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October 13, 2003

Jay Holmquist, General Manager
Nebraska Rural Electric Association
800 South 13th Street
P.O. Box 82048
Lincoln, NE 68501

Re: Purchase of Property by Directors and Employees

Dear Jay:

QUESTION

You have asked whether a public power district may sell a used vehicle that has been replaced or other district property that has become obsolete and is no longer useful to the district (surplus property) to a director/and or employee?

SHORT ANSWER

Yes, with certain qualifications stated below.

ANALYSIS

There are no applicable public power district statutes that cover this issue. There are however, relevant provisions in the Political Accountability and Disclosure Act.

I. Political Accountability and Disclosure Act. *Neb. Rev. Stat.* §§ 49-1401 to 49-14,141 is known as the Nebraska Political Accountability and Disclosure Act (the "Act") which among other things, governs the conduct of public officials, officers and public employees.

A. Definitions

(1) **Public official** means an official in the executive branch, an official in the legislative branch, or an elected or appointed official in the judicial branch of the state government or a political subdivision thereof; any elected or appointed member of a school board; and an elected or appointed member of a governing body of a state institution of higher education. (Emphasis added). *Neb. Rev. Stat.* § 49-1443.

(2) **Public employee** means an employee of the state or political subdivision thereof. *Neb. Rev. Stat.* § 49-1442.

(3) **Immediate family** means a child residing in an individual's household, a spouse of an individual, or an individual claimed by that individual or that individual's spouse as a dependent for federal income tax purposes. *Neb. Rev. Stat.* § 49-1425.

(4) **Business** means any corporation, partnership, limited liability company, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint-stock company, receivership, trust, activity or entity.

(5) **Business with which the individual is associated or business association** means (1) In which the individual is a partner, limited partner, limited liability company member, director, or officer; or (2) in which the individual or a member of the individual's immediate family is a stockholder of closed corporation stock worth one thousand dollars or more at fair market value or which represents more than a five percent equity interest or is a stockholder of publicly trade stock worth ten thousand dollars or more at fair market value or which represents more than ten percent equity interest. An individual who occupies a confidential professional relationship protected by law shall be exempt from this section. This section shall not apply to publicly traded stock under a trading account if the filer reports the name and address of the stockbroker. *Neb. Rev. Stat.* § 49-1408.

(6) **Governmental body** means an authority, department, commission, committee, council, board, bureau, division, office, legislative body, or other agency in the executive, legislative, or judicial branch of state government or of one or more political subdivisions thereof or a school district, state college, state university, or other state-supported institution of higher education. *Neb. Rev. Stat.* § 49-1424.

A director of a public power district is a public official within the meaning of the Act since a public power district is a political subdivision and a director is either elected or appointed. Since an employee of a public power district is an employee of a political subdivision, such employee is subject to the Act. A public power district is also a governmental body since it is a political subdivision of the State.

B. Financial gain is prohibited.

Neb. Rev. Stat. §49-14,101.01 provides in part:

(1) A public official or public employee shall not use or authorize the use of, for personal financial gain, financial gain of a member of his or her immediate family, or financial gain of a business with which he or she is associated, other than compensation provided by law, (a) that person's public office or any confidential information received through the holding of a public office or (b) personnel, resources, property, or funds under that person's official care and control other than in accordance with prescribed constitutional, statutory, and regulatory procedures.

The above statute prohibits a public official or public employee from using that person's office, confidential information, personnel, property, or funds under such person's care or control for personal financial gain. The prohibition also extends to a member of such person's immediate family or a business with such person is associated.

C. Certain contracts are prohibited unless they are awarded by public bidding.

Neb. Rev. Stat. § 49-14,102 provides:

Except as otherwise provided by law, no public official or public employee, a member of that individual's immediate family, or business with which the individual is associated shall enter into a contract valued at two thousand dollars or more, in any one year, with a governmental body unless the contract is awarded through an open and public process which includes prior public notice and subsequent availability for public inspection during the regular office hours of the contracting governmental body of the proposals considered and the contract awarded. No contract may be divided for the purpose of evading the requirements of this section. This section shall not apply to a contract when the public official or public employee does not in any way represent either party in the transaction. This section is intended to prevent public officials from engaging in certain activities under circumstances creating a substantial conflict of interest and is not intended to penalize innocent persons, and a contract shall not be absolutely void by reason of this section.

The above section prohibits, except as otherwise provided by law, a public official, public employee, a member of such individual's immediate family or business that such individual is associated with from entering into a contract with a governmental body valued at \$2,000 or more unless the contract is awarded pursuant to an open and public bidding procedure. Since a public power district is a governmental body within the meaning of the Act, a director or employee may not enter into a contract with the power district valued at \$2000 or more unless the contract is awarded pursuant to a public bidding process.

D. Prohibited conflict under § 49-1402 is voidable not void.

Neb. Rev. Stat. § 49-14,103 provides:

(1) A contract involving a prohibited conflict of interest under section 49-14,102 shall be voidable only by decree of a court of proper jurisdiction in an action brought by any citizen of this state as to any person that entered into the contract or took assignment thereof, with actual knowledge of the prohibited conflict. In the case of a person other than an individual, the actual knowledge must be that of an individual or body finally approving the contract for the person. An action to void any contract shall be brought within one year after discovery of circumstances suggesting the existence of a violation. To meet the ends of justice any such decree may provide for the reimbursement of any person for the reasonable value of all money, goods, material, labor, or services furnished under the contract, to the extent that the state or political subdivision has benefited thereby.

(2) Sections 49-14-102 and 49-14,103 shall not apply to a contract for labor which is negotiated or is being negotiated pursuant to the laws of this state.

