



THE 131ST OHIO GENERAL ASSEMBLY

JOINT LEGISLATIVE ETHICS COMMITTEE

OFFICE OF THE LEGISLATIVE INSPECTOR GENERAL

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Advisory Opinion 2016-001

Issued: December 6, 2016

Syllabus by the Committee:

- 1) R.C. 2921.42(A)(1) prohibits a Member of the General Assembly from authorizing a contract in which the Member has an interest.
- 2) R.C. 2921.42(A)(4) prohibits a Member from having an interest in the profits or benefits of a public contract with a government agency with which the Member is connected.
- 3) R.C. 2921.42(A)(5) prohibits a public official from having an interest in the profits or benefits of a public contract that is not let by competitive bidding if required by law and that involves more than \$150.00.
- 4) R.C. 102.03 prohibits a Member of the General Assembly or a legislative employee from using the authority or influence of his or her office to secure anything of value or the promise thereof that is of such a character as to manifest a substantial and improper influence upon the Member or employee.
- 5) R.C. 102.04(B) prohibits a Member from selling goods to the General Assembly or any state agency, except through competitive bidding.
- 6) For the purposes of R.C. 102.04 and 2921.42, the Invitation to Bid, Request for Proposals, and Reverse Auction processes are considered to be competitive bid processes.
- 7) R.C. 102.04(A) prohibits a Member from receiving, directly or indirectly, compensation, except from the agency with which he or she serves, for personally rendering any service in any matter before the General Assembly or any other governmental entity of the state, excluding the courts.

Jurisdiction & Authority:

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The Joint Legislative Ethics Committee (“JLEC” or “the Committee”) is the ethics advisory body to the Ohio General Assembly and to its individual members, candidates, and employees.¹ The Committee has the authority to render advisory opinions relative to ethics, conflicts of interest, and financial disclosure under R.C. Chapter 102, or R.C. sections 2921.42 or 2921.43.² Where the Committee issues a publicly sought advisory opinion, the person to whom the opinion is directed, and those similarly situated to the special set of circumstances presented, may reasonably rely on the opinion and be immune from criminal prosecution, civil suits, or actions for removal from office or employment for a violation of R.C. Chapter 102, or sections 2921.42 or 2921.43.³

Background & Issue Presented:

A Member-elect of the General Assembly is the owner of a private for-profit business. Prior to the Member-elect’s election to the General Assembly, the business entered into a contract to provide goods to a state agency. The current contract with the agency will expire during the Member’s term.

In light of R.C. sections 102.03 (representation by present or former public official or employee prohibited), 2921.42 (unlawful interest in a public contract) and 102.04 (prohibited additional compensation), may the Member’s business continue to contract with the state agency?

Consideration of the Issue:

1. Current Competitive Bidding Processes:

“Competitive bidding” is the “transparent procurement method in which bids from competing contractors, suppliers, or vendors are invited by openly advertising the scope, specifications, and terms and conditions of the proposed contract...”⁴ The aim of competitive bidding is to obtain goods and services at the lowest prices by stimulating competition and preventing favoritism.⁵

Generally, a Member’s private business may contract with a state agency if the contract is competitively bid.⁶ An agency wishing to contract with a non-governmental entity will work with the Department of Administrative Services (“DAS”) throughout the process of creating and awarding the contract.⁷ DAS, through its Office of Procurement

¹ R.C. 101.34(A)(8).

² R.C. 102.08(A).

³ R.C. 102.08(C).

⁴ “Competitive Bidding” BusinessDictionary.com, <http://www.businessdictionary.com/definition/competitive-bidding.html>.

⁵ *Id.*

⁶ See 2015 JLEC Advisory Op. No. 15-001.

