



Formal Advisory Opinion
No. 4 of 2013

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JOINT COMMITTEE ON ETHICAL STANDARDS

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TO: Honorable Members of the Joint Legislative Committee on
Ethical Standards

FROM: James G. Willson 
Assistant Counsel

DATE: July 23, 2013

SUBJECT: Ethics Counsel Question #9

By correspondence to the Joint Legislative Committee on Ethical Standards (Joint Committee) dated February 7, 2013, Marci L. Hochman, Ethics Counsel, has submitted various questions to the Joint Committee. In the past the Joint Committee has found Ethics Counsel's questions difficult to answer in the abstract as the Conflicts of Interest Law, N.J.S.A. 52:13D-12 et seq. (Conflicts Law) and the Legislative Code of Ethics (Code) contain provisions the resolution of which may be fact sensitive. Nevertheless, the Joint Committee asked counsel at its March 5, 2013 meeting to try to assist Ethics Counsel with some of her questions. Accordingly, counsel proposes the following response to Ethics Counsel's question 9, which reads as follows:

9. If a legislator obtains the approval of the Joint Committee pursuant to N.J.S.A. 52:13D-19 to bid on and, if successful, accept a State agency contract, does that also (by implication) authorize the legislator to represent, appear for and negotiate on behalf of his or her company in connection with that contract and any State agency or would that violate N.J.S.A. 52:13D-16?

Copies of N.J.S.A. 52:13D-16 and 19 are enclosed herewith in their entirety. Also enclosed are Code §§ 2:2, 2:3 and 2:4 which relate to N.J.S.A. 52:13D-16 and §2:5 which relates to N.J.S.A. 52:13D-19.

Subsection a. of N.J.S.A. 52:13D-19 prohibits members of the Legislature, and others, from entering into a "contract, agreement, sale or purchase of the value of

\$25.00 or more. . . ” with a State agency. It also prohibits a member’s “partners” and any corporation which the member controls or owns more than 1% of the stock from entering in such an agreement. And, it prohibits members from having “any other person” enter into such an agreement for the member’s “use or benefit or on his account”

Subsection b. provides that the provisions of subsection a. do not apply to:

. . . (a) purchases, contracts, agreements or sales which (1) are made or let after public notice and competitive bidding or which (2), pursuant to section 5 of chapter 48 of the laws of 1944 (C. 52:34-10) or such other similar provisions contained in the public bidding laws or regulations applicable to other State agencies, may be made, negotiated or awarded without public advertising for bids, or (b) any contract of insurance entered into by the Director of the Division of Purchase and Property pursuant to section 10 of article 6 of chapter 112 of the laws of 1944 (C. 52:27B-62), if such purchases, contracts or agreements, including change orders and amendments thereto, shall receive prior approval¹ of the Joint Legislative Committee on Ethical Standards if a member of the Legislature or State officer or employee or special State officer or employee in the Legislative Branch has an interest therein [Footnote added.]

Requests to the Joint Committee to bid and contract typically are made under (1), contracts awarded after public notice and competitive bidding. Upon receipt of a request to bid from a member, counsel investigates to confirm that the contract is publicly noticed and competitively awarded. If those criteria are met, counsel recommends approval of the member’s request to bid and to enter into a contract if the bid is successful. If the bid is successful, the member must provide a copy of the notice of award indicating the name of the State agency and dollar amount of the award. Change orders involving the dollar amount must also be provided. The Joint Committee publishes this information on the Legislature’s internet site. Code § 2:5.b. We note that unless the requester is otherwise advised, requests to bid are deemed approved within 15 days of receipt by the Joint Committee. Code § 2:5.b.

Safeguards are built into this process. The first is the public notice by the State agency of the proposed contract. Second is that the contract is competitively awarded from those bids responsive to the request for proposals. Third is the prior approval of the

¹ We note that it has been the practice of the Joint Committee to only provide prior approval to bid and, if successful, enter into a contract. The Joint Committee has advised that change orders affecting the dollar amount must be provided to the Joint Committee.

Joint Committee to bid which entails an examination by counsel to ensure that the contract is in fact publicly noticed and will be competitively awarded. Finally, posting notice of the award and change orders affecting the dollar amount opens the awarded contract to public scrutiny.

Counsel is also mindful of the fact that members of the New Jersey Legislature are considered part-time. Members are expected to have outside employment and bring the wealth of knowledge and expertise that employment provides to better inform their legislative decisions. The Conflicts Law and Code both try to accommodate the ability of members to retain their private jobs and employment when becoming a member of the Legislature. In counsel's opinion, the authorization in the Conflicts Law and Code allowing members to contract with State agencies is such an accommodation.

