

## Advisory Opinion 1999-2

June 3, 1999

Rockville, Maryland 20850

Dear . . . . . :

In a February 9, 1999 memorandum, you wrote to the Commission stating, in pertinent part that:

1. you are the . . . . . of the Department of Public Works and Transportation's Division of . . . . . ;
2. you soon would be eligible for retirement;
3. . . . . has expressed an interest in hiring you if you decide to retirement;
4. . . . . has a contract with Montgomery County under which it provides construction management services supporting the.....project currently under construction: and
5. the County's Contract Administrator for the . . . . . contract works in your division.

You, therefore, requested:

an advisory opinion "on the definition of the term 'official responsibility' as . . . . . used in Section 19A-13(b)(2) and whether [your] responsibilities as a . . . . . constitute "official responsibility" for the . . . . . and,

a waiver of the one year moratorium of Sec 19A-13(b) on entering into employment with . . . . .

In support of your request, you described your responsibilities as Chief of DFS as follows:

"My primary responsibility as . . . . . is to make facilities available for County programs. I also have charge of the County's . . . . . Facilities are made available in several ways; maintenance, care and renovation of existing facilities. I discharge my responsibilities through three Section Chiefs."

Your memorandum also described: (1) the responsibilities of your direct subordinate, the Chief, as well as the . . . . . program managers who report to the . . . . . Chief, and (2) the . . . . . manager selection process.

You further advised the Commission:

"I do not sit on vendor selection teams. Nor do I participate in contractor performance evaluations, billings review or payment processing. I develop and approve policy and standards to guide the section chiefs and managers; assist in the development of strategic facility plans to support County initiatives, prepare, review and defend budgets; and, on occasions, assist the Project Managers by acting as an expeditor to get documents through the procurement process i.e. County Attorney and Contract Review Committee."

Your memorandum then addressed why, in your view, the Commission should grant a waiver of §19A-13(b) of the Ethics Law. Among other things, you stated that if you are employed by . . . . your responsibilities will not include work on any contract with Montgomery County government or the "marketing of Montgomery County government" for a period of 12 months.

After reviewing the request and discussing the matter preliminarily at its February meeting, the Commission instructed the Associate County Attorney who is counsel to the Commission to investigate and report to it regarding your responsibilities and activities in connection with the . . . . contract.

Counsel submitted his report to the Commission in a memorandum that was reviewed at the Commission's March meeting. The report revealed significant involvement by you in the original award of the . . . . contract and in every amendment of that contract, including a relatively recent, major modification of the contract. In pertinent part, Counsel reported:

. . . . Agreement Overview

As described in a June 8, 1998, memorandum from Associate County Attorney Melnick:

On December 1, 1989, the County entered into a contract with . . . . Project Management, Inc. (" . . . . "), the purpose of which was for professional construction program management for the . . . . At the time of this contract, the precise manner of construction, management and nature of contractual relationships to perform the work was yet to be determined. The contract named as the . . . . Program Manager (CPM) "for any and all phases of the Project." (Contract, page 1) . . . . was required to work in "cooperation with, and reliance upon, the services of the Design Consultant. As CPM, it agreed to "furnish business administration and management services, and to perform in an expeditious and economic manner consistent with the interests of the County".

The parties entered into Amendments on March 13 and August 31, 1990, which varied the scope of services and increased compensation. The contract had no fixed term, but did identify the duration for each of the five phases, and for the project as a whole. The duration for all services under the contract passed in approximately 1994, with no amendment to the contract.

The County Council recently approved funding for the New . . . . ., at least in part based on . . . . . continuing efforts in the Pre-Design and Design Phases. DFS hopes that the Design Phase will be completed, and that the Construction Phase will begin, by October of 1998. It has a project completion target date of March or April 1999.

DFS would like to amend the project management contract with . . . . ., to expand services. It also desires to enter into approximately 23 prime contracts for construction, wherein the County would act as General Contractor and . . . . . would be Project Manager.

