



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 90-001
January 18, 1990

Syllabus by the Commission:

(1) Division (F) of Section 102.03 of the Revised Code and Division (A) of Section 2921.43 of the Revised Code prohibit a vendor who is doing or seeking to do business with an office, department, or agency of a political subdivision from promising or giving travel meal, and lodging expenses incurred in inspecting and observing the vendor's product to the officials and employees of the office, department, or agency, even though the expenses are limited to those which are essential to the conduct of official business and are incurred in connection with the officials or employee's duty to inspect and observe the vendor's products in operation at existing facilities;

(2) Division (F) of Section 102.03 of the Revised Code and Division (A) of Section 2921.43 of the Revised Code prohibit a vendor who is doing or seeking to do business with an office, department, or agency of a political subdivision from promising or giving travel meal, and lodging expenses to the officials and employees of the office, department, or agency, even if the vendor's products and services are sold to the political subdivision pursuant to competitive bidding and the vendor has submitted the lowest and best bid.

* * * * *

You have asked whether Division (F) of Section 102.03 of the Revised Code prohibits the company which you serve as an officer from providing travel, meal, and lodging expenses to public officials and employees of a political subdivision with which your company desires to do business. You have asked whether it would make a difference if the goods and services are sold to the political subdivision pursuant to competitive bidding and your company has provided the lowest and best bid.

You have stated that your company conducts business within the state of Ohio primarily with the private sector, but will, upon occasion, sell or seek to sell goods and services to political subdivisions. You have stated that in the instant situation, officials and employees of a political subdivision have expressed an interest in your company's products and services. You state that the political subdivision does not currently do business with your company and your company's representatives have supplied the officials and employees with information concerning your company's products and services and have referred them to current and past customers, but that the products and services can best be demonstrated by viewing their operation at an actual working site.

You argue that it would be mutually advantageous to the political subdivision and your company if your company paid the travel meal, and lodging expenses of the political subdivision's officials and employees to observe your company's products in operation at existing- facilities located both within and outside the state. You state that the political subdivision would have the advantage of determining- by on-site observation whether your company's products and services would best fit their needs and your company would have the opportunity to demonstrate its products and services at a working site. You state that if your company were to pay the travel, meal, and lodging expenses of the public officials and employees who would visit the existing facilities then the political subdivision would be relieved of the burden of paying for such expenses. You also state that giving travel, meal, and lodging expenses to clients and potential customers is a widely accepted practice in the industry and a common occurrence in your company's transaction of business with the private sector. You further state that no recreational or personal purposes will be served by the trips and only expenses which are essential to the conduct of official business will be paid by your company. All expenses would be documented and this information supplied to the political subdivisions.

Division (F) of Section 102.03 of the Revised Code provides:

(F) No person shall promise or give to a public official or employee anything of value that is of such character as to manifest a substantial and improper influence upon him with respect to his duties.

The term "person" is defined to include any individual, corporation, partnership, association, or other similar entity. See R.C. 1.59. A "public official or employee" is defined for purposes of R.C. 102.03 as any person who is elected or appointed to an office or is an employee of any public agency. R.C. 102.01(C) defines "public agency" to include any department, division, board, commission, authority, bureau, or other instrumentality of a county, city, village, township, or other governmental entity. See R.C. 102.01(B) and (C). The term "anything of value" is defined for purposes of R.C. 102.03 to include money, goods, chattels, any interest in realty, a promise of future employment, and every other thing of value. See R.C. 102.03(G) and R.C. 1.03. The Ohio Ethics Commission has previously determined that the payment of travel, meal, and lodging expenses of a public official or employee is considered to be a thing of value for purposes of R.C. 102.03(F). See Ohio Ethics Commission Advisory Opinions No. 87-005, 87-007, 89-013, and 89-014.

Division (F) of Section 102.03 of the Revised Code was enacted as part of Am. Sub. H.B. 300, 116th Gen. A. (1986) (eff. September 17, 1986). Prior to enactment of Am. Sub. H.B. 300, Division (D) of Section 102.03 prohibited a public official or employee from using the authority or influence of his office to secure anything of value for himself that would not ordinarily accrue to him in the performance of his duties if the thing of value was of such character as to manifest a substantial and improper influence upon him with respect to his duties. The Ethics Commission held that R.C. 102.03(D) prohibited a public official or employee from using his public position to solicit or receive consulting fees, honoraria , conference registration fees, travel, meal, and lodging expenses, or other similar payments or reimbursement from a party that was interested in matters before, regulated by, or doing or seeking- to do business with the Governmental entity

with which the public official or employee served. See Advisory Opinions No. 79-002, 79-006, 80-004, 84-009, and 84-010. The Commission explained in Advisory Opinion No. 84-010:

The receipt of something of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with the agency with which the public official or employee serves is of such character as to manifest a substantial or improper influence upon the public official or employee with respect to his duties, because it could impair his independence of judgment in the performance of his duties and affect subsequent decisions in matters involving the donor of the thing of value.