⁷ See generally, OhioDAS Office of Procurement Services, “Competitive Selection through DAS”, Chapter 5 (Revised Dec. 2013), available at https://procure.ohio.gov/pdf/PUR_ProcManual.pdf. The

Services, explains the three processes used by state agencies looking to contract with a non-governmental provider.⁸ The individual process used by DAS will vary depending upon the procurement method used.⁹ DAS uses Competitive Sealed Bids, Competitive Sealed Proposals, and Reverse Auction Processes.¹⁰

A. Invitation to Bid Process:

The Competitive Sealed Bid process includes five steps: (1) Creation of the Invitation to Bid; (2) Advertisement of the bid opportunity; (3) Opening of the bids; (4) Evaluation of the bids; and (5) Awarding of the contract.¹¹ The Invitation to Bid (“ITB”) process begins when an agency creates a requisition or completes a Request to Purchase form.¹² After a particular service or supply has been incorporated into the ITB, DAS then advertises the bid opportunity to the vendor community.¹³ To aid in this process, DAS maintains a database of vendors who are registered for particular supplies and services and are assigned a code.¹⁴ When a need for a particular supply or service arises, the corresponding code is used to notify potential vendors of the bid opportunity.¹⁵ Bid opportunities are posted online on one of three DAS web sites.¹⁶ Once the bids have been opened at the time and date specified in the ITB, the bids are evaluated for compliance with the specifications in the ITB.¹⁷ Ultimately, the contract is to be awarded to the “lowest responsive and responsible bidder.”¹⁸

B. Request for Proposal Process:

The Request for Proposal Process (“RFP”) allows DAS to make purchases through competitive sealed proposals if the competitive sealed bid process is not optimal for the state.¹⁹ With an RFP, the “award is made to the offeror whose proposal is determined to be most advantageous to the state, taking into consideration factors such as price and the evaluation criteria set forth in the RFP.”²⁰ The RFP process is similar to that of the ITB. It consists of five steps: (1) Creation of the RFP; (2) Advertisement of the proposal opportunity; (3) Opening of the proposals; (4) Evaluation of the proposals; and (5) Awarding

chapter provides an overview of the competitive selection processes used by DAS in the creation and awarding of new contracts.

⁸ *Id.*

⁹ Section 5.0, Ohio DAS “Competitive Selection through DAS.”

¹⁰ *Id.*

¹¹ *Id.* at § 5.2.

¹² *Id.* at § 5.2.1.

¹³ *Id.* at § 5.2.2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at § 5.2.4.

¹⁸ *Id.* at § 5.2.5.

¹⁹ *Id.* at § 5.3.

²⁰ *Id.*

of the contract.²¹ RFPs may be advertised for any number of days as determined by DAS, and proposal opportunities are always available at the State Procurement web site.²² Similarly to ITBs, the RFPs are evaluated and assigned a score at a designated date and time and a recommendation is made as to which proposal to select based upon criteria in the RFP.²³ The contract is then awarded to the best score.

C. Reverse Auction Process:

The final method by which DAS will award a contract is through the Reverse Auction Process, in which offerors submit bids to sell services or supplies in an open environment via the internet.²⁴ The auction is invitation-only for bidders that have been pre-qualified.²⁵ The auction is considered to be a competitive selection process authorized by R.C. 125.072.²⁶

D. Analysis of DAS procurement processes:

“Competitive bidding” is not defined in either R.C. 102.04 or 2921.42. Therefore, the Committee looks to the contracting agency and whether the particular agency considers a specific process to constitute competitive bidding. DAS considers the ITB, RFP, and Reverse Auction processes to be competitive bid processes.²⁷ **Therefore, for the purposes of R.C. 102.04 and 2921.42, these processes are considered competitive bid processes.** As such, if a factual scenario arises in which the process for the letting of the contract matches any of the processes as utilized by DAS, then that process will satisfy the competitive bid requirements of R.C. 102.04 and 2921.42.

In addition, if a contract is to be renewed at its natural termination, with no further action taken by the state agency, this would not qualify as competitive bidding. In order for the renewal to be considered let by competitive bidding, the contract must be re-let using competitive bidding.

2. R.C. 2921.42 – Unlawful Interest in a Public Contract:

The Committee notes accompanying section 2921.42 make clear that the overarching purpose of the section is to prohibit a public official from utilizing his or her position to broker or facilitate the investment of public funds by which he or she “will reap

²¹ *Id.*

²² *Id.* at § 5.3.2. The State’s Procurement website can be found at “State of Ohio Procurement” (last visited Oct. 13, 2016) <http://procure.ohio.gov/proc/index.asp>.

