



OHIO ETHICS COMMISSION

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June 24, 1996

Informal Opinion 1996-INF-0624

Robert Wilkinson
Village Administrator
Village of Canal Fulton

Dear Mr. Wilkinson:

In your letter to the Ohio Ethics Commission you ask whether the Ohio Ethics law and related statutes prohibit a corporation, which the Village of Canal Fulton (Village) has retained to serve as Village Engineer, from performing additional engineering services for the Village.

You state that on January 2, 1996, the Village contracted with CTI Environmental, Inc. (CTI) to serve as Village Engineer. CTI provides specified duties for the Village, as Village Engineer, for a monthly retainer of five hundred dollars. The contract includes a clause that enables CTI to provide additional services to the Village for special projects. The clause for additional services includes an hourly rate schedule and the provision that CTI and the Village may establish "a mutually acceptable not to exceed fee" for special services.

You state that the Village anticipates receiving a grant from the Ohio Public Works Commission for the rehabilitation of a sewage lift station. CTI desires to perform engineering services for the lift station rehabilitation project and has submitted a proposal to the Village. The proposed engineering services that would be provided by CTI consist of preparing plans and specifications that will enable the Village to seek bids for the rehabilitation work on the lift station. You also state that the President of CTI, William Dorman, in his capacity as Village Engineer but, under a separate agreement for professional services that expired December 31, 1995, helped prepare the application for the grant that the Village received from the Ohio Public Works Commission. Although the proposed engineering services may fall within the general provisions of the contract, these services do not fall within the specified duties for the Village that are covered by the monthly retainer, nor are they included in the contract's rate schedule for special services.

As explained below, R.C. 2921.42 (A)(3) and (A)(4) do not prohibit CTI from performing additional services that are not specified in the contract under which CTI performs services as Village Engineer. Division (A)(1) of R.C. 2921.42 and R.C. 102.03 (D) prohibit CTI from voting, discussing, deliberating, or otherwise authorizing or employing the authority or influence of its office, formally or informally, to secure authorization of the proposed contract for engineering service. R.C. 102.03 (D) and (E) also

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requires that CTI, in its capacity as Village Engineer, withdraw from all matters that may be required pertaining to the proposed project. For example, if the Village Engineer is required to review, approve, or act upon engineering services for the preparation of plans and specifications for the rehabilitation of the sewerage lift station, the Village must make arrangements with an independent engineering firm to act as Village Engineer with regards to CTI's work on this specific project. Finally, R.C. 102.03 (B) prohibits CTI from using or disclosing, without proper authorization, any confidential information acquired in the course of conducting its official duties as Village Engineer.

R.C. 2921.42 (A)(3) - Position of Profit in a Public Contract

R.C. 2921.42 (A)(3) reads:

(A) No public official shall knowingly do any of the following:

...

(3) 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.

The term "public official" is defined in R.C. 2921.01 (A) for purposes of R.C. 2921.42 to include an elected or appointed officer of any political subdivision of the state. The Ethics Commission has held that a corporation appointed to serve as a municipal engineer, and a member or employee of the corporation designated to serve in that capacity, is a "public official" and is subject to R.C. 2921.42. Advisory Op. No. 78-004. See also Advisory Ops. No. 77-004 and 82-001. Accordingly, CTI, and a member or employee of CTI who is designated to serve in the capacity of Village Engineer, is a "public official" and is subject to R.C. 2921.42.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (F)(1) of that section to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of a political subdivision. Also, Division (F)(2) of R.C. 2921.42 defines the term "public contract" as a contract for the design, construction, alteration, repair, or maintenance of any public property. Therefore, a contract for the engineering services for the proposed rehabilitation of the sewerage lift station is a public contract as that term is defined in both Divisions (F)(1) and (F)(2) of R.C. 2921.42. Also, the grant from the Ohio Public Works Commission to the Village is a "public contract" for purposes of R.C. 2921.42 (A)(3). Advisory Op. No. 82-004. By receiving payment from the Village for engineering services that would be derived from the grant from the Ohio Public Works Commission, CTI and its President, William Dorman, would profit from the contract. Advisory Ops. No. 87-004 and 88-008.

