

Public comment for NAC 287 regulation workshop, 9/24/2013

Submitted by Kent Ervin

I have been an active contributor and participant in the Nevada Deferred Compensation (NDC) Program since 2007. A substantial portion of my retirement savings is invested in my NDC 457 plan account. As a NSHE employee with no PERS guaranteed retirement benefit, I have been pleased with this additional opportunity to save for retirement. However, I was distressed last year when the NDC's Request for Proposals for recordkeepers was withdrawn amid threatened litigation about the Committee's process. This resulted in higher fees and lower returns for participants, by \$1M to \$1.5M for 2013 alone compared with the finalist proposals.

The proposed change of regulation NAC 287.715 to award recordkeeper contracts by simple majority vote of the NDC Committee unfortunately attempts to repeat that failed process. It is in conflict with state purchasing statutes and regulations. Going outside the well established and tested state procurement procedures is not in the best interests of participants for achieving a fair, competitive and legally defensible selection process for recordkeepers.

The goal for the future should be to conduct a RFP process that is legally defensible and that is both perceived to be and truly is competitive and fair. To that end it would be advantageous for the NDC to use the Purchasing Division to lead and coordinate its recordkeeper RFP and selection process. As detailed in my full written comments (background information below), the NDC Committee clearly meets the definition of a "using agency" under NRS 333 and thus is required by the statute to use the State Purchasing Division to award contracts over \$100,000. To meet the special fiduciary duties of the Committee regarding the 457 Plan, however, it would be appropriate for the program to negotiate with the Purchasing Administrator to designate the NDC Committee as the evaluation committee and to employ the NDC's Investment Consultant as an expert to evaluate technical aspects of the recordkeeper proposals. This course of action is more likely to produce a new recordkeeper contract that is in the best in of participants and not subject to litigation, as well as to protect Committee members from personal liability, than is repeating the disputed process attempted in 2012. For these reasons, the NAC 287 regulations should refer to NRS/NAC 333 procurement procedures for recordkeeper contracts.

In addition, the regulations should emphasize the statutory fiduciary duty of the Committee to make decisions solely in the best interests of participants and the Open Meeting Law requirement to conduct the process in public meetings except where closed meetings are specifically authorized by statute. The language should also allow flexibility to consider proprietary stable value funds, in addition to open-architecture funds.

I am respectfully submitting conceptual language to implement these ideas in NAC 287.715-730 (attached). Thank you for your consideration.

Background Information:

In a letter of 9/11/2012 from NDC Chair Scott Sisco to Purchasing Administrator Greg Smith (attached), Mr. Sisco stated that “as has been previously determined, there are no public funds associated with the [NDC] Program’s operations, and as such, the program does not fall within the requirements of the NRS 333 procurement process.” In response to my public records request (8/16/2013) for documentation of such a ruling, NDC provided only Mr. Smith’s advisory opinion of 9/19/2012 (attached), in which he explicitly declined to make a determination whether NDC must use NRS 333 procurement procedures as a general rule. NDC staff indicated they were unaware of any other public record of a ruling regarding NDC being exempt from NRS 333. Regardless, NRS 333 itself and the facts of the situation argue that NDC must use NRS 333 purchasing procedures for procurements.

NRS [333.020\(10\)](#) states: “Using agencies’ means all officers, departments, institutions, boards, commissions and other agencies in the Executive Department of the State Government which derive their support from public money in whole or in part, whether the money is provided by the State of Nevada, received from the Federal Government or any branch, bureau or agency thereof, or derived from private or other sources.” This is a very broad definition. The operations of the NDC Program and Committee are supported by public money in at least three ways:

- (1) The compensation of Committee members by their regular state salaries while they conduct NDC Committee business, as authorized by NRS [287.370](#).
- (2) Indirectly through the administrative support of the NDC’s operations and staff by other state agencies, and through use of state facilities. (Documented by Mr. George H. Taylor, Senior Deputy Attorney General, in OML Opinion 12-037, attached)
- (3) The fees collected by recordkeepers from participants on behalf of the NDC Program through their state contracts become public money once transferred to the NDC’s state operational accounts, the same as other state-collected user fees or private grants to state agencies. These funds are no longer in participants’ or vendors’ accounts or under their control, and NDC has long followed state budgeting and accounting regulations to administer them, as is appropriate. These public funds, while restricted by federal regulations to support only legitimate 457 plan expenses, directly support the staff and operations of the NDC Committee and NDC Program.

Any one of these is sufficient evidence of support from public money. The NDC Committee and NDC Program clearly meet the definition of “using agencies” in NRS 333 and thus are required to follow NRS 333 in procurements. Since the recordkeeper service contracts are well in excess of \$100,000, NRS [333.165](#) requires that the Administrator of the Purchasing Division contract for the services or else give approval for NDC to do so under NRS 333 provisions. Using a simple majority vote of the Committee to award contracts is inconsistent with NRS 333, according to Mr. Smith’s advisory opinion dated 9/19/2012. The proposed NAC provision to that effect would therefore violate the statute.