June 9, 1998 memorandum from Mr. Melnick to . . . . . Chief, . . . . .

The expansion that DFS desired and ultimately achieved was significant, both as a matter of construction contracting policy and in terms of the compensation . . . . . would receive. Whereas Montgomery County traditionally had obtained construction services through a prime contract, with the prime contractor subcontracting-as its sole responsibility and at its own risk-for a variety of specialized services (e.g., electrical, plumbing, etc.), the proposed expansion or modification would have the County use a construction manager, with the County itself contracting with multiple specialty contractors as prime contractors. As a matter of construction contracting policy, this was a legally permissible approach, but one that presented significant policy questions, increased liability exposure, and had not been used previously by Montgomery County. Both the County Attorney's Office and the Office of Procurement had reservations about whether the County had the resources to undertake this role, and whether projected cost savings were accurate in view of the increased risks . . . . . will be compensated in excess of \$1 million dollars for the increased services.

In an unattributed, one-page, June 10, 1998, document in the Office of Procurement file, the pros and cons of the proposal to amend the . . . . . contract were stated as follows:

#### PROS

Direct control over contractors performing work.

Elimination of the risk of a litigious General Contractor who may systematically plan for major claims, and solicits and coordinates same from subs.

May improve probability of project being built with a harmonious team relationship among the parties.

Savings of 1.8 million.

Increased contracting opportunities with local and minority firms.

Greater, and earlier, visibility of contract and construction issues which may impact project cost and schedule.

## CONS

The solicitation of 23 separate [contractors], with the possibility of protests etc. that could delay the project's completion.

Liability exposure arising from acts or omissions of multiple contractors on the site. Who dropped the banana peel?

Enormous risk of extensive claims by 23 contractors, resulting from other contractors failing to perform work timely along the critical path of construction.

### Pertinent Chronology of the . . . . . Contract

1989

July 24, 1989 . . . . . responsibilities in this matter date back to at least July 24, 1989, when, as Chief of the . . . . . Section, he joined in a memorandum requesting that the Contract Review Committee (CRC) approve the solicitation of proposals for Project Management Services at the . . . . . That memorandum identified the members of the Qualification and Selection Committee (QSC), which is a committee established by a "Using Department" for the purpose of evaluating responses submitted by offerors. The memorandum identified . . . . . as the team leader of the QSC for the proposed solicitation.

July 27, 1989. . . . . appeared before the CRC regarding the . . . . . Project Management Services RFP.

July 31, 1989. . . . ., as Chief, . . . . . Division, joined in a memorandum to John A. Battan, Acting Director, Office of Procurement, concerning changes that had been made in the RFP "per CRC meeting on July 27, 1989.

August 2, 1989. L. White of OAS-DFS sent draft minutes of the July 27, 1989, CRC meeting to the Office of Procurement and copied . . . . .

August 10, 1989. . . . . wrote to the Acting Director of Procurement requesting certain changes in the draft minutes of the July 27, 1989, CRC meeting.

September 6, 12, and 18, 1989. The QSC met and screened the 15 written proposals received in response to the . . . . . Project Management Services RFP, and ranked . . . . . as the second of the three top rated offerors . . . . . participated as a member of the QSC.

October 4, 1989. The QSC conducted interviews and, thereafter, rated as . . . . . the top offeror.

December 10, 1989. . . . . joined, as Chief of the. Management Division of the Dept. of Facilities and Services, in a memorandum to the Acting Director, Office of Procurement, Dept. of Finance, recommending awarding the . . . . . project manager contract to . . . . . The memorandum listed the QSC members, including . . . . ., and offered their recommendation that the contract be awarded to . . . . . Attached to the memorandum was a record of the selection process which included the usual QSC certifications, including the certification of . . . . .

