



CITY OF PHILADELPHIA

BOARD OF ETHICS
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Philadelphia Board of Ethics Non-Public Board Opinion No. 2020-003

April 28, 2020

Re: Application of restrictions on interests in City contracts and representation in City transactions to outside business owned by City employee

Dear Requestor:

You are a City employee. Outside of your City employment you work as a craftsman and have established a limited liability company to further that work. You are the sole owner of the LLC.

You requested a non-public advisory opinion about whether the City’s ethics rules would permit you to bid on construction projects advertised by the City or other local government entities. You have also asked whether you can serve as a subcontractor on such projects. You are particularly interested in projects related to the City’s Rebuilding Community Infrastructure (“Rebuild”) program, the Restore Repair Renew program, and Philadelphia Housing Development Corporation’s (“PHDC”) Home Improvement Programs.

As discussed in more detail below, the Home Rule Charter prohibits you from soliciting or entering into contracts involving Rebuild or the Restore Repair Renew program. The Charter also significantly limits your ability to bid on PHDC’s Home Improvement Programs. In addition, the Ethics Code prohibits you from representing your business in transactions involving the City. Lastly, you must also comply with the conflict of interest requirements if you could impact your business’ financial interest through official action.

I. Jurisdiction

Philadelphia Home Rule Charter Section 4-1100 grants the Board of Ethics jurisdiction to administer and enforce all Charter provisions and ordinances pertaining to ethical matters. Charter Section 4-1100 and Philadelphia Code Section 20-606 authorize the Board to render advisory opinions explaining the application of laws under the Board's jurisdiction concerning a City officer's or employee's proposed future conduct. The Board may address past conduct to provide guidance about corrective action or future action that is part of a continuing course of conduct. Board Regulation No. 4 describes the procedures related to seeking an advisory opinion and for requesting reconsideration of an advisory opinion issued by the Board.

II. Factual Background

You are a City employee. You are also the sole owner of a construction-related limited liability company (the "LLC"). The LLC was a sole proprietorship until recently, when it became a Pennsylvania limited liability company. You are the sole member and manager of the LLC.

Rebuild is a City program within the Managing Director's Office. Rebuild is designed to invest in physical improvements to City-owned parks, recreation centers, and libraries. Rebuild is also taking steps, like the Rebuild Ready and Emerging Vendors programs discussed below, to promote diversity and economic inclusion in the design and construction industries.

One of your goals for the LLC is to work on publicly funded projects. To this end, you participated in the first Rebuild Ready cohort. The Rebuild Ready program is an eight-week course for small business owners that is designed to help diverse contractors bid for and win Rebuild contracts. You also enrolled the LLC as a participant in Rebuild's Emerging Vendor program. The Emerging Vendor program gives participants an 18-month temporary certification as a Minority- or Woman-Owned Business Enterprise.

While you are interested in publicly funded contracts generally, you have asked us specifically whether you can bid on contracts through Rebuild, as well as whether you can obtain contracts through the Restore Repair Renew program or the Philadelphia Housing Development Corporation's Home Improvement Programs contractor registries.

III. Charter Section 10-102

Section 10-102 of the Home Rule Charter states, in relevant part, that City employees ... shall not be interested directly or indirectly in any contract for the purchase of property of any kind nor shall they be interested directly or indirectly in any contract for the erection of any structure or the supplying of any services to be paid out of the City Treasury; nor shall they solicit any contract in which they may have any such direct or indirect interest.

The purpose of Section 10-102 is to “preclude one who is a City officer from soliciting in a private capacity or personally profiting or being interested, directly or indirectly, in contracts with the City whose officer he is.” Charter § 10-100, Annot. 1 (incorporated by reference by Charter § 10-102, Annot. “Purpose”). This is a broad rule meant to limit the ability of City officers and employees to use their status or authority to benefit from City contracts. Section 10-102 also prevents “double dipping” – arrangements where a City employee receives payments from the City on top of the salary already attached to their City job. See Board Op. 2014-001 (citing *Golden Motors v. Southern Motors*, 9 Phila. Co. Rptr. 212, 219 (1983), *aff’d* 90 Pa. Commw. 137 (1985)). For example, Section 10-102 prohibits a City employee who owns an office building from leasing office space to the City. *Id.*

Even if payment is made through another person or entity, it is still prohibited if the money came from a City contract. For example, a City employee who authors a book on their own time cannot sell copies of that book to the City, regardless of whether the sales are made directly to the City or through a distributor who then pays royalties to the author. See Solicitor’s Op. 96-12 (May 7, 1996) (Ravelli). In addition, because Section 10-102 prohibits solicitation of a prohibited contractual arrangement, any formal expression of interest, such as responding to a request for proposals, would violate Section 10-102. In contrast, an informal request for information about how a contract is funded would not violate Section 10-102.