²³ *Id.* at §§ 5.3.4 and 5.3.5.

²⁴ *Id.* at §5.4

²⁵ *Id.*

²⁶ *Id.*

²⁷ See R.C. 125.01(I); see also Chapter 5, *supra* n. 7.

unconscionable benefits thereby.”²⁸ This ensures that public agencies are on the same footing as others in regards to necessary business dealings.²⁹

A. 2921.42(A)(1):

Revised Code section 2921.42(A)(1) prohibits a General Assembly member or legislative employee from unlawfully having a personal interest in a state contract. It provides that no public official shall knowingly “[a]uthorize, or employ the authority or influence of the public official’s office to secure authorization of any public contract in which the public official ... has an interest.”³⁰ Division (A)(1) prohibits a Member or legislative employee from discussing, deliberating, recommending, or otherwise using the Member or the employee’s official authority in any way, formally or informally, to secure a contract for the Member or the employee.³¹ For the purposes of section 2921.42, a “public contract” is defined as “[t]he 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.”³² Generally, a Member or employee will be deemed to have “authorized” a public contract where the contract could not have been awarded without the Member or the employee’s approval. Therefore, R.C. 2921.42(A)(1) prohibits a Member from authorizing, or using the authority or influence of his or her office, to secure authorization of a public contract in which he or she has a definite and direct pecuniary or fiduciary interest.

B. 2921.42(A)(4):

Section 2921.42(A)(4) prohibits a Member from having “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 the public official is connected.”³³ This is a two-fold test: (1) the Member or legislative employee must have both an interest, and (2) the contract must be entered into by the entity with which the Member or legislative employee is “connected”, which, for a Member or legislative employee, would be the General Assembly.³⁴ The Committee previously found a Member was not prohibited from continued employment by a private coal company which contracted with the Department of Natural Resources.³⁵ The Committee reasoned that since the General Assembly was not contracting with the Member’s employer, the Member was not prohibited by 2921.42 from acting as treasurer/comptroller for his employer.³⁶ Similarly, here, the Member’s private business is

²⁸ R.C. § 2921.42 (Comm. Notes).

²⁹ *Id.*

³⁰ R.C. § 2921.42(A)(1).

³¹ 2000 JLEC Advisory Op. 00-001, at 3.

³² R.C. §2921.42(I)(1); *see also* 2000 JLEC Advisory Op. 00-001, at 3.

³³ R.C. § 2921.42(A)(4).

³⁴ *See* 1997 JLEC Advisory Op. 97-004, at 3.

³⁵ *Id.* at 1.

³⁶ *Id.* at 3.

not seeking to contract with the General Assembly, but rather a state agency. Therefore, the prohibition found in 2921.42(A)(4) does not apply.

C. 2921.42(A)(5):

Revised Code 2921.42(A)(5) prohibits a public official from having “an interest in the profits or benefits of a public contract that is not let by competitive bidding if required by law and that involves more than one hundred fifty dollars.”³⁷ The Committee interpreted an interest prohibited under section 2921.42(A)(5) to mean an interest that is “definite and direct pecuniary or fiduciary in nature.”³⁸ If a person receives compensation for services performed under a public contract, that person would clearly have a definite and direct, pecuniary interest in the public contract.³⁹ By extension, receiving compensation for the sale of goods through a public contract would similarly constitute a definite and direct, pecuniary interest in the public contract. Therefore, a Member is prohibited from having an interest in a contract if competitive bidding was required by law, and the contract was not let by competitive bidding.

