

**CITY OF TALLAHASSEE
INDEPENDENT ETHICS BOARD**

AO 2024-08 – December 17, 2024

**MISUSE OF PUBLIC POSITION
ORD. NO.: 2-8**

**DISCLOSURE OR USE OF NON-PUBLIC INFORMATION
ORD. NO.: 2-17**

**REGISTRATION OF LOBBYISTS
ORD. NO.: 2-339**

To: Name withheld at person's request.

SUMMARY:

Under the City of Tallahassee Ethics Code, a city employee does not misuse his or her public position by working as an independent contractor for a third-party organization responding to a Request for Proposal (RFP) issued by the City of Tallahassee. This legal conclusion is contingent on the fact that the city employee does not use his or her position with the City of Tallahassee, municipal resources within his or her control.

The inquirer is not prohibited from disclosing or using nonpublic information as this prohibition in the local ethics code is only applicable to “covered individuals,” as defined by ordinance.

This opinion also addresses restrictions absent from the local ethics code but present in its state counterpart regarding doing business with one's agency and conflicting employment or contractual relationships.

FACTS:

The inquirer is a city employee who is not a “covered individual” as defined by the Tallahassee Ethics Code. In his or her role with the city, the inquirer works in a separate department from the Parks, Recreation & Neighborhood Affairs Department, which is issuing an RFP.

The inquirer wishes to work as an independent contractor to assist a third-party organization in preparing their proposal for the RFP. He or she does not intend to use his or her official position in connection with this work. While the inquirer will be compensated for his or her work toward the preparation of the proposal, he or she will not receive any financial benefit based on the proposal's success. The inquirer's involvement will be limited to proposal preparation, and his or her name will not appear on the submission.

QUESTION #1:

Does a city employee violate the Tallahassee Ethics Code ban on misuse of public position by working as an independent contractor with a third-party organization bidding on an RFP issued by the City of Tallahassee?

Based on other contingent factors discussed below in this opinion, this question is answered in the negative.

ANALYSIS #1:

MISUSE OF PUBLIC POSITION

The City of Tallahassee Ethics Code prohibits any covered individual or city employee from improperly using his or her public position for the benefit of him or herself or for another.

The applicable ordinance reads as follows:

No public official or employee of the city shall use or attempt to use their official position or any city property or resource which may be within their trust, or perform or fail to perform, their official duties, in a manner inconsistent with the proper performance of the official's or employee's office and which the official or employee knows or should know with the exercise of reasonable care will result in a special privilege, benefit, or exemption for the employee, official, or others.

§ 2-8, *Tallahassee Code of Ordinances* (2024).

In this case, the inquirer's role will be confined to proposal preparation, with no indication of influence over or interaction with Parks, Recreation & Neighborhood Affairs Department personnel managing the RFP. Provided the inquirer does not use his or her public position or city resources to benefit the third-party organization, his or her conduct would not constitute a misuse of public position, violating section 2-8.

The Tallahassee Ethics Code's prohibition on the misuse of public position is stricter than the state law equivalent. Under the state ethics code, a violation requires proof that the individual acted "corruptly." In contrast, the local ethics code does not include this "corruptly" condition, but rather that the conduct is inconsistent with an individual's official duties, effectively creating a strict standard of liability that does not require intent.

CONCLUSION #1:

Accordingly, based on the facts presented by the inquirer and this Board's reliance on those facts, the Tallahassee Independent Ethics Board finds that the inquirer would not violate

the prohibition on misuse of public position under the Tallahassee Ethics Code by assisting a third-party organization in preparing their RFP proposal, provided he or she does not use his or her public position to benefit the third-party organization.

QUESTION #2:

Does a city employee, who is not a “covered individual,” violate the Tallahassee Ethics Code if he or she discloses or uses information related to the RFP that is not available to the general public and is learned by way of his or her official position?

Since the Tallahassee Ethics Code does not impose its prohibition on the disclosure or use of nonpublic information on city employees who are not covered individuals, this question is answered in the negative.

This conclusion does not consider potential ramifications under the state ethics code.

