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COOK COUNTY BOARD OF ETHICS

69 W. WASHINGTON STREET, SUITE 3040
CHICAGO, ILLINOIS 60602
312/603-4304 OFFICE • 312/603-9988 FAX

December 13, 2019

VIA EMAIL (Elizabeth.Granato@cookcountyil.gov)

Ms. Elizabeth Granato
Deputy Bureau Chief
Cook County Bureau of Asset Management
69 W. Washington, 30th Floor
Chicago, IL 60602

Re: Ethics Staff Opinion 19S33

Ms. Granato:

On December 2, 2019, the Cook County ("County") Board of Ethics ("Board") received a written request from you for a staff opinion as to whether the County may enter into a competitively bid contract (number H19-25-116) with Paschen Ashlaur Joint Venture for the construction of the Belmont Cragin Health Center.¹ See 12/2/19 Granato Request.

Background

Ashlaur Construction is a party to the joint venture. Zollie Carridine is the majority owner of Ashlaur, LLC and serves as an unpaid appointee to the Cook County Commission on Small Business and Supplier Diversity ("Commission"). See 12/6/19 Ashlaur Meeting/Conference Call. The Commission was established in September 2018 to provide guidance and advice to the County on how to increase participation in County contracts by small businesses, women and minority owned business ("W/MBE"), and businesses that are owned by people with disabilities. Cook County, IL, Ordinance 18-4541 (Sept. 12, 2018).

The Ordinance establishing the Commission initially envisioned that the Commission would consist of:

eleven (11) members including: two (2) Commissioners who were the original co-sponsors of the ordinance who shall serve as Chair and Co-Chair of the Commission. *Four (4) of the Commission members shall be selected by the Chair and Co-Chair and must be certified MBE or WBE business owners certified by Cook County.* Five (5) members of the Commission shall be appointed by the

¹ The request for a staff opinion was made after concerns were raised as to whether Mr. Carridine's position on the Commission created an ethics issue (conflict of interest or appearance of impropriety) that would prevent his company, Ashlaur Construction, from contracting with the County.

President of the Cook County Board of Commissioners and may include but not be limited to: representatives of Cook County Agencies, civic leaders, majority contractors or private sector representatives who have established excellent diversity practices.

Id. § 5-333 (emphasis added).

However, the Ordinance was amended in March of 2019 because the County was unable to find owners of Cook County certified W/MBEs to serve on the Commission. The Ordinance now reads as follows:

The Commission will have 11 members including: Two Commissioners who were the original co-sponsors of the ordinance who shall serve as Chair and Co-Chair of the Commission. Four of the Commission members shall be selected by the Chair and Co-Chair and five members of the Commission shall be appointed by the President of the Cook County Board of Commissioners and may include, but not be limited to: Representatives of Cook County Agencies, civic leaders, majority contractors or private sector representatives who have established excellent diversity practices. All shall be confirmed by the Cook County Board.

Cook County Code of Ordinances ("County Code") § 5-333; *see also* Floor Debate of the Cook Cty. Bd. of Cmmrs. on Bill 19-2349, March 21, 2019 Meeting (statement of Comm. Deer), available at http://cook-county.granicus.com/MediaPlayer.php?view_id=2&clip_id=2323&meta_id=518942.

Question Presented

Does the Cook County Ethics Ordinance prohibit Commission appointees or the companies in which they have a financial interest from entering into competitively bid contracts with Cook County, if such contracts are neither approved by nor administered by the Commission?

Analysis

There are two provisions of the Cook County Code of Ordinances that are implicated by the question presented — Sections 2-581 and 2-571.

Section 2-581

Section 2-581(a)-(b) reads, in relevant part, as follows:

- (a) No elected official or employee shall have a financial interest in his or her own name or in the name of any other person in any contract, work or business of the County, *or in the case of a board or commission appointee in any contract, work or business of the board or commission to which they are appointed or that which the board or commission approves. [...]*
- (b) [N]o board or commission appointee shall engage in a transaction described in Subsection (a) of this section unless the matter is *wholly unrelated* to the board or commission appointee's board or commission duties and responsibilities.

County Code § 2-581(a)-(b) (emphasis added). Subsection (a) is unambiguous and clear; it prohibits board or commission appointees from having a financial interest in a contract that is approved by or administered by the appointee's board or commission. *See* Board Staff Opinion 15 S 23 (Jan. 12, 2015).

