

OHIO ETHICS COMMISSION

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October 8, 2004

Informal Opinion 2004-INF-1008-2

Hernan A. Vasquez
Trustee, University of Toledo

Sandra A. Drabik
Vice President and General Counsel
The University of Toledo

Dear Mr. Vasquez and Ms. Drabik:

In letters received by the Ohio Ethics Commission on March 18, 2004, April 5, 2004, and July 3, 2004, you have both asked a number of questions related to members of the University of Toledo (University) Board of Trustees. Specifically, you have asked whether the Ethics Law and related statutes prohibit a University Trustee from having a material or service subcontract with a contractor who has been selected through a competitive bidding process to supply materials or services to the University. You have also asked whether the Trustee is required to disclose his interests in these contracts to the Ethics Commission or the University. Finally, you have asked whether, and to what extent, a Trustee can participate in discussions and decisions related to University construction if he has, or will have, a subcontract with a contractor who has been selected to supply goods or services to the University.

Brief Answer

As explained below, R.C. 2921.42(A)(4) prohibits a Trustee from having a material or service subcontract with a contractor who has been selected to supply goods or services to the University unless the exception provided by R.C. 2921.42(C) can be met. Because one of the requirements in R.C. 2921.42(C) is that the University has full knowledge of the Trustee's interest in the transaction, the Trustee is required to fully inform the University any time he will be a subcontractor on a University contract.

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R.C. 2921.42(A)(1) prohibits a Trustee from authorizing or employing the authority or influence of his office to secure authorization of a public contract if, at the time the Board is considering the contract, he is aware that he has, or will pursue, a subcontract with a contractor to provide material or services under the general contract. R.C. 2921.42(A)(3) prohibits the Trustee from entering into a material or service subcontract with a contractor who has been selected by the Board without competitive bidding or where the contract was awarded through a competitive bidding process to a vendor who was not the lowest and best bidder.

Facts

You have explained that a Trustee of the University owns two corporations that provide heating, ventilation, and air conditioning services and supplies. The Trustee states that his companies “bid on all publicly bid projects advertised in Dodge [Reports] and Builders Exchange” including “any projects advertised by the University of Toledo” but excluding “any projects directly to the University.” (Emphasis in original). Dodge Reports and Builders Exchange are two publications that list construction projects.

From conversations with the University General Counsel, the Commission understands that the University selects either the prime or general contractor, who in turn selects the subcontractor. (For purposes of this opinion, the Commission’s use of the term “general contractor” refers to both general contractors and prime contractors.) The University does not select the subcontractor. The University does ask the general contractor to inform the University of its subcontractors. Further, the University has the authority, under DAS procedures established under R.C. 153.16, to reject a particular subcontractor. See R.C. 153.16. The University project manager (an employee of the University) requires subcontractors to attend all project meetings. Finally, while there is no direct relationship between the University and the subcontractors, if the general contractor fails to pay a subcontractor, the subcontractor can follow a process set forth in the Revised Code to pursue the funds, which can include bringing a cause of action against the University for the unpaid money. R.C 1311.25 and .32.

Ohio Ethics Commission Advisory Opinions

While your questions involve future contracts, you have referred to activity that has already occurred. The purpose of an Ohio Ethics Commission advisory opinion is to provide guidance upon which a public official or employee can rely before he engages in an action that may be prohibited by the Ethics Law and related statutes. The Ethics Commission can render an advisory opinion only in response to a hypothetical question or a question that involves the prospective conduct of the person who requests the opinion. Ohio Ethics Advisory Opinions No. 75-037 and 94-002. This opinion does not reach any conclusions as to an activity that have already occurred.

Subcontractor Under University Contract

Your first question is whether a Trustee can provide goods or services as a subcontractor under a University contract. The provision of the Ethics Law that is most closely implicated by your question is R.C. 2921.42(A)(4), which provides that no public official or employee 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, to include any appointed officer of the state. See R.C. 2901.01(A). A state college or university is an instrumentality of the state. R.C. 3345.011 ("state university" means a public institution of higher education which is a body politic and corporate"); Wolf v. Ohio State University Hosp. (1959), 170 Ohio St. 49. Therefore, a University Trustee is a "public official" subject to the restrictions in R.C. 2921.42. Adv. Op. No. 95-004.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (G)(1):

- (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.

R.C. 3360.04 provides that the Board of Trustees of the University may make and enter into all contracts and agreements necessary or incidental to the acquisition of property for the operation of the University. Your questions involve University construction projects. Any purchase of goods or services, regardless of whether it is competitively bid, whereby the University acquires goods or services in connection with the design, construction, alteration, repair, or maintenance of a University property is a "public contract." In addition, the Ethics Commission has explained that a subcontract under a public contract is a "public contract," because the public agency is acquiring goods or services as a result of the subcontract. Adv. Op. No. 82-007, 86-002, 87-003, and 88-001.

