



OHIO ETHICS COMMISSION

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May 15, 1998

Informal Opinion 1998-INF-0515-1

Richard P. McLaughlin
McLaughlin, McNally & Carlin

Dear Mr. McLaughlin:

In your letter received by the Ethics Commission on February 4, 1998, you have asked whether the Ohio Ethics Law and related statutes prohibit a member of the Financial Planning and Supervision Commission ["Commission"] for the Youngstown City School District ["District"] from entering into a contract to provide architectural services to the District.

As set forth below, R.C. 2921.42(A)(3) prohibits Mr. Jaminet from occupying a position of profit in the performance of the District's contract for architectural services unless the contract is let by competitive bidding and is awarded to the lowest and best bidder. Also, R.C. 2921.42(A)(4) prohibits Mr. Jaminet from entering into a contract to provide architectural services to the District while he is a member of the Commission unless he can objectively establish that the architectural services he would provide to the District are "unobtainable elsewhere for the same or lower cost," as well as satisfy the other requirements of the R.C. 2921.42(C) exception. Finally, R.C. 102.03(D) and (E) prohibit Mr. Jaminet from soliciting, accepting, or using the authority or influence of his official position as a member of the Commission to secure a contract for himself from the District.

Facts

You have stated that your client, Raymond J. Jaminet, is a member of the Financial Planning and Supervision Commission for the Youngstown City School District. This Commission is composed of seven members. See R.C. 3316.05(B). Four of these members are *ex officio* members: the Mayor of Youngstown, the District Superintendent, the Superintendent of Public Instruction, and the Director of Budget and Management. Id. The three other members are appointed to the Commission, one each appointed by the Mayor, the Superintendent of Public Instruction, and the Governor. Id. You have explained that Mr. Jaminet is the member appointed by the Mayor.

You have explained that the Commission was created in September of 1996, pursuant to R.C. 3316.05, to "assure the fiscal integrity" of the District until it "emerges from its current fiscal emergency." You have stated that the Commission's function is to "either approve or disapprove" expenditures that have been considered, reviewed, and recommended by the District. You have added, however, that the Commission is not involved in the negotiation of any of the District's contracts.

You have explained that the District is now planning to hire an architect to prepare drawings and specifications, handle the bidding process, and oversee a projected \$500,000 in renovations and alterations at several district schools. You have stated that the District's Board of Education ("Board"), not the Commission, will select the architect and negotiate the contract. You have also stated that the Board has the authority to either select the architect directly or to advertise for bids and conduct interviews before making its selection. You have explained that the Commission's only involvement in this process would be to approve the expenditure after the Board has negotiated the contract.

You have stated that Mr. Jaminet is an architect, and that prior to his appointment to the Commission, Mr. Jaminet had provided architectural services for the District. You have added that Mr. Jaminet is interested in contracting with the District to provide the architectural services for this project, and that Mr. Jaminet is willing to fully abstain from any discussions concerning this situation.

Restrictions on Entering into a Public Contract--R.C. 2921.42(A)(3)

You have asked whether the Ohio Ethics Law and related statutes prohibit Mr. Jaminet, as a member of the Commission, from entering into a contract to provide architectural services to the District. The first section of the Ethics Law that is relevant to your question is R.C. 2921.42(A)(3), which states that no public official shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder. (Emphasis added.)

The term "public official" is defined for purposes of R.C. 2921.42 to include "any elected or appointed officer, or employee, or agent of the state." See R.C. 2921.01(A). R.C. 3316.05(A) states that the Commission is "a body both corporate and politic constituting an agency and instrumentality of the state and performing essential governmental functions of the state" Therefore, as an appointed member of "an agency and instrumentality of the state," Mr. Jaminet is a "public official" for purposes of R.C. 2921.42(A).

The term "public contract" is defined, for purposes of R.C. 2921.42(A), to include:

- (a) The purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either;

- (b) A contract for the design, construction, alteration, repair, or maintenance of any public property.