Am. Sub. H.B. 300 amended Division (D) to omit the requirement that the thing of value be for the public official himself, and that it not ordinarily accrue to him in the performance of his official duties. See Advisory Opinions No. 87-004 and 88-004.

Am. Sub. H.B. 300 also enacted Division (E) of Section 102.03 which prohibits a public official or employee from soliciting or accepting anything of value that is of such character as to manifest a substantial and improper influence upon him with respect to his duties. R.C. 102.03(E) does not require that the public official or employee use the authority or influence of his office or employment to secure the thing of value and prohibits a public official or employee from merely accepting or soliciting anything of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with, his public agency. See Advisory Opinions No. 86-011 and 89-006. Divisions (D) and (E) of Section 102.03 of the Revised Code place the prohibitions and criminal penalties for violation of the prohibitions upon the public official or employee. ' The addition of Division (F) of Section 102.03 to the Ohio Ethics Law in 1986 by Am. Sub. H.B. 300 imposes a prohibition and criminal penalty upon the person or entity who improperly promises or gives a thing of value to a public official or employee. See R.C. 102.99.

The Ethics Commission has held that Division (F) of Section 102.03 of the Revised Code prohibits a company that is interested in matters before, regulated by, or doing or seeking to do business with a public agency from promising or giving, either directly to a public official or employee or indirectly to his public agency, travel, meal or lodging expenses. See Advisory Opinions No. 87-005, 87-007, 89-002, 89-013, and 89-014. This prohibition applies even in instances where the travel, meal and lodging expenses are directly related to the required performance of the public officials or employee's duties, and benefits his political subdivision by relieving the political subdivision of the necessity of paying for such expenses. See Advisory Opinion No. 86-011 (citing the example of a public official or employee receiving from a regulated party the expenses incurred in the inspection of a site or a facility required as part of a permit application, enforcement action, or compliance review). The Commission has explained that although budgetary considerations are of great concern to any political subdivision, the prohibitions of R.C. 102.03 override the political subdivision's desire to maximize its budget by having parties that are interested in matters before, regulated by, or doing or seeking to do business with the political subdivision pay the travel, meal, and lodging expenses of its officials and employees. See Advisory Opinion No. 89-014.

The fact that you propose that all expenses be documented to establish that your company paid only expenses essential to the conduct of official business and that no recreational or personal purpose was served by the trip does not alter the prohibition of R.C. 102.03(F). R.C. 102.03(F) simply prohibits such parties from promising or giving anything of value to a public official or employee as the best means of serving the public's interest in effective, objective, and impartial government by preventing the creation of situations which could impair the objectivity and impartiality, and therefore the effectiveness, of a public official or employee, or his public agency, in matters affecting an interested or regulated party or a party doing or seeking to do business with the public agency. See generally Advisory Opinion No. 89-014. Your company's documentation and disclosure that the expenses the company provided to public officials and employees were limited to expenses essential to the conduct of official business may serve to establish that your company desires to conduct business openly; however, such documentation and disclosure would not negate the potential impairment of objectivity and impartiality of the political subdivision's public officials or employees in matters affecting your company.

You have asked whether it would make a difference if the goods and services are sold to the political subdivision pursuant to competitive bidding and your company has submitted the lowest and best bid after providing the political subdivision's employees and officials with the travel, meal, and lodging expenses necessary to inspect and observe your company's products. A bidding process must be open and fair with every reasonable effort made by a political subdivision to ensure that the selection process is open to all interested and qualified parties and that a contract is awarded to the party that will provide the necessary goods and services at the lowest cost. See Generally Advisory Opinions No. 83-004, 88-001, and 89-004. Plans and specifications in W bidding invitation may not be drawn to favor any manufacturer or bidder unless specifically required by the public interest. See State v. Board 11 Ohio App. 2d 132, 140 (Montgomery County 1967). A public official or employee who is entrusted with the duty of formulating bid specifications, determining what is to be provided, advertising the bids, evaluating the goods and services offered by vendors, and deciding what is the lowest and best bid, must act with complete objectivity and independence of judgment. Therefore, the fact that your company would sell goods and services to political subdivisions pursuant to competitive bidding, would not negate the potential impairment of the objectivity and impartiality of judgment of the political subdivision's public officials or employees in matters concerning your company.

