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Dino Ioannides, *Executive Director*

Advisory Opinion 21-01

(Federal Government Contract with a Government Employee)

Summary: It would not be a violation of Article XXIX for Requestor to explore the possibility of contractual opportunities with a federal government agency. The Independent Ethics Commission (“Commission”) makes no determination about the ethical propriety of future contractual provisions that do not yet exist.

I. Background

An employee (“Requestor”) of the Colorado Department of Public Health and Environment (“CDPHE”) has submitted a request seeking an advisory opinion from the Commission about the propriety of Requestor’s software development company developing new software for the federal Environmental Protection Agency (“EPA”).

Requestor is employed with CDPHE as an environmental protection specialist in a workgroup lead capacity. Requestor works in CDPHE’s safe drinking water program and is responsible for managing data, records, and reporting. Requestor is also an administrator-level user of EPA’s Safe Drinking Water Information System (“SDWIS”). SDWIS is used to capture federal reporting requirements and assist state agencies like CDPHE in implementing the federal Safe Drinking Water Act.

Requestor’s software development firm is a Colorado limited liability company. Requestor describes his role in the company as “part owner with decision making authority.” Requestor indicates that SDWIS PRIME is an initiative by the EPA to replace SDWIS with newer software. Requestor’s company is interested in pursuing a contract with the EPA for the development of the new SDWIS software. More specifically, Requestor indicates that his company’s interest is to “[merge] our software structure to modernize SDWIS”. The EPA is in continuing discussions about the new software development with both Requestor and other software developers.

Requestor indicates that his discussions with the EPA are only preliminary at this time. For example, if Colorado wished to acquire the new software, Requestor does not know whether Colorado would do so through the EPA (after the EPA’s acquisition of the product) or, rather, directly through Requestor’s company. Additionally, the EPA provides the current SDWIS software to Colorado free of charge, besides hosting and server costs, which are borne by the state, but Requestor does not know what cost-sharing model will be used by EPA for the new

software. Requestor also does not know how Colorado’s ongoing maintenance and/or support services for the new software would be provided, or who would provide these services. Because the safe drinking water data that would be used for software development is not confidential, Requestor does not anticipate a risk of improperly disclosing Colorado’s confidential information if his company is awarded the software development contract.

CDPHE has no contracts with Requestor’s software company. Requestor has no decision-making authority over CDPHE’s contract vendors. More specifically, CDPHE has required that Requestor will not participate in CDPHE’s decision-making, if any, with respect to Requestor’s software company. CDPHE’s human resources department suggested that Requestor seek an advisory opinion from the Commission, and CDPHE is aware of the instant request. CDPHE does not perceive any potential for a conflict of interest or appearance of impropriety.

II. Jurisdiction

Employees and independent contractors of CDPHE are “government employee[s]” subject to the Commission’s jurisdiction. Colo. Const. art. XXIX, § 2(1).

The Commission has authority to issue advisory opinions on ethics issues arising under Article XXIX or any other standards of conduct or reporting requirements as provided by law. See Colo. Const. art. XXIX, § 5(5).

III. Applicable Law

Section 24-18-104(1)(a), C.R.S., provides:

...A public officer, a member of the general assembly, a local government official, or an employee shall not:

(a) Disclose or use confidential information acquired in the course of his official duties in order to further substantially his personal financial interests...

Section 24-18-108(2), C.R.S., provides:

A public officer or a state employee shall not:

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

(b) Assist any person for a fee or other compensation in obtaining any contract, claim, license, or other economic benefit from his agency;

(c) Assist any person for a contingent fee in obtaining any contract, claim, license, or other economic benefit from any state agency; or

(d) 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.

Section 24-18-201, C.R.S., provides:

(1) Members of the general assembly, public officers, local government officials, or employees 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...

