

## **Opinion No. 91-11**

October 17, 1991

**OPINION OF:** TOM UDALL, Attorney General

**BY:** Daniel Yohalem, Andrea R. Buzzard, Elizabeth A. Glenn, Assistant Attorneys General

**TO:** Honorable Christine A. Donisthorpe, State Senator, P.O. Box 746, Bloomfield, New Mexico 87413

### **QUESTIONS**

May a water users association continue to contract with a firm whose president and stockholder is a state legislator when the contract is for consulting services in connection with a project funded partly through a state contract authorized by the state legislature during the legislator's term in office?

### **CONCLUSIONS**

No. The legislator will have an indirect interest in a state contract authorized by the legislator during his term in office in violation of Article IV, Section 28 of the New Mexico Constitution.

### **FACTS**

During the past year, the Riverside Water Users Mutual Domestic Association ("Association") has employed Brewer Associates, Inc. ("Brewer") to provide consulting work with respect to the installation of a water system in San Juan County. State Representative Richard Cheney is the president of and a stockholder in Brewer. Brewer has prepared loan applications, conducted feasibility studies for the water system project and assisted in obtaining donations of equipment, material and supplies from several oil companies. The water system project will cost approximately \$344,000. Funding will be provided by San Juan County (\$50,000), oil company donations of materials and supplies (\$150,000), New Mexico Environmental Improvement Division loans (\$100,000), and a \$43,445 appropriation made by 1991 N.M. Laws, ch. 259, § 19.

### **ANALYSIS**

Article IV, section 28 of New Mexico's Constitution provides, in part:

No member of the legislature shall... 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 passed during such term.

Article IV, Section 28 prohibits a legislator from contracting with a state agency if the contract was authorized during the legislator's term. AG Op. No. 67-133 (1967). This section also applies to legislators who own shares in a company contracting with the state. AG Op. No. 89-34 (1989).<sup>1</sup>

Finally, a legislator who contracts with a state contractor to provide services on a state contract authorized during the legislator's term generally has an impermissible indirect interest in the state contract. *Id.*<sup>2</sup>

The circumstances in this case violate these principles. Chapter 259, § 19 was enacted in 1991 during Representative Cheney's term and appropriates \$43,445 to the Health and Environment Department ("HED") for a water treatment system in San Juan County.<sup>3</sup> The effect of this special appropriation is to authorize a contract between the state (HED) and the Association.<sup>4</sup> The Association, in turn, desires to contract with Brewer to work on a part of the state project. At the time in 1991 when the legislature passed the special appropriation which authorized the contract between HED and the Association, Brewer had an ongoing contractual relationship with the Association to perform work attributable specifically to the project that the legislature funded. These facts strongly indicate that, at the time the water project contract between the state and the Association was authorized, the legislator was aware (or should have been aware) that his firm would be employed by the Association as a contractor on the project. These facts also leave little doubt that, at the time of his contract negotiations, the legislator knew (or should have known) that the project had been funded in part by the special appropriation enacted a few months earlier.

The constitutional prohibition against any direct or indirect interest in state contracts ensures that legislators perform their public duties free of any personal influence. See, e.g., *Stigall v. City of Taft*, 375 P.2d 289, 291 (Cal. 1962) (en banc); *People v. Adduci*, 412 Ill. 621, 108 N.E.2d 1 (1952) (strongly stating the policy concerns underlying prohibitions against legislators having financial interests in the subjects of legislation enacted during their terms of office). That policy would be violated if Brewer were allowed to contract with the Association under the facts here. Accordingly, we conclude that Article IV, Section 28 does not permit the Association to continue to contract with Brewer to perform consulting work in connection with the water project funded by Chapter 259.

## ATTORNEY GENERAL

TOM UDALL Attorney General

## GENERAL FOOTNOTES

[n1](#) See also, cases upholding applicability of conflict of interest prohibitions to public officials because of their status as shareholders: ***Parkin Printing & Stationery Co. v. Arkansas Printing & Lithographing Co.***, 354 S.W.2d 560 (Ark. 1962); ***Thomson v. Call***, 699 P.2d 316, 323 (Cal. 1985), **cert. denied**, 474 U.S. 1057 (1986); ***People v.***

**Simpkins**, 359 N.E.2d 828, 832 (Ill. 1977); **Wilson v. Iowa City**, 165 N.W.2d 813, 824 (Iowa 1969); **Thompson v. District Bd. of School Dist. No. 1**, 233 N.W. 439, 440 (Mich. 1930).

[n2](#) Although there may be some indirect interests which are sufficiently attenuated so as not to violate Art. IV, Sec. 28, this is certainly not the case when the legislator, at the time the state contract is authorized, knows who the general contractor is and knows (or should know) that the contractor might use the legislator-subcontractor's supplies or services or knows (or should know) at the time of the negotiation of the subcontract that the state's contract with the general contractor was authorized by specific legislation enacted during the legislator's term in office. **See** discussion contained in Ag Op. No. 89-34, at pp. 5-6.

[n3](#) Specifically, Chapter 259, § 19 provides:

Forty-three thousand four hundred forty-five dollars (\$43,445) from the appropriation from the capital projects fund to the capital program fund, pursuant to paragraph (12) of Subsection B of Section 1 of Chapter 315 of Laws 1989, shall not be expended for its original purpose but is appropriated to the Environmental Improvement Division of the Health and Environment Department for expenditure in the seventy-ninth through eighty-second fiscal years for the purpose of planning, constructing or equipping a water treatment system from the Animas river to the community of Riverside located in San Juan County. Any unexpended or unencumbered balance remaining at the end of the eighty-second fiscal year shall revert to the capital projects fund.

[n4](#) Chapter 259, § 19 is not a "general appropriations" act which courts have held does not "authorize" a contract within the meaning of Article IV, Section 28. **See State ex rel. Stratton v. Roswell Independent Schools**, Vol. 30, No. 13, SBB 230 (1991); **State ex rel. Baca v. Otero**, 33 N.M. 310, 267 P. 68 (1928).