See R.C. 2921.42(G)(1) (emphasis added). The Ethics Commission has previously held that the purchase or acquisition of architectural services by or for the use of a public entity is a "public contract" for purposes of R.C. 2921.42(A). See Ohio Ethics Commission Advisory Opinion No. 85-010. Therefore, the contract into which Mr. Jaminet is considering entering with the District is a "public contract" for purposes of R.C. 2921.42(A).

As stated above, R.C. 2921.42(A)(3) prohibits Mr. Jaminet from occupying any position of profit in the prosecution of a public contract authorized by him, or by a commission of which he is a member at the time of authorization, unless the contract is let by competitive bidding to the lowest and best bidder. You have stated that the District's Board will select the architect and negotiate the contract. You have also stated that once the contract is "considered, reviewed and recommended" by the Board, it would then "be referred to the Commission for approval of the fee only." You have added that "[t]he function of the Commission is to either approve or disapprove expenditures considered, reviewed and recommended by the local school board." Therefore, the question is whether the Commission's approval of the fee is an authorization, as that term is used in R.C. 2921.42(A)(3), of the contract.

The Ethics Commission has held that, for purposes of R.C. 2921.42(A)(3), a public contract will be deemed to have been "authorized" by a public official or commission if the contract could not have been awarded without the approval of that public official or commission. See Adv. Ops. No. 89-006, 91-009, and 92-005. You have stated that the Financial Planning and Supervision Commission must approve the fee after the Board has "considered, reviewed and recommended" the contract. Therefore, the contract could not be awarded without the Commission's approval of the contract fee, and the Commission would be deemed to have authorized this contract.

Accordingly, even if Mr. Jaminet abstains from the Commission's consideration of the District's contract for architectural services, that contract must still be approved by the Commission of which he is a member. Therefore, R.C. 2921.42(A)(3) prohibits Mr. Jaminet from occupying a position of profit in the performance of the District's contract for architectural services unless the contract is let by competitive bidding and is awarded to the lowest and best bidder. See Adv. Op. No. 91-009.

In this case, you have stated that the Board has the authority to either select the architect directly or to advertise for bids and conduct interviews before making its selection. If the Board selects the architect directly, then the District's contract for architectural services will not have been let by competitive bidding and Mr. Jaminet would be prohibited from occupying a position of profit in the performance of this contract. Further, even if the Board advertises for bids and conducts interviews before making its selection, the Board must award the contract through competitive bidding to the lowest and best bidder in order to remove the prohibition against Mr. Jaminet occupying a position of profit in the performance of this contract. See Adv. Op. No. 92-020 and discussion of 2921.42(C)(2) below.

Restrictions on Entering into a Public Contract--R.C. 2921.42(A)(4)

The second section of the Ethics Law that is relevant to your question is R.C. 2921.42(A)(4), which states that no public official shall knowingly:

Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

As discussed above, Mr. Jaminet is a "public official" for purposes of R.C. 2921.42(A), and the contract into which he is considering entering with the District is a "public contract" for purposes of R.C. 2921.42(A).

It must be determined whether Mr. Jaminet, as a member of the Commission, is "connected" with the District. The Ethics Commission has previously held that R.C. 2921.42(A)(4) prohibits a public official having an interest in contracts with all of the political subdivisions, governmental agencies, and instrumentalities with which he is connected. See Adv. Ops. No. 89-004 and 89-012. Although R.C. 2921.42(A) does not define "connected," the Ethics Commission has noted that "common usage indicates that to be 'connected with' something is to be related to, or associated with, that entity." See Adv. Ops. No. 87-002, 89-004, and 89-012. R.C. 3316.05(A), the statute which created the Commission, states:

Pursuant to the powers of the general assembly and for the purposes of this chapter, upon the declaration of a fiscal emergency in any school district pursuant to division (B) of section 3316.03 of the Revised Code, there is established, with respect to that school district, a body both corporate and politic constituting an agency and instrumentality of the state and performing essential governmental functions of the state to be known as the "financial planning and supervision commission for (name of school district)," which, in that name, may exercise all authority vested in such a commission by this chapter. A separate commission is established with respect to each school district as to which there is a fiscal emergency as determined under this chapter. (Emphasis added.)

