisions would not affect a legislator's ability to contract with the state unless he attempted to participate in both sides of a procurement transaction. The prohibitions of Section 13-1-190 and Section 13-1-193 can be waived under certain circumstances. NMSA 1978, §13-1-194.

contract with state, county or municipality) with Okla. Const. art. 5, §23 (prohibiting direct or indirect interest in contract with state, county or other subdivision of the state) and with Tex. Const. art. 3, §18 (prohibiting direct or indirect interest in contract with state or county).

Although school districts are defined by statute as political subdivisions, NMSA 1978, §22-1-2(J) (Repl. Pamp. 1989), and are not named in N.M. Const. art. IV, §28, this office recently concluded that a legislator's contract with a school district was a contract with the state for purposes of the constitution. AG Op. No. 88-20 (1988) (legislator may not enter into an employment contract with a school district for one year after his term expires if the contract was authorized by law during his term). The opinion acknowledges the statute's definition, but observes that, because of the extensive state control over the daily business and fiscal operations of school districts, "[t]hey are not separate and distinct political subdivisions as that term is normally used."

We conclude that the limitations on a legislator's contracts imposed under N.M. Const. art. IV, §28 apply to contracts with the state, municipalities and school districts, but do not apply to counties. Whether other entities like community action agencies and municipal housing authorities are covered by the constitutional provision depends on their specific characteristics and their relationship to the governmental bodies subject to the provision. In Harrington v. Atteberry, 21 N.M. 50, 153 P.1041 (1915), the New Mexico Supreme Court discussed what constitutes a public agency. According to that decision, a public agency characteristically is operated and managed by officers appointed by the government and is created by an act of the legislature. 21 N.M. at 61, 72, 153 P. at 1045, 1049. An entity that performs functions beneficial to the public or receives appropriations regulated by the government is not a public agency if it is not otherwise controlled by the government. Id. at 54, 63, 74, 153 P. at 1042, 1045, 1049. See also Raton Pub. Serv. Co. v. Hobbes, 76 N.M. 535, 417 P.2d 32 (1966) (board of corporation operating city's electric utility system was "governmental board" where stock of corporation was held by trustees in the name of the city, board of directors consisted of 3 members elected by trustees, mayor of city and city commissioner elected by city commission); AG Op. No. 87-44 (1987) (Beef Council created by state statute and appointed by the director of the state department of agriculture is a state agency).

Community action agencies are provided for under the Community Action Act. NMSA 1978, §§27-8-1 to -9 (Repl. Pamp. 1989). The purpose of the statute is to "strengthen, supplement and coordinate efforts" to further the policy of eliminating

poverty in the state. Id. §27-8-2. A community action agency is defined as "a political subdivision of the state, a combination of political subdivisions or a public or private nonprofit agency that has a service area at least equivalent to the geographic boundaries of a county." Id. §27-8-5(A). It may receive financial assistance from the Secretary of Human Services and federal funds, provided that plans for use of state funds are approved by the Secretary and the funds distributed are subject to annual audit by the Secretary. Id. §27-8-4. One-third of the board members selected to administer a community action agency are elected officials currently holding office in the geographic area to be served by the agency or their representatives, one-third are chosen democratically as representatives of the poor in the area served, and one-third represent business and other major groups and interests in the community. Id. §27-8-6(A). Programs for which community action agencies may use available funds are specified in the statute. Id. §27-8-7.

Community action agencies are not state agencies. Their governing boards are not appointed by the state, but consist of local officials and citizens of the community. Nothing in the statute suggests that board members or agency employees are state employees. Although state law directs the kind of program for which a community action agency may spend funds made available to it under the statute, the state does not assume control over the way those programs are implemented or the day-to-day operations of the agency's board. See United States v. Orleans, 425 U.S. 807, 816-18 (1976) (employees of community action agency were not federal employees where government extensively regulated use of funds granted to agency but did not control the detailed physical performance of the programs and projects it financed). Cf. AG Op. No. 88-20 (discussing extensive state control over daily operations of school districts and concluding that school personnel are state employees).