There is no conflict between the Committee discharging its duties under NRS [287.330](#) and following the established procurement procedures of NRS 333. If NDC instead rejects the applicability of NRS 333 for its recordkeeper search, the Committee will again open itself to litigation and potentially members’ personal liability. Furthermore, it is highly questionable whether the Committee could still rely on provisions in NRS 333 to evaluate proposals in closed meetings or to keep proposals confidential during the process.

[Proposed conceptual revision to NAC 287.715, 720, & 730
with ~~new deletions~~ and new additions]

287.715 NAC ~~[Administrators and providers]~~ Recordkeeper(s): Bases for selection. (NRS 287.330) The Committee will base its selection, ~~as applicable,~~ of ~~[administrators and providers]~~ Recordkeeper(s) solely on *the best interests of participants and will act with the care, skill, prudence and diligence that, under the circumstances existing at the time of the decision, a prudent person who is familiar with similar deferred compensation programs would use while acting in a similar capacity. The Committee will consider, as applicable:*

1. The criteria set forth in NAC 287.720;
2. The ~~answers~~ responses to the questionnaire and request for proposals provided pursuant to NAC 287.725 and analyses by the Investment Consultant of technical aspects of the responses.
3. Any interviews conducted by the Committee;
4. The ~~[variety and quality of any investment options offered to participants]~~ ability of the Recordkeeper(s) to make available the investment options managed by third-party investment companies and designated by the Committee at the recommendation of the Investment Consultant;
5. The quality, safety, performance, and terms of any investment options offered to participants that are managed or guaranteed by the Recordkeeper(s); and
~~[5.]~~ 6. The projected costs submitted by each applicant.

→The Committee will not select an applicant who submits the least expensive proposal if another applicant ~~[is better qualified]~~ will better meet the overall needs of the program as determined by a majority vote of the committee. selection of other Recordkeeper(s) is in the best interests of participants.

287.720 NAC ~~[Administrators and providers]~~ Recordkeeper(s): Criteria for selection. (NRS 287.330) In selecting an applicant, the Committee will consider:

1. The criteria set forth in NRS 333.335(3);
2. The experience of the applicant in providing services to deferred compensation and similar programs ~~[and the rate of return of any investments offered by the applicant];~~
3. The amount of money the applicant is currently managing and the general financial condition of the applicant;
4. Whether the applicant is qualified to do business in this State; and
5. Whether the applicant employs a sufficient number of employees and possesses sufficient equipment to offer timely and efficient communication and service to the participants in the Program.

...

~~287.730 NAC Appointment of subcommittee to review proposals and make recommendations;~~ Review of proposals. General meetings of Committee; Confidentiality of responses. Closed meetings. Negotiation of changes to accepted proposals. (NRS 287.330) The Committee's procurement of Recordkeeper contract(s) will follow the provisions of NRS Chapter 333 and NAC Chapter 333 using the following procedures:

~~1. The Chair shall, if he or she deems it appropriate, appoint a subcommittee to review the proposals and make recommendations to the full Committee.~~

~~2.~~

1. The Committee as a whole will serve as the evaluation committee defined in NRS 333.135(1) to discharge its duties pursuant to NRS 287.330(2)(c) and NRS 287.330(3).

2. In evaluating proposals pursuant to NRS 333.335, the best interests of the participants shall be deemed to be also in the best interest of the State of Nevada as plan sponsor.

3. The Chair shall call a ~~an~~ open general meeting(s) of the Committee to:

(a) Accept information from appropriate sources pertaining to any applicant;

(b) Conduct interviews of the applicants;

(c) Deliberate whether one or more than one Recordkeeper will be retained;

(d) Discuss Committee members' scorings of proposals pursuant to NRS 333.335(3) and NAC 333.162, during which each member of the Committee shall provide explanations of the scores he or she assigns; and

(e) Select ~~two~~ one or more of the applicants for appointment as ~~administrators and providers~~ Recordkeeper(s) in order of the highest to lowest scores pursuant to NRS 333.335(5).

4. Responses to a Request for Proposals issued by the Committee are confidential while being evaluated by the Committee pursuant to the provisions of NRS 333.335, until the earlier of:

(a) The date the contract is awarded; or

(b) Ninety days after the Request for Proposals is withdrawn, cancelled, or suspended by the Committee unless a replacement or modified Request for Proposals has been issued by the Committee.

5. Meetings of the Committee may be closed to the public for the sole purpose of discussion of the content of proposals that are confidential pursuant to subsection (4).

6. Acceptance of an applicant's proposal does not preclude the Committee from negotiating specific changes to the proposal which are in the best interests of ~~the State of Nevada~~ participants.

Brian Sandoval
Governor



**Nevada Public Employees'
Deferred Compensation Program**

COMMITTEE
Scott Sisco, Chair
NDOT
Carlos Romo, Vice Chair
Retired
Brian L. Davie
LCB
Karen Oliver
GCB
Steve C. Woodbury
DTCA

Carrie L. Parker
Deputy Attorney General

September 11, 2012

Mr. Greg Smith, Administrator
State of Nevada Purchasing Administrator
515 E. Musser Street, Suite # 300
Carson City, NV 89701

Dear Mr. Smith:

Thank you for the opportunity for the Nevada Public Employee's Deferred Compensation Program to provide additional information relevant to your review of the Petition for a Declaratory Order requested by ING Life Insurance and Annuity Company.