Accordingly, as a member of the Financial Planning and Supervision Commission for the Youngstown City School District, Mr. Jaminet is "connected" with the District. Therefore, R.C. 2921.42(A)(4) prohibits Mr. Jaminet from entering into a contract to provide architectural services to the District while he is a member of the Commission.

However, R.C. 2921.42(C) provides an exception to the prohibition of R.C. 2921.42(A)(4) against Mr. Jaminet entering into a contract to provide architectural services to the District while he is a member of the Commission. R.C. 2921.42(C) states that R.C. 2921.42(A)(4) does not apply to a public contract in which a public official has an interest if all of the following apply:

- (1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;
- (2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official's becoming associated with the political subdivision or governmental agency or instrumentality involved;
- (3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;
- (4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of his family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract. (Emphasis added.)

The Ethics Commission has stated that the facts and circumstances of an individual case must be analyzed under each of the four requirements of R.C. 2921.42(C) in order to determine whether an interest in a public contract meets this exception. See Adv. Ops. No. 80-003, 82-007, and 88-001. Moreover, the Ethics Commission has held that the criteria of R.C. 2921.42(C) must be strictly construed against the public official, and that the burden is on the official to demonstrate that he meets all four requirements of the exemption. See Adv. Ops. No. 83-004, 84-011, and 88-001.

Division (C)(1) requires Mr. Jaminet to demonstrate that these architectural services are "necessary" services for the District. Division (C)(3) requires him to show that he has treated the District in either the same manner, or preferentially, to the manner in which he treats other potential employers. Division (C)(4) requires evidence that Mr. Jaminet has conducted this transaction at arm's length, with full knowledge of his interest by the District, and requires that he take no part in the District's and/or Commission's deliberations or decisions with respect to the public contract. See also R.C. 2921.42(A)(1).

Division (C)(2) requires a showing either that the architectural services are unobtainable elsewhere for the same or lower cost, or that the services are being furnished to the District as part of a continuing course of dealing established prior to the time the Mr. Jaminet was appointed to the Commission. A contract to perform the architectural services in question between Mr. Jaminet and the District that predated Mr. Jaminet's appointment to the Commission would show a continuing course of dealing, and Mr. Jaminet would not be prohibited from continuing to provide the services as provided in that contract. See Adv. Op. No. 88-008. In this situation, it appears that there was no such contract between Mr. Jaminet and the District before he was appointed to the Commission. As Mr. Jaminet is not providing these architectural services as part of a continuing course of conduct,

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he cannot establish that half of the test for Division (C)(2). Therefore, even if Mr. Jaminet can satisfy the requirements of Divisions (C)(1), (C)(3), and (C)(4), he cannot meet the R.C. 2921.42(C) exception unless he can satisfy the other test of Division (C)(2) that the architectural services he would provide are "unobtainable elsewhere for the same or lower cost." See Adv. Op. No. 88-001.

The Ethics Commission has stated that establishing that Mr. Jaminet's architectural services are "unobtainable elsewhere for the same or lower cost" must be done by some objective standard. See Adv. Op. No. 83-004. One objective indication would be where a public contract is competitively bid and the public official submits the lowest bid. See Adv. Ops. No. 82-007 and 83-004. This fact, alone, is not determinative. The Ethics Commission has stated that "factors such as the availability and adequacy of notice to potential competitors, the openness and fairness of the bidding process, and the conditions of the market must be considered in determining whether the public official complies" with R.C. 2921.42(C)(2). See Adv. Op. No. 83-004. Within the context of the pertinent statutory and administrative requirements regarding competitive bidding, R.C. 2921.42(C)(2) requires the District to reasonably ensure that bids are solicited openly and fairly from all interested and qualified individuals, are not limited to solicitations from District employees, and that the work is awarded to the person who will provide the necessary services at the lowest cost. See Adv. Op. No. 88-001. Therefore, unless Mr. Jaminet can objectively establish that the architectural services he would provide to the District are "unobtainable elsewhere for the same or lower cost," as well as satisfy the other requirements of the R.C. 2921.42(C) exception, he would remain prohibited by R.C. 2921.42(A)(4) from entering into a contract to provide architectural services while he is a member of the Commission.

