

OHIO ETHICS COMMISSION

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June 13, 2002

Informal Opinion 2002-INF-0613

Laura M. Meeks, Ph. D.
President, Jefferson Community College



Dear Dr. Meeks:

In a letter received by the Ethics Commission on February 17, 2002, you have asked whether a company in which a member of the Board of Trustees of Jefferson Community College (College) owns a 49% interest is permitted to conduct business with the College. You have stated that the company is a minority business enterprise (MBE), certified in all states.

Brief Answer

You have stated that it is your understanding that, on a case-by-case basis, business projects can be appropriately conducted by Board members with application to the Ethics Law. As set forth more fully below, R.C. 2921.42(A)(4) prohibits the trustee's company from performing services for the College, unless each of the four requirements of R.C. 2921.42(C) can be met. Perhaps the most significant requirement of this exception is that the services are unobtainable elsewhere for the same or lower cost. However, so long as the trustee can show that he meets the four requirements in R.C. 2921.42(C), his company is not prohibited from selling services to the college.

You understand that, during formal competitive bidding processes, the Board member must exclude himself from any direct involvement in the selection process including deliberation and actual voting actions. You have stated that you understand that, if appropriate steps are taken, the Board members company may be selected by Board action for electrical contracted services. If the acquisition of services must be, or is, authorized by the board of trustees, R.C. 2921.42(A)(3) applies and requires that the services of the trustee's company be provided pursuant to a contract that is awarded through competitive bidding to the lowest and best bidder. Even where the requirements of the exception of R.C. 2921.42(C) are met, and where the contracts, if necessary, are awarded pursuant to competitive bidding to the lowest and best bidder, the trustee is prohibited from using the authority or influence of his position to secure a contract or any other thing of value for his company.

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Facts

In your letter to the Ethics Commission, you explain that a member of the Board of Trustees of the College owns 49% of an MBE contracting company. You also explain that the Trustee's son owns 51% of the company.

You explain that College purchasing policy permits the College to expend up to \$7500 for purchases not including capital improvements without Board approval or action as long as multiple quotes have been received. With regard to capital projects, you state that College purchasing policy permits the College to expend \$15,000 on each project without Board approval or action as long as multiple quotes have been received.

Having an Interest in a Contract of the College—R.C. 2921.42(A)(4)

The situation you have described implicates R.C. 2921.42(A)(4), which provides 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.

The term "public official" is defined, for purposes of the application of R.C. 2921.42, to include any elected or appointed officer, or employee, or agent of the state or any political subdivision. R.C. 2921.01(A). Therefore, a community College trustee is a "public official" subject to the prohibitions of R.C. 2921.42. See R.C. 3354.03 (a community College district is a political subdivision of the state).

The term "public contract" is defined to include the purchase or acquisition of property or services by or for the use of any political subdivision of the state; and any contract for the design, construction, alteration, repair, or maintenance of any public property. R.C. 2921.42(G)(1). The College's acquisition of services from the trustee's company is a public contract.

An "interest" that is prohibited under R.C. 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. See Adv. Op. No. 89-004. The Ethics Commission has held that a public official who has an ownership interest in a business has a pecuniary interest in the contracts of that business for purposes of R.C. 2921.42. See Adv. Op. No. 94-002. The College trustee has an interest in the contracts of the company of which he is a 49% owner. R.C. 2921.42(A)(4) prohibits the College trustee from having an interest in the profits or benefits of any public contract entered into by or for the use of the College, regardless of whether the College acquires the services of his company through a written contract and regardless of whether the purchase or acquisition of services is authorized by the board of trustees. See also R.C. 2921.42(A)(3), which also applies where a particular College contract is authorized by the trustee or by the board of trustees, as discussed below. Division (C) of Section 2921.42 of the Ohio Revised Code, however, provides an exception to the prohibition of R.C. 2921.42(A)(4).

Exception to the Prohibition of R.C. 2921.42(A)(4)—R.C. 2921.42(C)

R.C. 2921.42(C) provides an exception to R.C. 2921.42(A)(4), as follows:

- (C) This section does not apply to a public contract in which a public official, member of his family, or one of his business associates has an interest, when 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.)

