

March 22, 1995

Advisory Opinion 1995 - No. 6

The Board has received an advisory opinion request from Senator Dan McDonald, who has waived confidentiality.

FACTS

In 1993 the Legislature approved Substitute House Bill 1006, Public-Private Transportation Initiatives (Initiatives), which authorized the Department of Transportation (DOT) to solicit proposals and enter into contracts with private entities for transportation systems and facilities. The law authorized a maximum of six demonstration projects, to be evaluated and approved through a competitive process conducted by DOT and the Transportation Commission. Fourteen proposals were received and ranked and six were selected.

Senator McDonald is an employee and nominal stockholder in an engineering firm which, subsequent to the passage of the bill, joined a consortia in proposing a project for consideration. The Senator took no part in preparing the project nor presenting it to the DOT.

This project was ranked seventh in the selection process. One of the original six projects has been dropped from consideration. The law does not provide that projects "move up" according to rank and at this time any decision to add a project to the list of approved projects is within the discretion of state transportation authorities.

QUESTIONS

A. Under these facts, would it be permissible for the Senator to participate in the consideration of bills, including advocacy, deliberation and voting, which would:

1. authorize state bonds as capital "seed money" to launch the Initiative projects this biennium;
2. require a vote of the people on the issue of whether tolls or fees could be levied on users of the projects;
3. remove the current authority for the Initiative projects, thereby "killing" the projects and, perhaps, starting over with the selection process;
4. make appropriations to continue the administrative/overhead costs of the current Initiative projects?

B. In addition, the Senator asks if any of the answers to questions 1-4 would be different if his employer's project became one of the approved projects?

C. Further, if his employer's project proposal is approved and a contract is executed, (a) is he prohibited from having a beneficial interest in the contract? (b) Must the contract be filed with the Legislative Ethics Board?

OPINION

Pursuant to the facts as represented to the Board, we conclude that Senator McDonald may fully participate in the type of legislation detailed in question A,(1)-(4).

However, the Board finds that if the employer's proposal becomes one of the approved Initiative projects the Senator would have a conflict of interest if he participated in the type of legislation identified in the inquiry.

The Board further finds that Senator McDonald has a permissible interest in a contract between his employer and DOT pursuant to the Initiatives program and that the ethics law does not require that the contract be filed with the Legislative Ethics Board.

ANALYSIS

Conflict of Interest

RCW 42.52.020 provides:

No state officer or state employee may have an interest, financial or otherwise, direct or indirect, or engage in a business or transaction or professional activity, or incur an obligation of any nature, that is in conflict with the proper discharge of the state officer's ... duties.

Senator McDonald has an interest, as an employee and nominal stockholder, in his employer's project proposal with the DOT which constitutes an "interest" within the meaning of this statute. If that interest does not conflict with the legislative duties he has described, then his participation in those activities would not conflict with the "proper discharge" of his legislative duties.

The citizen-legislator concept is fundamental to our state's form of the legislative process and this is recognized in the State Ethics Act (RCW 42.52.330). We have adopted the "citizen-legislator exception" to the conflict of interest provisions found in RCW 42.52.020. A legislator:

does not have . . . [an] interest which is in conflict with the proper discharge of

legislative duties if no benefit or detriment accrues to the legislator as a member of a business, profession, occupation, or group, to a greater extent than to any other member of such business, profession, occupation or group. (Advisory Opinion 1995 - No. 1)

We believe that engineer McDonald and his employer are similarly situated with other engineers and engineering firms who are not on the DOT list of approved projects and are members of a "business, profession, occupation, or group" for purposes of the "citizen-legislator exception".

However, we caution all legislators to be aware of and avoid those situations where they might exercise their legislative prerogatives in such a way as to affect a small group in which they have an interest. The appearance of a conflict of interest can seriously undermine the confidence of the electorate in the legislative process.

We again quote with approval that part of House Opinion 1987 - No. 1 which states:

We do not believe that the Code of Legislative Ethics should be construed in a manner which, in effect, authorizes a legislator to promote his or her private interests in the legislature where the justification for the authorization would be that there exists one or two other persons who would similarly benefit.

Accordingly, we answer question "B" in the affirmative. If the employer's project is approved by DOT, the Senator and his employer are no longer similarly situated as others in their "business, profession or occupation". Legislation which affects this select group of approved projects would confer a benefit or detriment to the Senator and his employer greater than other members of the "business, profession or occupation" and the citizen-legislator exemption from the conflict of interest prohibition found in RCW 42.52.020 would no longer be applicable.