Restrictions on Authorizing a Public Contract--R.C. 2921.42(A)(1)

You should also be aware of R.C. 2921.42(A)(1), which provides that no public official shall knowingly:

Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

Even if the contract meets the requirements set forth above, such that Mr. Jaminet is not prohibited from selling architectural services to the District, Mr. Jaminet is prohibited from voting to authorize this contract, or taking any other action in his official capacity to secure the public contract. See Adv. Op. No. 90-003. You have stated that Mr. Jaminet is willing to fully abstain from any discussions concerning this situation. R.C. 2921.42(A)(1) prohibits Mr. Jaminet from participating in discussions, voting, recommending, formally or informally lobbying the Board or the Commission, or taking any other action to secure the contract.

Restrictions on Receiving a Thing of Value--R.C. 102.03(D) and (E)

The final sections of the Ethics Law that are relevant to your question are R.C. 102.03(D) and (E), which provide:

- (D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.
- (E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

The Ethics Commission has stated that the application of the prohibitions of R.C. 102.03(D) and (E) is dependent upon the facts and circumstances of each individual case. See Adv. Ops. No. 77-003 and 77-006. The term "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is elected or appointed to an office of any instrumentality of the state. See R.C. 102.01(B) and (C). As stated above, R.C. 3316.05(A) states that the Commission is "a body both corporate and politic constituting an agency and instrumentality of the state . . ." Therefore, as an appointed member of an instrumentality of the state, Mr. Jaminet is a "public official or employee" for purposes of R.C. 102.03.

The term "anything of value" is defined, for the purposes of R.C. 102.03(D) and (E), to include money, a promise of future employment, and every other thing of value. See R.C. 1.03, 102.01(G); see also Adv. Op. No. 92-005. The Ethics Commission has held that compensation received from engaging in private outside employment or business activity is a thing of value for purposes of R.C. 102.03(D) and (E). See Adv. Op. No. 96-004. Obtaining a contract to perform architectural services for the District would, therefore, be a thing of value for purposes of R.C. 102.03(D) and (E). Accordingly, R.C. 102.03(D) and (E) prohibit Mr. Jaminet from soliciting, accepting, or using the authority or influence of his official position as a member of the Commission to secure a contract for himself from the District. See Adv. Op. No. 87-008; see also R.C. 2921.42(A)(1) (which prohibits a public official from authorizing or employing the authority or influence of his office to secure authorization of a public contract in which he has an interest).

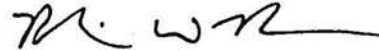
Summary and Conclusion

As set forth above, R.C. 2921.42(A)(3) prohibits Mr. Jaminet from occupying a position of profit in the performance of the District's contract for architectural services unless the contract is let by competitive bidding and is awarded to the lowest and best bidder. Also, R.C. 2921.42(A)(4) prohibits Mr. Jaminet from entering into a contract to provide architectural services to the District while he is a member of the Commission unless he can objectively establish that the architectural services he would provide to the District are "unobtainable elsewhere for the same or lower cost," as well as satisfy the other requirements of the R.C. 2921.42(C) exception. Finally, R.C. 102.03(D) and (E) prohibit Mr. Jaminet from soliciting, accepting, or using the authority or influence of his official position as a member of the Commission to secure a contract for himself from the District.

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This informal advisory opinion was approved by the Ohio Ethics Commission on May 15, 1998, and is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules. If you have any questions, or need additional information, please feel free to contact this Office again.

Very truly yours,

A handwritten signature in black ink, appearing to read "Blaine W. Brown", with a long horizontal flourish extending to the right.

Blaine W. Brown
Staff Attorney