In summary, you can neither solicit nor have a contract to which the City is a party or under which you would receive payment, either directly or indirectly, from the City Treasury. Note that Section 10-102 does not preclude you from seeking contracts funded by governmental bodies that are not part of the City of Philadelphia, such as the Commonwealth of Pennsylvania or other municipalities. You may also enter into contracts that are solely funded by the School District of Philadelphia.¹ It is your responsibility to obtain information about whether a particular contracting opportunity involves City contracts or funds.

¹ While the School District receives a substantial part of its budget via appropriation from the City, that appropriation is not a contract for the purposes of Section 10-102.

Rebuild

The majority of Rebuild funding comes from the proceeds of bonds issued by the Philadelphia Authority for Industrial Development (“PAID”) under a financing arrangement with the City backed by income from the Beverage Tax. Project funds are held by PAID subject to an Intergovernmental Cooperation Agreement (“ICA”) with the City. Rebuild is also funded through the City’s capital budget and grants. Rebuild grant funds are administered through a donor-advised fund held by the National Philanthropic Trust. Payments from capital or grant funds may be disbursed either through the City, PAID or directly to a recipient.

Contracting for most Rebuild projects is handled in one of three ways:

- (1) Contracts are bid and awarded by the City’s Procurement Department. The City is a party to these contracts, and they are signed by the Procurement Commissioner.
- (2) Contracts are bid and awarded by the Philadelphia Redevelopment Authority (“PRA”)² as part of the Grant Agreement between the City and PAID in which PRA is the designated subgrantee. Through the Grant Agreement, the City retains significant control over contracts handled through PRA.
- (3) Nonprofit project users bid on project sites, then receive grants to contract directly with vendors for design and construction services. These may be subgrants from PAID. Like the PRA subgrant agreement, project user grants through PAID are the product of PAID’s agreements with the City.

Because each of these approaches involves a contract or agreement with the City at some stage and each involves the expenditure of funds from the City Treasury, Section 10-102 prohibits you from soliciting or having contracts or subcontracts on Rebuild projects, regardless of which of the above contracting approaches is used.

PHDC Home Improvement Programs

The Philadelphia Housing Development Corporation (“PHDC”) administers several home improvement programs. PHDC maintains a registry of qualified contractors based on responses to a Request for Qualifications (“RFQ”). The particular RFQ you expressed interest in seeks qualified contractors for projects to be funded through four different programs: Community Development Block Grants, Housing Preservation Program Bonds proceeds, the City’s Housing Trust Fund, and the Community Asthma Prevention Program + Home Repairs Program (“CAPP+”).

² PRA is a government authority with its own board. PRA shares administrative staff with PHDC but remains a separate legal entity with distinct powers and obligations.

PHDC contracts with the City to manage programs funded through the Community Development Block Grants, Housing Preservation Program Bonds proceeds, and the Housing Trust Fund. PHDC pays the contractors and is then reimbursed by the City. Because these programs involve both City contracts and funds from the City Treasury, Section 10-102 prohibits you from seeking or having contracts or subcontracts to perform work on projects funded through any of these programs.

In contrast, CAPP+ is funded by Children’s Hospital of Philadelphia, not the City. Accordingly, Section 10-102 does not prohibit you from entering into a contract or subcontract funded by that program. If you respond to the RFQ, you must clearly communicate in your submission that you are only applying for projects funded by the CAPP+ program and are not seeking and cannot accept work on projects funded through any other program.

Restore Repair Renew

PRA’s Restore Repair Renew (“RRR”) program facilitates loans for small home improvement projects. While homeowners may choose any contractor who meets certain criteria, RRR provides a non-exclusive list of pre-qualified contractors based on responses to an RFQ.

PRA uses proceeds from bonds funded by the City’s real estate transfer tax to reimburse banks and nonprofits for much of the cost of underwriting and servicing the loans. Contractors are paid directly by the bank or nonprofit. The PRA, under authority provided by the City Treasurer and City Council, buys back the loans at closing (i.e. after work is completed and contractors are paid), though the lender continues to service the loans and is paid for those services by PRA with bond proceeds. The disbursement of bond proceeds for PRA loan programs requires approval by the City Treasurer.

A City employee who is paid as a contractor through an RRR loan receives a personal financial benefit from a City contract that is prohibited by Section 10-102 because the loan, and subsequent payment to the employee/contractor, originates from and is guaranteed by the City’s contract with PRA. As a result, Section 10-102 prohibits you from entering into contracts or subcontracts financed through a loan from the RRR program. While the RRR list of qualified contractors is not exclusive, responding to the RFQ would be soliciting prohibited contracts. If you have already responded to this RFQ, you should immediately contact PRA to have the LLC removed from the list of qualified RRR contractors.