As a corollary to our decision with respect to question "B", we feel the Senator would also have a conflict of interest if he attempted to use his influence as a legislator to promote his employer's project to the list of approved projects, whether such efforts be directed at DOT or the legislative process.

Beneficial Interest

RCW 42.52.030(1) provides:

No state officer . . . may be beneficially interested, directly or indirectly, in a contract, sale, lease, purchase, or grant that may be made by, through, or is under the supervision of the officer or employee, in whole or in part, or accept, directly or indirectly, any compensation, gratuity, or reward from any other person beneficially interested in the contract, sale, lease, purchase, or grant.

RCW 42.52.010(4) provides that "beneficial interest" shall have the meaning ascribed to it under

Washington case law. Washington cases have analyzed "beneficial interest" as a financial advantage or interest.¹

Should his employer contract for a project with DOT, under the procedures as described, Senator McDonald might have a "beneficial interest" (a financial interest) therein but there are no facts which suggest that the contract would have been made by, through, or under his supervision. Absent this type of "control" over the contract, Senator McDonald may have a beneficial interest in it.

Compensation

In addition to the analysis of "beneficial interest," RCW 42.52.120(1) contains a general prohibition against compensation for outside activities unless several conditions are met. That law provides:

No state officer or state employee may receive anything of economic value under any contract or grant outside of his or her official duties . . . [unless all] of the following conditions are met:

- a. The contract is bona fide and actually performed.
- b. The performance or administration of the contract or grant is not within the course of the officer's or employee's official duties, or is not under the officer's or employee's official supervision;
- c. The performance of the contract or grant is not otherwise prohibited by statute or rules governing outside employment;
- d. The contract or grant is neither performed nor compensated by any person from whom such officer or employee would be prohibited by RCW 42.52.150(4) from receiving a gift (officer of a regulatory agency);
- e. The contract or grant is not one expressly created or authorized by the officer or employee in his or her official capacity or by his or her agency;
- f. The contract or grant would not require unauthorized disclosure of confidential information.

The Board has been presented with no facts which suggest that any of the conditions in a-f of

¹ *Thiemens v. White*, 102 Wash. 453 (1918); *Mumma v. Brewster*, 174 Wash. 113 (1933); *State v. Hurd*, 5 W.2d 662 (1940); *Kitsap County v. Bubar*, 14 W.2d 379 (1942).

RCW 42.52.120(1) would not be met. Absent such facts, this statute would not prohibit Senator McDonald from receiving compensation from a contract between his employer and the DOT.

Contract with State Agency

Because this potential contract would involve a state agency, further analysis is required. RCW 42.52.120(2) provides that

a state officer or state employee may have a beneficial interest in a **grant or contract with a state agency** (emphasis added) only if:

(a) The contract or grant is awarded or issued as a result of an open and competitive bidding process in which more than one bid or grant application was received; or

(b) The contract or grant is awarded or issued as a result of an open and competitive bidding or selection process in which the officer's or employee's bid or proposal was the only bid or proposal received and the officer or employee has been advised by the appropriate ethics board, before execution of the contract or grant, that the contract or grant would not be in conflict with the proper discharge of the officer's or employee's official duties; or

(c) The process for awarding the contract or issuing the grant is not open and competitive, but the officer or employee has been advised by the appropriate ethics board that the contract or grant would not be in conflict with the proper discharge of the officer's or employee's official duties.

The project approval process was competitive and involved the ranking of fourteen projects and the ultimate selection of six projects. The Board therefore finds that a contract between DOT and the Senator's employer would satisfy RCW 42.52.120(a) and Senator McDonald could have a beneficial interest therein.

Filing the Contract

RCW 42.52.120(3) provides that certain contracts be filed with the ethics board:

A state officer or state employee awarded a contract or issued a grant in compliance with subsection (2) of this section shall file the contract or grant with the appropriate ethics board within thirty days after the date of execution.

The filing requirement is applicable when an agency contracts with the state officer or state employee. The facts before the Board are that Senator McDonald's **employer** may eventually

have the opportunity to contract for an Initiatives project but the Senator would not be a contracting party. Therefore, if such a contract were executed between the employer and DOT, the Senator would not have an obligation to file it with the Board.

The Board is mindful that there may be situations where a state officer or employee may in fact be a party to a contract with a state agency even though the contract, on its face, does not identify the officer or employee as such. The Board will analyze the filing requirements on a case-by-case basis and encourages affected individuals to request guidance from the Board if they question their obligations to file and/or seek preapproval of certain contracts or grants with state agencies.