Requests to contract under N.J.S.A. 52:13D-19 and Code §2:5 could also be made pursuant to N.J.S.A. 52:34-10 (copy enclosed), which lists circumstances under which contracts may be awarded without public advertising. Contracts for insurance under N.J.S.A. 52:27B-62 (copy enclosed) also may be awarded without public notice and competitive bidding. Because question 9 begins, "[i]f a legislator obtains the approval of the Joint Committee . . . to bid on and, if successful, accept a State agency contract . . .," we do not need to herein address the propriety of members being awarded no bid contracts pursuant to N.J.S.A. 52:34-10 or 52:27B-62. Counsel suggests that requests by members to enter into no bid contracts with State agencies would need to be closely examined and justified as two of the most important safeguards set forth above may not apply to these contracts. Those safeguards possibly missing would be the public notice of the intent of the State agency to contract and the competitive award process. Counsel notes that contracts let without public notice may still be subject to a competitive quoting process.

It is counsel's view that N.J.S.A. 52:13D-16 was enacted with legal representation in mind. Under this statute, a member of the Legislature, a partnership, firm or corporation in which the member has an interest² may not appear before a State agency on behalf of any party other than the State. However, such a partnership, firm or

² An "interest" is defined in N.J.S.A. 52:13D-13.g. as set forth below.

g. "Interest" means (1) the ownership or control of more than 10% of the profits or assets of a firm, association, or partnership, or more than 10% of the stock in a corporation for profit other than a professional service corporation organized under the "Professional Service Corporation Act," P.L. 1969, c. 232 (C. 14A:17-1 et seq.); or (2) the ownership or control of more than 1% of the profits of a firm, association, or partnership, or more than 1% of the stock in any corporation, which is the holder of, or an applicant for, a casino license or in any holding or intermediary company with respect thereto, as defined by the "Casino Control Act," P.L. 1977, c. 110 (C. 5:12-1 et seq.). The provision of this act governing the conduct of individuals are applicable to shareholders, associates or professional employees of a professional service corporation regardless of the extent or amount of their shareholder interest in such a corporation.

corporation may appear on its own behalf. N.J.S.A. 52:13D-16.b. Further, this subsection does not prohibit the member from making inquiries on behalf of a constituent, assisting a constituent to bring the merits of a matter before a State agency or making a recommendation to or supporting a constituent's position before a State agency. No "fee, reward, employment, offer of employment, or other thing of value. . ." may be given or promised to the member for such assistance.

As previously stated, Ethics Counsel's question assumes that Joint Committee approval to bid and contract is required and received. Beyond that, the question is short on facts. When counsel raised this question at the end of the March 5, 2013 meeting of the Joint Committee, both Joint Committee members who are former members of the Legislature raised concerns with members engaging in meetings with State agency officials. However, the law and Code authorize members' contracting with State agencies so long as the requirements of the law and Code are met.

Because Ethics Counsel has not set forth a particular factual situation, we will look at two hypothetical situations. The first hypothetical we will look at is where the member is employed by a company with a corporate structure and various employees. The member is not an officer, but an employee with a minimal (just over 1%) stock ownership. Further, the member's duties do not involve contracting or contract administration and the member would in fact have no direct State agency contact, although the State agency may be aware that the member is employed by the bidding/contracting company. Counsel sees this as the most benign factual situation. The company, upon receipt of the Joint Committee's approval to bid, if successful, may enter into a contract with the State agency and administer the contract.

The factual situation seemingly most potentially in conflict with the law and Code would be where the member is contracting in the member's own name as an individual. Upon approval by the Joint Committee to bid, if successful, may the member enter into a contract with the State agency, upon negotiations if necessary, and subsequently deal directly with State agency officials and employees in the administration of the contract, possibly involving change orders and possibly requiring face to face meetings?

It is counsel's opinion that because the Conflicts Law and Code are explicit in allowing members to bid on State agency contracts that are publicly noticed and competitively awarded, because there are multiple safeguards in place, and because members are part-time, Joint Committee approval to bid carries with it the implicit authorization to take such other necessary actions as are customary and usual in contracting and contract administration. Because counsel sees both hypothetical extremes as allowable, all of the various in between shadings do not need to be examined. They too are acceptable.

