

OHIO ETHICS COMMISSION

Santiago Feliciano, Jr.
Commission Chair

David E. Freel
Executive Director



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368

Website: <http://www.ethics.state.oh.us>

Advisory Opinion Number 2000-02
March 16, 2000

Syllabus by the Commission:

(1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a member of city council from having an interest in the profits or benefits of a contract that is entered into by or for the use of the political subdivision with which the member of city council is connected unless all four requirements of Division (C) of Section 2921.42 are met;

(2) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a member of city council, during his term of office or within one year thereafter, from occupying any position of profit in the prosecution of a public contract authorized by him when the public contract is not let by competitive bidding to the lowest and best bidder;

(3) The status of a member of city council as the owner of a minority business enterprise does not change the application of Divisions (A)(3) and (A)(4) of Section 2921.42; and

(4) Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code prohibit a member of city council from using or authorizing the use of the authority or influence of his office to secure authorization of any public contract in which he or his company has an interest.

* * * * *

In your letter to the Ethics Commission, you asked several questions regarding the application of the public contract restrictions contained in the Ohio Ethics Law and related statutes to your client, a city council member who began his first term in January, 2000. Specifically, you asked whether the Ethics Law prohibits your client from bidding on city construction contracts, during his term of office, if his business is what is described under law as a "Minority Business Enterprise." You also asked whether the Ethics Law restricts your client's ability to continue to perform under any contracts that existed prior to the commencement of his term of office.

As more fully explained below, the Ohio Ethics Law does restrict the activities of your client, as a city council member, and prohibits him from having an interest in contracts entered into by or for the use of the city, unless an exception provided in the Ethics Law applies. Next, the Ethics Law prohibits your client from profiting from a public contract authorized by him or by a legislative body of which he is a member, unless the contract was let by competitive bidding

to the lowest and best bidder. Finally, the Ethics Law prohibits your client from using or authorizing the use of the authority or influence of his office to secure a public contract in which he or his company has an interest.

Facts

In your letter to the Commission, you stated that your client is a city councilman and that he assumed his position on city council in January, 2000. You further stated that your client owns a construction company that receives public contracts as a Minority Business Enterprise. Your client's Minority Business Enterprise currently performs services under construction contracts with the city that existed prior to your client's term of office on city council. You stated that your client's Minority Business Enterprise is also interested in bidding on city construction contracts while your client serves as a member of city council.

Having an Interest in a Public Contract—R.C. 2921.42(A)(4)

Your questions implicate several provisions in the law regarding public contracts. First, your attention is directed to Division (A)(4) of Section 2921.42 of the Revised Code, which 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, to include any elected or appointed officer, employee, or agent of any political subdivision of the state. R.C. 2921.01(A). A member of city council is a public official for purposes of R.C. 2921.42, and is subject to its prohibitions. See R.C. 2921.01(A); Ohio Ethics Commission Advisory Opinions No. 79-005, 80-001, 81-008, and 89-008.

For purposes of R.C. 2921.42, the term "public contract" is defined to include any of the following:

- (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.

See R.C. 2921.42(G)(1). Thus, a contract for construction services between your client's company and the city would be a "public contract." In addition, any contract for construction services entered into between your client's company and any other party, for the use of the city, would be a "public contract." See Adv. Op. No. 86-001.

An "interest" that is prohibited under R.C. 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. See Adv. Op. No. 89-004. The Ethics Commission has held that a public official who has an ownership interest in a business has a pecuniary interest in the contracts of that business for purposes of R.C. 2921.42. See Adv. Op. No. 94-002. Your client has an interest in the profits or benefits of the construction company that he owns. As a city council member, R.C. 2921.42(A)(4) prohibits your client from having an interest in the profits or benefits of any public contract entered into by or for the use of the city. Division (C) of Section 2921.42 of the Ohio Revised Code, however, provides an exception to this prohibition.

Exception to the Restriction of R.C. 2921.42(A)(4)

R.C. 2921.42(C) provides an exception to R.C. 2921.42(A)(4), as follows:

(C) This section does not apply to a public contract in which a public official, member of his family, or one of his business associates has an interest, when all of the following apply:

(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. (Emphasis added.)

Each of the provisions in Division (C) is a question of fact which, when applied to the circumstances of the individual case, 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, and the official must show compliance with all four requirements in the exception. Adv. Ops. No. 83-004, 84-011, and 88-008.