Subsection (b), however, provides that an appointee to a board or commission may only engage in a transaction in subsection (a) if the matter is "wholly unrelated" to the appointee's board or commission duties. Hence, the plain language of subsection (b) limits its application to the prohibited transactions in subsection (a); the inappositeness of such an interpretation is evident. If staff instead interpreted subsection (b) as simply prohibiting board or commission appointees from entering into any County contracts unless they are "wholly unrelated" to the board or commission's duties and responsibilities, then its prohibitions would be broader than those in subsection (a). Such a reading is also problematic because the scope of subsection (b) is limited to "transaction[s] described in subsection (a) of [Section 2-581]." *Id.* at § 2-581(b). Consequently, Board staff turned to legislative history to inform its interpretation of subsection (b).

Section 2-581 was updated in 2012 to include board and commission appointees. *See* Cook County, Ill., Ordinance 12-O-38 (July 24, 2012). Prior to that date, it only covered County elected and appointed officials and County employees. *Id.*; *see also* Cook County, Ill., Ordinance 1-O-37 (Mar. 15, 2011). The legislative record indicates that Section 2-581 was amended in 2012 to include board and commission appointees to address concerns raised by the Office of the Independent Inspector General in a report on the fiscal mismanagement of the Northfield Woods Sanitary District.² *See* Hearing of the Cook Cty. Legis. Intergovt. Rel. Comm., July 24, 2012 Meeting (statement of Comm. Garcia) (on file with Board staff). When discussing the report's findings, Commissioner Garcia, a sponsor of the amendment, specifically highlighted how the trustees of the Northfield Woods Sanitary District violated their fiduciary duties to the County through self-dealing. *Id.*

Based on the above-referenced legislative history, it is Board staff's opinion that Section 2-581(b) prohibits a board or commission appointee from entering into a contract with the County if the appointee's board or commission duties and/or responsibilities have had some impact on the contract in question and/or gave that appointee an unfair advantage in the acquisition of the contract.³

Here, Earl Manning, Jr. (Director of Capital Planning, Cook County), Jessica Caffrey (Director of Real Estate Management, Cook County), Charles Jones (Chief Procurement Officer, Cook County Health and Hospital Systems (CCHHS)),⁴ and Edward Olivieri (Director of Contract Compliance, Cook County) have all said that Mr. Carridine, Ashlaur's majority owner, did not directly or indirectly affect the contract in question. *See* 12/6/19 Ashlaur Meeting/Conference Call. Further, Chief Procurement Officer Jones confirmed that none of the members of the Commission had any knowledge of the details of the Belmont Cragin Health Center request for proposal prior to such

² The Independent Inspector General's Report is available at <http://opendocs.cookcountyil.gov/inspector-general/public-statements/Northfield-Woods-Sanitary-District-April-27-2012-IIG11-0047.pdf>.

³ An example of this would be if the members of the Commission reviewed and commented on W/MBE participation on a request for proposals prior to its publication on the County's website.

⁴ In addition, Mr. Jones confirmed that the evaluation committee for the Belmont Cragin project ranked Ashlaur first among the responsive bidders; Ashlaur was also the lowest responsive bidder for the overall project. *See* 12/6/19 Ashlaur Meeting/Conference Call.

information being released to the general public. Based on the above, and despite Mr. Carridine's financial interest in Paschen Ashlaur Joint Venture, it is the opinion of Board staff that Section 2-581 does not prohibit the County from contracting with the joint venture to construct the Belmont Cragin Health Center.

Section 2-571

In addition to the concerns raised regarding conflicts of interest, Board staff understands that there are also concerns as to whether a contract with Paschen Ashlaur Joint Venture would create an appearance of impropriety because of Mr. Carridine's position on the Commission.