The intent of this response is not to dispute the various statements contained within the petition relative to how NRS 333.335 sections (3) and (5) might be applied to procurement processes overseen by the State of Nevada Purchasing Division for various State agencies. **However, as has been previously determined, there are no public funds associated with the Program's operations, and as such, the program does not fall within the requirements of the NRS 333 procurement processes.** Ultimately, the selection of service providers (Administrator's or Record Keepers), by the Committee falls under the statutory and regulatory authorities of NRS 287.250 through 287.370 and NAC 287.700 through NAC 287.735.

Unique to this Program, finalists were scheduled for an interview date, and notified that they could alter their bids that were evaluated and scored up to that point under the guidelines of the RFP (see attached) prior to that interview date. Further, finalists that were invited to provide best and final offers and invited to the interview, were specifically informed in writing that "the contract may not necessarily be awarded according to the highest score" (see attached). This process of soliciting and ultimately accepting best and final offers and awarding the contract based on a final interview and review of those last minute offers, while perhaps unorthodox to a State procurement process, is considered to be normal practice in the Deferred Compensation industry, and meets the decision making needs of the Committee in selecting the vendor in the best interest of NDC participants and their beneficiaries.

Ultimately the second place vendor (by a margin of approximately one point) was selected. Please find the attached final score sheet used by the committee.

Mr. Gregg Smith
September 11, 2012
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We understand that NAC 333.200 provides for 30-days for a response from the Administrator to the petitioner. However, since the Committee has a scheduled meeting on September 20th, anything you can do to expedite the process so as to have your response by that day would allow the Committee to take action if ultimately necessary – and would be greatly appreciated. Please let me know if I may provide any additional information to assist you.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott K. Sisco". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Scott K. Sisco
Chairman

Attachments (3)

cc: Carrie Parker, Deputy Attorney General
Carlos Romo, Vice Chairman
Brian L. Davie, Member
Karen Oliver, Member
Steve Woodbury, Member



STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION

Purchasing Division

515 East Musser Street, Suite 300 | Carson City, Nevada 89701

Phone: (775) 684-0170 | Fax: (775) 684-0188

September 19, 2012

MEMORANDUM

TO: Robert L. Crowell, Esq.
Nevada Deferred Compensation Committee, Scott K. Sisco, Chairman
Charles R. Zeh, Esq.

FROM: Greg Smith, Administrator
Purchasing Division

SUBJECT: ADVISORY OPINION of the Administrator of the Division of Purchasing,
Nevada Department of Administration

Under NRS 287.250 et seq., the State of Nevada may offer to its employees a program to defer a portion of the employee's compensation, to be invested in an investment approved by the Nevada Deferred Compensation Committee (the "Committee"), subject to applicable federal and state laws and regulations. The Committee is expected to solicit proposals from qualified providers of investment plans at least once every five years. NRS 287.330(3)(e).

On March 5, 2012, the Nevada Public Employees' Deferred Compensation Program ("NDC") issued a Request for Proposals ("RFP") for general retirement plan administration, record keeping and other services in connection with the NDC's 457 Deferred Compensation Plan and FICA Alternative Plan. The RFP stated that the procurement "is being conducted in accordance with NRS chapter 333 and NAC chapter 333," and included references to numerous statutes and regulations within those chapters, including NRS 333.335, governing the scoring of proposals.

The deadline for submission of proposals was April 30, 2012. Proposals were given initial scores by the Committee, and the top proposals were invited to make oral presentations on July 18, 2012. At the July 18 meeting of the Committee final scores were assigned after the oral presentations. The proposal from ING Life insurance and Annuity Company (ING) received the highest score, but the Committee voted to award the contract to The Hartford, whose proposal received the next highest score.

On August 29, 2012, counsel for ING sent a document to the Administrator of Purchasing entitled "Petition for Declaratory Order" pursuant to NAC 333.200. The Petition requests a declaratory order that awarding the contract to a proposer other than the one whose proposal received the highest score violates NRS 333.335 and nullifies the contract award.

On September 4, 2012 the Administrator of Purchasing sent a letter to the Committee inviting a response as to the facts alleged by ING in its petition.

On September 11, 2012 the Committee, by its chairman, Scott Sisco, responded to ING's petition.

On September 13, 2012 counsel for ING submitted a letter replying to the Committee's response. Counsel for the Hartford requested to submit its own response, and such a response was sent by email on September 18, 2012.

I. Does ING Have Standing to Request a Declaratory Order or Advisory Opinion Under NAC 333.200?

The first issue to be considered is whether ING has standing to make a request of the Administrator of the Purchasing Division under NAC 333.200, which provides as follows:

1. A person may petition the Administrator to issue a declaratory order or an advisory opinion if the person has a direct or tangible interest in the applicability of a statutory provision, regulation of the Administrator or decision of the Administrator or Division.
2. A petition must be:
 - (a) Submitted to the Administrator in writing; and
 - (b) Signed by the petitioner.
3. If the Administrator receives a petition filed pursuant to this section, he or she will issue a declaratory order or an advisory opinion not more than 30 days after receiving the petition. A copy of the order or opinion must be mailed to the petitioner.