October 17, 1989. Mr. Larry White sent the CRC draft minutes of the CRC's 10/12/89 meeting. Item 12 on the agenda of that meeting was entitled . . . . . The minutes state that . . . . . was present and there was "a brief discussion." A motion to award the contract to . . . . . was made, seconded and unanimously approved.

November 15, 1989. The County and . . . . . entered into an agreement for construction management services for the . . . . . name appeared in three places:

Paragraph 16 of the Agreement identified . . . . . as the County's contact for "any notice required by this Agreement or other communication."

The signature page of the Agreement carried the recommendation of . . . . .

Article 15 of the Agreement's ATTACHMENT C (SUPPLEMENTAL GENERAL CONDITIONS OF CONTRACT) provided for . . . . . to maintain certain insurance, and required that the Certificate Holder be "Montgomery County Government Attn: . . . . ."

November 16, 1989. Mr. White sent to the Chief of Purchasing and Materiel Management Division, Dept. of Finance, a form "padm 56:Rev 03/21/86," dated November 16, 1 (sic), furnishing information to assist in processing and reporting the contract awarded to . . . . .

November 17, 1989. . . . . was among those who signed a memorandum recommending that the Acting Director of the Office of Procurement approve the contract negotiated with . . . . .

1990

January 25, 1990. Under cover of a letter to . . . . ., a . . . . . vice-president, . . . . ., submitted, as requested, a 'proposal to accelerate the

submission of the draft program of requirements." On the same date, . . . . . recommended proposed Amendment No.1 by signing his name for that purpose on the signature page of the Amendment.

February 2, 1990. . . . . sent . . . . . an original and four signed copies of Contract Amendment No. 1, and . . . . . then sent the amendment to the Director of the Office of Procurement, via the Director of the Dept. of Facilities & Services, recommending "awarding Amendment No.1."

February 9, 1990. The CRC approved Amendment No. I. The minutes of that meeting record that the matter was placed on the agenda via "FACILITY MEMO of 02/02/90, . . . . . 217-603 1," that . . . . . was present at the meeting, that there was a brief discussion regarding the matter, and that Amendment No.1 was approved.

March 13, 1990. The Director of the Office of Procurement signed . . . . . Contract Amendment No. 1, adding the Condensed Program of Requirements, as per the January 25th letter. The Amendment carried . . . . . written recommendation on its signature page, dated January 25, 1990.

July 13, 1990. . . . . , a . . . . . Vice-President, wrote to . . . . . submitting, as requested, a proposal to provide additional services for the . . . . .

August 13, 1990. . . . . wrote to the Director of the Office of Procurement, forwarding Amendment No.2 to the . . . . . contract for final processing and recommending approval . . . . . recommendation also appeared on the signature page of the Amendment.

August 16, 1990. Amendment 2 was the first item on the agenda of the CRC meeting. The minutes of that meeting state that . . . . . was present and that he addressed the need for the amendment.

August 21, 1990 . . . . . resubmitted Contract Amendment No.2 to the Director of the Office of Procurement for signature . . . . . recommendation, dated 7/18/90, appeared on the signature page of the Amendment.

1995

June 6, 1995 . . . . . , as Chief of the . . . . . Management Division, wrote to . . . . . regarding "Existing Site Feasibility Study, and instructed the company to proceed with its proposal, dated May 26, 1995.

1996

February 27, 1996. In a letter to . . . . ., . . . . . notified . . . . . to "proceed with the building component of the new 1100/900 facility cost estimate."

1998

March 25, 1998. . . . . International's Senior Associate . . . . . sent F&S's Capital Projects Manager . . . . . "a revised Fee Proposal, Staffing Schedule, Scope of Work, Proposed Contract Modifications and Resumes of Key Staff for the . . . . ." (Emphasis supplied.) The 15 page Scope of Services carried the title "revised 01/12/98."

