



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 86-002
February 26, 1986

Syllabus by the Commission:

(1) Division (D) of Section 102.03 and Division (A)(1) of Section 2921.42 of the Revised Code prohibit a city council member, who is an officer and shareholder in an insurance agency, from authorizing, voting, or otherwise using his official position or the authority or influence of his office to secure approval of a public contract in which his firm provides a bid or performance bond or has some other interest.

(2) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a city council member, who is an officer and shareholder of an insurance agency, from having an interest in the profits or benefits of a public contract with the city with which he serves, unless the criteria of Division (C) of Section 2921.42 of the Revised Code are satisfied.

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You asked whether the Ohio Ethics Law or related statutes would prohibit a member of city council, who is an officer and shareholder in an insurance agency, from voting to approve contracts between the city and a business client, or from selling insurance, including bid or performance bonds, to firms under contract with the city.

You stated, by way of history, that a member of city council is an officer and shareholder of an insurance agency which has business clients, including construction firms, that seek to do business with the city. You stated further that the professional insurance services provided to bidders range from property and liability insurance to bid and performance bonds. You indicated that city contracts, including construction contracts, usually are approved by city council on the basis of competitive bidding, and that the city charter prohibits abstentions from votes without authorization by a vote of city council. Finally, you stated that the insurance company is not shown as a proposed subcontractor on the forms attached to the construction bid proposal.

Division (D) of Section 102.03 of the Revised Code provides:

No public official or employee shall use or attempt to use his official position to secure anything of value for himself that would not ordinarily accrue to him in the performance of his official duties, which thing is of such character as to manifest a substantial and improper influence upon him with respect to his duties.

A city council member is a "public official or employee" as defined in Division (B) of Section 102.01 of the Revised Code, since he is elected to an office of the city (See: Ohio Ethics

Commission Advisory Opinion No. 76-005). A commission or fee generated from the sale of insurance to a business client is within the definition of "anything of value" in Section 1.03 of the Revised Code.' Such commissions or fees would not ordinarily accrue to a city council member in the performance of his official duties. Many insurance products sold to a construction firm or other business client are not specifically connected with a particular contract or transaction. In other words, the insurance is provided to the client regardless of whether it receives the particular contract authorized by city council. However, a bid or performance bond is contract specific. If a city council member knows or has reason to know that his insurance agency will write the bond on a city contract, the prospect of additional commissions or fees would be of such character as to manifest a substantial and improper influence on the performance of his official duties. Thus, Division (D) of Section 102.03 of the Revised Code prohibits a city council member, who is an officer and shareholder of an insurance agency, from authorizing, voting, or otherwise using his official position to secure approval of a city contract in which his firm provides a bid or performance bond or has some other direct interest.

Division (A) of Section 2921.42 of the Revised Code provides, in pertinent part:

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

(1) 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;

...

(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 city council member is a "public official" as defined in Division (A) of Section 2921.01 of the Revised Code, since he is an elected officer of a political subdivision of the state (See: Advisory Opinion No. 78-001). The purchase or acquisition of goods or services, including insurance services, by or for the use of the city is a "public contract" as defined in Division (E)(1) of Section 2921.42 of the Revised Code. In addition, a contract for the construction of a public property is a "public contract" as defined in Division (E)(2) of Section 2921.42 of the Revised Code (See: Advisory Opinion No. 80-001). An officer and major shareholder of a corporation is deemed to be interested in contracts with his firm (See: Advisory Opinions No. 78-002, 79-005, and 85-009).

In the instant case, the insurance agency is not selling property or services directly to the city, but to a private firm doing business with the city. In Advisory Opinion No. 82-007, the Commission held that a subcontract under a prime contract with a governmental entity is deemed to be a "public contract" However, in the instant case, the insurance agency is not a subcontractor under the construction contract, since it is providing only insurance services and not undertaking to perform all or part of the work (See: Advisory Opinion No. 85-002). Thus, the issue is

whether a council member who is an insurance provider is deemed to have an "interest in the profits or benefits" of a contract between the city and his business client.

For purposes of Section 2921.42 of the Revised Code, an "interest" in a public contract must be definite and direct, and may be either fiduciary or pecuniary (See: Advisory Opinions No. 78-005, 81-003, and 81-007). A business that sells property or services to a business client that contracts with governmental entities would benefit indirectly from the public contracts, but would not have a definite and direct interest in the transactions. It would be unreasonable to hold that lawyers, accountants, insurance agents, and other professionals have an interest in the contracts of their business clients. In general, such professionals are not deemed to be interested in the business dealings of a client, merely because they receive fees for professional services (See: Advisory Opinion No. 78-005).