Section 2-571(b) of the County Code provides that the "fiduciary duty owed by officials, Board or commission appointees and employees shall include the [duty to] [a]void the appearance of impropriety[.]" An appearance of impropriety may exist even though an actual conflict of interest does not. However, concerns related to a commission appointee creating an appearance of impropriety by engaging in business with the County are already addressed by another provision of the Ethics Ordinance, Section 2-581. The Cook County Board of Commissioners, by passing Section 2-581, made it clear that unlike County officials and employees, board and commission appointees may have a financial interest in County business. *See also* United State Office of Government Ethics: Advisory Committee Members,

<https://www.oge.gov/Web/oge.nsf/Resources/Advisory+Committee+Members> (last visited on Dec. 12, 2019) (explaining that most members of advisory committees are Special Government Employees (SGEs) or Representatives and that executive branch ethics provisions do not apply to representatives because they "are appointed to a committee to provide it with the points of view of nongovernmental entities or of a recognizable group of persons (e.g., an industry sector, labor unions, or environmental groups, etc.). [Therefore,] [i]t is expected that [such] representatives will represent a particular bias." SGEs on the other hand, must follow some but not all ethics provisions that regular government employees are expected to follow.); United States Office of Government Ethics: Special Government Employees, <https://www.oge.gov/Web/oge.nsf/Resources/Special+Government+Employees> (last visited on Dec. 12, 2019) (explaining that "Government cannot obtain the expertise it needs if it requires experts to forego their private professional lives as a condition of temporary service. Since 1962, the SGE category has been used in a number of statutes and regulations as a means of tailoring the applicability of some [conflict of interest] restrictions."). Therefore, in Board staff's opinion, a board or commission appointee entering into a contract with the County does not constitute a per se violation of Section 2-571.⁵

Cognizant that it is the Board of Ethics, not Board staff, who is ultimately charged with interpreting the Ethics Ordinance, assume *arguendo* that Section 2-581(b) and section 2-571 should be read more broadly to prohibit board or commission appointees who sit on boards with far reaching mandates, like the Commission, from contracting with the County. Even if Board staff took this position, its ultimate conclusion would be the same – contracting with Paschen Ashlaur Joint Venture to build Belmont Cragin Health Center is permitted under the Ethics Ordinance.

⁵ However, that is not to say that an appearance of impropriety may never exist. One can imagine a situation, for example, where an appointee's new girlfriend worked in the CCHHS procurement department and was involved in drafting the RFP specifications. In such a circumstance, even if there was no actual conflict of interest, the appointee would likely be unable to move forward with that contract because of the appearance of impropriety created by their relationship.

The reason being that here, the ordinance establishing the Commission provided that “[f]our (4) of the Commission members [...] must be certified MBE or WBE business owners certified by Cook County” – suggesting that the Cook County Board envisioned that some of the appointees (or their companies) would be seeking to do business with the County and that such actions would not result in a conflict of interest. *See* Cook County, IL, Ordinance 18-4541 (Sept. 12, 2018). Although this requirement was later removed from the code because the County was unable to find Cook County certified W/MBE business owners to serve on the Commission, it still informs our analysis.⁶ *See* Floor Debate of the Cook Cty. Bd. of Cmmrs., March 21, 2019 Meeting (statement of Comm. Deer), available at http://cook-county.granicus.com/MediaPlayer.php?view_id=2&clip_id=2323&meta_id=518942. As the code establishing the Commission was subsequently passed by the same body that passed §§ 2-581 and 2-571 of the County Code, it is Board staff’s opinion that the Cook County Board did not intend for Commission W/MBE representatives to be barred from contracting with the County.

Although unapparent to Board staff, if any remaining miniscule appearance of impropriety still exists, it must be weighed against the serious financial harm that would be done to the County if this contract was rebid.⁷

Conclusion

For the above reasons, it is Board staff’s opinion that the Department of Asset Management may move forward with its efforts to finalize the Belmont Cragin contract with Paschen Ashlaur Joint Venture. If you have any questions regarding this opinion, please feel free to call me at (312) 603-1106.

Sincerely,



N. Keith Chambers
Director

Gina Smith
Deputy Director

Emily Stewart
Legal Counsel

⁶ Ashlaur is a City of Chicago certified MBE.

⁷ If the County did not contract with Paschen Ashlaur Joint Venture, the procurement rules would require CCHHS to select the next responsive bidder, which is GMA Construction. GMA’s bid is \$307,764 more than Paschen-Ashlaur’s bid. Furthermore, GMA’s majority business owner, Cornelius Griggs, also serves on the Commission. After GMA, the next responsive bid is \$4,150,930 more than Paschen-Ashlaur’s bid. Hence, if Paschen-Ashlaur and GMA are prohibited from participating in this RFP, then, absent a rebid, project costs would increase by more than \$4 Million. In the instant case a rebid is also problematic because any further delays may result in the County’s breach of its ground lease with CPS.