ING submitted a proposal in response to the RFP, received the highest score from the Committee, but the Committee has chosen not to award the contract to ING. In addition, ING (with the Hartford) is one of two providers currently offering investment of deferred compensation for Nevada employees. It appears that ING has the necessary "direct or tangible interest" to make a request under this regulation.

Does ING's request involve the "applicability of a statutory provision, regulation of the Administrator or decision of the Administrator or Division"? The request involves applicability of both the statutes and regulations governing purchasing and procurement for agencies of the State of Nevada, NRS Chapter 333 and NAC Chapter 333.

Is the Committee subject to the requirements of these statutes and regulations? In its response, the Committee has argued that it is not subject to NRS Chapter 333 or regulations adopted pursuant to that Chapter. The Committee contends that because no "public funds" or appropriated money of the State may be spent in connection with the administration of the Program, see NRS 287.370 and State Administrative Manual (SAM) 3812, it is not a "using agency" under NRS 333.020(10), which includes only those Executive Branch "officers, departments, institutions, boards, commissions and other agencies . . . which derive their support from public money."

I do not believe it is necessary to determine whether the Committee is legally bound to follow NRS Chapter 333, or whether the Committee could conduct a procurement outside the procedures set forth in that chapter, because in this case the Committee has chosen to follow both NRS Chapter 333 and NAC Chapter 333. The RFP stated that the procurement was being conducted in accordance with NRS Chapter 333 and NAC Chapter 333, including NRS 333.335, the provision for scoring proposals. It has been observed that the RFP is contractual in nature, in that it defines the rights of the persons who respond to the RFP and submit a proposal to supply the services solicited. Cf. 1998 Op. Nev. Att'y Gen. 46, 52 (Opinion #98-07, March 2, 1998). In addition, while a chapter or provision of the procurement law may not be mandatory to a government agency, if that agency chooses to follow the statutory procedure, it may be bound by

the statutory procedure. *See, Orion Portfolio Services 2, LLC v. County of Clark*, 126 Nev. Adv. Op. 39, 245 P.3d 527, 532 (2010) (“We conclude that local government may dispose of its personal property in any manner it chooses, but if it chooses to use the competitive bidding process, it must follow the mandates of NRS Chapter 332 as nearly as possible.”)

II. Does NRS 333.335 Require That the Contract Be Awarded to the Highest Scoring Proposal?

NRS 333.335 sets forth certain requirements in the evaluation of proposals submitted pursuant to an RFP conducted under Chapter 333. Subsection 3 lists the factors on which proposals must be scored to determine whether the proposal is in the best interests of the State:

- (a) The experience and financial stability of the person submitting the proposal;
- (b) Whether the proposal complies with the requirements of the request for proposals as prescribed in [NRS 333.311](#);
- (c) The price of the proposal; and
- (d) Any other factor disclosed in the request for proposals

Subsection 5 states in relevant part:

[The agency] . . . shall award the contract based on the best interests of the State, *as determined by the total scores assigned pursuant to subsection 3*, and is not required to accept the lowest-priced proposal. . . .

(emphasis added.)

NAC 333.170 governs the procedure for final contract negotiation after the contract has been awarded on a contingency basis. It presumes that the highest scoring proposer will have the first opportunity to negotiate a contract, and states in subsection (3)(b) that if a final contract is not agreed upon with the originally selected vendor, the agency may either withdraw the RFP or “[n]egotiate . . . the final terms of the contract with the person who submitted the proposal that received the next highest score.”

The Hartford argues that the phrase “total scores assigned” in NRS 333.335(5) does not mean that the proposal receiving the highest total score should be selected, and the agency still retains full discretion to disregard the highest total score and select another proposal that it deems in the best interests of the State. The regulations of the Purchasing Division such as NAC 333.170 have construed that phrase to refer to the relative ranking of the proposals by the total numerical score given to each proposal, and I see no reason to depart from that interpretation.

Therefore, in an RFP issued under the terms of NRS Chapter 333, the totals of the numerical scores assigned are expected to determine the best interests of the State, and, except in highly unusual circumstances, the person receiving the highest or best score should be awarded the contract, contingent upon successful negotiation of the final terms of the contract. There may be cases in which an award to a proposal other than the one receiving the highest score is justifiable, or even required. For example, it may be discovered after scores are assigned that the person receiving the highest score is unable or unwilling to perform the services required by the RFP for the duration of the expected contract. After the scoring but before contract award, it may be found that the highest scorer no longer meets the minimum requirements of the RFP, so that a contract may not be awarded to that proposer. See NRS 333.311. Or, the proposer may lose or be unable to acquire necessary licenses and permits to perform the services. These examples are not exhaustive, but awarding the contract to someone other than the highest scoring proposer should be supported by persuasive, if not compelling, reasons. We have not been made aware of any persuasive reason why ING would be unable to perform the services for which it made a proposal.