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The Ethics Commission has held that a public official will be deemed to have authorized a public contract, for purposes of R.C. 2921.42 (A)(3), where the contract could not have been awarded without the official's approval. Advisory Ops. No. 87-004, 88-003, and 88-008. However, in the instant situation, the prohibition of R.C. 2921.42 (A)(3) is inapplicable because Mr. William Dorman did not "authorize" the grant. Mr. Dorman, in his capacity as Village Engineer, helped the Village apply for the grant from the Ohio Public Works Commission. The "authorization" of the grant, for purposes of R.C. 2921.42 (A)(3) was made by the Ohio Public Works Commission.

Also, nothing in the contract between CTI and the Village provides CTI, as Village Engineer, with the authority to approve contracts, and therefore, the prohibition of R.C. 2921.42 (A)(3) is not applicable to the instant situation. See also R.C. 2921.42 (A)(1) (set forth below).

R.C. 2921.42 (A)(4) - Interest in a Public Contract

The issue becomes whether R.C. 2921.42 (A)(4) prohibits CTI from performing additional services that are not specified in the contract under which CTI performs services as Village Engineer.

R.C. 2921.42 (A)(4) reads as follows:

- (A) No public official shall knowingly do any of the following:
 -
 - (4) 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 Ethics Commission has held that a public official has a prohibited "interest" in a public contract if the official has a definite and direct interest, of either a pecuniary or fiduciary nature, in the contract. Advisory Op. No. 89-004. CTI and the President of CTI, William Dorman, have a definite and direct interest in the proposed public contract.

However, in this instance, the contract between CTI and the Village unequivocally contemplates that the Village may request CTI to perform additional services on special projects according to the rate schedule "or at a mutually acceptable not to exceed fee." Because additional services are specially contemplated in the contract between CTI and the Village, the Village may use CTI for engineering services for the proposed rehabilitation of the sewage lift station, at a mutually acceptable fee, without CTI having a prohibited interest in a public contract for purposes of R.C. 2921.42 (A)(4).

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However, it must be stressed that R.C. 2921.42 (A)(4) prohibits CTI from selling goods to or rendering services for the Village that would be outside the scope of the additional engineering services on special projects that are allowed by the contract. For example, while the provision of additional engineering services on special projects, such as the rehabilitation of the sewage lift station, are specially contemplated in the contract, the provision of materials to the Village is not. In such instances, CTI must abide by the prohibition of R.C. 2921.42 (A)(4) unless it meets the exception provided by R.C. 2921.42 (C). Because this is not an issue in the instant situation, the exception provided by Division (C) need not be addressed. If such an issue should arise, you should contact this office for further guidance.

Prohibition Imposed by R.C. 2921.42 (A)(1)

Despite the fact that CTI is not prohibited by R.C. 2921.42 (A)(4) from contracting with the Village to supply engineering services for the rehabilitation of the sewage lift station, CTI is bound by Division (A)(1) of Section 2921.42 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.

As stated earlier, the Ethics Commission has held that a public official will be deemed to have "authorized" a public contract for purposes of R.C. 2921.42 where the public contract could not have been awarded without the approval of the official. Advisory Ops. No. 87-004, 88-008, 90-010, 91-007, and 92-008.

Nothing in the contract between CTI and the Village provides CTI, as Village Engineer, with the authority to approve contracts. Therefore, this prohibition of R.C. 2921.42 (A)(1) is not applicable to the instant situation. However, R.C. 2921.42 (A)(1) also prohibits a public official from employing the "authority or influence of his office" to secure authorization of any public contract in which he has an interest.

The Ethics Commission has held that R.C. 2921.42 (A)(1) prohibits a public official from exercising the power and influence inherent in his public position to affect the awarding of a public contract. Advisory Op. No. 90-003. This prohibition includes, but is not limited to, discussing, recommending, or otherwise using the authority or influence of its position as Village Engineer, either formally or informally, in order to persuade Village officials to utilize the services of CTI.

Prohibition Imposed by R.C. 102.03 (D) and (E)

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

- (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.