R.C. 2921.42(A)(4) prohibits a public official from having either a pecuniary or fiduciary interest in a public contract. Adv. Op. No. 81-008. An individual who profits or benefits from a public contract has a pecuniary interest in that contract for purposes of R.C. 2921.42(A)(4). Adv. Op. No. 85-009. See also 1971 Op. Att'y Gen. No. 71-020 (holding that a Youngstown

State University trustee was prohibited, by the statute that preceded R.C. 2921.42, from having an interest in the lease of real property to the University, even if he abstained from the vote of the trustees on the transaction).

In the instant situation, if a Trustee were to enter into a material or service subcontract with a contractor, under a contract to supply goods or services to the University, then the Trustee would have a pecuniary interest in the public contract with the University. R.C. 2921.42(A)(4) prohibits a Trustee from having an interest in a University contract. Therefore, R.C. 2921.42(A)(4) prohibits a Trustee from being a material or service subcontractor under a University contract. There is, however, an exception to this prohibition, which is set forth in R.C. 2921.42(C).

Exception to the Prohibition—R.C. 2921.42(C)

R.C. 2921.42(C) provides an exception to the prohibition imposed by R.C. 2921.42(A)(4) to allow a public official to have an interest in a public contract with his own public agency when these four requirements are met:

- (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.

Each of the provisions in Division (C) is a question of fact which, when applied to the circumstances of the individual situation, 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, who must show that he meets all four requirements. Adv. Ops. No. 84-011 and 88-008.

Unobtainable Elsewhere for the Same or Lower Cost—Division (C)(2)

Division (C)(2) of R.C. 2921.42 is extremely important in this situation. R.C. 2921.42(C)(2) requires that the goods or services provided under the public contract be either “unobtainable elsewhere for the same or lower cost” or provided as part of a “continuing course of dealing” established prior to the public official becoming associated with the political subdivision involved.

A “continuing course of dealing” is a contract entered into before the official was appointed to his public position and completed after he is appointed. Adv. Op. No. 88-008. You are asking about new contracts. For this reason, the Trustee is unable to meet the “continuing course of dealing” requirement in the exception. Therefore, R.C. 2921.42(C)(2) can only be met in the instant situation by an objective showing that the goods or services being purchased by the University, in the contract where the Trustee is a subcontractor, are “unobtainable elsewhere for the same or lower cost.”

An open and fair competitive bidding process, whereby the vendor submits the lowest bid is one indication that this requirement has been met, but it is not determinative. Adv. Op. No. 86-002 and 90-003. Other factors must be considered, such as the availability and adequacy of notice to potential bidders, the openness and fairness of the bidding process, the objectivity and validity of the bid specifications, and the conditions of the marketplace. Adv. Ops. No. 83-004, 86-002, and 88-001.

As set forth above, the Board member does not desire to enter into a contract directly with the University. Instead, the Board member desires to enter into a material or service subcontract with a contractor who has been selected through a competitive bidding process to supply goods or services to the University.

In Advisory Opinion No. 88-001, the Ethics Commission stated:

The underlying principal of the exception of (C)(2) is to permit a public official to have an interest in a public contract with his governmental agency in those limited situations where the contract is the best or only alternative available to the governmental agency.

In a situation where a public official seeks to be a subcontractor under a general contract with his governmental agency, this principal is met where the contract between the general contractor and the governmental agency complies with the requirement of Division (C)(2) that the goods or services are unobtainable elsewhere for the same or lower cost. Adv. Op. No. 84-001 and 88-001. The governmental agency is buying goods and/or services from the general contractor who, in turn, selects subcontractors to assist in completing the contract for the governmental agency. Generally, the governmental agency is not involved in selecting the subcontractors on the project. Thus, it would be unnecessary for a public official who is a subcontractor to

demonstrate that he is providing goods or services to the general contractor, for use in completing the public agency's contract, at the lowest cost as long as the general contractor can demonstrate that he is providing goods or services to the public agency at the lowest cost. Adv. Op. No. 88-001.

Therefore, in order to meet the requirements in R.C. 2921.42(C)(2), the Trustee would have to demonstrate that the goods and services provided by the general contractor to the University are unobtainable, from any other party, for the same or lower cost than that paid to the general contractor. The Trustee would not have to demonstrate that the general contractor could not have acquired the goods or services provided by the Trustee's company from any other source for the same or lower cost. However, the Trustee would have to meet the remaining provisions of Division (C) in order to enter into a material or service subcontract under a University contract with a contractor who has been selected through a competitive bidding process to supply goods or services to the University.