When a member is authorized to bid on a State agency contract, counsel believes that the member, as a sole proprietor, partner, member of a firm, employee or officer of a corporation, may do that which is necessary to enter into a contract if one is awarded

pursuant to the bid. The member may further have such contacts with the State agency as are necessary for the efficient administration of the contract, including the negotiation of the initial contract and change orders, *if such dealings and negotiation would normally be a part of the member's job with regard to non-State agency contracts. The member's legislative position should not be exploited in an attempt to gain benefits from a State agency not available to the general public.*

Accordingly, if it is part of the member's normal and usual duties of employment to contract and be involved in contract administration generally, the member may perform the member's usual job duties as to State agency contract awards and contract performance. State agency contacts should be kept to the minimum required for the efficient contracting and administration of the contract. Should the member exceed that minimum contact required, that contact could create the appearance of impropriety under Code § 2:1.a or constitute a prohibited State agency contact under N.J.S.A. 52:13D-16.

Further, requests for Joint Committee approval to enter no bid contracts authorized by the Conflicts Law and Code should be closely scrutinized by the Joint Committee.

If approved by the Joint Committee, counsel will provide a copy of this opinion to the Ethics Counsel and post it on the Legislature's web site.

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Enclosures

2:2. Except as hereinafter provided in sections 2:3 and 2:4, no member of the Legislature nor any partnership or firm of which he is a member or any corporation in which he owns or controls an interest, nor any partner, officer or employee of any such partnership, firm or corporation, shall represent, appear for, or negotiate on behalf of, or agree to represent, appear for, or negotiate on behalf of, any person or party other than the State in connection with:

a. The acquisition or sale by the State or a State agency of any interest in real or tangible or intangible personal property (C.52:13D-15);

b. The acquisition by the State or a State agency of any interest in real property by condemnation proceedings (C.52:13D-15);

c. Any specific cause, proceeding, application or other matter before any State agency (C.52:13D-16).

2:3. a. The provisions of section 2:2 above shall not prohibit or restrict a member of the Legislature from:

(1) Representing himself in negotiations or proceedings concerning his own interest in real property, or

(2) (a) Making an inquiry for information on behalf of a constituent, which may include ascertaining the status of a matter, identifying the statutes or regulations involved in a matter or inquiring how to expedite a matter; (b) assisting the constituent in bringing the merits of the constituent's position to the attention of a State agency; or (c) making a recommendation on a matter or indicating support for the constituent's position to a State agency; if no fee, reward, employment, offer of employment, or other thing of value is promised to, given to or accepted by the member, whether directly or indirectly, and the member does not endeavor to use his official position to improperly influence any determination. As used in this paragraph, "constituent" shall mean any State resident or other person seeking legislative assistance. Nothing contained herein shall authorize contact with State agencies by members of the Legislature which is otherwise prohibited by the criminal law, by the "New Jersey Conflicts of Interest Law," P.L.1971, c.182 (C.52:13D-12 et seq.), or this code and nothing contained herein shall authorize contact with an administrative law judge or agency head during the hearing of a contested case.

b. The provisions of section 2:2 above shall not prohibit or restrict a partnership or firm with which a member of the Legislature is associated or a corporation in which he owns or controls an interest from appearing before a State agency in any cause, proceeding or other matter on its own behalf (C.52:13D-16).

2:4. A member of the Legislature is authorized to represent, appear for or negotiate on behalf of, or agree so to do, any person other than the State in any proceeding before:

- a. Any court of record;
- b. The Division of Workers' Compensation;
- c. The Division of Taxation in connection with the determination or review of transfer inheritance or estate taxes;
- d. The Department of State in connection with the filing of corporate or other documents;
- e. The Division on Civil Rights;
- f. The New Jersey Board of Mediation;
- g. The New Jersey Public Employment Relations Commission;
- h. The Unsatisfied Claim and Judgment Fund Board, solely for the purpose of filing a protective notice of intention pursuant to P.L.1952, c.174, s.5 (C.39:6-65);
- i. A State agency, other than the Legislature or any agency thereof, on behalf of a county, municipality or school district, or any authority, agency or commission of any thereof, except where the State is an adverse party in the cause, action or proceeding. The State shall not be considered an "adverse party" in a cause, action or proceeding where joinder of the State or a State agency as a party is required by law or order to protect possible incidental interests of the State (C.52:13D-16).