ANALYSIS #2:

DISCLOSURE OR USE OF NONPUBLIC INFORMATION

The inquirer should also avoid disclosing or using nonpublic information that would present an unfair advantage to the third-party organization. The Tallahassee Ethics Code prohibits such use in limited circumstances, and the applicable ordinance reads as follows:

A covered individual shall not disclose or use information that is not available to members of the public and that was gained by reason of his or her official position, except for information relating exclusively to governmental practices, for the covered individual's personal gain or benefit or for the personal gain or benefit of any other person or business entity.

§ 2-17, *Tallahassee Code of Ordinances* (2024).

The Tallahassee Ethics Code restricts “covered individuals” from using nonpublic information for personal gain or that of others but does not apply to all city employees.

Since the inquirer is not a covered individual, this local prohibition does not apply. The state ethics code, however, prohibits the disclosure or use of information not available to the public and learned by reason of his or her official position. *See* § 112.313(8), FLA. STAT. (2024).¹ If the

¹ In 2022, the Tallahassee Independent Ethics Board recommended an amendment to section 2-17, which corrected a scrivener’s error and provided for the ordinance to apply to all city employees. The City Commission instead amended the ordinance to only apply to covered individuals, making the provision less stringent than the state ethics code. *See* Ord. No. 22-O-16AA, § 2, 4-20-2022.

inquirer acquires nonpublic information relevant to the RFP due to his or her position, any disclosure to benefit the third-party organization, while not a violation of the Tallahassee Ethics Code, would likely constitute a violation of state law.

CONCLUSION #2:

Since the prohibition on disclosure or use of nonpublic information under the Tallahassee Ethics Code does not apply to all city employees and since the inquirer is not a “covered individual,” as defined by local ordinance, the inquirer would not violate the local ethics code by disclosing or using nonpublic information. The state ethics code, however, applies this prohibition to all city employees, so the inquirer could potentially violate state law by engaging in this action.

QUESTION #3:

Does the inquirer violate the Tallahassee Ethics Code by engaging with a third party as an independent contract to assist this third party in preparing and submitting a Request for Proposal (RFP) with the city?

Since the Tallahassee Ethics Code does not address the prohibitions or restrictions against one doing business with his or her agency or entering into a conflicting contractual relationship, this question is answered in the negative.

This conclusion does not consider potential ramifications under the state ethics code.

ANALYSIS #3:

DOING BUSINESS WITH ONE’S AGENCY
Section 112.313(3), Florida Statutes

While not addressed in local ordinance, the state ethics code bars municipal employees from doing business with the city in some circumstances. The relevant language of the statute reads as follows:

No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer’s or employee’s spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer’s or employee’s spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer’s or employee’s own agency, if he or

she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision.

§ 112.313(3), FLA. STAT. (2024).

The statute addresses two separate scenarios. The first sentence prohibits a municipal employee, acting in his or her official capacity, from purchasing goods or services from a private business in which he or she has an interest. Under the facts presented, the inquirer is not involved with the department overseeing the RFP; therefore, the inquirer lacks the authority to engage in business with any private business.

The second sentence prohibits a municipal employee, acting in his or her private capacity, from selling goods or services to the city. In this case, the inquirer does not have a business interest in the organization that will submit the bid. Based on the facts presented, the inquirer's relationship with the third party is solely for the purpose of preparing a proposal, and this relationship will cease prior to the third-party organization entering into a contract with the city. As a result, this portion of the statute is not applicable.

Under both scenarios identified in the applicable ordinance, the inquirer does not appear to violate the state ethics code's prohibition on doing business with one's agency. If, however, he or she does engage in the actions described above, he or she could still argue that this prohibition is not applicable because either the inquirer is employed by a different department within the city, or an exemption applies. These two alternatives are explained in detail below.

CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP

Section 112.313(7), Florida Statutes

State law prohibits a city employee from holding any conflicting employment or contractual relationship. The applicable statute reads as follows:

No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with ... nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

§ 112.313(7)(a), FLA. STAT. (2024).

Although the inquirer's role does not involve his or her immediate department or use of his or her position to influence the RFP outcome, he or she would work for a third party that will contract with the city for goods or services. The basic elements of this prohibition appear to be

met, and state ethics laws may still apply due to the external nature of his or her employment. Based on these facts, his or her contractual relationship with this third-party organization could violate the state ethics code, although this contractual relationship might end before the organization does business with the city.

If the contractual relationship, however, were to continue beyond the award and execution of the procurement contract, this Board recommends that the inquirer seek further guidance from the Florida Commission on Ethics to determine whether the statute's prohibition applies.

