

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

November 30, 2007 Informal Opinion 2007-INF-1130-1

Jane L. Campbell

Dear Ms. Campbell:

On November 5, 2007, the Ohio Ethics Commission received your letter requesting an advisory opinion. You explained that you are a member of the Greater Cleveland Regional Transit Authority (GCRTA) Board of Trustees. You also own a company, Jane L. Campbell Consulting, LLC, that assists small governments with economic development and property matters. You have asked whether the Ethics Law and related statutes prohibit Colliers Ostendorf-Morris Real Estate Company (Colliers), your biggest client, from bidding on a GCRTA contract if you would not benefit from the contract and would not participate in the discussion or vote on the contract. You explained that the request for proposals (RFP) are due on November 6, 2007, and Colliers will submit the RFP to preserve its right to compete for the contract. GCRTA will review the RFPs in November and discuss the issue at its December board meeting.

Brief Answer

As explained more fully below, the Ethics Law does not prohibit your client, Colliers, from bidding on the real estate contract with GCRTA provided that: (1) neither you nor your business will benefit from the contract; and (2) you do not use your public position in any way, formally or informally, to secure the contract for or otherwise benefit Colliers. For example, you and your business are prohibited from giving information or advice to Colliers regarding its dealings with GCRTA, or from providing any other services related to the contract, including real estate services.

Facts

In your letter, you explained that Colliers contracts with your consulting company to manage its company Public Sector Solutions (PSS). PSS assists Colliers's corporate clients on government-related matters, such as zoning variances, incentive packages, and building permits. Colliers pays your company for its services and you also earn commissions on real estate transactions that you complete on behalf of your company. Any commissions that you earn are distributed equally between you and Colliers. You have explained that, although this has not already occurred, you would receive 70% of any amount over \$400,000 that you earned in commissions in a year. Colliers has given you a title, Managing Director of PSS, and provides you with an office and an assistant. However, you stated that you are an independent contractor responsible for your own taxes, insurance, and retirement planning. You do not have any ownership in PSS and do not profit from the income of the company.

GCRTA recently issued a RFP for real estate services. Colliers is interested in the contract. You indicated that you would have no involvement in the work for GCRTA and would not benefit in any way from the income that Colliers would earn if it were to be awarded the contract. You stated that you will not participate in any discussion or vote on the matter because Colliers, as an on-going client of your company, is your business associate.

Participating in Matters Affecting a Customers or Clients

The conflict of interest restrictions, set forth in R.C. 102.03(D) and (E), are applicable to the situation you have described and provide:

- (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.

As a GCRTA trustee, you are subject to R.C. 102.03(D) and (E). See R.C. 102.01(B) and (C); R.C. 306.31 (a regional transit authority is a political subdivision of the state). See R.C. 102.01(B). See also Ohio Ethics Commission Advisory Opinions No. 89-009 and 93-003.

The term "anything of value" is defined to include money and every other thing of value. See R.C. 1.03. R.C. 102.01(G). A definite and direct pecuniary benefit, or the avoidance of a detriment, is considered to be a thing of value. Adv. Ops. No. 88-004 and 92-019. A decision regarding the award of a public contract is also within the definition of anything of value. Adv. Op. No. 2003-02.

The Ethics Commission has stated that R.C. 102.03(D) and (E) prohibit a public official from securing and soliciting a thing of substantial value for a person with which she has close fiduciary or economic relationship, such as a business associate, where it is of such a character as to manifest a substantial and improper influence on the official with respect to her public duties. Adv. Op. No. 92-010. A thing of value manifests a substantial and improper influence on a public official or employee if it could impair her objectivity and independence of judgment in future matters affecting the source of the thing of value. Adv. Ops. No. 91-010 and 95-001.

The Ethics Commission has held that a public official's or employee's relationship with a customer or client, merely because the individual is a customer or client, is generally not sufficient to manifest a substantial and improper influence upon the official or employee. Adv. Ops. No. 90-008 and 91-004. However, the Commission has stated that the application of R.C. 102.03(D) and (E) is dependent upon the facts and circumstances of each individual situation. Adv. Ops. No. 87-007 and 89-003. In a situation where the customer relationship is

longstanding, ongoing, and substantial in nature, it could impair the public employee's or official's objectivity and independence of judgment. Id.

