

**CAUTION:** The following advice may be based on a rule that has been revised since the opinion was first issued. Consequently, the analysis reflected in the opinion may be outdated.

**Conflict of interest, Moonlighting**

SEC found it was permissible for a civil engineer in the Adjutant General's Office to hire contractors for his private development project that he dealt with in his state job so long as he did not exercise final supervisory authority over any of the contractors in his position with the State.

96-I-6 Conflict of Interest, Moonlighting

(Decision May 16, 1996)

Fact Situation

A Civil Engineer in the Adjutant General's Office who designed projects, wrote specifications, and managed construction of projects, but did not take bids or award contracts bought seven acres of land which he wanted to develop into forty condominium units plus commercial space. The question was whether he was permitted to use the same contractors in his private development that he dealt with on his state job. He planned to build the units and commercial space in four phases, each requiring one year to complete. Due to his work with the state, he knew the better contractors. Because the commercial work and the condominium project differed, different contractors would be used for each. The contractor for the commercial work was most likely to be a contractor with whom he had worked on his state job. He did not intend to put his project out for bid but planned to hire contractors whose work quality was higher, even if those contractors were slightly more expensive.

State contracts went to the lowest bidder. Bids in sealed envelopes were opened in a public meeting; the lowest bidder normally won. The contracting officer, staff attorney, or judge participated in the decision of whether the lowest bidder met the contract specifications. The project engineer made no recommendations in this regard. In the unlikely occurrence that two bidders had the same low bid, he would not decide which contractor won.

Contractors for state projects first qualified with the state. The Department of Administration then prepared a list of qualified contractors. The project was advertised. Qualified contractors who wished to submit a bid picked up a bid packet. The companies then decided whether they wanted to tender a bid; the winning contractor was selected from the pool of contractors who submitted bids.

If there was a poor response to the bidding on a particular project, the project engineer contacted contractors about bidding. He referred to the list of contractors prepared by DOA and called those he considered most qualified, urging them to bid on the project. He would not call everyone on the list. The call was a reminder to the contractors who still went through the same bidding process as those not called.

If a contractor was not performing adequately according to specifications and regulations, the project engineer reviewed what the contractor proposed. If he agreed, he put in a change order. Most of the time, however, projects required little in the way of change orders. On state projects, two other people evaluated the work jointly with the project engineer. The nature of construction required some discretion to the contractors. A replacement part had to be as close as possible to the original cost. Replacement products had to comply with specifications. For any change orders that required other than the original cost or specifications, the project engineer had to talk to the supervisor from the agency.

### Question

Is a Civil Engineer in the Adjutant General's Office who designs projects, writes specifications, and manages construction of projects but does not take bids or award contracts permitted to use the same contractors in a private development that he deals with on his state job.

### Opinion

The Commission found that the Civil Engineer was permitted to contract with contractors who had been placed on the state's approved list of contractors provided he did not exercise final supervisory authority on any projects in his state capacity that involved a contractor that he had hired for his personal development project of seven acres of condominiums and commercial space during the term of the personal project.