



MEMORANDUM

TO: Mayor and Council Members
FROM: Howard S. Lazarus, City Administrator
DATE: April 7, 2017
SUBJECT: City Contract Awards Where an Individual Employee of the Company serves as an Appointed Public Official

PURPOSE. I am providing this memorandum in response to concerns raised about City Board and Commission members or their firms holding contracts with the City.

BACKGROUND. In February 2017, Ms. Patricia Lesko provided a PDF spreadsheet reflecting selected City contracts between 2010 and 2016 awarded to companies, which employed an appointed member of a City Board or Commission. Ms. Lesko prepared her PDF spreadsheet using A2OpenBook, the online financial database posted by the City Finance Service Area designed and made available to the public to disclose all City of Ann Arbor expenses. Ms. Lesko alleged that as an employee of the named company the appointee received a benefit from the award of a contract. In support of her position that such an alleged benefit was improper, Ms. Lesko cited Ann Arbor City Charter Section 14.4.¹

SCOPE OF REVIEW. The question presented for review is as follows: whether violation of the City Charter or the State Contracts/Conflicts statute occurs when the City enters into a contract with a Company, in which an individual employee serves as an appointed member of a City Board or Commission, the Downtown Development Authority (DDA), or the Local Development Financing Authority (LDFA).

SHORT ANSWER. No.

ANALYSIS. Michigan's Contracts of Public Servants with Public Entities Act, MCL 15.321 et seq., (the Act) provides the "sole law" in the state of Michigan governing conflicts of interest relative to public contracts involving public servants. Therefore, the Act preempts City of Ann Arbor City Charter Section 14.4, Business Dealings with the City.

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SECTION 14.4. An officer of the City, who intends to have business dealings with the City, either directly or indirectly, whereby the officer may acquire any income or benefits, other than such as are provided as remuneration for the officer's official duties, shall file with the Clerk a statement, under oath, setting forth the nature of such business dealings, and the officer's interest therein....Approval of any such business dealings shall require a concurring vote of at least eight members of the Council, not including any member disqualified under Section 4.4 of this charter. Any business dealing made in violation of this section shall be void.(Excerpt)

The Act is not violated because the contracts are not between the City and the individuals serving on the authorities, commissions or boards, and because these individuals are exempt from the application, and because those individuals did not play any part in approving the contracts. All members of Boards and Commissions serve without compensation (Section 1:171(5) of Ann Arbor City Code).

The Act provides that “a public servant shall not be a party, directly or indirectly, to any contract between himself or herself and the public entity of which he or she is an officer or employee.” The definition of “public servant” includes elected (members of City Council) and appointed (members of City Boards and Commissions) officers of the City. However, the Act specifically exempts public servants who are “paid for working an average of 25 hours per week or less” from the bar on being party to, or soliciting contracts. (MCL 15.323(1)(a)). As members of the City’s boards and commissions are not paid, and in any event work less than an average of 25 hours per week in those positions, they would qualify for this exemption.

Even for an exempt public servant, the Act still strictly regulates the public servant’s ability to enter into contracts with the public entity if the public servant has approval power over the contract. Because none of the individuals had approval power over the contracts, this provision was not violated.

The DDA and the LDFA are legal entities distinct from the City. The contracts in question were with the City, not the DDA or LDFA. Appointees to these Authorities do not vote on contracts entered into by the City. City Boards and Commissions are advisory bodies and have no approval power over the award of a City contract. Under the Ann Arbor City Charter that authority is vested in the City Administrator (for contracts \$25,000 or less) or City Council (for contracts in excess of \$25,000). The Act’s provision regarding conflicts arising from approval of a contract applies only to the Administrator and members of City Council as the final decision-makers.

Specific Contracts. The City’s current invoicing system, Logos, was initiated 7/1/2010. A record search from that date forward to 2/13/2017, for each of the following named companies and individuals and further analysis was performed. The information below provides a general review of the specific instances of concern.

I. Contracts between the City and Companies that Employ Persons Who are DDA Board Members

The DDA created pursuant to Act 197 of 1975 is a separate legal entity with its own financial system. Applying the above analysis, the contracts highlighted by Ms. Lesko are City contracts with the respective companies; not DDA contracts. The named DDA Board members obviously did not vote on the City contracts, so the state statute is not applicable in this situation. Nevertheless, the factual background of each contract is set forth below:

a. Quack Media – two contracts

- \$11,590.00 A2 Energy Efficient Videos, Best Source award/approval City Administrator (2014)
- \$11,902.50 Climate Adaptation Videos, Best Source award/approval City Administrator (2014)

According to City Clerk records Al McWilliams was appointed to the Ann Arbor Downtown Development Authority 9/16/2013 for a term ending 9/2/2017. Mr. McWilliams is the identified contact for the company.

b. Mitchell & Mouat Architects – two contracts

- \$104,300.00 Bryant Community Center Addition Design – RFP 909 award approved by City Council R-14-384
- \$78,000.00 Gallup Park Livery, Entry and Dock Improvements Design – RFQ 793 award approved by City Council R-11-229