Each of the provisions in Division (C) is a question of fact which, when applied to the circumstances of the individual case, will determine whether a particular transaction fits within the exception. Adv. Ops. No. 80-003 and 88-008. The criteria of Division (C) are strictly construed against the public official, and the official must show compliance with all four requirements in the exception. Adv. Ops. No. 83-004, 84-011, and 88-008.

Continuing Course or Unobtainable Elsewhere—R.C. 2921.42(C)(2)

The trustee can meet Division (C)(2) in one of two ways: by showing a continuing course of dealing established before he was connected with the College or by showing that the services his company provides are unobtainable elsewhere for the same or lower cost. You indicate that the trustee's company has performed services for the College in the past. A "continuing course of dealing" does not refer to a past practice of business, but applies only to contracts that were entered into before the individual became a trustee. The trustee can meet the continuing course of dealing requirement with respect to contracts entered into before he became a trustee if the terms and conditions of the contracts are not modified after he assumed the board position.

Any new contracts or purchases must comply with the other prong of R.C. 2921.42(C)(2), which requires that the goods or services are unobtainable elsewhere for the same or lower cost. Competitive bidding, whereby the trustee's company submits the lowest bid, is one indication that this requirement has been met, but it is not determinative. Adv. Op. No. 86-002. Other factors must be considered including the availability and adequacy of notice to potential bidders, the openness and fairness of the process, and the conditions of the market. Adv. Ops. No. 83-004 and 88-001. The trustee must be able to show, by some objective standard such as a competitive bid, or a fair and open solicitation of available vendors, that the services or goods provided by his company are unobtainable from another source for the same or lower cost.

You have indicated that the trustee's company is a certified MBE. The Commission discussed the application of the "unobtainable elsewhere for the same or lower cost" requirement to a certified MBE in Advisory Opinion No. 2000-02. For a certified MBE, the "unobtainable elsewhere" prong of R.C. 2921.42(C) is met where the College awards a contract to the trustee's company based on its submission of the lowest and most responsive MBE bid in a bidding process as described in R.C. 3354.161. See R.C. 3354.161 (in awarding a contract for a work of improvement, the board of trustees of the community College district shall comply with the requirements of R.C. 123.151(C)(1)).¹ See also R.C. 123.151(C)(1) (describes the percentage of contracts to be set aside for MBEs). However, it must be clear that the contract is open for bidding to all certified MBEs, and that every aspect of the selection process is conducted fairly and openly, such that the trustee would not have an unfair advantage over other certified MBE contractors. Adv. Op. No. 2000-02.

Other Requirements of R.C. 2921.42(C)

If the College trustee can meet the criterion of Division (C)(2), he must, in addition, comply with the other provisions of R.C. 2921.42(C). R.C. 2921.42(C)(1) requires that the services are necessary purchases for the College. Division (C)(3) requires that the treatment provided by the trustee's company to the College is as good as or better than the treatment provided by the company to its other clients or customers. Finally, Division (C)(4) requires that the transaction be conducted at arm's length, that the College has full knowledge of the trustee's interest, and that the trustee take no part in the deliberations and decision of the College with respect to the contract. See also R.C. 2921.42(A)(1) (discussed below).

¹ There have been several court cases regarding the constitutionality of set-aside programs for MBE contractors in Ohio. See, e.g., Ritchey Produce Co. v. State, 85 Ohio St.3d 194 (1999). The Ethics Commission does not have the authority to determine the constitutionality of any proposed activity. You, or the legal counsel for the College, may wish to review this question.

Therefore, R.C. 2921.42(A)(4) generally prohibits the College trustee from having an interest in public contracts entered into by or for the use of the College. The College trustee would have an interest in the contracts of the company of which he is a 49% owner. R.C. 2921.42(C) provides an exception to the restriction in R.C. 2921.42(A)(4), if the trustee can demonstrate that he meets all four requirements in the exception. One of the requirements is that the College is unable to obtain the services, from any other source, for the same or lower cost, or that the supplies or services are being furnished as part of a continuing course of dealing established prior to the trustee's association with the College. R.C. 2921.42(C)(2). If the services are not furnished pursuant to a contract that existed before the trustee assumed his position on the board of trustees, he must be able to demonstrate that his company provides the services at the lowest cost, as determined by some objective measure, such as a fully open competitive bidding process. He must also be able to meet the other requirements of R.C. 2921.42(C).