Whether a given community action agency constitutes a municipal or county agency depends on how it is organized. According to the definition in the statute, it might consist of a municipality, a county, a combination of counties and municipalities, a county or municipal agency or a private organization. Accordingly, a legislator contracting with a community action agency will have to ascertain how the agency is organized to determine whether N.M. Const. art. IV, §28 will apply. If it is a county, county agency or a private agency, the contract will not be covered by the provision, but if it is a municipality or municipal agency, the contract will be prohibited if it was authorized by law during the legislator's term.

Municipal housing authorities are governed by the Municipal Housing Law, NMSA 1978, §§3-45-1 to -25 (Repl. Pamp. 1984 and Cum. Supp. 1989), which provides that

> Every city...shall have power and is hereby authorized, by proper resolution of its governing body, to create, as an agent of such city, an authority to be known as the "housing authority" of the city.

NMSA 1978, §3-45-5(A) (emphasis added). The statute also provides that the city may delegate to such authority the powers conferred on the city under the Municipal Housing Law, provides that the mayor has the power to appoint and remove housing authority commissioners, and forbids city and authority officials from acquiring any interest in housing projects. Id. §§3-45-5 (A), -6, -7. By statute, therefore, a municipal housing authority is designated an agency of a city, see also AG Op. No. 69-138 (1969) (housing authority is an agent and instrumentality of the creating municipality), and N.M. Const. art. IV, §28 applies to any interest a legislator may have in a contract with the housing authority authorized by law during his term.

b. Conflict of Interest Act.

The Conflict of Interest Act governs contracts between a legislator and a "state agency." The Act does not define what constitutes a state agency, but we have concluded in previous opinions that the statute does not cover political subdivisions. See, e.g., AG Op. No. 69-135 (1969) (term does not include a county commission); AG Op. No. 69-19 (Conflict of Interest Act does not apply to school districts). Accordingly, contracts between a legislator and a county or municipality are not subject to the Conflict of Interest Act.

As discussed above, we recently determined that a legislator's employment contract with a school district is a contract with the state under N.M. Const. art. IV, §28. See AG Op. No. 88-20. We believe that opinion effectively overrules AG Op. No. 69-19, referenced above, to the extent it concluded that the state legislature did not intend the term "state agency" used in the Conflict of Interest Act to include school districts. As explained in AG Op. No. 88-20, since 1969 the state has centralized public education to the point that there is little local control. Rather, school districts are

> alter egos of the state that are mechanisms for implementing state education policy. They are not separate and distinct political subdivisions as that term is normally used.

AG Op. No. 88-22 views local school districts as part of the state's executive branch.

Based on AG Op. No. 88-22, we conclude that, in the absence of any definition describing them otherwise, school districts are "state agencies" covered by the Conflict of Interest Act. Cf. NMSA 1978, §22-1-2(J) (Repl. Pamp. 1989) (school district defined in Public School Code as a "political subdivision of the state for the administration of public schools"); NMSA 1978, §12-6-2 (Repl. Pamp. 1988) (political subdivision of the state defined under the Audit Act to include school districts). The Conflict of Interest Act does not apply to community action agencies or municipal housing authorities because, as discussed above, those entities are not state agencies.

5. Under Section 10-16-9 of the Conflict of Interest Act, a legislator may not enter into a procurement contract with a state agency in excess of $1,000 unless the contract is made after public notice and competitive sealed bidding or competitive sealed proposal. This means that a legislator can sell products to an agency on an open account or collect-on-delivery basis only under contracts of less than $1,000. See NMSA 1978, §13-1-125 (Supp. 1989) (governing small purchases by state agencies and local public bodies, authorizing purchases of tangible personal property with a value of less than $500 by direct purchase order and prohibiting artificial division of procurement requirements so as to constitute a small purchase). In addition, a legislator would remain subject to N.M. Const. art. IV, §28, so that he could not make any sales during his term or one year afterwards if the sales were authorized by law during his term.

6. Both the constitution and the Conflict of Interest Act refer to contracts between a legislator and the state or other covered public body. If a legislator enters into a contract with one of those entities, he is subject to the restrictions that apply regardless of how or from what source the contract is funded. Accordingly, we conclude that any potential conflict of interest is not affected if a contract or project is funded with local bond proceeds rather than state money.

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