EXCEPTIONS TO PROHIBITED ACTS

Two areas where the inquirer may wish to seek further clarification are whether the inquirer is determined to be within the same agency as that issuing the RFP and whether the exemption pertaining to sealed competitive solicitations would apply. For subsections to apply to the inquirer, the third party must engage in a business relationship with the inquirer's department. Furthermore, the state ethics code enumerates exemptions to subsections (3) and (7), that may apply in this circumstance.

Separate Agency

The Florida Commission on Ethics has previously opined that city employees of one particular department are not automatically employees, for purposes of these prohibitions, of the city as a whole and by extension its other departments and divisions. This rule is not absolute and would depend on the specific facts of each case.

In some cases, a violation would not occur when an employee works in a department and the prohibited act applies to a separate department. *See* CEO 11-6 (Aug. 3, 2011) (the prohibition as applied to a member of a planning and zoning commission did not extend to the city council). *See also* CEO 87-39 (June 11, 1987) (a member of a planning and zoning board was permitted to contract with a consultant who assisted clients with grant applications that were recommended by an advisory committee and ultimately decided by a Town Council).

At the same time, an employee could be seen as part of the "agency" of another city department if the two departments interacted. *See* CEO 10-24 (Oct. 27, 2010) (an economic development board, which operated as a CRA, was not determined to be a separate agency from a downtown development review board, because the former provided appellate review in permitting disputes originating from the latter).

Again, the analysis of this question is fact specific and must be decided on a case-by-case basis. Based on the facts presented, it appears that the inquirer is employed by a separate agency and would not violate the prohibited act under this statute; however, the Florida Commission on Ethics would be the ultimate authority of this issue.

Exemptions to subsections (3) and (7)
Section 112.313(12), Florida Statutes

The inquirer may wish to seek guidance from the Florida Commission on Ethics to determine whether the contractual relationship would be permissible under the sealed, competitive bidding exemption.

State law provides for an exemption to the prohibitions and restrictions under subsections (3) and (7) when the business connection with the city is subject to a sealed, competitive bidding process where the award is offered to the lowest or best bidder. The applicable language reads in part as follows:

The business is awarded under a system of sealed, competitive bidding to the lowest or best bidder[.]

§ 112.313(12)(b), FLA. STAT. (2024).

The State's procurement statute provides three manners in which to exercise a competitive solicitation process. The three methods, listed from strictest to least strictive, are Invitation to Bid (ITB), Request for Proposal (RFP), and Invitation to Negotiation (ITN). § 287.057(1), FLA. STAT. (2024). The third example, Invitation to Negotiate, is very informal and would not meet the bare minimum requirements for competitive solicitation under this exemption; therefore, it will not be part of this analysis.

The Invitation to Bid is the preferred procurement method under state law because it is the most objective. Under an ITB, interested parties submit their bids to the governing body who receives and reviews the submissions. The statute mandates that only cost may be considered by stating, "**The contract shall be awarded** to the responsible and responsive vendor who **submits the lowest responsive bid.**" § 287.057(1)(a)4., Fla. Stat. (2024) (*emphasis added*).

The Florida Commission on Ethic previously applied RFPs to this exemption in section 112.313(12), *Florida Statutes*; however, it receded from this position in 1989. In CEO 89-48, the Commission opined that this exemption only applied to Invitations to Bid and not Requests for Proposal. In its analysis, the Commission argues, "We further believe that this construction is supported by the fact that a bid must confirm to specific criteria and therefore can be objectively evaluated. In contrast, a proposal **may be more general** and **may be evaluated by less precise criteria.**" CEO 89-48 (Sept. 14, 1989) (*emphasis added*).

The exemption in section 112.313(12), *Florida Statutes*, however, does not limit sealed competitive bids to only the lowest bidders, as required for Invitations to Bid by the procurement statute. The exemption instead says that the award may be issued "to the lowest **or best** bidder[.]" (*emphasis added*). As evident above in the procurement statute, an Invitation to Bid cannot consider a "best bidder." The statute explicitly states that the bidder must be lowest.

The prior advisory opinions issued by the Florida Commission on Ethics address the application of RFPs; however, they do not specify whether those RFPs were sealed or open. There does not appear to be any dispute that an unsealed RFP would fall outside the exemption in section 112.313(12), *Florida Statutes*. The state commission has not specifically addressed sealed RFPs and whether that distinction would alter the prior analyses.

