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Advisory Opinion 12-01

(Conflict of Interest)

SUMMARY: A County Commissioner should avoid real and perceived conflicts of interest when doing business with the county in which he is an elected official. The County Commission should erect confidentiality walls between the Commissioner and the purchasing process to ensure public confidence in the fairness of the procurement system. County Commissioners should avoid a conflict of interest when they have a financial, personal or private interest in a matter.

I. BACKGROUND

The Independent Ethics Commission (“IEC” or “Commission”) has received a request for an advisory opinion by Logan County Commissioner James Edwards asking for guidance concerning the business relationship of his personal business and Logan County.¹

According to the request, Commissioner Edwards (“Edwards”), besides his duties as a Commissioner, is also the owner of a store called New Age Electronics (“NAE”). According to its website, www.naenet.net, “New Age Electronics is a locally owned IT

¹ Commissioner Edwards has waived confidentiality regarding this request.

company in Sterling, Colorado. We have been in business for over 20 years providing computer sales and IT services to northeastern Colorado.” According to the request, both prior and subsequent to his election as a county commissioner in 2008, Edwards and NAE had business contracts with Logan County, Colorado.

The requestor acknowledged in his request and at his appearance before the Commission that the county has made several purchases from NAE since Edwards was elected, and the percentage of work awarded to NAE in relation to other potential bidders has increased. Although the subject of the request involves actions that have already occurred, Commissioner Edwards has requested that the Ethics Commission issue an advisory opinion. However, such opinions are generally issued as prospective guidance for decisions and actions yet to occur rather than as sanction for past decisions and actions. Therefore, the Commission limits this advisory opinion to prospective advice and declines to opine as to the ethical propriety of the past conduct of the requestor.

II. JURISDICTION

The IEC finds that a County Commissioner is a “local government official” subject to the jurisdiction of the Commission. CO Const. Art. XXIX (2)(3). Pursuant to Constitution Art. XXIX, the Independent Ethics Commission is charged with issuing advice on ethics issues “arising under this article and under any other standards of conduct... as provided by law.”

III. DISCUSSION

A. Applicable Statutes

Colorado Revised Statutes section 24-18-109 addresses the issue of conflicts of

interest by local government officials and provides that they shall not:

2 (a) Engage in a substantial financial transaction for his private business purposes with a person whom he inspects or supervises in the course of his official duties; or

(b) Perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent.

Paragraph 3 of the statute proscribes voting on matters in which the official has a conflict:

(3)(a) A member of the governing body of a local government who has a personal or private interest in any matter proposed or pending before the governing body shall disclose such interest to the governing body and shall not vote thereon and shall refrain from attempting to influence the decisions of the other members of the governing body in voting on the matter.

Thus a local official should avoid engaging in financial business with the entity he represents, but if he does, he shall not participate in the vote on the matter or urge his fellow Commissioners to vote a particular way.

Moreover, C.R.S. § 24-18-201(1) provides that local government officials “shall not be interested in any contract made by them in their official capacity or by any body, agency or board of which they are members or employees.” The statute also provides that an official “who has a private interest in any matter proposed or pending before the governing body shall disclose such interest to the governing body, and shall not vote thereon and shall refrain from attempting to influence the decisions of other members...”

Id. 3(a). That section, however, specifically exempts from the definition of contracts, any contract awarded to the “lowest responsible bidder based on competitive bidding procedures.” *Id.* (1)(b).

C. Appearance of Impropriety

In addition to the statutory provisions cited above, section 1(c) of Article XXIX also requires covered individuals “to avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated.” Appearances of impropriety are generally referred to as “perception issues” or “violating the smell test.” They can weaken public confidence in government and create a perception of dishonesty, even among government officials who are in technical compliance with the law.

In order to avoid the appearance of impropriety, local government officials that continue to contract with the entity that they serve in a public capacity should be removed from any involvement in the procurement process when his or her business is a potential bidder. Such interested officials should not be involved in the crafting of requests for proposals or bid solicitations or designing the specifications of the goods or services being contracted. He or she should not have any access to the bid specifications prior to its release to the public. He or she should not discuss the potential request for proposals with the other officials with authority over the process. And he or she should not authorize or sign off on any purchases from or payments to his or her business made by the local government. In sum, interested contractors should endeavor to erect a wall between him or herself and the local government purchasing or contracting goods or services provided by his business.

The IEC further believes that the more transparent and open the purchasing process, the greater the public confidence in the fairness of the procurement system.

The County should endeavor to make its bids and purchasing activities public and continue its practice of publishing its expenditures.

The IEC also recommends that when feasible, counties and municipalities should consider enacting an ethics code to provide further guidance to elected officials with similar potential conflicts.²

IV. CONCLUSION

A county commissioner should follow Colorado statutes in engaging in contracts, and should to the extent possible avoid not only unlawful conduct, but even the appearance of impropriety. The Commission cautions public officials and employees that this opinion is based on the specific facts presented in this request, and that different facts could produce a different result. The IEC therefore encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinions and letter rulings.

The Independent Ethics Commission

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Dated: March __, 2012

² Colorado Counties Inc. does provide guidance to county commissioners on ethics issues. The Handbook issued to all county commissioners primarily paraphrases the applicable statutes. The Colorado Municipal League offers ethics sessions at its annual conference but does not have written materials for its members.