

Ravalli County Attorney

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OCT 10 2015

Ravalli County Commissioners

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To: Rural Development, USDA
Ravalli County Economic Development Authority
From: Howard F. Recht, Deputy Attorney *HFR*
CC: Ravalli County Board of County Commissioners
Date: October 9, 2015
Re: Feasibility Study Conflict of Interest

Question presented: Does the appointment of the Ravalli County Economic Development Authority (RCEDA) by the Ravalli County Board of Commissioners (BCC) to conduct a feasibility study constitute a conflict of interest under the Rural Business Development Grant program guidelines?

Short answer: No. There is a unity of interest between the BCC and the RCEDA, not a conflict of interest. The legislature intended that the RCEDA work cooperatively with the BCCs to further the economic development of the county.

Discussion: Ravalli County, acting through its governing body, the Board of County Commissioners, has applied for a Rural Business Development Grant (Grant) to fund a feasibility study. The purpose of the study is to investigate the economic and practical feasibility of operating a food processing center in Ravalli County, possibly at the facility currently owned by the RCEDA.

The Grant program is governed by published guidelines that forbid an actual or the appearance of a conflict of interest.

A conflict of interest is defined as:

When the grantee's employees, Board of Directors, or their immediate families have a legal or personal financial interest in the recipient(s) receiving the benefits or services of the grant. Agency employees should refer to 2 CFR 400.1 to 400.18.

§ 4280.403 Definitions.

This definition is expanded in § 4280.406, which states:



(a) **General.** No conflict of interest or appearance of conflict of interest will be allowed. For purposes of this subpart, Conflict of Interest includes, but is not limited to, distribution or payment of grant, guaranteed loan funds, and matching funds or award of Project construction contracts to an individual owner, partner, or stockholder, or to a beneficiary or immediate family of the applicant or borrower when the recipient will retain any portion of ownership in the applicant's or grantee's Project. Grant and matching funds may not be used to support costs for services or goods going to, or coming from, a person or entity with a real or apparent conflict of interest. All transactions must be Arm's-length Transactions.

An arm's-length transaction is defined as:

The sale, release, or disposition of assets in which title to the property passes to a ready, willing, and able disinterested third party that is not affiliated with or related to and has no security, monetary or stockholder interest in the grantee or transferor at the time of the transaction.

§ 4280.403 Definitions.

Ravalli County, which is a political subdivision of the state of Montana (§ 7-1-2101, MCA), is the grant applicant, and, if the grant is awarded, will be the grantee or recipient.

The powers of a county are exercised by the board of county commissioners, or their appointed agents. § 7-1-2104, MCA. Because Ravalli County has not adopted self-government powers, its corporate powers are set forth in § 7-1-2103, MCA, liberally construed so as to facilitate the county's exercise of those powers. Art. XI, § 4(2), Montana Constitution.

RCEDA is a port authority organized under Title 7, chapter 14, part 11, Montana Code Annotated. The BCC is considering appointing the RCEDA to conduct the feasibility study, and thus it will receive the Grant funds if awarded.

The RCEDA was created by resolution of the BCC (§ 7-14-1101, MCA), and is governed by a board of commissioners appointed by the BCC (§ 2.2, RCEDA By-Laws). The purpose of the RCEDA is to "promote, stimulate, develop, and advance the general welfare, commerce, economic development, and prosperity" of the county, the state of Montana, and its citizens. § 7-14-1104, MCA. The RCEDA is funded largely through Ravalli County tax revenues, but also receives municipal (Hamilton) and private funds.

The Montana legislature intended a cooperative relationship between a county and any port authority created by the county. § 7-14-1105, MCA. Thus, the county is specifically authorized to lend or donate money; provide tax funds; and dedicate, sell, convey, or lease property to the port authority. *Id.* There is, therefore, a unity of interest between Ravalli County and the RCEDA within the limits of a port authority's purposes and authority. The RCEDA becomes the agent of the BCC when it acts under an agreement entered into between the County and the RCEDA. §§ 7-1-2104 and 7-14-1105(7), MCA.

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The receipt of the Grant funds by the RCEDA to conduct a feasibility study on behalf of the BCC does not constitute a plain-letter conflict of interest under § 4280.403, § 4280.406, or 2 CFR 400.2. The RCEDA and its individual board members are not board members, employees or immediate family members of the county or of any individual county commissioner, nor are individual county commissioners board members, employees or immediate family members of the RCEDA or its board. The RCEDA and its individual board members are not owners, partners, stockholders, or beneficiaries of the county or any individual county commissioner, nor are individual county commissioners owners, partners, stockholders, or beneficiaries of the RCEDA or its board.

The RCEDA's board members, employees, agents and representatives will not individually obtain a legal or personal financial interest in the Grant if awarded, nor will their family members, owners, partners, stockholders, or beneficiaries. The Grant will not be used to support costs for services or goods going to, or coming from, a person or entity with a real or apparent conflict of interest.

No evidence has been presented that the award of the Grant funds to the RCEDA for a feasibility study would violate a public trust under § 2-2-103, MCA, any ethical requirements under § 2-2-105, MCA, or rule of conduct under §§ 2-2-104 or 121, MCA. No public officer or employee has disclosed a private interest under § 2-2-131, MCA, that creates a conflict impinging on a public duty.

The receipt of the Grant funds by the RCEDA to conduct a feasibility study on behalf of the BCC does not constitute a conflict of interest as that term is otherwise commonly defined in the law. Black's Law Dictionary defines a conflict of interest as "[a] real or seeming incompatibility between a persons' private interests and his or her public or fiduciary duties." But in this instance, the award of the Grant to the RCEDA furthers the public duty of both the BCC and the RCEDA to advance the general welfare and economic development of the county, the state of Montana, and its citizens. The Grant will not make that responsibility subservient to the private interests of the board members of either entity or of their family members, owners, partners, stockholders or beneficiaries.

Satisfying the requirement that there be no conflict of interest also requires that transactions be arm's length. Even though the RCEDA is not disinterested and is related to the BCC, this relationship does not run afoul of the requirement for arm's-length transactions because the legislature clearly intended the creation of a special relationship by the enactment of § 7-14-1105, MCA. Thus, Montana law appears to have created an exception to the requirement of an arm's-length transaction; otherwise, the purposes of § 7-14-1105, MCA, would be frustrated, preventing the RCEDA from working cooperatively with the BCC in promoting, stimulating, developing, and advancing "the general welfare, commerce, economic development, and prosperity of its jurisdiction and of the state and its citizens." § 7-14-1104(1)(a), MCA. If the Grant is awarded, the RCEDA will act as the agent of the BCC in conducting a feasibility study.

Oct. 19, 2015
Howard Reed