The Committee contends that it has waived or opted out of the requirements of NRS 333.335(5). After preliminary scores were assigned, on July 3, 2012 the Committee's consultant, Arnerich Massena, sent letters to the highest scoring proposers, inviting them to make oral presentations at the Committee's meeting on July 18. The letter stated in part, "The contract may not necessarily be awarded according to the highest score."

It is doubtful that the letter could withdraw the Committee from the requirements of NRS Chapter 333 that the Committee assumed when the RFP was issued. The letter does not purport to amend the RFP, and it may not be possible to do so after proposals have been submitted, opened and scoring has begun. Certainly, the minimum requirements of an RFP may not be waived, and if a material provision of the RFP is waived or disregarded, the resulting contract may be void under the analysis of *Orion Portfolio Services, supra*, as exceeding the authority of the agency ("If the invitation to bid and the contract differ materially, then the contract is void.") It would be better to construe that statement in the July 3 letter as consistent with our opinion that unusual circumstances could occur that could justify award to a lower scoring proposal.

III. Conclusion and Caveats

The Deferred Compensation Committee chose to follow NRS Chapter 333 in its procurement and issued an RFP on that basis. **It is my opinion as the Administrator of the Division of Purchasing that (a) absent a persuasive reason why a contract should not be awarded to the person whose proposal received the highest score, NRS 333.335(5) requires that the highest scoring proposal be selected for the opportunity to negotiate the terms of the final contract; and (b) a determination of whether a resulting contract would be void, or whether a notice of contract award would be cancelled, lies with either a hearing officer under the provisions of NRS 333.370, or a court.**

In giving this opinion, I want to emphasize several caveats. This is an advisory opinion, not a declaratory order. This procurement was done by the Deferred Compensation Committee and not by the Purchasing Division. As Administrator of the Purchasing Division, I do not have the authority to issue an order to the Committee. However, in accordance with NAC 333.200 I can issue an advisory opinion as to how the Purchasing Division would apply the statutes and regulations in question.

NAC 333.200 is not intended to circumvent or avoid the contract appeals process set forth in NRS 333.370. That statute was amended in 1995 (1995 Nev. Stat. 378, AB 453) to provide for hearing by a hearing officer and give the process of a contract appeal the characteristics of a contested case under NRS Chapter 233B. NAC 333.200 was adopted effective March 5, 1998 (LCB File No. R179-97), so the two provisions are not inconsistent. The Purchasing Division does not intend to use NAC 333.200 in cases in which NRS 333.370 should govern.

There may be statutes and regulations of the Committee that would take precedence over NRS Chapter 333. While it may be that not every provision of NRS Chapter 333 can apply to the Committee, once the Committee chose to issue its RFP pursuant to NRS Chapter 333, it committed to follow Chapter 333 as nearly as possible. **I have not been made aware of any statutes or regulations that would prevent the Committee from following NRS 333.335 with respect to awarding the contract to the highest scoring proposer.**

In its reply to the Committee's response, ING raised the issue whether The Hartford, which has announced a sale of its section 457 retirement services business to Massachusetts Mutual, could receive any contract as a result of this procurement, since it would not be in position to perform the contract on which it submitted a proposal, and Massachusetts Mutual submitted no proposal in response to this RFP. This issue was not raised in ING's petition and was not considered in this advisory opinion.

CC: Governor Brian Sandoval
Attorney General Catherine Cortez Masto
Secretary of State Ross Miller
Deputy Attorney General Carrie L. Parker
Mike Pavlakis, Esq., Counsel for Great West



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
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CATHERINE CORTEZ MASTO
Attorney General

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Assistant Attorney General

GREGORY SMITH
Chief of Staff

February 28, 2013

Scott K. Sisco, Chairman
Nevada Public Employees Deferred
Compensation Program
100 North Stewart Street, Suite 210
Carson City, Nevada 89701

Re: Open Meeting Law Complaint / AG File No. 12-037
Nevada Public Employees' Deferred Compensation Program

Dear Mr. Sisco:

This Office has investigated an Open Meeting Law (OML) complaint that alleged the Committee that administers the Nevada Public Employees Deferred Compensation Program¹ (Committee) violated the OML requirement to make available minutes of meetings within 30 working days of the meeting. It is also alleged that supporting material was not provided upon request following the Committee's November 2, 2012 open public meeting. Finally, the complaint alleged that the minutes of certain meetings, closed because of confidentiality regarding the discussion, were redacted more extensively than required by the confidentiality statutes.

The Committee's response to the complaint stated that the Committee does not meet the technical requirements of a public body. Furthermore, the response stated that even though the Committee "makes a practice of operating within the requirements of [OML] statute[s]" the Program does not meet the definition of public body within the statute. At most, it is argued, the Committee's duty to comply with the OML is voluntary, primarily because it "does not expend, disburse, nor is it supported by tax revenue." See, NRS 241.015(3)(a)(public body must expend, disburse, or be supported in whole or in part by tax revenue).

¹ The Committee was created in statute NRS 287.325.

