



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion No. 82-007
November 18, 1982

Syllabus by the Commission:

- 1) The Ohio Ethics Law and related statutes do not prohibit a partner in a public accounting firm that has a professional services contract with a regional sewer district from accepting an appointment to the board of trustees of the sewer district, provided that all elements of Division (C) of Section 2921.42 of the Revised Code are met.
- 2) The exemption of Division (C)(2) of Section 2921.42 of the Revised Code for services being furnished as part of a "continuing course of dealing" applies only to services provided during the term of the existing contract.

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You asked whether the Ohio Ethics Law and related statutes prohibit a partner in an accounting firm that has a contract with a regional sewer district from accepting an appointment to the sewer district board of trustees. You also asked whether acceptance of the appointment would affect existing and subsequent contracts involving the accounting firm and the sewer district.

You stated, by way of history, that a public accounting firm has a contract with a regional sewer district to provide professional services, including the making of recommendations for the improvement of the sewer district's financial management systems. You stated further that the accounting firm may subsequently be employed to implement these recommendations, or may be awarded a subcontract by another firm that is rendering services for the sewer district under a currently existing general contract. Finally, you stated that a partner in the accounting firm has been offered an appointment to the board of trustees of the sewer district.

Division (A)(4) of Section 2921.42 of the Revised Code states:

(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.

A member of the board of trustees of a regional sewer district is a "public official" as defined in Division (A) of Section 2921.01 of the Revised Code. A contract between a regional sewer district and a public accounting firm for the purchase of professional services is a "public contract" as defined in Division (E)(1) of Section 2921.42 of the Revised Code. A subcontract between the accounting firm and a general contractor under contract with the regional sewer district is also a "public contract," since it is an agreement for the purchase or acquisition of services by or for the use of a political subdivision of the state. Thus, if the partner were to accept the appointment, he would have a prohibited interest in the existing general contract (See: Ohio Ethics Commission Advisory Opinion No. 78-001).

However, Division (C) of Section 2921.42 of the Revised Code establishes an exemption from the prohibitions in Division (A) of that Section:

(C) This section does not apply to a public contract in which a public servant, 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 servant'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 servant, member of his family, or business associate, and the public servant 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.)

Under this provision, all of the following criteria must be met: 1) the subject of the contract is necessary supplies or services; 2) the supplies or services are unobtainable elsewhere for the same or a lower cost, or are furnished as part of a continuing course of dealing established prior to the public officials association with the governmental entity; 3) the treatment accorded the governmental entity is either preferential to or the same as that accorded other customers or clients in similar transactions; and 4) the entire transaction is conducted at arm's length, with full knowledge by the governmental entity of the interest of the public official, provided that he takes no part in the deliberations or decision with respect to the contract. These are factual determinations, and whether a particular transaction meets the criteria of Division (C) of Section 2921.42 of the Revised Code depends upon the facts and circumstances of the individual case. In

the instant case, it appears that the first, third, and fourth criteria listed above are satisfied, since the accounting services are necessary, the government receives the same treatment as other clients of the accounting firm, and the transaction is fully disclosed. The essential question is whether the pre-existing contract establishes "a continuing course of dealing," as required by Division (C)(2) of Section 2921.42.

Since the contract between the sewer district and the accounting firm was established before the partner was offered the appointment to the board of trustees, the accounting services provided under the existing agreement are "part of a continuing course of dealing", for purposes of Division (C)(2) of Section 2921.42 of the Revised Code. Thus, the accounting firm may continue to provide accounting services under the agreement until that contract expires. However, material changes in the existing agreement, including modifications, extensions, or renewals, would not be within the exemption, since such changes alter the original understanding of the parties. Therefore, the original contract, which only obligated the accounting firm to make recommendations for the improvement of the financial management systems of the sewer district, may not be modified, extended, or renewed to allow the accounting firm to implement its recommendations, or it would no longer be "part of a continuing course of dealing". Furthermore, a subcontract under a pre-existing general contract may not be awarded to the accounting firm after the appointment has been made, since a course of dealing was not established before the partner took office.

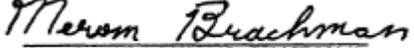
If the accounting firm were subsequently awarded a subcontract, or another contract with the sewer district following expiration of the original contract, it would not be "part of a continuing course of dealing" established before the appointment, but the exemption in Division (C)(2) of Section 2921.42 could still apply. However, it would be necessary to establish, as a factual matter, that the services "are unobtainable elsewhere for the same or lower cost". The awarding of the contract by competitive bidding would be helpful, but not determinative, in establishing this fact. In addition, all other elements of Division (C) of Section 2921.42 must be met for the exemption to apply.

Division (C) of Section 102.04 of the Revised Code prohibits a public official or employee from receiving compensation, other than from the agency with which he serves, for services rendered personally by him on any matter before any agency of the entity of government with which he is connected. Thus, a member of the board of a sewer district, who also is a partner in an accounting firm, is prohibited from receiving compensation, other than from the sewer district, for accounting services rendered by him personally to the district. Although he would be prohibited from receiving compensation for services he renders himself, he would not be prohibited from receiving his partnership share for work done by his partners (See: Ohio Ethics Commission Advisory Opinion No. 77-001).

The conclusions of this opinion are based upon the facts presented, and are rendered only with regard to questions arising under Chapter 102. and Section 2921.42 of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that:
1) the Ohio Ethics Law and related statutes do not prohibit a partner in a public accounting firm that has a professional services contract with a regional sewer district from accepting an

appointment to the board of trustees of the sewer district, provided that all elements of Division (C) of Section 2921.42 of the Revised Code are met; and 2) the exemption of Division (C)(2) of Section 2921.42 of the Revised Code for services being furnished as part of a "continuing course of dealing" applies only to services being provided during the term of the existing contract.


MEROM BRACHMAN, CHAIRMAN
Ohio Ethics Commission