Unobtainable Elsewhere for the Same or Lower Cost—R.C. 2921.42(C)(2)

Division (C)(2) is of particular importance. This division requires that the supplies or services be unobtainable elsewhere for the same or lower cost. In order for the company with

which your client is connected to have an interest in a construction contract entered into by or for the use of the city, your client must be able to show by some objective standard that the supplies or services the company is providing are "unobtainable elsewhere for the same or lower cost." Adv. Ops. No. 84-006. You have stated that any contracts would have to be competitively bid. Competitive bidding, whereby your client's company submits the lowest bid, is one indication that this requirement has been met, but it is not determinative. Adv. Op. No. 86-002. Other factors that must be considered include the availability and adequacy of notice to potential bidders, the openness and fairness of the bidding process, and the conditions of the market. Adv. Ops. No. 83-004 and 88-001. As a city official, your client must be able to show, by some objective standard such as a competitive bid, or a fair and open solicitation of other vendors, that the services and/or supplies provided by his company are unobtainable by the city for the same or lower cost.

You indicate, in your letter and subsequent telephone conversations, that your client's construction company is a Minority Business Enterprise (MBE) as defined by the applicable local city ordinance. The city has determined that an MBE is "a business Enterprise that is both owned and controlled by minority group persons." A "minority" is defined by local city ordinance as a person who is a citizen of the United States, and who is "Black, Hispanic, Asian or Pacific Islander, American Indian or Alaskan Native." The City, through its Human Relations Commission, issues a certificate to any firm, corporation or partnership that meets the above definition of a minority business enterprise. The Human Relations Commission also oversees the implementation of minority participation in public contracts and fosters local minority business opportunities consistent with ensuring that the interests of the City are protected.

Pursuant to city ordinance, each agency or department of the City must, unless otherwise determined by the Human Relations Commission, award its construction contracts to minority business enterprises consistent with a goal of twenty percent (20%), or such goal as may be determined by the Mayor, of the dollar volume of all construction contracts. As a certified MBE, your client may be awarded contracts pursuant to this local city ordinance. The question becomes whether an award of a contract in such a manner satisfies the first prong of Division (C)(2) of R.C. 2921.42.

R.C. 2921.42(C)(2) provides that the supplies or services furnished by the public official must be unobtainable elsewhere for the same or lower cost. As stated above, the Commission has found that the presence of competitive bidding may be one indication that the supplies or services are unobtainable elsewhere for the same or lower cost. The city in your question has decided that, in determining which is the lowest and best bid, the city board of control may give consideration to the goals of the city's affirmative action program and to whether the bid is submitted by a minority-owned business enterprise. However, the city has not removed MBE contracts from the competitive bidding process.

In the present situation, if the city awards a contract to your client's company based on its submission of the lowest and most responsive bid submitted by an MBE in a bidding process open to all qualified contractors, including all certified MBEs, your client may meet the requirement of R.C. 2921.42(C)(2). However, it must be clear that the contract is open for bidding to all certified MBEs, and that every aspect of the selection process is conducted fairly

and openly, such that the city council member does not have an unfair advantage over other certified MBE contractors. Further, it must be clear that the city fairly and objectively assesses which contractors qualify for MBE status under the applicable city ordinance.

Continuing Course of Dealing—R.C. 2921.42(C)(2)

Division (C)(2) can also be met by showing a continuing course of dealing established before the public official was connected with the public employer. In your client's case, you indicate that he is currently performing construction services under one or more contracts entered into by or for the use of the city. Thus, under the exception provided in Division (C), and assuming your client meets the other criteria contained in Division (C), as discussed below, your client is not prohibited, after he has assumed his official duties as a member of city council, from continuing to have an interest in the profits or benefits of a public construction contract that was entered into before he assumed his official duties as a member of city council.

The continuing course of dealing exception does not apply to any pre-existing contracts that are renewed after the city council member assumes office, unless the renewal is a term of the existing contract and the contract is renewed without action of any office, department, or agency of the city. See Adv. Op. No. 88-008. Further, the terms and conditions of the renewal contract must be the same as the terms and conditions of the pre-existing contract. If there are any modifications in the terms and conditions of the pre-existing contract, aside from any modifications that are specified in the pre-existing contract, such as cost-of-living increases or other changes calculated pursuant to a formula established in the pre-existing contract, the continuing course of dealing exception of (C)(2) is not met.