2:5. a. No member of the Legislature shall knowingly himself, or by his partners or through any corporation which he controls or in which he owns or controls more than 1% of the stock, or by any other person for his use or benefit or on his account, undertake or execute, in whole or in part, any contract, agreement, sale or purchase of the value of \$25 or more, made, entered into, awarded or granted by any State agency, except as provided in subsection b. of this section. The restriction contained in this subsection shall apply to the contracts of interstate agencies to the extent consistent with law only if the contract, agreement, sale or purchase is undertaken or executed by a New Jersey member to that agency or by his partners or a corporation in which he owns or controls more than 1% of the stock.

b. The provisions of subsection a. of this section shall not apply to (a) purchases, contracts, agreements or sales which (1) are made or let after public notice and competitive bidding or which (2), pursuant to section 5 of P.L.1954, c.48 (C.52:34-10) or such other similar provisions contained in the public bidding laws or regulations applicable to other State agencies, may be made, negotiated or awarded without public advertising or bids, or (b) any contract of insurance entered into by the Director of the Division of Purchase and Property pursuant to section 10 of P.L.1944, c.112 (C.52:27B-62), if the purchases, contracts or agreements, including change orders and amendments thereto, shall receive prior approval of the Joint Legislative Committee on Ethical Standards.

Upon the award of a contract by a State agency to a member of the Legislature, his partnership or firm or corporation described in this section he shall file with the joint committee a notice of the award, the name of the State agency involved and the dollar amount of the contract. Any amendment or change order to any such contract involving a change in the dollar amount involved shall likewise be reported to the joint committee. The joint committee shall post the notice and a brief description of the contract on the Internet site of the Legislature.

Within 15 days of receipt by the joint committee of a request by a member of the Legislature for approval to bid on or negotiate a State agency contract or contracts or notice of the award of a State agency contract or amendment of or change order to an approved State agency contract, the joint committee shall notify the member of its approval, disapproval or the time and place of a meeting to discuss the matter with the member. Any request so submitted to the joint committee shall be deemed to be approved after the expiration of 15 days from the receipt thereof unless the joint committee shall otherwise advise the member in writing (C.52:13D-19).

52:13D-16. Certain representations, prohibited; exceptions

5. a. No special State officer or employee, nor any partnership, firm or corporation in which he has an interest, nor any partner, officer or employee of any such partnership, firm or corporation, shall represent, appear for, or negotiate on behalf of, or agree to represent, appear for or negotiate on behalf of, any person or party other than the State in connection with any cause, proceeding, application or other matter pending before the particular office, bureau, board, council, commission, authority, agency, fund or system in which such special State officer or employee holds office or employment.

b. No State officer or employee or member of the Legislature, nor any partnership, firm or corporation in which he has an interest, nor any partner, officer or employee of any such partnership, firm or corporation, shall represent, appear for, or negotiate on behalf of, or agree to represent, appear for, or negotiate on behalf of, any person or party other than the State in connection with any cause, proceeding, application or other matter pending before any State agency. Nothing contained herein shall be deemed to prohibit any such partnership, firm or corporation from appearing on its own behalf. This subsection shall not be deemed to prohibit a member of the Legislature or an employee on the member's behalf from: (1) making an inquiry for information on behalf of a constituent, which may include ascertaining the status of a matter, identifying the statutes or regulations involved in a matter or inquiring how to expedite a matter; (2) assisting the constituent in bringing the merits of the constituent's position to the attention of a State agency; or (3) making a recommendation on a matter or indicating support for a constituent's position to a State agency if no fee, reward, employment, offer of employment, or other thing of value is promised to, given to or accepted by the member of the Legislature or an employee therefor, whether directly or indirectly, and the member or employee does not endeavor to use his official position to improperly influence any determination. As used in this subsection "constituent" shall mean any State resident or other person seeking legislative assistance. Nothing contained herein shall authorize contact with State agencies by members of the Legislature or their employees which is otherwise prohibited by the criminal law, this act or the Code of Ethics and nothing contained herein shall authorize contact with an administrative law judge or agency head during the hearing of a contested case.

c. Nothing contained in this section shall be deemed to prohibit any legislator, or any State officer or employee or special State officer or employee from representing, appearing for or negotiating on behalf of, or agreeing to represent, appear for, or negotiate on behalf of, any person or party other than the State in connection with any proceeding:

- (1) Pending before any court of record of this State,
- (2) In regard to a claim for compensation arising under chapter 15 of Title 34 of the Revised Statutes (Workers' Compensation),
- (3) In connection with the determination or review of transfer inheritance or estate taxes,

