



City of San Antonio, Texas

Ethics Advisory Opinion No. 2012-05

June 20, 2012

Issued By: City Attorney's Office

I. Issue:

Does a City-appointed member of the board of another governmental entity have a prohibited interest in a contract if he applies for and receives a discretionary contract from the City?

II. Inquiry

A City-appointed member of the board of another governmental entity has inquired whether they may submit a bid for, and accept a discretionary contract with the City of San Antonio.

III. The Ethics Code

The City's Ethics Code applies to members of boards and commissions created by the City, as well as to those City-appointed members of the boards of other governmental entities whose bylaws or organizational papers designate a City-appointee to serve on behalf of the City. All City-appointed board members are city officials, but are not necessarily officers. More than advisory board members have more rules about their activities than members of purely advisory boards. The board on which this member serves is a more than advisory board, as it is a governmental entity.

A. 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 official and any businesses in which the official or his or her family members hold an ownership interest, or any business entities or non-profit organizations for which the official serves in an executive or decision-making capacity.

Ethics Code, Section 2-43. The act of seeking a discretionary City contract is not "official action" - an action within the scope of the official's duties - but is a professional

action of the individual, who happens to be a member of a more than advisory board. Therefore, the first conflict of interest rule is not triggered by this activity.

B. Prohibition against the Unfair Advancement of Private Interests

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 its “Statement of Purpose,” the Ethics Code offers this guidance:

Public service is a public trust...To ensure and enhance public confidence in city government, each city official must not only adhere to the principles of ethical conduct set forth in this code and technical compliance therewith, but they must scrupulously avoid the appearance of impropriety at all times.

Section 2-44 of the Ethics Code prohibits a City official or employee from using their official position to unfairly advance or impede private interests. The board member is in private business, and there is no indication he has held himself out as a board member of the governmental entity in order to obtain the discretionary contract with the City. However, the Ethics Code urges employees to avoid even “the appearance of impropriety.”

C. Prohibited Interests in Contracts Provisions

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 and defines a financial interest in a contract as follows:

2-52 (b) Financial Interest. An officer or employee is presumed to have a prohibited “financial interest” in a contract with the City, or in the sale to the City of land, materials,

supplies, or service, if any of the following individuals or entities is a party to the contract or sale:

- (1) the officer or employee;
- (2) his or her spouse, sibling, parent, child or other family member within the first degree of consanguinity or affinity;
- (3) a business entity in which the officer or employee, or his or her parent, child or spouse, directly or indirectly owns:
 - (A) ten (10) percent or more of the voting stock or shares of the business entity, or
 - (B) ten (10) percent or more of the fair market value of the business entity; or
- (4) a business entity of which any individual or entity listed in Subsection (1), (2) or (3) is:
 - (A) a subcontractor on a city contract;
 - (B) a partner; or
 - (C) a parent or subsidiary business entity.

For purposes of applying Section 141 of the Charter under this Section, the City Code defines City officers as the Mayor and Council members, Municipal Court Judges and Magistrates, and members of boards and commissions that are more than advisory in Nature. However, the Code specifically excludes members of the board of another governmental entity even if some or all of the members are appointed by the City, such as in this instance.

IV. Conclusion

Under the facts and circumstances presented in this inquiry, the Ethics Code would not prohibit the City-appointed board member of the governmental entity from seeking a discretionary contract with the City.