

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

December 29, 2003 Informal Opinion 2003-INF-1229-2

Artis Gillam, Sr.
[REDACTED]

Dear Mr. Gillam:

In a letter that the Ethics Commission received on October 29, 2003, you ask whether the Ohio Ethics Law and related statutes prohibit you from bidding on contracts to perform services for the Board of Education of the Youngstown City Schools, in light of the fact that you serve as member of Youngstown City Council. You state that your private occupation is general contracting.

Brief Answer

As explained below, you are not prohibited from bidding on contracts to perform services for the Board of Education of the Youngstown City Schools. However, you must comply with the general restrictions imposed upon all public officials and employees who engage in outside private employment with parties that are interested in matters before, regulated by, or doing or seeking to business with the political subdivision with which they serve.

Public Contract Prohibitions—R.C. 2921.42(A)(4)

R.C. 2921.42(A)(4) 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 R.C. 2921.42 in Section 2921.01 of the Revised Code to include any elected or appointed officer of a political subdivision of the state. As a city council member, you are, therefore, a “public official” subject to the prohibitions of Section 2921.42. Ohio Ethics Commission Advisory Opinion No. 88-008.

The term "public contract" is defined for purposes of R.C. 2921.42 as "[t]he purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state or any of its political subdivisions, or any agency or instrumentality of either." Therefore, a contract with the Board of Education to supply general contracting services to the Board is a "public contract" for purposes of R.C. 2921.42 because it is a contract for the purchase or acquisition of services by or for the use of a political subdivision. Adv. Op. No. 89-005.

An interest that is prohibited under Section 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. Adv. Op. No. 81-008. An owner of a business is deemed to have a definite and direct pecuniary and fiduciary interest in the contracts of his business. Adv. Op. No. 86-005. Therefore, you have an "interest" in the contracts of your private business for purposes of R.C. 2921.42.

In the instant situation, it is apparent that you desire to bid on contracts with a political subdivision other than the one that you serve as an elected official. However, the Ethics Commission has explained that R.C. 2921.42(A)(4) prohibits a public official from having an interest in a public contract "entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected." (Emphasis added.) Adv. Op. No. 87-002. The issue, therefore, is whether you, as a city council member, are "connected" with the school district.

As stated in Advisory Opinion No. 89-004:

The purpose of R.C. 2921.42 is to prevent public officials from personally benefiting from the contracts of a public agency where such personal benefit is to the detriment of the public interest, and that the potential for a public officials private interest to conflict with the public interest is greatest where the public official is doing business with an agency with regard to which he is authorized to exercise authority, discretion, or other official responsibilities. It is apparent that the purpose of R.C. 2921.42 is best served if the statute is interpreted as prohibiting a public official from doing business with all political subdivisions, governmental agencies, and instrumentalities with which he is connected. (Emphasis added.)

Therefore, as a city councilmember, you are prohibited from having an interest in any public contract entered into by any political subdivision, governmental agency or instrumentality with which you are connected.

The word "connected," as used in R.C. 2921.42, is not defined within the statute. However, the Ethics Commission noted, in Advisory Opinion No. 87-002, "common usage indicates that to be 'connected with' something is to be related to, or associated with, that entity."

A city school district is a political subdivision of the state that operates independently from the municipality in which it is located. See R.C. 5705.01(C) (The board of education of a school district is a taxing authority with the authority to levy taxes on real property within the district to pay operating expenses, acquire or construct permanent improvements and to retire and pay interest on indebtedness.).

There are however, some connections between a city school district and the municipality in which it is located. For example, a city law director is "connected" with a city school district, for purposes of R.C. 2921.42(A)(4), because R.C. 3313.35 requires the law director to provide legal services to the school district as part of his official duties. Adv. Op. No. 89-012. However, if a city council member is not required to exercise statutorily mandated or other required duties that affect the management or operations of the city school district, the council member is not "connected" with the school district.

Based on the information you have provided, it does not seem that the council exercises authority regarding the city school district in Ohio. In such a case, you would not have a prohibited interest in a public contract for purposes of R.C. 2921.42(A)(4) if you were to perform services for the Board of Education.

