

**The Honorable Ruth Solomon**  
**Arizona State Senate**

**October 6, 1999**  
**Nº 199-020 (R99-005)**

### **Questions Presented**

You have asked whether the spouse of a public agency officer or employee is prohibited from selling equipment, materials, supplies, or services to that public agency except pursuant to a contract awarded after public competitive bidding.

### **Summary Answer**

The Legislature has prohibited a public agency officer or employee from selling equipment, materials, supplies, or providing services to that public agency except pursuant to a contract awarded after public competitive bidding. This prohibition does not apply to the spouses of public agency officers or employees. However, the public agency officer or employee cannot be involved in any manner with decisions associated with a spouse's contract and must disclose the spouse's interest in the contract as required by Arizona's conflict of interest statutes.

### **Background**

In 1968, the Arizona Legislature adopted a series of statutes governing conflicts of interest by public officers and employees.<sup>(1)</sup> 1968 Ariz. Sess. Laws ch. 88 (codified as Arizona Revised Statutes ("A.R.S.") §§ 38-501 through -511). This comprehensive legislation applied to the State as well as all political subdivisions. A.R.S. § 38-502(5) and (6). It was intended to protect the public from self-dealing by public officers and employees. *See Maucher v. City of Eloy*, 145 Ariz. 335, 338, 701 P.2d 593, 596 (App. 1985).

Arizona's law has two distinct provisions addressing conflicts of interest that may arise in public contracting. The first concerns contracts in which a public officer or employee or a relative of a public officer or employee has a "substantial interest." <sup>(2)</sup> A.R.S. § 38-503(A). If a public officer or employee or a relative of the officer or employee has a "substantial interest" in "any contract, sale, purchase or service" to the public agency, the public officer or employee must

disclose the interest and refrain from participating in any manner on issues relating to the contract, sale, or purchase. A.R.S. § 38-503(A).

Additionally, the Legislature has established more restrictive prohibitions on certain contracts involving public officers and employees and their agencies. For these situations, the Legislature determined that disclosure and refraining from participation were not sufficient to fulfill the purposes of the conflict of interest statutes. Specifically, the legislative limitation provides that "no public officer or employee of a public agency shall supply to such public agency any equipment, material, supplies or services unless pursuant to an award or contract let after public competitive bidding . . ." A.R.S. § 38-503(C).<sup>(3)</sup> There are limited exceptions to this prohibition for school districts and other political subdivisions. A.R.S. § 38-503(C)(1) and (2).

### **Analysis**

Arizona's conflict of interest statutes include the spouse of a public officer or employee within the definition of "relatives" who are covered by certain portions of the laws. *See* A.R.S. § 38-502(9).<sup>(4)</sup>

Under A.R.S. § 38-503(A):

Any public officer or employee of a public agency who has, or whose relative has, a substantial interest in any contract, sale, purchase or service to such public agency, shall

make known the interest in the official records of such public agency and shall refrain from voting upon or otherwise participating in any manner as an officer or employee in such contract, sale or purchase.

Thus, under A.R.S. § 38-503(A), if an employee's or public officer's spouse has a substantial interest in a contract, the public officer or employee must disclose that interest and refrain from any involvement concerning such a contract.

In contrast, the limitation on contracting between public officers and employees and their agencies in A.R.S. § 38-503(C) is more narrowly drafted. Unlike subsections A and B of A.R.S. § 38-503, subsection C refers only to public officers or employees and does not refer to "relatives." Moreover, subsection C does not mention the public officer's or employee's spouse. This further contrasts with the language in subsection D of this statute that specifically applies to school district and community college district governing board members and their spouses but no other relatives.<sup>(5)</sup> In addition, one "remote interest" is "that of a public school board member when the relative involved is not a dependent . . . or a spouse." A.R.S. § 38-502(10)(h). Thus, where the Legislature intended to include spouses, it expressly did so. The failure to include spouses in A.R.S. § 38-503 (C) indicates the Legislature did not intend that section to apply to spouses. *See Banks v. Arizona State Bd. of Pardons and Paroles*, 129 Ariz. 199, 203, 629 P.2d 1035 1039 (App. 1981) (where Legislature included a term in one portion of statute and excluded it elsewhere, courts will not read in the excluded term).

Although a spouse is not expressly mentioned in A.R.S. § 38-503(C), it could be argued that the contracting restriction should apply to spouses because Arizona is a community property state and the public officer or employee has an equal undivided interest in community assets resulting from a spouse's contract. *See Koelsch v. Koelsch*, 148 Ariz. 176, 181, 713 P.2d 1234, 1239 (1986). It is well established that, in a community property state, a public officer or employee has an interest in a contract executed by his or her spouse. *See Beakley v. City of Bremerton*, 105 P.2d 40, 41-42 (Wash. 1940) (city attorney violated Washington's prohibition against city employees having "an interest" in city contract when he hired spouse); Ariz. Op. Att'y Gen. I63-59-L (statute barring employee from having "an interest" in a real estate license precludes employment of person whose spouse holds a license). Nevertheless, the statutory language and history of the conflict of interest provision do not support the conclusion that the Legislature intended A.R.S. § 38-503(C) to apply to spouses of public officers and employees.