(4) In connection with the filing of corporate or other documents in the office of the Secretary of State,

(5) Before the Division on Civil Rights or any successor thereof,

(6) Before the New Jersey State Board of Mediation or any successor thereof,

(7) Before the New Jersey Public Employment Relations Commission or any successor thereof,

(8) Before the Unsatisfied Claim and Judgment Fund Board or any successor thereof solely for the purpose of filing a notice of intention pursuant to P.L.1952, c.174, s.5 (C.39:6-65), or

(9) Before any State agency on behalf of a county, municipality or school district, or any authority, agency or commission of any thereof except where the State is an adverse party in the proceeding and provided he is not holding any office or employment in the State agency in which any such proceeding is pending.

L.1971,c.182,s.5; amended 1971, c.359, s.2; 1975, c.228; 1980, c.79, s.1; 1981, c.142, s.3; 1987, c.432, s.3; 1996, c.116.

52:13D-19 Contracts of State agencies.

8. a. No member of the Legislature or State officer or employee shall knowingly himself, or by his partners or through any corporation which he controls or in which he owns or controls more than 1% of the stock, or by any other person for his use or benefit or on his account, undertake or execute, in whole or in part, any contract, agreement, sale or purchase of the value of \$25.00 or more, made, entered into, awarded or granted by any State agency, except as provided in subsection b. of this section. No special State officer or employee having any duties or responsibilities in connection with the purchase or acquisition of property or services by the State agency where he is employed or an officer shall knowingly himself, by his partners or through any corporation which he controls or in which he owns or controls more than 1% of the stock, or by any other person for his use or benefit or on his account, undertake or execute, in whole or in part, any contract, agreement, sale or purchase of the value of \$25.00 or more, made, entered into, awarded or granted by that State agency, except as provided in subsection b. of this section. The restriction contained in this subsection shall apply to the contracts of interstate agencies to the extent consistent with law only if the contract, agreement, sale or purchase is undertaken or executed by a New Jersey member to that agency or by his partners or a corporation in which he owns or controls more than 1% of the stock.

b. The provisions of subsection a. of this section shall not apply to (a) purchases, contracts, agreements or sales which (1) are made or let after public notice and competitive bidding or which (2), pursuant to section 5 of chapter 48 of the laws of 1944 (C. 52:34-10) or such other similar provisions contained in the public bidding laws or regulations applicable to other State agencies, may be made, negotiated or awarded without public advertising for bids, or (b) any contract of insurance entered into by the Director of the Division of Purchase and Property pursuant to section 10 of article 6 of chapter 112 of the laws of 1944 (C. 52:27B-62), if such purchases, contracts or agreements, including change orders and amendments thereto, shall receive prior approval of the Joint Legislative Committee on Ethical Standards if a member of the Legislature or State officer or employee or special State officer or employee in the Legislative Branch has an interest therein, or the State Ethics Commission if a State officer or employee or special State officer or employee in the Executive Branch has an interest therein.

L.1971,c.182,s.8; amended 1987, c.432, s.5; 2005, c.382, s.9.

52:27B-62. Insurance

The director shall, subject to the approval of the commissioner, effect and maintain insurance against loss or damage by fire upon the State House and the contents thereof in such sum as may be deemed necessary. The director is hereby authorized, and it shall be his duty, after consultation with the heads of State departments and agencies, to purchase and secure all necessary casualty insurance, marine insurance, fire insurance, fidelity bonds, and any other insurance necessary for the safeguarding of the interest of the State. He is hereby authorized, subject to the commissioner's supervision and approval, to establish, in the Division of Purchase and Property, a bureau to administer a centralized system of insurance for all departments and agencies of the State Government.

L.1944, c. 112, art. 6, p. 308, s. 10.

52:34-10. Circumstances under which advertising is unnecessary under s. 52:34-8

Any such purchase, contract or agreement may be made, negotiated or awarded pursuant to section 3 of this act when

(a) the purchase is to be made from, or the contract to be made with, the Federal or any State Government or any agency or political subdivision thereof; or

(b) the public exigency requires the immediate delivery of the articles or performance of the service; or

(c) only 1 source of supply is available; or

(d) more favorable terms can be obtained from a primary source of supply; or

(e) articles of wearing apparel are to be purchased which are styled or seasonal in character; or

(f) commodities traded on a national commodity exchange are to be purchased and fluctuations of the market require immediate action; or

(g) the equipment to be purchased is of a technical nature and the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts in the public interest.

L.1954, c. 48, s. 5.