IV. Discussion

It is clear that both CDPHE and Requestor have already discussed and addressed some of the possible conflicts issues inherent in the Requestor's ownership of a software company that seeks to contract with a federal agency. CDPHE and Requestor have established appropriate boundaries in that regard, such as ensuring that Requestor is not involved in the awarding of contracts for CDPHE.

Section 24-18-104(1)(a), C.R.S., prohibits the Requestor's disclosure or use of confidential information acquired in the course of his official duties in order to substantially further his personal financial interests. Requestor has already indicated that, due to the nonconfidential nature of the data collected by CDPHE, the risk of improper disclosure is low. Two issues should be highlighted in this regard, however. First, it is not only disclosure that is prohibited under these circumstances, but use of confidential information. Second, the statute does not speak merely to the nature of the data used in SDWIS, but to *any* information acquired by Requestor in the course of his official duties. Any disclosure or use of such information is prohibited. In particular, if Requestor obtains any information by virtue of his position with CDPHE that is not available to competitors, but is advantageous to his company's interests, that would be a violation of § 24-18-104(1)(a).

Section 24-18-108(2), C.R.S., prohibits Requestor's (a) engagement in a substantial financial transaction with a person whom he inspects, regulates, or supervises; (b) assistance to any person for compensation or (c) a contingency fee in obtaining any contract, claim, license, or other economic benefit from his agency; and (d) performance of any official act that directly and substantially provides economic benefits to his software company. An "official act" is defined as an action that includes the use of discretionary authority, including decisions, recommendations, approvals, disapprovals, and inaction. § 24-18-102(7), C.R.S. Subsections (2)(a), (b), and (c) do not apply in the context of this advisory opinion request because Requestor does not inspect, regulate, or supervise the EPA; nor will EPA obtain any contract, claim, license, or other economic benefit from CDPHE. Subsection (2)(d), on the other hand, is applicable, and CDPHE and Requestor have taken appropriate steps to mitigate the possibility that Requestor will perform any official act that provides economic benefits to his software company.

Section 24-18-201(1), C.R.S., prohibits Requestor from having an interest in any contract either made by Requestor in his official capacity or made by CDPHE or any of its boards or commissions. There is no indication that this prohibition is implicated because the contract, if any, will be between the EPA and Requestor, but not in Requestor's official capacity. This situation could change, however. As indicated above, there are multiple unknowns for the Requestor at this point in the process. For example, Requestor does not know how the new SDWIS software will be provided to CDPHE, if at all. The Commission cautions that Requestor

is prohibited from having an “interest” in a contract made by CDPHE or its boards or commissions—this prohibition applies even if Requestor is not a party to the contract. For example, a system in which the EPA pays Requestor royalties for states’ use of the new software would violate the statute. To the extent Requestor will financially benefit from Colorado’s use of the new software, that would be a violation of § 24-18-201(1), C.R.S.

The Commission is unable to determine the ethical propriety of every possible outcome of Requestor’s nascent proposal. As currently formulated, Requestor’s proposed actions—negotiating with the EPA and developing software in cooperation with the EPA—do not violate Article XXIX. However, the Commission makes no determination about the contract itself and particularly the State of Colorado’s possible use of software developed by Requestor’s company. Rather, the Commission recommends that Requestor seek additional guidance from the Commission as contractual conditions become clearer, and prior to contract execution.

V. Conclusion

It would not be a violation of Article XXIX for Requestor to continue exploring contractual opportunities with the EPA for the development of new SDWIS software. But the Commission makes no determination regarding the state’s potential acquisition of new SDWIS software. In particular, Requestor should determine, before contracting with the EPA, how the EPA intends to provide the new SDWIS software to the states and ensure that he will not reap a financial benefit from the State of Colorado’s acquisition of such software.

The Commission cautions that this opinion is based on the specific facts presented herein, and that different facts could produce a different result. The Commission encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinions and letter rulings related to their individual circumstances.

The Independent Ethics Commission

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Dated: September 21, 2021