This Office has jurisdiction to investigate OML complaints and seek civil remedies against public bodies, including injunctive relief, to require compliance with the OML, or to prevent violations of the OML. A criminal misdemeanor penalty and a monetary penalty are also authorized relief against individuals in any court of competent jurisdiction. NRS 241.037; NRS 241.040.

FACTS

On March 5, 2012 the Committee which administers the Nevada Public Employees' Deferred Compensation Program authorized by NRS 287.250 to 287.370, distributed a Request for Proposals (RFP) for Administrator services for the 457(b) (Internal Revenue Code) Program. The proposal informed those interested in submitting a proposal that the proposals would be evaluated and scored in accordance with NRS 333.335(3) based on enumerated criteria set out in the RFP. One of the terms and conditions of the procurement process was that it would be conducted in accordance with NRS Chapter 333 and NAC Chapter 333. The RFP also informed the reader that "proposals shall be kept confidential until a contract is awarded." NRS 333.335(6).

Responses to the RFPs were received and reviewed during the summer of 2012, but contracts with the vendors (record keepers) were not awarded; instead, in November 2012, two existing administrator services contracts between the State of Nevada acting by and through the Committee and Hartford Financial Services Group, Inc. (Hartford) and ING Life Insurance and Annuity Company (ING) were extended for a period of two years.

During this RFP process beginning in March 2012, the Committee and staff experienced almost a complete turnover of personnel. From June 22, 2012 until October 8, 2012, the Committee's only full-time employee position was vacant. The Committee's part-time administrative assistant position was vacant twice during the same period. Without clerical support, Committee meeting minutes for June 21, July 12, July 18, August 16, August 24, and September 20 were not made available within 30 working days of the adjournment of the meeting.

Minutes from the August 16, 2012 Committee meeting indicate that at least one Committee member was concerned about the backlog of unpublished meeting minutes. (Item I.F., i.e. discussion and possible action relating to transcripts for bringing minutes [of prior meetings] up to date). Discussion of Item I.F. was brief. One member suggested the cost estimate was expensive. The item was deferred pending further discussion with the administrative assistant, but no further discussion of the backlog of minutes appeared on subsequent meeting agendas. Despite lack of public discussion of the backlog, all of the backlogs of minutes of Committee meetings were made available by December 17, 2012.²

² We are also unaware of any request for Committee meeting minutes until October 6, 2010 when the complainant made an email request to the new Program Coordinator.

Meeting minutes for June 21, July 12, July 18, August 16, August 24, and September 20 meetings were posted by early December 2012. Minutes of the closed portion of the Committee's June 21, 2012 meeting, alleged to represent confidential discussions, were redacted, but were made available to the public (posted online on the Committee's website) by December 17, 2012. Complainant acknowledged having received, by December 17, 2012, minutes of all the meetings he requested, once they were posted online.

On June 22, 2012, the Program's executive director resigned. The Committee needed to hire a full-time employee. The Committee relied on the Division of Human Resource Management (DHRM) to pursue the recruitment of a full-time employee. The Committee conducted interviews for the full-time position in public session. A full-time Program Coordinator was hired during its September 20, 2012 meeting. The Program Coordinator began work on October 8, 2012.

Department of Human Resource Management (DHRM) provided recruitment services for the position of Program Coordinator. Services were provided, without charge to the Committee, by two DHRM employees, both of whom attended Committee meetings to discuss the recruitment process with the members. Other services provided included posting the job announcement, review of all job applications, the administration of a written examination, creation of an eligible list of applicants, performance of reference checks of the eligible applicants and facilitation of the interview process during public meetings. Our review of the Governor's Line item Budget Account 1017 (Committee) for the 2013–2015 biennium does not show any charges (cost allocation) to recoup the cost of services provided by DHRM related to recruitment services.

Similarly, the Committee's RFP process to select a vendor for administrator services (record keeper) also utilized limited services of an employee of the Division of State Purchasing. These services included meetings with staff, and review and advice regarding the RFP, such as whether the Committee was required to comply with NRS Chapter 333 State purchasing statutes. Purchasing's employee attended Committee meetings where she answered questions about responses to the Committee's RFP. She also answered questions from the Committee about Hartford's ability to meet mandatory requirements set out in the RFP. The employee attended the public meeting at which vendor responses to the RFP were determined. Her attendance was at the request of the Committee. Other services included numerous telephone conversations with the Chair and other members of the Committee. Purchasing did not bill the Committee for services related to the RFP process.

Direct support from the State was also given to the Committee in 2012 when the Program's executive officer's lease of office space terminated at the end of March 2012. The executive officer moved to office space in the State Library. For four months no rent was paid. Division of Buildings and Ground confirmed that the Program enjoyed rent abatement until July 1, 2012.

The Committee's statutory authority provides continuing indirect support. NRS 287.370 provides an exception to the prohibition against use of appropriated funds by the Program's members and staff. NRS 287.370 prohibits use of appropriated money of the State in connection with the administration of the Program except as compensation for employees who participate in the administration as part of their regular duties. In other words, the Legislature encourages service on the Committee by allowing its members and staff to receive their regular pay, which is appropriated funds from State revenues, while serving on the Committee.