If the council does exercise authority regarding the school district, or there are any contracts between the city and the school district, prohibitions in R.C. 2921.42(A)(4) may be implicated. You should also be aware of R.C. 2921.42(A)(3), which prohibits you from profiting from a contract authorized by the city while you were a member of the city council. If the city has a contract with the school district related to a project on which you would be bidding, the prohibition in R.C. 2921.42(A)(3) is also implicated. If any of these factors is present, you should contact the Commission for further guidance.

Although R.C. 2921.42(A)(4) does not prohibit you from bidding on the contract you have described, you are subject to general conflict of interest prohibitions imposed by other statutes under the jurisdiction of the Ethics Commission.

Participation in Matters Affecting a Customer—R.C. 102.03(D) and (E)

Your attention is directed to R.C. 102.03(D) and (E), which read:

- (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.

A city council member is a "public official or employee" for purposes of R.C. 102.03(D) and (E). Adv. Op. No. 89-008.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. The fees received from a customer of a private business fall within the definition of "anything of value" for purposes of R.C. 102.03(D) and (E). Adv. Ops. No. 86-004, 89-015, and 89-016.

R.C. 102.03(D) prohibits a public official or employee from using his position to secure anything of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the public agency with which he serves, or anything of value that could impair the official's or employee's objectivity and independence of judgment with respect to his official actions and decisions for the agency with which he serves. Adv. Ops. No. 84-010, 87-006, and 87-009.

R.C. 102.03(E) prohibits a public official or employee from soliciting or accepting anything of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the public agency with which he serves, or where the receipt of such a thing of value could impair his objectivity and independence of judgment with regard to his official decisions and responsibilities. Adv. Ops. No. 86-011 and 89-006. The application of R.C. 102.03(D) and (E) is dependent on the facts and circumstances of each individual situation. Adv. Ops. No. 87-007 and 89-003.

For example, in Advisory Opinion No. 91-006, the Ethics Commission explained that R.C. 102.03(D) prohibits a city council member, who was employed by a school district that included the territory within the city, from participating in matters that could definitely and directly affect the school district. A copy of Advisory Opinion No. 91-006 is enclosed for your reference.

R.C. 102.03(D) and (E) also impose general restrictions upon all public officials and employees who engage in outside private employment. In Advisory Opinion No. 96-004, the Ethics Commission explained that the Ethics Law does not prohibit a public official or employee from engaging in private business, provided he does not misuse his public position and there is no other conflict of interest. However, a public official or employee is prohibited from engaging in private business with a party that is interested in matters before, regulated by, or doing or seeking to do business with his own public employer unless it is possible for the official or employee to withdraw from all matters affecting the party. In addition, a public official or employee with a private business is prohibited from: (1) using any public resources in his private business; (2) using his title or uniform while conducting his private business; (3) using

his relationships with other public employees to benefit his business interests; (4) using the authority of his office or employment to benefit his private business; (5) receiving payment for services on projects he recommended in his official capacity; (6) using his official authority in matters affecting his competitors; and (7) otherwise using his public position to benefit his private business interests. A copy of Advisory Opinion No. 96-004 is enclosed for your reference.

Application to Specific Facts

For example, as a member of city council, you would clearly be prohibited from exercising the power and influence inherent in your position as a city council member, either formally or informally, to affect the decisions of the Board of Education to award a public contract to your company. You are prohibited from using your position of authority over other city officials, and city employees, with respect to matters in which the school district has an interest. In addition, if the school district is pursuing a development project on which the city has made recommendations, and you previously participated as a city council member on those recommendations, then you are prohibited from bidding to provide the services on that project. Further, you could not participate in matters pending before city council that would affect either the Youngstown City Schools or private companies that are directly competing with your company for the contract with the Board of Education that you seek or hold.

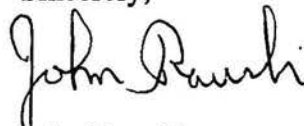
Conclusion

As explained above, you are not prohibited from bidding on contracts to perform services for the Board of Education of the Youngstown City Schools. However, you must comply with the general restrictions imposed upon all public officials and employees who engage in outside private employment with parties that are interested in matters before, regulated by, or doing or seeking to business with the political subdivision with which they serve.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on December 17, 2003. The Commission commends you for requesting guidance before taking any actions that could be prohibited by the Ethics Law.

The opinion is based on the facts presented. It 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,



John Rawski
Staff Attorney