Other Requirements of R.C. 2921.42(C)

If your client can meet the criterion of Division (C)(2), he must, in addition, comply with the other provisions of R.C. 2921.42(C). R.C. 2921.42(C)(1) requires that the construction services are necessary purchases for the city. Division (C)(3) requires that the treatment provided by your client's company to the city is as good as or better than the treatment provided by the company to its other clients or customers. Finally, Division (C)(4) requires that the transaction be conducted at arm's length, that the city has full knowledge of your client's interest, and that your client take no part in the deliberations and decision of the city with respect to the contract. See also R.C. 2921.42(A)(1) (discussed below).

Therefore, R.C. 2921.42(A)(4) generally prohibits your client, as a city official, from having an interest in public contracts entered into by or for the use of the city. Your client would have an interest in the contracts of the company that he owns. R.C. 2921.42(C) provides an exception to the restriction in R.C. 2921.42(A)(4), if your client can demonstrate that he meets all four requirements in the exception. One of the requirements is that the city is unable to obtain the construction services, from any other source, for the same or lower cost, or that the supplies or services are being furnished as part of a continuing course of dealing established prior to your client's association with the city. R.C. 2921.42(C)(2). If the construction services are not furnished pursuant to a contract that existed before your client became a city council member, your client must be able to demonstrate that his company provides the services at the lowest cost,

as determined by some objective measure, such as a fully open competitive bidding process. Your client must also be able to meet the other requirements of R.C. 2921.42(C).

Authorization of a Public Contract—R.C. 2921.42(A)(1)

Assuming that all of the criteria in R.C. 2921.42(C) can be established, the prohibitions in R.C. 2921.42(A)(1) must still be observed. 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.

As set forth above, your client would be considered to have an interest in the contracts of the company that he owns. Accordingly, your client is prohibited by R.C. 2921.42(A)(1) from voting, discussing, deliberating, formally or informally lobbying, or taking any other action, as a member of city council, to secure contracts for his company. Adv. Ops. No. 79-005 and 90-003. For example, your client would be prohibited from voting to approve payments under contracts that had been entered into by other city officials or employees, from recommending his company to other city officials or employees, and from using his position of authority over other city officials or employees, in any other way, to secure business for his company. Your client would also be prohibited from bidding on any contract to perform work on any city project he had sponsored, discussed, voted on, or recommended in his position as a city council member. Casual, as-needed purchases, whether they are written agreements or not, are included within the definition of public contract. Therefore, your client would be prohibited from using his public position in any way to secure casual purchases or rentals from his company.

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

Your attention is also directed to Division (A)(3) of Section 2921.42 of the Revised Code, 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.

R.C. 2921.42(A)(3) does not prohibit a public official from "[h]av[ing] an interest in the profits or benefits of a public contract," but rather prohibits a public official from "occupy[ing] any position of profit in the prosecution of a public contract," under specific circumstances. See Adv. Op. No. 93-001. Therefore, the exception provided by 2921.42(C) to the prohibition against a public official having an "interest" in a contract with his own political subdivision does not provide an exception to the prohibition imposed by R.C. 2921.42(A)(3). Id.

As stated above, R.C. 2921.42(A)(1) prohibits the city council member from participating in the authorization of a contract in which he has an interest. However, the application of R.C.

2921.42(A)(3) is not limited to situations in which the official, himself, authorizes the contracts. For purposes of R.C. 2921.42(A)(3), a public contract will be deemed to have been "authorized" by a public official or board if the contract could not have been awarded without the approval of the official, the position that he holds, or the board on which he serves. See Adv. Ops. No. 87-004 and 92-008. Therefore, R.C. 2921.42(A)(3) prohibits the city council member from occupying a position of profit in a public contract authorized by the city council, even if he abstains, as required by R.C. 2921.42(A)(1), from the authorization of the contract.

However, your client is not prohibited from occupying a position of profit in the prosecution of a public contract authorized by city council if the contract is let by competitive bidding to the lowest and best bidder. Therefore, unlike the prohibition of 2921.42(A)(4), 2921.42(A)(3) provides a clear exclusion for those contracts that are let by competitive bidding. Your client would not need to show, for purposes of 2921.42(A)(3), that the construction supplies or services are unobtainable elsewhere for the same or lower cost. Your client must demonstrate, however, that the contract is awarded pursuant to competitive bidding.