This statute provides that a court may declare a contract involving a prohibited conflict of interest under section 49-14,102 void if any person entering into the contract had knowledge of the prohibited conflict. In other words, a contract that is entered into in violation of this section is not void from its inception but only voidable if the violator had actual knowledge of the contract and the contract it is challenged in court.

E. An officer that has a business association or will receive a direct pecuniary fee is prohibited from having an interest in a contract.

Neb. Rev. Stat. § 49-14-14,103.01 provides:

(1) For the purposes of sections 49-14,103.01 to 49-14,103.06, unless the context otherwise requires, officer means (a) a member of the board of directors of a natural resources district, (b) a member of any board or commission of any county, school district, city, or village . . .(c) any elected county, school district, educational service unit, city, or village official, and (d) a member of any board of directors or trustees of a district hospital as provided by the Nebraska Local Hospital District Act or a county hospital as provided by . . .Officer does not mean volunteer firefighters or ambulance drivers with respect to their duties as firefighters or ambulance drivers.

(2) Except as provided in section 49-1499.04 or 70-624.04, no officer may have an interest in any contract to which his or her governing body, or anyone for its benefit, is a party. The existence of such an interest in any contract shall render the contract voidable . . .

The prohibition in this subsection shall apply only when the officer or his or her parent, spouse, or child (a) has a business association as defined in section 49-1408 with the business involved in the contract or (b) will receive a direct pecuniary fee or commission as a result of the contract.

(3) Subsection (2) of this section does not apply if the contract is an agenda item approved at a board meeting and the interested officer:

(a) Makes a declaration on the record to the governing body responsible for approving the contract regarding the nature and extent of his or her interest prior to official consideration of the contract;

(b) Does not vote on the matters of granting the contract, making payments pursuant to the contract, or accepting performance of work under the contract, or similar matters relating to the contract, except that if the number of members of the governing body declaring an interest in the contract, would prevent the body with all members present from securing a quorum on the issue, then all members may vote on the matters.

(c) Does not act for the governing body which is a party to the contract as to the inspection or performance under the contract in which he or she has an interest

It would appear that a director of a public power district is not subject to the prohibitions and limitations contained in *Neb. Rev. Stat.* § 49-14-14,103.01 because the definition of "officer" in subsection (1) does not include a member of the board of directors of a public power district or a member of the board of directors of a political subdivision although most of the entities identified are political subdivision. It is curious then as to why subsection (2) identifies section 70-624.04. This statute is a public power district statute dealing with expenses, compensation, and exceptions to compensation for serving on another board, which derives funds by way of dues from a public power district. I have no explanation for this curiosity other than it was inadvertently added.

CONCLUSION

There is no prohibition on the sale of surplus property by a public power district to its directors/and or employees. A director and/or employee of a public power district is prohibited from using his public office, confidential information, personnel, resources or property of the power district for personal financial gain.

If a director and/or employee uses his public office, confidential information, personnel, resources or property of a power district to obtain surplus property at a cost below market value or obtain some other advantage in order to purchase surplus property, such director and/or employee may be in violation of *Neb. Rev. Stat.* § 49-14-14,101.01.

If the subject of the sale is a contract valued at \$2,000 or more, in any one year, the contract is required by *Neb. Rev. Stat.* § 49-14-14,102 to be awarded through an open and public process with prior public notice. "A 'contract' in its broad sense, is an agreement, obligation, or legal tie whereby a party binds itself, or becomes bound, expressly or impliedly, to pay money or to perform or omit to do some certain act or thing." *Kosmicki v. State*, 264 Neb. 887, 652

N.W.2d 883 (2002). It is therefore reasonable to assume that a purchase by a director and/or employee from the a power district of a surplus item valued at \$2,000 or more is a contract subject to the provisions of *Neb. Rev. Stat. § 49-14-14,102*.

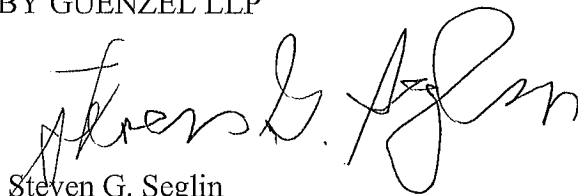
For purposes of illustration, it may be helpful to pose a hypothetical example and speculate on the conclusions that may be drawn. Lets assume that a director or an employee of a power district desires to purchase a used vehicle that has been declared surplus by the power district. It would be prudent for the power district to establish the fair market value of the vehicle, not the book value. There are a number of ways that fair market value could be established. One way is to consult one of the blue books on the wholesale and retail value of used vehicles. Another way would be to try and get a dealer to tell you what it is worth. If the fair market value of the used vehicle is \$2,000 or more, then a public bidding process must be followed before a contract may legally be awarded. If the fair market value of the vehicle is less than \$2,000, then there is no requirement for a public bidding process. However, the director or employee cannot use his public office or any confidential information or personnel, resources, property or funds under person's financial care and control in the purchase of the used vehicle to gain an advantage over someone who does not have the position of director or employee since this would arguably result in financial gain to the director or employee in violation of *Neb. Rev. Stat. § 49-14-14,101.01*. The same analysis would be appropriate for a member of the immediate family of the director or employee or a business that such director or employee is associated. It appears that a director should not take part in any discussions or vote on any sale by the power district of an item which the director or a member of his immediate family or a business which such director is associated desires to purchase.

Very truly yours,

CROSBY GUENZEL LLP

By

Steven G. Seglin

A handwritten signature in black ink, appearing to read "Steven G. Seglin", is written over the typed name. The signature is fluid and cursive.

SGS:rrk