There is other indirect support for the Program and the Committee regardless of whether the support is denominated as tax revenue, public money, or appropriated funds. The Program's full-time employee is a state employee who participates in PERS, PEBC, and receives liability coverage through the State's tort claims fund.

The Committee has always complied with the OML until the response to this complaint alleged it was not subject to the OML. The Program's Administrative Manual (amended and effective August 18, 2011) Article VII, section 2 requires that each Committee meeting agenda be posted in accordance with the OML. Article IX, section 1, states that members of the Committee must comply with the OML as well as the Attorney General's Boards and Commission Manual. On May 15, 2012 at the request of the Committee, this Office provided OML training for Committee members.

The State agencies mentioned herein, which have provided personnel time and other services to the Committee, are all part of the Executive Department which expend, disburse, or are supported in whole or in part by tax revenue.

ISSUES

I. WHETHER THE COMMITTEE WHICH ADMINISTERS THE NEVADA PUBLIC EMPLOYEES' DEFERRED COMPENSATION PROGRAM IS A PUBLIC BODY SUBJECT TO NRS CHAPTER 241.

II. WHETHER COMMITTEE'S REDACTION OF THE MINUTES OF ITS JUNE 21, 2012 CLOSED MEETING COMPLIED WITH THE OML.

III. WHETHER A LETTER DATED OCTOBER 4, 2012 FROM THE HARTFORD TO THE COMMITTEE SHOULD HAVE BEEN PART OF SUPPORTING MATERIAL FOR THE NOVEMBER 2, 2012 MEETING.

DISCUSSION

I. WHETHER THE COMMITTEE WHICH ADMINISTERS THE NEVADA PUBLIC EMPLOYEES' DEFERRED COMPENSATION PROGRAM IS A PUBLIC BODY SUBJECT TO NRS CHAPTER 241.

Central to the resolution of the Committee's declaration that the Committee is not subject to the OML is determination of the meaning of the term public body and in

particular with reference to the language in NRS 241.015(3) which defines public body.³ The Committee's defense to the allegation it was in violation of the OML is that it is not subject to the OML. Committee asserts that it does not "expend or disburse" tax revenue, a requirement in NRS 241.015(3). However, "expending" tax revenue is not the only path to becoming a public body. The relevant language in NRS 241.015(3) states that a public body is also created if it is "supported in whole or in part by tax revenue." This phrase is a distinct separate criterion; it is not part of the requirement that the public body expend or disburse tax revenue. These two criteria are distinct because they are stated in the disjunctive in the statute. A public body may be created if it "expends or disburses" tax revenue, or it may be created if it is "supported in whole or in part by tax revenue."

The OML was enacted for the benefit of the public because all public bodies exist to aid in the conduct of the people's business. NRS 241.010. The OML should be interpreted broadly to promote openness in government; exceptions to the OML are to be strictly construed. *McKay v. Board of Supervisors*, 102 Nev. 644, 647, 730, P.2d. 438, 441 (1986). As well, this Office has previously opined that the term "tax revenues" should be construed in its broadest possible sense to include not only those terms traditionally thought of as taxes but also license fees. OPEN MEETING LAW MANUAL, § 3.01 (11th ed. 2012), citing Letter Opinion to the Nevada State Board of Architecture (September 1, 1977).

³ 3. Except as otherwise provided in this subsection, "public body" means:

(a) Any administrative, advisory, executive or legislative body of the State or a local government consisting of at least two persons which expends or disburses or is supported in whole or in part by tax revenue or which advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue, including, but not limited to, any board, commission, committee, subcommittee or other subsidiary thereof and includes an educational foundation as defined in subsection 3 of NRS 388.750 and a university foundation as defined in subsection 3 of NRS 396.405, if the administrative, advisory, executive or legislative body is created by:

(1) The Constitution of this State;
(2) Any statute of this State;
(3) A city charter and any city ordinance which has been filed or recorded as required by the applicable law;

(4) The Nevada Administrative Code
(5) A resolution or other formal designation by such a body created by a statute of this State or an ordinance of a local government;

(6) An executive order issued by the Governor; or
(7) A resolution or an action by the governing body of a political subdivision of this State;

(b) Any board, commission or committee consisting of at least two persons appointed by:
(1) The Governor or a public officer who is under the direction of the Governor, if the board, commission or committee has at least two members who are not employees of the Executive Department of the State Government;

(2) An entity in the Executive Department of the State Government consisting of members appointed by the Governor, if the board, commission or committee otherwise meets the definition of a public body pursuant to this subsection; or

(3) A public officer who is under the direction of an agency or other entity in the Executive Department of the State Government consisting of members appointed by the Governor, if the board, commission or committee has at least two members who are not employed by the public officer or entity.

This Office opined in 2002 that administrative support from other agencies was sufficient to come within the meaning of support by tax revenue. Our opinion said that the fact that support is given through another agency in property and services funded by tax revenue, rather than direct money, does not change the nature of the entity as being supported by tax revenue. OMLO 2002-19 (May 7, 2002).

We conclude, therefore, that Committee is a public body subject to the OML.