CONCLUSION #3:

As stated above, the application of this statutory exemption is a question of state law. This Board cannot issue an opinion regarding the state ethics code; therefore, any future inquirer would be well advised to seek an opinion on this matter with the Florida Commission on Ethics.

POTENTIAL LOBBYING REQUIREMENTS

While the inquirer did not state that he or she intends to communicate directly with city staff on behalf of the third-party organization, it is important to note what conduct would classify him or her as a lobbyist, so the inquirer may avoid actions that present new legal predicaments.

The terms “lobbying” and “lobbyist” are defined by local ordinance.

Lobbying shall mean communications, whether written or oral, by a lobbyist outside a duly noticed public meeting or hearing on the record with any member or members of the city commission, or any member or members of any decision-making body under the jurisdiction of the city commission, or any city employee, whereby the lobbyist seeks to encourage or influence the passage, defeat, modification or repeal of any item which may be presented for vote before the city commission, or any decision-making body under the jurisdiction of the city commission, or which may be presented for consideration by a city employee as a recommendation to the city commission or decision-making body.

§ 2-338(c), *Tallahassee Code of Ordinances* (2024).

Lobbyist means a person who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying, or a person who is principally employed for governmental affairs by another person or governmental entity to lobby on behalf of that other person or governmental entity.

§ 2-338(d), *Tallahassee Code of Ordinances* (2024).

Under local ordinance, a lobbyist is required to register with the City Treasurer-Clerk prior to engaging in conduct that meets the definition of lobbying. See § 2-339, *Tallahassee Code of*

Ordinances (2024). A lobbyist is only an individual who either is (1) employed and receives payment for the purpose of lobbying or (2) principally employed for governmental affairs.

As the inquirer did not seek an opinion on lobbying, it is unknown whether the inquirer would in fact be employed or contracted for the purpose of lobbying. Again, the inquirer does not state that he or she intends to communicate directly with city staff but instead will simply assist in the preparation of a proposal to be submitted to the City of Tallahassee through a sealed, competitive bidding process.

If the inquirer only provides advice, he or she is acting as a consultant and not as a lobbyist. If the inquirer, however, contacts city staff and seeks to influence the award of funds to the third-party organization, he or she could be considered a lobbyist.

CONCLUSION

Accordingly, based on the facts presented by the inquirer and this Board's reliance on those facts, the Tallahassee Independent Ethics Board finds that the inquirer would not violate the Tallahassee Ethics Code by assisting a third-party organization in preparing their RFP proposal, provided he or she does not use his or her public position to benefit the third-party organization.

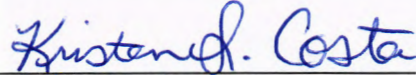
The inquirer's conduct, however, requires caution under the state ethics code, specifically regarding the disclosure or use of nonpublic information and potential conflicts of interest caused by engaging with a third party that does business with the city. Opinions on these questions should be sought through a request for advisory opinion with the Florida Commission on Ethics.

The foregoing opinion also does not speak to any city policies, including those addressing outside employment. The inquirer must contact the City Attorney's Office if he or she seeks an opinion related to city policies.

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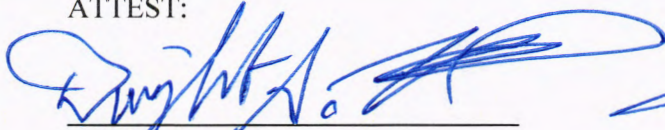
ORDERED by the City of Tallahassee Independent Ethics Board meeting in public session on December 17, 2024, and **RENDERED** this 17th day of December 2024.

APPROVED:



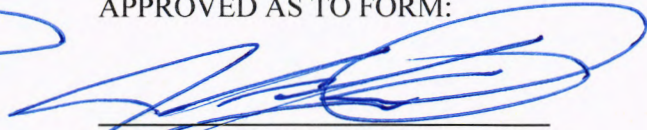
Kristen S. Costa, Chair
Tallahassee Independent Ethics Board

ATTEST:



DWIGHT A. FLOYD
Independent Ethics Officer

APPROVED AS TO FORM:



JOHN LAURANCE REID
Board Counsel