R.C. 102.01 (B) defines the term "public official or employee" as any person who is elected or appointed to an office of any public agency. R.C. 102.01 (C) defines the term "public agency" as any department, division, board, commission, authority, bureau, or other instrumentality of a village. Thus, CTI, as Village Engineer, is a "public official or employee" of the Village and is subject to the prohibitions of R.C. 102.03 (D) and (E). Advisory Ops. No. 77-004 and 78-004. See also Advisory Ops. 79-002 and 82-001.

R.C. 1.03 defines "anything of value" for purposes of R.C. 102.03 to include money and every other thing of value. R.C. 102.01 (G). A definite pecuniary benefit to a corporation or person is considered to be a thing of value under R.C. 102.03 (D) and (E). Advisory Ops. No. 79-010, 85-006, and 89-008. Thus, the payments that CTI will receive from the Village for preparing plans and specifications for the proposed rehabilitation of the sewage lift station fall within the definition of "anything of value." Advisory Op. 82-001.

R.C. 102.03 (D) and (E) prohibit a public official or employee from soliciting or accepting, or using the authority or influence of his position to secure anything of value for himself that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. Advisory Ops. No. 87-006, 89-0010, and 93-014. The Ethics Commission has held that R.C. 102.03 (D) and (E) prohibit a public official or employee from soliciting, accepting, or using his position to secure anything of value from a party where such thing of value could impair the official's or employee's "independence of judgment in the performance of his duties and affect subsequent decisions in matters involving the donor of the thing of value." Advisory Op. 84-010. See also Advisory Op. No. 93-014. The Commission has explained that the Ethics Law and related statutes impose restrictions upon public officials and employees with regard to their ability to engage in private outside employment or the practice of a profession in order to serve the public interest in effective, objective, and impartial government by preventing the creation of a situation which may impair the objectivity and impartiality, and therefore, the

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effectiveness, of a public official or employee, or the public agency with which he serves. Advisory Ops. No. 89-014, 90-002, and 93-014.

The fact that CTI will perform engineering services for the Village, on a special project that is outside the scope of the enumerated duties that they have contracted to perform as Village Engineer, creates a situation that could impair CTI's objectivity and independence of judgment and that could affect the performance of its duties as Village Engineer if it is required to review, and did so in its official capacity, work that it has done on the special project.

The instant situation is similar to the one that the Ethics Commission addressed in Advisory Opinion No. 82-001, in which the Commission held that if a city engineer were to review private engineering work prepared by him or by other members of his employing firm, then such a review "could manifest a substantial and improper influence upon the city engineer with respect to his duties to the extent that his personal interests could impair his independence of judgment as city engineer." See also Advisory Ops. No. 78-004, 83-001, and 84-004.

Therefore, R.C. 102.03 (D) and (E) prohibit CTI from performing engineering services for the Village outside the scope of duties that it has contracted to perform as Village Engineer under the January 2, 1996 contract, if CTI must, in its capacity as Village Engineer, review and approve the work that it has performed.

However, the Ethics Commission has held, in certain circumstances, that an official or employee is not absolutely prohibited from engaging in private outside employment or the practice of a profession, but must withdraw from consideration of matters which would pose a conflict of interest for him. Advisory Op. No. 96-002. The Commission has held that a withdrawal by a public official or employee from a matter which poses a conflict of interest: (1) may not interfere with the official's or employee's performance of his duties; and (2) must be approved by the appropriate officials at his public agency. Advisory Ops. 89-010 and 90-002.

The issue in the instant situation is whether the withdrawal of CTI would interfere with the performance of its duties as Village Engineer.

The Ethics Commission has recognized that in some instances, a public official's or employee's withdrawal from a matter will not interfere with the performance of his duties provided that the official or employee delegates responsibility to a subordinate, with review of the subordinate's action by an official or entity independent of, or superior to, the official with the conflict of interest, or empowers an authority who is independent of, or superior to, the official with the conflict of interest to approve the matter, if such transfer of authority is permitted under relevant statutes. Advisory Ops. No. 92-004 and 92-008.