Thus, the issue becomes whether the bidding process for MBE contracts satisfies the competitive bidding requirement of R.C. 2921.42(A)(3). As set forth above, the bidding process for MBE contracts does not differ from the bidding process for other city contracts. In other words, contracts are not set-aside for solely MBE bidders. Instead, the city determines after the bidding is conducted whether to award the contract to the lowest and best MBE bidder. In making this consideration, the city compares the total dollar volume of all city construction contracts to the total dollar volume of city construction contracts awarded to MBEs in order to satisfy the requirement, as set forth by the local city ordinance, that twenty percent of all city construction contracts be awarded to MBEs. Aside from this fact, the bidding process proceeds in the same manner as any other competitive bidding process, and the contract is awarded to the MBE contractor who submits the lowest and best bid. As stated above, so long as the bidding process proceeds in the manner specified by the applicable city ordinances, and so long as all certified MBEs have a full and fair opportunity to bid on the contracts, a competitive bidding process that is conducted in such a manner would meet the requirement of R.C. 2921.42(A)(3).

Therefore, you are advised that R.C. 2921.42(A)(3) does not prohibit your client from occupying any position of profit in the prosecution of a public contract that was let by competitive bidding to the lowest and best certified MBE bidder.

Conflict of Interest Prohibition—R.C. 102.03(D)

Your attention is also directed to Division (D) of Section 102.03 of the Revised Code, which reads as follows:

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.

A "public official or employee" is defined, for purposes of R.C. 102.03, to include any person who is elected or appointed to an office or is an employee of any public agency. R.C. 102.01(B). As a city council member, your client would fall within the definition of "public official or employee" for purposes of R.C. 102.03 and would be subject to the prohibition imposed by Division (D). R.C. 102.01(B) and (C). Adv. Ops. No. 88-004, 88-005, and 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. See R.C. 102.01(G). A pecuniary interest in a private business, and the benefit of a contract to that business, is a thing of value under R.C. 102.03(D). See Adv. Ops. No. 86-007 and 87-006.

R.C. 102.03(D) does not speak in terms of a public official's or employee's "interest" or "position of profit," but rather prohibits a public official or employee from taking any action, formally or informally, to secure a thing of value if the thing of value could manifest a substantial and improper influence upon the public official or employee with respect to that person's duties. See Adv. Ops. No. 88-004 and 91-004. The Ethics Commission has held that a determination of whether a thing of value could manifest a substantial and improper influence upon a public official or employee with respect to that person's duties is dependent upon the facts and circumstances of each individual situation. See Adv. Ops. No. 87-008, 88-004, and 91-004.

A matter that affects the personal financial interests of a public official or employee would generally be of such a character as to manifest an improper influence upon him with respect to his duties. See Adv. Ops. No. 88-004 and 90-003. However, in order for R.C. 102.03(D) to prohibit a public official or employee from participating in a matter that would secure a thing of value for himself, the thing of value must also be of a "substantial" nature. See Adv. Ops. No. 86-011 and 92-014. The word "substantial" means "of or having substance, real, actual, true; not imaginary; of considerable worth or value; important." Adv. Op. No. 89-014 (quoting Adv. Ops. No. 75-014 and 76-005). In your client's situation, the pecuniary benefits that would accrue as a result of his interest in the contracts of his company would be substantial.

Therefore, R.C. 102.03(D) prohibits your client from: (a) using public time, facilities, personnel, or resources to operate his private business; (b) using his relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding his business; (c) discussing, deliberating, or taking any action, as a city official, on any matter involving his business; and (d) using his public position or authority in any other way to secure a benefit for his business. Adv. Op. No. 96-004.

Disclosure of Confidential Information—R.C. 102.03(B)

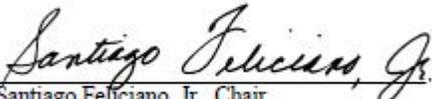
Finally, your attention is directed to Division (B) of Section 102.03 of the Revised Code, which provides:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential

because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that 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 a public official or employee from using or disclosing, without proper authorization, confidential information acquired in the course of his official duties to any party. Thus, as a member of city council, your client is prohibited from using or disclosing confidential information acquired in the course of his duties as a member of city council.

This advisory opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised, and does not purport to interpret other laws or rules. Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a member of city council from having an interest in the profits or benefits of a contract that is entered into by or for the use of the political subdivision with which the member of city council is connected unless all four requirements of Division (C) of Section 2921.42 are met; (2) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a member of city council, during his term of office or within one year thereafter, from occupying any position of profit in the prosecution of a public contract authorized by him when the public contract is not let by competitive bidding to the lowest and best bidder; (3) The status of a member of city council as the owner of a minority business enterprise does not change the application of Divisions (A)(3) and (A)(4) of Section 2921.42; and (4) Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code prohibit a member of city council from using or authorizing the use of the authority or influence of his office to secure authorization of any public contract in which he or his company has an interest.


Santiago Feliciano, Jr., Chair
Ohio Ethics Commission