Nevertheless, as described above, some services are sold in conjunction with a particular transaction. For example, a bid or performance bond on a particular construction contract with the city is directly related to that transaction. Since the profits from the sale of such a bid or performance bond are a "benefit" of the public contract, a city council member who is an officer and shareholder of an insurance agency that provides the bond would have an interest in the construction contract. Therefore, Division (A)(1) of Section 2921.42 of the Revised Code prohibits a city council member from authorizing, voting, or otherwise using the authority or influence of his office to secure approval of a construction contract in which his insurance agency provides a bid or performance bond or has some other direct interest. Also, Division (A)(4) of Section 2921-42 of the Revised Code prohibits him from selling a bid or performance bond on a construction contract with the city with which he serves as a council member.

Assuming the insurance agency does not sell a bid or performance bond on the city contract, the issue remains whether a business client of an insurance agency is a "business associate" for purposes of the prohibition of Division (A)(1) of Section 2921.42 of the Revised Code. This term is not defined in the Ohio Revised Code. However, the Commission has held that an employer is the business associate of an employee or consultant (See: Advisory Opinions No. 78-006, 79-005, 81-001, and 84-009). In addition, a firm is a business associate of an agent or representative (See: Advisory Opinion No. 84-013). Finally, law partners and other business partners are business associates (See: Advisory Opinions No. 79-001 and 85-004). In all of these situations, the business associates are acting together to pursue a common business purpose (See: Advisory Opinion No. 85-004). Indeed, the general meaning of the term "associate" is as follows:

In ordinary nomenclature it signifies, to connect closely or join with others in a common purpose, activity, or responsibility, to partake or share in a common design. It implies participation by each of the individuals, so united, in the achievement of a common purpose. In its general and ordinary sense it is said to signify confederacy or union for a particular purpose . . . Weir v. United States, 92 F.2d 634,638 (7th Cir. 1937).

Another definition of "associate" is:

To join often, in a loose relationship as a partner, fellow worker, colleague, friend, companion or ally. DiMarco v. Greene, 385 F.2d 556,561 (6th Cir. 1967).

If such associates are conducting a common business enterprise, the prohibition of Division (A)(1) of Section 2921.42 of the Revised Code would apply.

Under the facts presented, the contractor is a client or customer of the insurance agency. Thus, the transaction is one of the purchase and sale of insurance services, as opposed to a general business relationship or association to conduct a common business enterprise. While it may be argued that an insurance agency and its clients often have an established business relationship, it would be inaccurate to characterize that relationship as a business association, since they are not engaged in a common business enterprise. Therefore, Division (A)(1) of Section 2921.42 of the Revised Code would not prohibit a city council member who is an officer and major shareholder of an insurance agency from authorizing, voting, or otherwise using the authority or influence of his office to secure approval of a public contract with a firm that is a client or customer of the agency. However, it would create the appearance of impropriety because of their business relationship.

Division (C) of Section 2921.42 of the Revised Code provides an exemption from the prohibitions of Division (A) if all the following criteria are met: (1) the subject of the contract is necessary supplies or services; (2) the services are unobtainable elsewhere for the same or lower cost, or are furnished as a part of a continuing course of dealing established prior to the public servant's association with the governmental entity; (3) the treatment accorded the governmental entity is either preferential to or the same as that accorded to 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 servant, and the public servant takes no part in the deliberations or decision with respect to the contract.

In Ohio Ethics Commission Advisory Opinion No. 83-004, the Commission held the following:

These criteria are strictly applied, and the burden is on the public official claiming the exemption to demonstrate compliance. It is particularly important that the requirement that the goods or services are "unobtainable elsewhere for the same or lower cost" be demonstrated by some objective standard.

The use of competitive bidding would indicate that the goods are "unobtainable elsewhere for the same or lower cost," but it is not determinative. The Commission held that such factors as the availability and adequacy of notice to potential competitors, the openness and fairness of the bidding process, and the conditions of the market must also be considered in determining whether the exemption applies. In addition, all other criteria must be met, including the requirement that the public official refrain from participation in the deliberations and decision on the contract.

The requirement of a criminal statute that a public official refrain from participating in discussions and abstain from voting on an issue would override any charter provision prohibiting abstentions without the approval of council (See: Advisory Opinion No. 83-004).

This advisory opinion is based on the facts presented, and is limited 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) Division (D) of Section 102.03 and Division (A)(1) of Section 2921.42 of the Revised Code prohibit a city council member, who is an officer and shareholder in an insurance agency, from authorizing, voting, or otherwise using his official position or the authority or influence of his office to secure approval of a public contract in which his firm provides a bid or performance bond or has some other interest; and (2) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a city council member, who is an officer and shareholder of an insurance agency, from having an interest in the profits or benefits of a public contract with the city with which he serves, unless the criteria of Division (C) of Section 2921.42 of the Revised Code are satisfied.


Merom Brachman, Chairman
Ohio Ethics Commission