OEO Registry

The Office of Equal Opportunity’s (“OEO”) maintains a registry of certified Minority- or Woman-Owned Business Enterprises (“M/WBE”). The OEO registry is used by both City departments and private businesses as a way to identify women- and minority-owned businesses. To be included on the OEO registry, a business must have third-party certification. You participated in Rebuild’s Emerging Vendor program to obtain temporary certification as an M/WBE.

You asked whether the LLC can be listed in the OEO registry. Simply being listed in the OEO registry, which is used by both public and private entities to identify certified M/WBEs, would not constitute solicitation of an interest in a City contract. You should, however, clearly communicate to OEO that you are not soliciting and cannot accept any City contracts or subcontracts.

IV. City Code Section 20-602

City Code Section 20-602(1)(a) prohibits City officers and employees from representing others as an agent or attorney, whether paid or unpaid, in transactions involving the City. Transactions involving the City include applications, decisions, and contracts in which the City takes action, is a party, or has a proprietary interest. Code § 20-601(27). City officers or employees may, however, act on behalf of themselves or a close family member in a transaction involving the City. Code § 20-602(4). Specifically, a City officer or employee

may act ... on his own behalf or as agent or attorney for ... any person for whom he is serving as guardian, executor, administrator, trustee, or other personal fiduciary, except in those matters in which he has participated personally ... or which are the subject of his official responsibility.

Code § 20-602(4).

Thus, for this exception to apply, the employee's representation must be either (1) acting "on [their] own behalf" or (2) acting on behalf of "any person" for which they are a "personal fiduciary." The Board has not previously considered whether a City employee representing an LLC of which they are the sole owner fits within the Section 20-602(4) exception.

Forming an LLC creates a separate legal entity (15 Pa. C.S. § 8818(a)) and provides significant legal and financial protection to members of the business. A member of an LLC is not personally liable for debts, obligations or other liabilities of the LLC. 15 Pa. C.S. § 8834(a).³ This rule applies even if the LLC has only one member. *Id.* Under most circumstances, LLCs are also required to indemnify individual members from liabilities relating to their role as a member. 15 Pa. C.S. § 8848(b). The owner of a single-member LLC may receive all the benefits from the company, but does not face the same liabilities. The interests of the individual and the business

³ In contrast, a sole proprietorship has no separate legal existence from the individual owner. *See, e.g., Glidden Co. v. Dep't of Labor & Indus.*, 700 A.2d 555, 558 (Pa. Commw. Ct. 1997) (noting a sole proprietorship has no existence separate and apart from its owner). The owner of a sole proprietorship is generally personally responsible for the debts, obligations, and liabilities of the business. As a result, under most circumstances Section 20-604(4) would permit a City employee operating through a sole proprietorship to represent that business in transactions with the City.

are, therefore, not necessarily the same. As a result, a City officer representing their solely-owned LLC in transactions with the City is acting not “on [their] own behalf,” but on behalf of the LLC.

Furthermore, while the owner of an LLC may have certain fiduciary responsibilities to the LLC, Section 20-604(4) limits the types of fiduciaries that qualify for the exception by using the term “personal fiduciary.” An owner representing their own LLC is clearly not acting as a “personal fiduciary,” but as a representative of a business entity with an independent legal existence. As a result, this part of the exception would not permit a City employee to represent their own LLC in City transactions.

Because representing a single-member LLC falls outside the Section 20-602(4) exception, you would be prohibited from representing the LLC in any transactions with the City. This restriction applies regardless of whether the transactions are related to your official duties. As a result, you would not be permitted to submit applications or otherwise engage in transactions with the City on behalf of the LLC. This does not prohibit the LLC from doing business in the City. Rather, it means you must designate an official representative other than yourself to act as an agent for the LLC in transactions with the City.

V. City Code Section 20-607

In addition to the rules discussed above, you must comply with the City’s conflict of interest rules. Under Code Section 20-607, you cannot take any official action as a City employee that would impact your financial interest or that of the LLC. If you are able to take official action that would impact the LLC’s financial interest, you must disclose the conflict and disqualify yourself from such official action as required by Section 20-608.

* * * * *

Thank you for your concern about compliance with the City’s Ethics Code and for seeking advice. Advisory opinions are fact-specific, and this Opinion is predicated on the facts you have provided. Requestors of advisory opinions are entitled to act in reasonable reliance on opinions issued to them and not be subject to penalties under the laws within the Board’s jurisdiction, unless they have omitted or misstated material facts in their requests. Code § 20-606(1)(d)(ii); Board Reg. 4 ¶ 4.12.

Since you requested a non-public opinion, the original Opinion will not be made public. As required by the City Code, a version of the Opinion that has been redacted to conceal facts that are reasonably likely to identify you is being made public. Please let Board Staff know if you have any questions.

BY THE PHILADELPHIA BOARD OF ETHICS

/s/ Michael H. Reed

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