March, 1998. DFS personnel contacted the County Attorney's Office to schedule an April 1, 1998, meeting concerning a proposed modification to the . . . . . contract. Mr. Hansen, via voice mail, assigned the matter to Associate County Attorney Richard H. Melnick, who, among other things, advises and represents the Office of Procurement. Mr. Melnick's notes regarding the assignment contain . . . . . name and telephone number.

April 1, and approximately May 1, 1998. Mr. Melnick met with representatives of DFS and the Office of Procurement. Mr. Melnick had several significant questions regarding the proposal. According to Mr. Melnick, the senior F&S representative, . . . . ., made it clear that this matter was very important to his direct superior, . . . . . Following one of these meetings, . . . . . himself approached . . . . . Mr. Melnick and talked with him regarding the importance of the proposal and questions that had been raised about it.

June 8, 1998. Mr. Melnick wrote to . . . . . and . . . . . regarding ". . . . ." Among those issues were the following :

Can the [ . . . . . ] contract now be amended to include the expanded scope of management services?

Can the County undertake the responsibilities of a general contractor and enter into multiple contracts to perform the construction?

Mr. Melnick advised the proposed amendment permissibly expanded the scope of services, and, therefore, could be amended. On the latter issue, he observed:

The decision to undertake the role and responsibilities of general contractor is one of policy, with legal implications. Deciding to enter into multiple prime contracts for the construction work requires a cost-benefit analysis including: monies saved; control

desired; expertise and management available to monitor and be accountable for the progress and coordination of each prime contractor; the potential of liability and delay damages that may arise from the actions and omissions of one or more prime contractors; and, the potential for project delay.

June 18, 1998. Item No.5 on the CRC Agenda was the proposed modification of the . . . . . Contract. The CRC Agenda Assignment/Review and Decision Transmittal Form prepared by the Office of Procurement indicated that the projected cost of the proposed amendment was \$2.5 million dollars.

The CRC expressed serious concerns about whether the County could obtain the desired services through a modification of the . . . . . contract, and about the prudence of a contract-manager/multiple-prime-contractors method, rather than the traditional single-prime contractor/multiple-subcontractors relationship. The Committee, therefore, deferred action on the item, and asked the County Attorney's Office for legal advice.

July 1, 1998. At . . . . . request, a meeting was held in the Office of the County Attorney regarding this matter. Present were Mr . . . . . of DFS; County Attorney Thompson, Marc Hansen, Richard Melnick and Judson Garrett of the County Attorney's Office; and Richard G. Hawes, Director of Construction, Montgomery County Public Schools System. Mr. Hawes was present at the request of DFS to brief the County Attorney on the School System's successful use of the construction manager approach proposed by Amendment No.3. Mr. . . . . . was the principal spokesperson for DFS, and pressed strongly the case for Amendment No.3.

July 7, 1998. . . . . wrote to the Director of the Office of Procurement requesting approval of an amendment to the . . . . . contract, i.e., Amendment No.3, to provide contract management services and a corresponding increase in . . . . . compensation in the amount of \$1,045,833.

July 9, 1998. Associate County Attorney Garrett, as counsel to the CRC, submitted, on behalf of the County Attorney's Office, a memorandum to the Chairman, in which he advised, in pertinent part:

At the request of the Contract Review Committee (CRC), I have reviewed the question of whether the proposed modification to the Construction Management Contract with Program Management, Inc., is legally permissible. I have concluded that although the modification may constitute a change beyond the scope of the competition, the modification nevertheless is legally permissible if the Committee determines that there is sufficient justification for



acquiring the additional services from . . . . on a non-competitive basis, e.g., on a sole source basis.

The Chief of the Division of DFS has submitted a memorandum to the Director [of Procurement] in which he states that . . . . is intimately familiar with the project and that only . . . . can meet the performance delivery date required by the County. If the CRC determines, as a matter of fact, that the proposed modification meets the criteria for a noncompetitive procurement, it may, in its discretion, approve the proposed amendment.

