

ADVISORY OPINION

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REFERENCES: RCW 42.52.020, RCW 42.52.030,
RCW 42.52.040, RCW 42.52.120, RCW 42.52.903

SUMMARY OF CHANGES: Updated language of statutory references.

Conflicts of Interest Regarding Board Membership

QUESTIONS

1. May Public Works board members rely on the Advisory Opinion 98-08 and recuse themselves from discussion and voting on matters on which there is no existing conflict of interest in order to preserve potential future business opportunities?
2. Does the fact that general public members of the Public Works Board or their employers must, by law, engage in competitive bidding or in competitive selection for public works projects make members less susceptible to conflicts of interest under the state's ethics law?
3. Are potential conflicts of interest mitigated by the fact that 80 percent of projects approved by the Public Works Board are subject to legislative review and approval?

ANSWERS

1. Yes. The Board sees no reason to limit the application of Advisory Opinion 98-08. Any board or commission whose members are covered under RCW 42.52.903 may rely on the guidance offered in that opinion.
2. No. There is no language in RCW 42.52.030 or RCW 42.52.040 to suggest that the prohibitions against a state officer having a financial interest in a transaction involving the state, or assisting in a transaction involving the state, is limited to circumstances where competitive bidding or competitive selection is not used. Therefore, the Board views the model rules in Advisory Opinion 96-09A as an effective means of addressing the ethical obligations of board and commission members under the state's ethics law.
3. No. The primary purpose of legislative oversight for public works projects is for the appropriation of funding, not for the review of conflicts of interest which may or may not be

known at the time of appropriation. By statute, the Public Works Board is responsible for signing contracts and financially obligating funds— transactions involving the state—and the Public Works Board retains responsibility for developing rules to address conflicts of interest.

ANALYSIS

The Public Works Board (PWB) is established pursuant to RCW 43.155.030 to plan and finance public works projects, and to provide technical assistance to local governments. The PWB is composed of thirteen members, nine of whom represent public entities. The remaining four are general public members, with preference given to members having expertise in the areas of public finance, architecture, civil engineering, and public works construction.

The PWB's chief concern is the development of rules that will prevent conflicts of interest for members. If a conflict of interest were to arise, the conflict likely will involve one of the four general public members, any one of whom could be reasonably expected to have an interest in bidding to perform work on public works projects. The PWB has posed three questions. Each is concerned with the circumstances under which a board member may avoid a conflict of interest.

1. May PWB board members rely on the Advisory Opinion 98-08 and recuse themselves from discussions and voting on matters on which there is no existing conflict of interest in order to preserve potential future opportunity to bid on a public works project?

In Advisory Opinion 98-08 the Board determined that a board member for the Washington Technology Center (WTC) could recuse from discussions and voting on matters in order to preserve a future business opportunity, provided that the effect of the recusal was not to limit the WTC board's ability to perform its public duties. The Board cautioned, however, that recusal may be incompatible with the performance of public duties under RCW 42.52.020 if the participation of a member is required for action, and the effect of the recusal is to enhance a future business opportunity.

The Board sees no reason to limit the application of Advisory Opinion 98-08 to the WTC board, and concludes that any board or commission whose members are covered under RCW 42.52.903, including the PWB, could rely on the guidance offered in that opinion.

2. Does the fact that general public members of the PWB or their employers must, by law, engage in competitive bidding or in competitive selection for public work make these members less susceptible to conflicts of interest under the state's ethics law?

In Advisory Opinion 96-09, the Board identified two potential ethics issues that may be raised by the participation of board and commission members in transactions involving the state. The first is that such participation may violate RCW 42.52.030, which deals with financial interest in transactions. RCW 42.52.030 provides:

- (1) No state officer or state employee 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.

- (2) No state officer or state employee may participate in a transaction involving the state in his or her official capacity with a person of which the officer or employee is an officer, agent, employee, or member, or in which the officer or employee owns a beneficial interest[.]

While the employee of a firm may not be beneficially interested in a contract between the firm and the PWB, RCW 42.52.030(1) would also prohibit a state officer from accepting compensation from a person beneficially interested in a contract. Under RCW 42.52.030(2), the officer is prohibited from participating in a transaction involving the state with a person of which the officer is an employee. This would prohibit a PWB member from participating in a transaction involving the state and the firm which employs the member.

Potential conflict of interest concerns are also raised under RCW 42.52.040, which deals with assisting persons in transactions involving the state in which the officer has at any time participated, or if the transaction has been under the officer's official supervision within a period of two years preceding such assistance. [Emphasis added.] RCW 42.52.040(1)(a)-(b). RCW 42.52.040(2) prohibits a state officer from sharing in compensation received by another for assistance that the officer is prohibited from providing.

Unlike RCW 42.52.120, there is no language in RCW 42.52.030 or RCW 42.52.040 to indicate that the legislature intended to limit the application of these ethical prohibitions to circumstances where competitive bidding or competitive selection is not used. Rather, it is precisely because of these statutory provisions that the Board proposed the adoption of model rules in Advisory Opinion 96-09A.

The Board believes the model rules continue to serve as an effective means of balancing a board or commission member's obligations under the state's ethics law, and allowing the member to use his or her general expertise to inform decisions made on behalf of the public. Therefore, the Board sees no reason to exempt the PWB from the model rules.

3. *To what extent are potential conflicts of interest mitigated by the fact that 80 percent of projects approved by the Public Works Board are subject to legislative review and approval?*

Pursuant to RCW 43.155.070(4), the PWB develops and submits a prioritized list of public works projects that are recommended for funding by the legislature. The PWB may not sign contracts or financially obligate funds from the public works assistance account before the legislature has appropriated funds for a specific list of projects. The primary purpose of legislative review and approval is to appropriate funds, not to address conflicts of interest that may or may not be known to the legislature at the time projects are recommended by the PWB.