Profiting From a Contract Awarded by the Board of Trustees—R.C. 2921.42(A)(3)

Where a contract is authorized by the College board of trustees, the situation you have described also implicates R.C. 2921.42(A)(3), which provides that no public official shall:

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.

For purposes of R.C. 2921.42(A)(3), a public contract is deemed to have been "authorized" by a public official or board if the contract could not have been awarded without the approval of the official, the position that he holds, or the board on which he serves. See Adv. Ops. No. 87-004 and 92-008. Therefore, R.C. 2921.42(A)(3) prohibits the College trustee from occupying a position of profit in a public contract authorized by the College board of trustees, even if he abstains from the authorization of the contract.

However, the College trustee is not prohibited from occupying a position of profit in the prosecution of a public contract authorized by the College board of trustees if the contract is let by competitive bidding to the lowest and best bidder. R.C. 2921.42(A)(3) does not prohibit the College trustee from occupying any position of profit in the prosecution of a public contract that was let by competitive bidding to the lowest and best certified MBE bidder, in accordance with R.C. 3354.161. See also R.C. 123.151(C)(1). See Adv. Op. No. 2002-02 (copy attached).

Using Public Position to Secure a Contract or Any Other Thing of Value

R.C. 2921.42(A)(1) and 102.03(D) are also applicable to the situation you have described. R.C. 2921.42(A)(1) prohibits the trustee from using the authority or influence of his public position, in any way, to secure a contract with the College, or payments for goods or services from the College to him or his business. Adv. Op. No. 79-005. For example, the trustee

is prohibited from voting to approve payments under contracts that had been entered into by other College officials or employees, participating in the college's decisions with respect to which contracts will be set-aside for MBE contractors, and using his position of authority over other College officials or employees, to recommend his company or secure business for his company in any other way. The College trustee would also be prohibited from bidding on any contract to perform work on a project he had sponsored, voted on, or recommended as a trustee.

Similarly, R.C. 102.03(D) and (E), which apply to any public official or employee including a College trustee, prohibit the trustee from soliciting, or using his public position to secure, a substantial thing of value for himself or his company. The monetary benefits that the trustee or his company would receive from the sale of goods or services to the College would be substantial. R.C. 102.03(D) and (E) prohibit the trustee from soliciting or using his position with the College to secure a contract or any payments for goods and services from the College.

Therefore, R.C. 102.03(D) prohibits the College trustee from: (a) using public time, facilities, personnel, or resources to operate his private business; (b) using his relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding his business; (c) discussing, deliberating, or taking any action, as a College trustee, on any matter involving his business; and (d) using his public position or authority in any other way to secure a benefit for his business. Adv. Op. No. 96-004. R.C. 102.03(E) prohibits the College trustee from soliciting any benefits, from his fellow trustees or from College employees, for himself or his company.

Conclusion

As explained more fully above, R.C. 2921.42(A)(4) prohibits the trustee's company from performing services for the College, unless each of the four requirements of R.C. 2921.42(C) can be met. Perhaps the most significant requirement of this exception is that the services are unobtainable elsewhere for the same or lower cost. However, so long as the trustee can show that he meets the four requirements in R.C. 2921.42(C), his company is not prohibited from selling services to the college.

If the acquisition of services must be, or is, authorized by the board of trustees, R.C. 2921.42(A)(3) applies and requires that the services of the trustee's company be provided pursuant to a contract that is awarded through competitive bidding to the lowest and best bidder.

Even where the requirements of the exception of R.C. 2921.42(C) are met, and where the contracts, if necessary, are awarded pursuant to competitive bidding to the lowest and best bidder, the trustee is prohibited from using the authority or influence of his position to secure a contract or any other thing of value for his company.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on June 13, 2002. The Commission commends you and the trustee for requesting guidance before any actions that could be prohibited by law are taken.

Dr. Laura M. Meeks

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The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any questions or desire additional information, please contact this Office again.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer A. Hardin". The signature is fluid and cursive, with a large initial "J" and "H".

Jennifer A. Hardin

Chief Advisory Attorney