At its regularly scheduled meeting on the same day, the CRC again took up the matter of proposed Amendment No.3 to the . . . . contract. The minutes reflect that Mr. and . . . . represented the Dept. of Public Works and Transportation, DFS, and that the "County Attorney and CRC determined that the contract can be amended [ as proposed] provided the contract meets the sole source criteria for award." ...again was the principal spokesperson for DFS, and strongly pressed the case for Amendment No.3. Among other things, . . . . advised that considerations of timeliness-as presented by the needs of a nearby school-as well as . . . . unique knowledge constituted sufficient sole source justification. In addition, Mr. . . . . assured the CRC that, as a matter of fact, the services to be provided under the Amendment were within the scope of the competition for the original contract. The Committee approved the Amendment.

July 21, 1998. . . . . wrote to the Chief Administrative Officer (CAO) recommending approval of the use of the a construction manager and multiple contractor approach for the construction of the . . . . .

July 29,1998. The CAO wrote to . . . . approving . . . . recommendation of July 21, 1998.

Following its review of counsel's report, the Commission granted your request to appear at its April meeting and address the matter in person. During that meeting, you acknowledged that you have had official responsibility for the . . . . contract, and that the . . . . project has been the Division's most significant project during your approximately ten-year tenure with the County. You, therefore, requested that the Commission exercise its discretion, under §19A-8(c)(2), to waive the one-year prohibition of §19A-13(b) on the basis that your proposed employment is not likely to create an actual conflict of interest.

Even absent your acknowledgment, there would be no question about the applicability of §19A-13(b) to your . . . . contract responsibilities. Because the term "official responsibility" is not defined by the County Ethics Law, it is to be given its natural and ordinary meaning considered in the light of the nature of the subject matter and the purposes to be accomplished by

the legislation. The numerous actions you have taken over the years in connection with the . . . . contract leave no doubt that as Chief of the . . . . and, previously, as Chief . . . . Section, you had, in your official capacity, responsibility for various aspects of the . . . . contract. Therefore, the only question presented is whether, notwithstanding your official responsibility for the contract, the Commission, pursuant to §19A-8(c), should waive the one-year employment prohibition of §19A-13.

The Montgomery County Public Ethics Law is founded on the following express legislative findings and statements of policy:

- (a) Our system of representative government depends in part on the people maintaining the highest trust in their officials and employees. The people have a right to public officials and employees who are impartial and use independent judgment.
- (b) The confidence and trust of the people erodes when the conduct of County business is subject to improper influence or even the appearance of improper influence.
- (c) To guard against improper influence, the Council enacts this public ethics law. This law sets comprehensive standards for the conduct of County business and requires public employees to disclose information about their financial affairs.
- (d) The Council intends that this Chapter, except in the context of imposing criminal sanctions, be liberally construed to accomplish the policy goals of this Chapter. The Council also intends that this Chapter meet the requirement under state law that the County adopts legislation that is similar to the state public ethics law.

Montgomery County Code, Sec. 19A-2. (Emphasis supplied.)

Given your involvement and the involvement of your Division in the . . . . contract—especially your pivotal role in the recent and significant amendment of that contract—the Commission is convinced that a waiver of the one-year prohibition on your employment by . . . . could create an appearance of significant impropriety or improper influence and seriously erode the confidence and trust of the people in the conduct of County business.

Therefore, although the Commission has the discretion to waive the one- year prohibition on the ground that the proposed employment is not likely to create an actual conflict of interest, it declines to exercise that discretion given the facts of this matter, i.e., your significant involvement in this contract recently and over an extended period of time.

Very truly yours,

[signed]

Kenneth C. Jackson, Sr.

Chairman

NOTICE OF RIGHT TO JUDICIAL REVIEW

§19A-6(c) of the Montgomery County Public Ethics Law provides that a final decision of the Commission on a request for a waiver "may be appealed to the Circuit Court under the applicable Maryland Rules governing administrative appeals."