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However, in the instant situation, any employee of CTI would be under the supervision of the management of CTI. Therefore, CTI's management is in a position to control the work product of its employees and would be required to evaluate the performance of his employees in accomplishing their tasks. It is apparent that there is no one to whom employees of CTI could report with respect to the review and approval of the services that would be rendered under the proposed contract. If CTI were to perform the proposed rehabilitation of the sewage lift station and then withdraw from the consideration of matters which would pose a conflict of interest for it, then the employees over which the management of CTI has authority would be required to determine whether CTI, as the Village Engineer, had met all the requirements of the proposed contract. This would result in an untenable situation for the employees of CTI. Advisory Ops. No. 83-001 (where a county requires submission of a deed to the county engineer's office prior to the transfer of real property to determine if the deed identifies the property sufficiently to locate it on the tax lists and maps, such a determination cannot be made by the county engineer or employees under his supervision if the county engineer prepared the survey in his private capacity); Advisory Ops. No. 89-015 (if the law firm of a city law director were to serve as opposing counsel, then an assistant city law director could not objectively fulfill his duties); and 92-009 (if the Executive Director of the Barber Board were to own a barber shop, then an employee of the Barber Board could not objectively determine whether the Executive Director's barber shop meets requirements established by statute and rules adopted by the Barber Board). Therefore, the withdrawal by CTI, as Village Engineer, from matters involving work that it performed for the Village that is supplemental to the duties it performs as Village Engineer, would interfere with CTI's duties as Village Engineer.

With regard to the second criterion, the Ethics Commission, in Advisory Opinion No. 89-010, held that there may be instances where a public agency is willing to accommodate the interests of its officials and employees and excuse or reassign an employee with outside interests to avoid inherent conflicts of interest, where the agency determines that such special consideration would not interfere with the agency's operations or work hardship upon other officials and employees. See also Advisory Ops. No. 89-006 and 90-002.

In the instant situation, in order to satisfy the two criteria described above, if the Village Engineer is required to review, approve, or act upon engineering services for the preparation of plans and specifications for the rehabilitation of the sewerage lift station, the Village must make arrangements with an independent engineering firm to act as Village Engineer with regard to CTI's work on this special project. It must be noted that this would only be required if CTI must, in its capacity as Village Engineer, review and approve the work that it performed on this special project.

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Prohibition Imposed by R.C. 102.03 (B)

Finally, you are subject to Division (B) of Section 102.03 of the Revised Code, which provides as follows:

- (B) No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

R.C. 102.03 (B) prohibits CTI from using or disclosing without proper authorization any confidential information acquired in the course of conducting its official duties as Village Engineer. CTI is prohibited from using confidential information to position itself advantageously in securing additional work from the Village outside of the duties that it performs as Village Engineer. See generally Advisory Op. No. 90-012. It is important to note that no time limit exists for this prohibition and it is effective while presently serving and after leaving public employment. Advisory Op. No. 88-009.

Conclusion

As explained above, R.C. 2921.42 (A)(3) and (A)(4) do not prohibit CTI from performing additional services that are not specified in the contract under which CTI performs services as Village Engineer. Division (A)(1) of R.C. 2921.42 and Division (D) of R.C. 102.03 prohibit CTI from voting, discussing, deliberating, or otherwise authorizing or employing the authority or influence of its office, formally or informally, to secure authorization of the proposed contract for engineering service. R.C. 102.03 (D) and (E) also require that CTI, in its capacity as Village Engineer, withdraw from all matters pertaining to the proposed project, and if the Village Engineer is required to review, approve, or act upon engineering services for the preparation of plans and specifications for the rehabilitation of the sewerage lift station, the Village must make arrangements with an independent engineering firm to act as Village Engineer with regard to CTI's work on this specific project. Finally, R.C. 102.03 (B) prohibits CTI from using or disclosing without proper authorization, any confidential information acquired in the course of conducting its official duties as Village Engineer.

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This informal advisory opinion was approved by the Ethics Commission at its meeting on June 24, 1996. 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 further questions, please feel free to contact this Office again.

Very truly yours,



John Rawski
Staff Attorney