Other Requirements of R.C. 2921.42(C)

R.C. 2921.42(C)(1) requires that the material or services that a Trustee would provide through the subcontract are necessary services for the University. R.C. 2921.42(C)(3) requires that the public official or employee provides the same or better services under the public contract than they would for any other client in similar transactions. The material or services the Trustee provides to the general contractor must be as good as or better than those to his other customers.

Finally, R.C. 2921.42(C)(4) has three elements. R.C. 2921.42(C)(4) requires that: (1) the transaction be conducted at arm's length; (2) the University has full knowledge of the Trustee's interest in the public contract; and (3) the Trustee takes no part in deliberations and decisions with respect to the contract. One of the questions you raised is whether the Trustee is required to notify the University of his interest in University contracts as a subcontractor. R.C. 2921.42(C)(4) requires that the University has full knowledge of a Trustee's interests in University contracts. In direct answer to your question, the Trustee would have to notify the University, before he acquires an interest in the University's contract, that his company is submitting a bid to become a subcontractor on a University contract. The Trustee would also be required to disclose the interest to the Ohio Ethics Commission when he completes his annual financial disclosure statement. Finally, the Trustee must comply with the other provisions of R.C. 2921.42(C)(4). See also R.C. 2921.42(A)(1).

Participating in the Discussion and Authorization of a University Contract

You have also asked whether, and to what extent, a Trustee can participate in discussions and decisions related to University construction if he has, or will have, a subcontract with the contractor who has been selected to supply goods or services to the University. Assuming that he can meet the requirements in R.C. 2921.42(C), such that he is not prohibited from having a subcontract on a University contract, the Trustee must also comply with R.C. 2921.42(A)(1).

Use of Authority or Influence to Secure a Public Contract—R. C. 2921.42(A)(1)

R.C. 2921.42(A)(1) 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.

If the Trustee is unable to comply with prohibition imposed by R.C. 2921.42(A)(1), he will be unable to have a material or service subcontract with a contractor who has been selected through a competitive bidding process to supply goods or services to the University. It would also make it impossible for the Trustee to comply with one of the elements of the exception described in R.C. 2921.42(C)(4).

As set forth above, R.C. 3360.04 provides that the Board of the University may make and enter into all contracts and agreements necessary or incidental to the acquisition of property for the operation of the University. The issue becomes whether the prohibition imposed by R.C. 2921.42(A)(1) will prevent a Trustee from having a material or service subcontract with a contractor who has been selected through a competitive bidding process to supply goods or services to the University.

R.C. 2921.42(A)(1) prohibits a public official from “knowingly” authorizing or employing the authority or influence of his office to secure authorization of a public contract in which he, a business associate, or a family member, has an interest. The word “knowingly” is defined in R.C. 2901.22(B) as follows:

A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

In State v. Pinkney (1988), 36 Ohio St. 3d 190, the Supreme Court upheld the conviction of a public official, who was the secretary of the board of a transit authority, and was conviction of violating R.C. 2921.42(A)(1) by signing a check that authorized payment to a company in which he had an ownership interest. The Court held:

[The public official] in his capacity as board secretary signed the check authorizing payment. The evidence is overwhelming that appellant was aware that the instrument that he was signing was payable to his agency and that he would benefit financially. (Emphasis added.)

State v. Pinkney (1988), 36 Ohio St. 3d 190 at 199.

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In the situation you have presented, R.C. 2921.42(A)(1) prohibits a Trustee from authorizing or employing the authority or influence of his office to secure authorization of a public contract if, at the time the Board is considering the contract, he is aware that he has, or will pursue, a subcontract with a contractor to provide material or services under the general contract.

As noted above, Mr. Vasquez has stated that his companies "bid on all publicly bid projects advertised in Dodge and Builders Exchange" including "any projects advertised by the University of Toledo" but excluding "any projects directly to the University." (Emphasis in original.) Therefore, the Trustee knows that he will pursue a subcontract on every University construction contract.

Consequently, the Trustee is prohibited from authorizing, or using his authority or influence in any way to secure authorization of, any University construction contract because he will pursue a subcontract on the contract. See also R.C. 2921.42(C)(4) (in order to comply with the exception in R.C. 2921.42(C), the Trustee must demonstrate that he has taken no part in deliberations and decisions regarding a public contract if he has an interest in the contract). The Trustee is prohibited from discussing, deliberating about, recommending, voting on, or taking any other action, as a Trustee, with respect to these projects. He is prohibited from discussing projects with other Trustees, and with University officials and employees over whom he has authority. Because the Trustee has stated that his companies will bid to be a subcontractor on all University projects, he is prohibited from taking any formal or informal action on a University construction contract, both before and after he becomes a subcontractor.