3. R.C. 102.03 – Representation by Present or Former Public Official or Employee Prohibited:

Revised Code 102.03 prohibits public officials and employees from using the authority or influence of their office or employment to secure anything of value or the promise thereof that is of such a character as to manifest a substantial and improper influence upon the public official or employee.⁴⁰ The section also contains divisions prohibiting the solicitation or acceptance or giving of anything of value that would manifest a substantial and improper influence over the public official or employee.⁴¹

The awarding of a contract to a public official’s private business is a thing of value, and R.C. 102.03 is necessarily implicated. The state’s competitive bidding requirements and ethics laws are designed to protect against the manifestation of substantial and improper influence by and/or for the benefit of the public official. Further, the prohibition does not, *per se*, prohibit a Member from having an interest in a public contract, if otherwise permitted by law, “if the Member conducts himself in any dealings with respect to the public contract in the normal manner that a business person would conduct himself and does not attempt to influence such dealings by reference to or other use of his membership in the General Assembly.”⁴² Therefore, a Member should avoid taking any actions that would result in his or her membership in the General Assembly being used to secure

³⁷ R.C. § 2921.42(A)(5).

³⁸ See 2000 JLEC Advisory Op. No. 00-001, at 3.

³⁹ *Id.* at 4.

⁴⁰ R.C. § 102.03(D).

⁴¹ See R.C. § 102.03(E) and (F).

⁴² 1997 JLEC Advisory Op. 97-004, at 4.

anything of value or the promise of anything of value such as preferential consideration for a state contract.⁴³

4. R.C. 102.04 – No Compensation to Elected or Appointed State Official Other than from Agency Served:

A. *102.04(B):*

The selling of goods or services by an elected official concerns R.C. 102.04(B). Division (B) prohibits a Member of the General Assembly from selling goods and services to state agencies except through competitive bidding.⁴⁴ It provides:

[...]no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall sell or agree to sell, except through competitive bidding, any goods or services to the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.⁴⁵

This prohibition applies to state agencies as well as subdivisions thereof. A Member would not be prohibited from selling goods or services, regardless of whether or not the contract was competitively bid, to counties, municipalities or any other local unit of government so long as the Member did not use his or her title or state resources. However, as the Member seeks to contract with a state agency for the purchase of goods, the contract must be competitively bid pursuant to R.C. 102.04(B).

B. *102.04(A):*

Section 102.04(A), which prohibits General Assembly Members from receiving any compensation for *personally* [emphasis added] representing clients in a matter pending before a state agency,⁴⁶ prohibits a Member from appearing before the General Assembly or any state agency on behalf of his or her business. Section 102.04(A) provides:

No person elected or appointed to ... the general assembly ... shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application,

⁴³ See *id.*; see also 1995 JLEC Advisory Op. 95-006.

⁴⁴ R.C. § 102.04.

⁴⁵ R.C. § 102.04(B).

⁴⁶ 2015 JLEC Advisory Op. 15-001, at 4.

or other matter that is before the general assembly or any ... bureau of the state, excluding the courts.⁴⁷

The intent of the provision is to prohibit public officials from receiving compensation for the personal representation of clients before state agencies.⁴⁸ The goal being to serve an impartial government by prohibiting public officials from using the inherent influence of his or her position and personally appearing on behalf of a client or him or herself for a personal benefit.⁴⁹ Therefore, as a Member of the General Assembly, R.C. 102.04(A) prohibits the Member from *personally* appearing on behalf of the business before any state agency or the General Assembly.

Conclusion:

R.C. 2921.42(A)(1) prohibits a Member from having a personal interest in a state contract. Additionally, a Member is prohibited from contracting for the sale of goods to the General Assembly under 2921.42(A)(4). R.C. 2921.42(A)(5) prohibits a public official from having an interest in the profits or benefits of a public contract not let by competitive bidding if otherwise required by law. Revised Code 102.03 prohibits public officials and employees from using the authority or influence of their office or employment to secure anything of value or the promise thereof that is of such a character as to manifest a substantial and improper influence upon the public official or employee, including the authorization of a public contract. Under R.C. 102.04(B), a Member of the General Assembly may not initially contract or renew a prior contract with a state agency for the sale of goods unless the contract is let by competitive bidding. Finally, under R.C. 102.04(A), a Member is prohibited from personally appearing on behalf of his or her private business before any state agency or the General Assembly.

⁴⁷ R.C. § 102.04(A).

⁴⁸ 2015 JLEC Advisory Op. 15-001, at 3.

⁴⁹ *Id.* at 3–4.