The payment of a public officials or employee's expenses by a source other than the employing public agency also implicates the prohibitions of R.C. 2921.43(A), which reads:

(A) No public servant shall knowingly solicit and no person shall knowingly promise or give to a public servant either of the following:

(1) Any compensation, other than allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform his official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation;

(2) Additional or greater fees or costs than are allowed by law to perform his official duties.

R.C. 2921.43(A)(1) prohibits a person, including an individual, corporation, partnership, association or other similar entity, see R.C. 1.59, from promising or giving to a public servant any compensation, other than allowed by R.C. 102.03(G)-(I) or other provision of law, to perform any act in his public capacity or generally perform the duties of his public position. See Advisory Opinion No. 89-013. R.C. 2921.43(A)(1) also prohibits a public servant from soliciting any such outside compensation. *Id.* The Commission has held that the term "compensation" as used in R.C. 2921.43 includes travel, meal, and lodging expenses incurred by a public official in visiting a site to view and evaluate a vendor's product since such an act is clearly within the performance of the officials or employee's public duties. See Advisory Opinions No. 89-013 and 89-014. Therefore, R.C. 2921.43(A) prohibits a vendor seeking to do business with a political subdivision from promising or giving travel, meal, and lodging expenses to public officials and employees of that political subdivision in order to view and evaluate the vendor's product. See Advisory Opinion No. 89-014.

The Ethics Commission has previously held that R.C. 102.03(F) does not prohibit a party that is interested in matters before, regulated by, or doing or seeking to do business with a public agency from promising or giving travel, meal, and lodging expenses to the political subdivision or its personnel in two limited situations. The Commission has held that R.C. 102.03(F) does not prohibit such a party from promising or giving directly to the public agency itself the cost of inspecting or examining such a party where the public agency is statutorily authorized to charge for the cost of inspecting that party. See Advisory Opinion No. 87-005.

Also, the Commission has held that R.C. 102.03(F) does not prohibit such a party from promising or giving travel meal, and lodging expenses to public officials and employees where the requirement that the party provide trips for business purposes to the public agency's officials and employees is included in the agency's bid specifications and ultimately in the contract between the party and the public agency. See Advisory Opinion No. 87-007. The political subdivision, by including the cost of trips in bid specifications and in the final contract, pays consideration for such trips, and ultimately bears the cost of such trips. *Id.* Such an arrangement will avoid the prohibitions of R.C. 102.03 and R.C. 2921.43. §e-e Advisory Opinion No. 89-013.

This opinion addresses facts which involve officials and employees of political subdivisions of the state, however, the prohibitions of R.C. 102.03 and R.C. 2921.43 include all public officials and employees whether on the state or the local level See R.C. 102.01(C); R.C. 2921.01(B); Advisory Opinion No. 89-014. Therefore, R.C. 102.03(F) and R.C. 2921.43 would prohibit a vendor who is doing or seeking to do business with an office, department, or agency of the state from promising or giving travel, meal, and lodging expenses to officials and employees of that state office, department, or agency. Furthermore, as explained above, the Commission has previously determined that parties who are regulated by or interested in matters before a public agency, as well as parties which do business or seek to do business with, a public agency are improper sources of things of value for the officials and employees of that agency. Therefore, R.C. 102.03(F) and R.C. 2921.43 prohibit any party that is regulated by, interested in matters before, or doing or seeking to do business with, a public office, department, or agency is

prohibited from giving travel, meal, and lodging expenses to an official or employee of that office, department, or agency.

This advisory opinion is based on the facts presented, and is rendered only with regard to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code.

Therefore, it is the opinion of the Ethics Commission, and you are so advised, that: (1) Division (F) of Section 102.03 of the Revised Code and Division (A) of Section 2921.43 of the Revised Code prohibit a vendor who is doing or seeking to do business with an office, department, or agency of a political subdivision from promising or giving travel, meal, and lodging expenses incurred in inspecting and observing the vendor's product to the officials and employees of the office, department, or agency, even though the expenses are limited to those which are essential to the conduct of official business and are incurred in connection with the officials or employee's duty to inspect and observe the vendor's products in operation at existing facilities; and (2) Division (F) of Section 102.03 of the Revised Code and Division (A) of Section 2921.43 of the Revised Code prohibit a vendor who is doing or seeking to do business with an office, department, or agency of a political subdivision from promising or giving travel, meal, and lodging expenses to the officials and employees of the office, department, or agency, even if the vendor's products and services are sold to the political subdivision pursuant to competitive bidding and the vendor has submitted the lowest and best bid.



David L. Warren, Chairman
Ohio Ethics Commission