You have stated that Colliers is your firm's biggest client. You are titled the Managing Director of Colliers's company, PSS, and Colliers provides you with an office and an assistant. Colliers pays your company for its services and you have the right to earn commissions on real estate transactions you complete for Colliers. Even though you are an independent contractor for Colliers, you have described an ongoing, substantial business and financial relationship between your firm and Colliers. The nature of the relationship is such that a thing of value going to Colliers from GCRTA could manifest a substantial and improper influence upon you.

Therefore, R.C. 102.03(D) and (E) prohibit you from soliciting a particular and definite substantial benefit, or using the authority or influence of your public position in any way, whether formally or informally, in any matter that would render a definite and direct financial benefit for, or avoid a detriment to, Colliers. Adv. Ops. No. 88-005 and 89-008. See also R.C. 2921.42(A)(1) (which prohibits a public official from authorizing, or using her position to secure authorization of, any public contract if the official, her family members, or her business associates would have a direct fiduciary or financial interest in the contract.)

You stated that you will not participate, as a GCRTA trustee, in any discussions or votes regarding the contract on which Colliers will bid. You are also prohibited from lobbying other public officials or employees regarding Colliers's interests or otherwise using your unique connection with GCRTA in any manner which would provide an advantage for Colliers in securing the contract. For example, you are prohibited providing any information to Colliers that would give the company an advantage over other bidders in its dealings with the GCRTA.¹

Public Contract Restrictions—R.C. 2921.42(A)(1), (3), and (4)

R.C. 2921.42(A)(4) prohibits you from having an interest in any GCRTA contract. You are prohibited from having a financial or fiduciary interest in any GCRTA contract. If GCRTA were to enter into a contract with PSS, rather than Colliers, you may be considered to have a fiduciary interest in the contract because you are Managing Director of PSS. Even if the contract is with Colliers, rather than PSS, R.C. 2921.42(A)(4) prohibits you from receiving any financial benefit from the contract. See also Adv. Op. No. 88-008 and R.C. 2921.42(A)(3) (prohibiting you from profiting from any GCRTA contract even if you did not participate in authorizing the contract). You stated that you would not have any involvement in the work Colliers would perform under the contract and would not benefit in any way from the income Colliers would earn if it receives the contract. You and your business are prohibited from performing any services related to the contract, including real estate and consulting services.

¹ See also R.C. 102.03(B) which prohibits you from disclosing, without proper authorization, confidential information acquired during the course of your public duties. No time limit exists for the prohibition of R.C. 102.03(B), and it is effective while you hold the position of GCRTA trustee and after you leave public service. See Adv. Op. No. 88-009.

You should also note R.C. 2921.42(A)(1), which prohibits you from authorizing any contract if you or a business associate has an interest in the contract. The term "business associate" is not defined in R.C. 2921.42(A)(1). The Ethics Commission has held that a business associate relationship exists whenever parties act together to pursue a common business purpose. See Adv. Ops. No. 78-006 (an employer is a business associate of an employee), 84-013 (a firm is a business associate of an agent or representative), and 85-004 (business partners are business associates).

The nature of the relationship between your firm and Colliers, constitutes a business associate relationship. Like R.C. 102.03(D), R.C. 2921.42(A)(1) prohibits you from taking any formal or informal action to secure approval of a contract for Colliers because Colliers is your business associate. If Colliers were awarded the contract, you would also be prohibited from voting, discussing, deliberating, or taking any other formal or informal action in any matter before GCRTA that would affect the terms or conditions of the contract between Colliers and GCRTA, or affect the payments made by GCRTA to Colliers.

Conclusion

As explained more fully above, the Ethics Law does not prohibit your client, Colliers, from bidding on the real estate contract with GCRTA provided that: (1) neither you nor your business will benefit from the contract; and (2) you do not use your public position in any way, formally or informally, to secure the contract for or otherwise benefit Colliers. For example, you and your business are prohibited from giving information or advice to Colliers regarding its dealings with GCRTA, or from providing any other services related to the contract, including real estate services.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on November 28, 2007.

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,



Karen R. King
Staff Advisory Attorney