In addition to not including spouses in the language of A.R.S. § 38-503(C), the Legislature provided only that the public officer or employee cannot "supply" equipment, material, supplies, or services unless the contract is let after public competitive bidding. In contrast, the prior prohibition on contracts applied to any contract in which the public officer was "interested directly or indirectly." *See* A.R.S. § 38-446 (1956) (repealed by 1968 Ariz. Sess. Laws ch. 88). The Legislature repealed the broad restrictions prohibiting contracts in which the public officer had an interest and replaced them with A.R.S. § 38-503(C), which limits the prohibition to situations in which an officer or employee supplies equipment, material, supplies, or services. Courts will presume the Legislature knows existing law when it enacts a statute and that a change in a statute indicates the Legislature intends to change the law. *See State v. Garza Rodriguez*, 164 Ariz. 107, 111, 791 P.2d 633, 637 (1990). By replacing a statute based on a public officer's or employee's "interest" with a statute based on a public officer or employee supplying equipment, materials, or services, the Legislature narrowed the scope of the statute. "Supply" means to provide or furnish. Webster's Third New International Dictionary 2297 (1993). "Supply" is an active verb, requiring some affirmative action to deliver or transfer the product or service. *DeMore v. Dieters*, 334 N.W.2d 734, 737 (Iowa 1983). The existence of an interest in the proceeds of a contract under community property laws is not enough to establish that the public officer or employee is "supplying" the product or services under the language of A.R.S. § 38-503(C).

Both the language and legislative history of the conflict of interest statutes support the conclusion that the prohibition on contracts absent public competitive bidding

established in A.R.S. § 38-503(C) applies only to the public officers or employees. It does not apply to contracts with spouses of a public officer or employee unless the contract is a device or subterfuge to evade the prohibition in A.R.S. § 38-503(C). *See* McQuillan, *supra*. note 1, § 29.97 (courts will not permit schemes or devices to evade prohibition on contracting with public agency); *cf.* Ariz. Op. Att'y Gen. I86-036 (A.R.S. § 38-503(C) does not apply to corporations unless the corporation is the alter ego of the public officer or employee or was formed for the purpose of evading the requirements of this subsection). Although not subject to the public competitive bidding requirement in A.R.S. § 38-503(C), a contract with a spouse of a public employee or officer remains subject to A.R.S. § 38-503(A), requiring the officer or employee to disclose the interest and to refrain from voting or participating in the matter.<sup>(6)</sup>

### Conclusion

No public officer or an employee of a public agency may supply equipment, materials, supplies, or services to that agency unless public competitive bidding procedures are followed. This does not apply to spouses of public officers and employees. Although spouses of public officers or employees are not subject to the public competitive bidding requirements established in A.R.S. § 38-503(C), the public officer or employee must disclose any substantial interest his or her spouse may have in a contract and refrain from any participation in the matter.

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**1.** The 1968 conflict of interest legislation repealed other laws on that subject, including a requirement that members of the Legislature and state, county, city, town, or precinct officers not be interested "directly or indirectly in any contract or in any sale or purchase made by them in their official capacity, or by any body or board of which they are a member." A.R.S. § 38-446 (1956) (repealed by 1968 Ariz. Sess. Laws ch. 88). This broad prohibition against public officers having any interest in a contract with the public body of which the person was a member had been the law in Arizona since before statehood. *See* Ariz. Civ. Code §§ 217 through 219, 99 (1901). It was based on the principle that public officers "must have no personal interest in transactions with the government which they represent." *State ex rel. Smith v. Bohannan*, 101 Ariz. 520, 522, 421 P.2d 877, 879 (1966). This philosophy was consistent with common law principles that prohibited a member of a public body from contracting with that body. *See* 7 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 16.11 (4th ed. 1997); 10A E. McQuillan, et al., The Law of Municipal Corporations § 29.97 (3d ed. 1999). While the 1968 legislation repealed similar prohibitions for school board members and governing boards of special districts, it included those individuals within the comprehensive conflict of interest laws codified at A.R.S. §§ 38-501 through -503. 1968 Ariz. Sess. Laws ch. 88.

**2.** A "substantial interest" is defined as "any pecuniary or proprietary interest, either direct or indirect, other than a remote interest." A.R.S. § 38-502(11). A "remote interest" includes ten specific types of interests, including, for example, that of a nonsalaried officer of a nonprofit corporation, that of a landlord or tenant of a contracting party, that of an attorney of a contracting party, that of a member of a nonprofit cooperative marketing association, and that of a public officer or employee who owns less than three percent of the shares of a corporation for profit, provided that the total income from the corporation does not exceed five percent of the total annual income of the public officer or employee. A.R.S. § 38-502(10)(a)-(e).

**3.** The conflict of interest laws define "public competitive bidding" as "the method of purchasing defined in title 41, chapter 4, article 3 or procedures substantially equivalent to such method of purchasing or as provided by local charter or ordinance." A.R.S. § 38-502(7). The reference to title 41, chapter 4, article 3 is out-dated because, after this definition was adopted, the Legislature enacted the procurement code that currently

governs public purchasing. 1984 Ariz. Sess. Laws ch. 251 (codified as A.R.S. Title 41, ch. 23).

**4.** "Relative" includes "the spouse, child, child's child, parent, grandparent, brother or sister of the whole or half blood, and their spouses and the parent, brother, sister or child of a spouse." A.R.S. § 38-502(9).

**5.** Section 38-503(D), A.R.S. , prohibits the governing board of a school district or a community college district from employing a person who is a governing board member or who is the spouse of a member of the governing board.

**6.** Moreover, public officers and employees should avoid any appearance of impropriety. Contracts with a public officer's or employee's spouse that are not subject to public bidding may raise questions about whether there was improper influence in letting the contract even though the public officer or employee made the required disclosures and was not involved in the decision making.

 [Back to 1999 Opinions](#)