II. WHETHER COMMITTEE'S REDACTION OF THE MINUTES OF ITS JUNE 21, 2012 CLOSED MEETING COMPLIED WITH THE OML.

The complaint alleges that redaction of the closed portion of the Committee's June 21, 2012 minutes based on confidentiality included matters that could not be considered confidential, such as each member's scoring of the RFP as disclosed later in the open portion of the same meeting. State Purchasing statutes (NRS 333.335(6) and NRS 239.0115) provide statutory confidentiality to these records. NRS 333.335(6) states: "Except as otherwise provided in NRS 239.0115, each proposal evaluated pursuant to the provisions of this section is confidential and may not be disclosed until the contract is awarded."

Contracts were not awarded based on the responses submitted by both Hartford and ING, but the existing contracts were extended for two years. Our review of the RFP disclosed a specific attachment requiring an affirmation signature from any firm before submitting its response. The attached document is entitled "Certification of Indemnification and Compliance with Terms and Conditions of RFP." It repeats verbatim NRS 333.335(6), but subsequent sentences provide some insight into the intent of the statute. The Certification states that "following contract award, in accordance with NRS 333.333,⁴ only specific parts of the proposal may be labeled 'trade secret' as defined in NRS 600A.030(5)."⁵ As disclosed in the Certification, failure to execute the document constitutes a complete waiver of the protection provided for proprietary information and trade secrets.

⁴ **NRS 333.333 Proprietary information regarding trade secret: Confidentiality; disclosure.**

1. Except as otherwise provided in subsection 2 and NRS 239.0115, proprietary information regarding a trade secret does not constitute public information and is confidential.

2. A person shall not disclose proprietary information regarding a trade secret unless the disclosure is made for the purpose of a civil, administrative or criminal investigation or proceeding, and the person receiving the information represents in writing that protections exist under applicable law to preserve the integrity, confidentiality and security of the information.

(Added to NRS by 1995, 1732; A 2007, 2088)

⁵ **NRS 600A.030(5). Definitions.** "Trade secret" means information, including, without limitation, a formula, pattern, compilation, program, device, method, technique, product, system, process, design, prototype, procedure, computer programming instruction or code that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other persons who can obtain commercial or economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

NRS 600A.030, coupled with the language in the Certification each vendor was required to make in order to provide protection for its trade secrets, seems to provide sufficient protection from disclosure in the absence of an award.

III. WHETHER A LETTER DATED OCTOBER 9, 2012 FROM THE HARTFORD TO THE COMMITTEE SHOULD HAVE BEEN PART OF SUPPORTING MATERIAL FOR THE NOVEMBER 2, 2012 MEETING.

Finally, complainant alleged that the Committee failed to make a letter from the Hartford to the Committee part of supporting material for the November 2, 2012 meeting. By letter to the Program Coordinator, complainant requested the letter be made public on the Committee's website. This letter dated October 9, 2012 was requested from the Committee subsequent to the November 2, 2012 meeting pursuant to the public records act (NRS 239).

The OML does not determine which documents to include in supporting materials; however, when information is discussed in an open meeting and it is information from material not included in supporting material, then a public information request may be utilized. Complainant requested the Committee make the letter available on its website shortly after the November 2, 2012 meeting. Committee responded that the letter was confidential under NRS 333.335(6). As stated in the previous section, the public body requesting responses to an RFP is required to keep confidential proprietary information related to trade secrets. Discussion of the document may have waived protection for the information disclosed in public, but further waiver is not implied.

The public body must determine what material to include in supporting material for any meeting. Despite the Committee's discussion of its contents, it is the Committees responsibility to determine whether to make it a part of supporting materials.

CONCLUSION

The Committee to administer the Nevada Public Employees Deferred Compensation Program is a public body within the meaning of NRS 241.015(3). Failure to make the June 21, July 12, July 18, August 16, August 24, and September 20 meeting minutes or an audio copy of the individual meetings available within 30 working days was a violation of the OML. NRS 241.035(2).

The 30 working day period during which a public body must make available either the minutes (even in draft form with notation that the Committee may revise them in a future meeting) or an audio copy, is a bright line rule from which there can be no deviation. But, because the Committee's lack of staff during the summer of 2012 was clearly a hardship, we will only issue a warning to the Committee to correct this problem in the future.

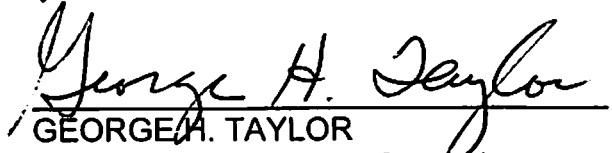
Scott K. Sisco, Chairman
February 28, 2013
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NOTE: NRS 241.0395 requires that when this Office issues an opinion finding OML violation(s), the public body must place the matter on its next agenda for discussion and make this Office's opinion a part of supporting material to be made available to the public body and the public at the same time.

Sincerely,

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Attorney General

By:


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GHT/CG

cc: Kent M. Ervin, Complainant
Nevada Deferred Compensation Program Members:
Carlos Romo, Vice Chair
Karen Oliver, Member
Brian Davie, Member
Steve Woodbury, Member
Shane S. Chesney, Program Counsel