



## City of San Antonio, Texas

Ethics Advisory Opinion No. 2012-04

June 20, 2012

*Issued By: City Attorney's Office*

### **I. Issues:**

1) May a firm in which a member of an advisory board owns more than 10% interest subcontract on a contract with the city?

2) Does the member's husband, a Director of a City Department, have a prohibited interest in the contract, if they have a contract providing that the company is not community property?

### **II. Inquiry**

1) A member of a purely advisory board owns a firm that is interested in seeking a subcontract on a city contract. The member has inquired whether her firm would be prohibited from seeking that subcontract because of her position with the city.

The "prohibited-interests-in-contracts" provision of the City Charter would not bar the member's firm from contracting with the city or from subcontracting or partnering with other firms on contracts with the city because his current ownership interest in the firm is less than 10%.

2) The member is married to a Director of a City Department. She has indicated that they have entered into an agreement whereby all assets and revenues of her firm are her sole property, and that the Director has no community property interest in her company. She has asked whether or not this is sufficient to exempt her husband from Section 2-52 of the Ethics Code, and Section 160 of the Charter, which prohibit city officers from having a financial interest, directly or indirectly, in a city contract.

The Ethics Code does not take into consideration contractual arrangements between spouses to determine whether or not a prohibited interest in a city contract exists. The determination of a prohibited interest is made based upon criteria set out in Section 2-52 of the Code, detailed below.

The member or the Director may seek an opinion from the Ethics Review Board to determine if there is clear and convincing evidence that the Director does not have a prohibited interest in the subcontract with the City.

### **III. The Ethics Code**

#### **A. The Prohibited Contracts Provision of City Charter and Ethics Code**

Section 141 of the City Charter prohibits city officers and higher-level city staff members from having an interest in a contract with the city. Section 141 states:

“No officer or employee of the City shall have a financial interest, direct or indirect, in any contract with the City, or shall be financially interested, directly or indirectly, in the sale to the City of any land, materials, supplies, or service, except on behalf of the City as an officer or employee. Any willful violation of this Section shall constitute malfeasance in office, and any officer or employee guilty thereof shall thereby forfeit his office or position. Any violation of this Section, with the knowledge, expressed or implied, of the person or corporation contracting with the Council shall render the contract involved voidable by the City Manager or the Council.”

Section 2-52 of the Ethics Code restates and interprets this prohibition as well. The Ethics Code establishes that a member of a city board that is more-than-advisory in nature is an “officer” for purposes of the prohibited contracts provision. Members of purely advisory boards are not city officers, and are not subject to this prohibition. Section 2-52 further states that an officer is presumed to have a prohibited interest in a city contract if the officer, the officer’s immediate family members or the businesses in which they hold a 10% or greater ownership interest are parties to the contract or subcontract with the city.

Given this, the “prohibited-interests-in contracts” provisions of the City Charter and the Ethics Code would not prohibit the member’s firm from contracting with the city or from having partnerships with other firms that contract with the city. As a city official, however, the conflicts-of-interest provisions of the Ethics Code would apply.

However, the member is married to a City Department Director, a City Officer. The member has stated that she would be a signatory to the contract, and that she owns more than 10% of the company. Because of these factors, the Director would have a prohibited interest in the contract with the City. If the member were to be awarded the contract, the Director would forfeit his position with the City, and the contract may be voided.

The member has indicated that she and her spouse entered into a contractual agreement whereby the assets and revenues of the company remain her sole property. The member has asked if this is an exception to the prohibited interest in a contract provision. The Ethics Code does not contain an exception for a contractual agreement regarding ownership, but does provide that a person may seek an opinion from the Ethics Review

Board regarding any issues relating to the Ethics Code. The Ethics Review Board must make their determination based on clear and convincing evidence.

## **B. Conflicts of Interests Provisions**

The Ethics Code has two “conflicts-of-interest” provisions applicable to all city officials and employees. First, a city official cannot take any official action that is likely to affect the economic interests of the:

- 1) official;
- 2) the official’s family within the 2<sup>nd</sup> degree, and members of the official’s household;
- 3) businesses in which the official or his or her family members hold an ownership interest;
- 4) employers of the official or the official’s family members;
- 5) business entities or non-profit organizations for which the official serves in an executive or decision-making capacity;
- 6) individuals or businesses with whom the official is engaged in business or employment negotiations; and
- 7) any outside client of the official.

Ethics Code, Section 2-43. Should a matter that could affect the financial interests of any of these individuals or entities come before the member’s board, the Ethics Code requires that she recuse herself from voting or any other participation in the matter.

The second conflict-of-interest provision states that a city official cannot use his or her position with the city to unfairly advance or impede private interests or to secure for any person any form of special consideration, treatment, exemption or advantage beyond that which is lawfully available to other persons. Ethics Code, Section 2-44. This provision requires officials and employees to render decisions based on the merits and not on personal considerations or relationships. In the event a matter came before the member’s board that might relate to business interests of her firm, Section 2-44 might also require recusal, even if no specific financial interest is at stake.

## **C. Conclusion**

Because the member serves on a purely advisory board, the “prohibited-interests-in-contracts” provision would not bar the firm from contracting with the city or from subcontracting or partnering with other firms on contracts with the city. The conflicts-of-interest provisions however, would apply.

Further, because the member is married to a City Department Director, he would have a prohibited interest in the contract with the City, and would forfeit his position with the City should the member be awarded the contract. In addition, the contract could be voided.