This conduct by a Trustee would also be prohibited by R.C. 102.03(D) which prohibits a public official or employee from using or authorizing the use of the authority or influence of his office or employment to secure anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

In his letter dated March 12, 2004, the Trustee states that, because of his expertise in the construction field, he should not be barred from participating in University construction matters. His argument is that barring him from participating in these matters is the same as barring a Trustee who is a doctor from participating in health-related matters or a Trustee who is an attorney from participating in legal issues.

However, the Ethics Law does not bar the Trustee from participating in University construction matters because of his expertise. Rather, he is barred from participating in those matters because his companies are, or may become, interested in the University's construction contracts. If the Trustee believes that his expertise in the construction field is valuable to the University, he can choose to forego pursuing subcontracts on University projects during his term as a Trustee. By so doing, the Trustee would remove the legal impediment and can fully participate as a Trustee in University construction projects. He would also remove any potential for appearance of impropriety that may arise as a result of the subcontracts.

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

The Trustee is also subject to R.C. 2921.42(A)(3), which provides 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 word "profit," as used in R.C. 2921.42(A)(3), connotes a pecuniary gain or benefit. Adv. Op. No. 92-013 and 93-001. The Ethics Commission has explained that an individual who has an ownership interest in a business occupies a "position of profit" in the contracts of the business. Adv. Op. No. 88-008. Therefore, the prohibition of R.C. 2921.42(A)(3) will apply whenever a public official realizes an advantage, gain, or benefit, which is a definite and direct result of a public contract that he, or a body of which he was a member, authorized, and which was not competitively bid and awarded to the lowest and best bidder. Adv. Op. No. 92-013. A public official who enters into a subcontract with a general contractor who was awarded a public contract from the agency he serves will realize an advantage, gain, or benefit that is a definite and direct result of the public contract and thus he will occupy a "position of profit" in that contract for purposes of R.C. 2921.42(A)(3).

A legislative body, commission, or board 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 board's approval. Adv. Ops. No 87-004 and 87-008. Accordingly, the statutory proscription applies to a public official who occupies a position of profit in a public contract authorized by the board on which he serves regardless of whether he participates in discussions or votes on the public contract as a member of the legislative body, commission, or board. Adv. Ops. No. 88-006, 88-008, and 91-005.

Therefore, R.C. 2921.42(A)(3) prohibits a Trustee from occupying a position of profit in the award of any University contracts that are not competitively bid and awarded to the lowest and best bidder, if the Board authorized the contracts, even if he abstained from the authorization. Adv. Op. No. 90-005.

In the instant situation, you have stated that the Trustee desires to enter into a material or service subcontract with a general contractor who has been selected by the Board through a competitive bidding process. If the Board awarded the contract through a competitive bidding process, and the general contractor submitted the lowest and best bid, the prohibition in R.C. 2921.42(A)(3) would not apply. In such a case, assuming the Trustee has complied with all of the provisions of R.C. 2921.42(A)(1) and met the exception in R.C. 2921.42(A)(4) (discussed above), R.C. 2921.42(A)(3) would not prohibit him from profiting from the University contract

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by having a subcontract under the general contract. However, R.C. 2921.42(A)(3) prohibits the Trustee from entering into a material or service subcontract with a contractor who has been selected by the Board without competitive bidding or where the contract was awarded through a competitive bidding process to a vendor who was not the lowest and best bidder.

Conclusion

As explained above, R.C. 2921.42(A)(4) prohibits a Trustee from having a material or service subcontract with a contractor who has been selected to supply goods or services to the University unless the exception provided by R.C. 2921.42(C) can be met. Because one of the requirements in R.C. 2921.42(C) is that the University has full knowledge of the Trustee's interest in the transaction, the Trustee is required to fully inform the University any time he will be a subcontractor on a University contract.

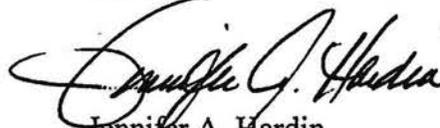
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The restrictions discussed in this opinion are criminal laws. If any person is convicted of a violation of a state criminal law, including the Ethics Law and related statutes, the person faces criminal penalties.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 24, 2004. The Commission commends the Trustee and the University for requesting guidance on this issue.

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 feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

cc: Members, University of Toledo Board of Trustees