According to City Clerk records, John Mouat was appointed to the Ann Arbor Downtown Development Authority 9/4/2007 with a current term ending 5/31/2019. Mr. Mouat is a founding partner of the Firm. Work under R-14-384 was unanimously approved by City Council. City Council was advised in the cover letter “The selected firm was required to submit a fee proposal for each project to be designed so that staff has a basis upon which to evaluate the individual projects. Individual work statements will be issued for each project awarded to the most qualified and cost-effective consultant for that project.” Work under R-11-229 was also approved unanimously by City Council. City Council was advised in the cover letter “Consultants will submit a fee proposal for each project to be designed so that staff has a basis upon which to evaluate the individual projects and so that competitive pricing is still achieved. Individual work statements will be issued for each project awarded to the most qualified and cost-effective consultant for that project.” Documentation supports that all of the above contracts were bid and/or awarded according to City procurement administrative procedures.

c. Ann Arbor Art Center

- \$35,000.00 Stadium Blvd Art Selection – Direct City Council Action R-16-152

Marie Klopf was appointed to the Ann Arbor Downtown Development Authority 3/16/2015 with a term ending 5/31/2017. Ms. Klopf is the President and CEO of the Ann Arbor Art Center. The Art Center functions under a Board of Directors. (Further, Ms. Klopf has no direct pecuniary interest in the contracts noted above.)

d. Underground Printing

- Various miscellaneous checks – all invoices paid since 2008 under \$3,000. \$952 in total paid to this vendor since FY2015

According to City Clerk records, Rishi Narayan was appointed to the Ann Arbor Downtown Development Authority 8/19/2013 with a term ending 8/18/2017

II. Contracts Between the City and a Law Firm that Employs A Person who is on the Board of the LDFA

The Ann Arbor/Ypsilanti Local Development Financing Authority was created pursuant to Act 281 of 1986 by the cities of Ann Arbor and Ypsilanti and is a separate legal entity. Applying the above analysis, the contract highlighted by Ms. Lesko is a City contract with the identified Firm; not an LDFA contract. This LDFA Board member obviously did not vote on the contract, so the state statute is not applicable.

Bodman PLC

- Gelman Sciences 1,4 Dioxane Plumes Legal Services – Direct City Council Action (most recently R-16-504)

According to City Clerk records, Carrie Leahy was appointed to the LDFA 1/15/2013 for a term ending 6/30/2020. Ms. Leahy is a member of the firm but does not practice in the environmental practice group. Further, Ms. Leahy is not a party to this contract nor did she have any involvement with the work of the contract, or prior contracts.

Bodman has provided legal services to the City related to Gelman Sciences since at least 1999. The first contract with Bodman, Longley was for Council approved work by Mr. Fred Dindoffer in July of 1999. This was to represent the City in a Michigan Department of Environmental Quality Administrative NPDES Permit. Then City Attorney Abigail Elias selected the firm and Mr. Dindoffer. Mr. Dindoffer was selected as he is one of a handful of expert environmental lawyers in the State of Michigan with the experience to handle these complex and specialized matters.

Based on work done for the City with the first contract, Council then approved a second contract with the Firm for work by Attorney Dindoffer in August, 2002 for administrative work arising out of modifications to the NPRDES permit on April 26, 2002 as well as litigation services to a Washtenaw County Circuit Court lawsuit related to Gelman Sciences and the 1988 lawsuit by the state against Gelman Sciences.

In July 2003, the City approved a First Amendment to the second contract, as significant litigation was undertaken. In November 2005, the City approved a Second Amendment to this second contract to continue with both state and federal claims against Gelman. This work continued until the matters were settled. This work was extensive.

The firm was hired again in 2016 because of the 1,4 dioxane changes and new push for additional remedial work.

III. Contracts between the City and a Company that Employs a Person who is on the City Planning Commission.

Applying the above analysis, these contracts are between Clean Energy and the City and not with the Planning Commission and therefore analysis of the statutory provision would still be limited. Again, the question for this contract is whether the appointee, as a public servant, under Michigan's public contract law was a "party, directly or indirectly, to any contract between himself or herself and the public entity of which he or she is an officer." (MCL 15.322(1)).

Clean Energy Coalition

- \$250,000.00 Community Climate and Energy Programs, RFP 911 awards/approved by City Council R-14-348, R-15-355, R-16-351
- \$150,000.00 Bike Share Program (solicitation issued by AAATA) award/approved by City Council R-13-260
- \$333,962.00 Community Energy Program Coordinator, RFP 760, award/approved by City Council R-12-451
- Solar Cities Partnership Grant Agreement – Direct Council Action R-07-498

Neither Ms. Bona nor the Planning Commission are parties to these contracts. According to City Clerk records Bonnie Bona was appointed to the Planning Commission 7/16/2007 and served until 6/30/2016. Given this, Ms. Bona did not vote on this contract. Ms. Bona's employment biography on the Clean Energy Coalition website lists her as a Project Manager for the company. Sean Reed, the company's Executive Director, is the authorized signatory on City contracts and Clean Energy Coalition operates under a Board of Directors. According to State records search, Ms. Bona has never been listed as a member of the Board of Directors or had any other position in the nonprofit corporation other than as an employee. Documentation supports that all of the above contracts were bid and/or awarded according to City procurement administrative procedures. In her position Ms. Bona did provide technical support for the A2PACE program and assistance to a2energy; however, this would have been as assigned staff by Mr. Reed under his authority as Executive Director. It should also be noted that contract records indicate Clean Energy providing grant support services as far back as 2006.

IV. Payment to First Martin

The payment to First Martin was a reimbursement for erroneous overcharges for City inspections. Mr. McKinnon's appointment to the Ann Arbor DDA has no relevance to the issued raised by Ms. Lesko.

COMMUNICATIONS. Kindly provide all communications to me directly should you have any additional questions concerning this matter.

cc: S Postema
M Fales
T Crawford
C Spencer