



Missouri Ethics Commission

Elizabeth L. Ziegler
EXECUTIVE DIRECTOR

February 19, 2021

Re: Advisory Opinion No. 2021.02.CI.003

Dear :

At the February 19, 2021 meeting of the Missouri Ethics Commission, your request for an opinion was discussed.

Opinion

Pursuant to Section 105.955.16, RSMo, the Missouri Ethics Commission (MEC or Commission) may issue a written opinion regarding any issue on which the Commission may receive a complaint. Section 105.957.1(5), RSMo, authorizes the MEC to receive complaints alleging violations of “the conflict of interest laws contained in sections 105.450 to 105.468 and section 171.181.” The Commission issues this opinion within the context of Missouri’s laws governing such issues, assuming only the facts presented by you in your letter and other such facts that are generally available to the public.

The questions presented and the Commission’s opinion appear below.

If an officer of a clean energy development district (a “District) owns a greater than 10 percent interest in a company that has a services contract with the District, must that contract (if in excess of \$500 per transaction or \$5,000 per year) be awarded after public notice and competitive bidding and must the bid be the lowest received?

May a company controlled by (ownership of greater than 50 percent) or owned by (100 percent ownership) a District board member receive payments from or approved by the District for services rendered on District approved construction projects if the contract for those services (if in excess of \$500 per year) is awarded after public notice and competitive bidding and the bid is the lowest received?

If a District officer or a company that the officer is associated with has a contract with a third party for compensation contingent on the District’s use of the third party’s financing products, may that officer participate in any way in the District’s decision to utilize the third party financing products? In addition, can the District officer or a company the officer is associated with accept such third party compensation?

Clean Energy Development Boards

Clean energy development boards are authorized by the “Property Assessment Clean Energy Act” in Section 67.2800.1, RSMo. “One or more municipalities may form clean energy development boards for the purpose of exercising the powers described in” the Act. Section 67.2810.1, RSMo. The Act provides that “A clean energy development board shall be a political subdivision of the state and shall have all powers necessary and convenient to carry out and effectuate the provisions of sections 67.2800 to 67.2835, including” the power “To make and enter into contracts and other instruments with public and private entities[.]” Section 67.2810.2(3), RSMo.

Conflict of Interest Laws

Because clean energy development boards are political subdivisions, the officials who control them must be cognizant of the prohibitions in the conflict of interest statutes found in Chapter 105, RSMo. Two statutes have direct applicability to your questions.

Section 105.452.1, RSMo, in pertinent part, states that “No elected or appointed official or employee of the state or any political subdivision thereof shall:

- (1) Act or refrain from acting in any capacity in which he is lawfully empowered to act as such an official or employee by reason of any payment, offer to pay, promise to pay, or receipt of anything of actual pecuniary value paid or payable, or received or receivable, to himself or any third person, including any gift or campaign contribution, made or received in relationship to or as a condition of the performance of an official act, other than compensation to be paid by the state or political subdivision; or
- (2) Use confidential information obtained in the course of or by reason of his employment or official capacity in any manner with intent to result in financial gain for himself, his spouse, his dependent child in his custody, or any business with which he is associated;
- (3) Disclose confidential information obtained in the course of or by reason of his employment or official capacity in any manner with intent to result in financial gain for himself or any other person[.]

Similarly, the relevant provisions in Section 105.454.1, RSMo, state that “No elected or appointed official or employee of the state or any political subdivision thereof, serving in an executive or administrative capacity, shall:

- (1) Perform any service for any agency of the state, or for any political subdivision thereof in which he or she is an officer or employee or over which he or she has supervisory power for receipt or payment of any compensation, other than of the compensation provided for the performance of his or her official duties, in excess of five hundred dollars per transaction or five thousand dollars per annum, except on transactions made pursuant to an award on a contract let or sale made after public notice and competitive bidding, provided that the bid or offer is the lowest received;

- (2) Sell, rent or lease any property to any agency of the state, or to any political subdivision thereof in which he or she is an officer or employee or over which he or she has supervisory power and received consideration therefore in excess of five hundred dollars per transaction or five thousand dollars per year, unless the transaction is made pursuant to an award on a contract let or sale made after public notice and in the case of property other than real property, competitive bidding, provided that the bid or offer accepted is the lowest received;
- (3) Participate in any matter, directly or indirectly, in which he or she attempts to influence any decision of any agency of the state, or political subdivision thereof in which he or she is an officer or employee or over which he or she has supervisory power, when he or she knows the result of such decision may be the acceptance of the performance of a service or the sale, rental, or lease of any property to that agency for consideration in excess of five hundred dollars' value per transaction or five thousand dollars' value per annum to him or her, to his or her spouse, to a dependent child in his or her custody or to any business with which he or she is associated unless the transaction is made pursuant to an award on a contract let or sale made after public notice and in the case of property other than real property, competitive bidding, provided that the bid or offer accepted is the lowest received;
- (4) Perform any services during the time of his or her office or employment for any consideration from any person, firm or corporation, other than the compensation provided for the performance of his or her official duties, by which service he or she attempts to influence a decision of the agency of the state, or of any political subdivision in which he or she is an officer or employee or over which he or she has supervisory power;
- (5) Perform any service for consideration, during one year after termination of his or her office or employment, by which performance he or she attempts to influence a decision of any state agency, or a decision of any political subdivision in which he or she was an officer or employee or over which he or she had supervisory power, except that this provision shall not be construed to prohibit any person from performing such service and receiving compensation therefore, in any adversary proceeding or in the preparation or filing of any public document . . . [;]
- (6) Perform any service for any consideration from any person, firm or corporation after termination of his or her office or employment in relation to any case, decision, proceeding or application with respect to which he or she was directly concerned or in which he or she personally participated during the period of his or her service or employment.

Additionally, the following statutory definitions are integral to the understanding and application of these conflict of interest statutes:

Section 105.450(3), RSMo, provides that "Business with which a person is associated" [means]:

- (a) Any sole proprietorship owned by himself or herself, the person's spouse or any dependent child in the person's custody;
- (b) Any partnership or joint venture in which the person or the person's spouse is a partner, other than as a limited partner of a limited partnership, and any corporation or limited partnership in which the person is an officer or director or of which either the person or the person's spouse or dependent child in the person's custody whether singularly or collectively owns in excess of ten percent of the outstanding shares of any class of stock or partnership units; or
- (c) Any trust in which the person is a trustee or settlor or in which the person or the person's spouse or dependent child whether singularly or collectively is a beneficiary or holder of a reversionary interest of ten percent or more of the corpus of the trust[.]

“Confidential information” is statutorily defined as “all information whether transmitted orally or in writing which is of such a nature that it is not, at that time, a matter of public record or public knowledge[.]” Section 105.450(5), RSMo.

Applicability of these Conflict of Interest Laws to Clean Energy Development Boards

The Commission provides the following discussion in response to all of your questions.

First, the Commission advises this officer to remain cognizant of the prohibitions in Sections 105.452.1(2) and (3), RSMo. Those provisions prohibit him or her from using or disclosing confidential information with the intent to realize a financial gain for himself or others, including a business with which he or she is associated or a business that he or she controls. As a member of the clean energy development board, this officer would likely have access to confidential board information that should not be shared with anyone – especially a business with which he or she is associated or a business that he or she controls, if that business intends to bid on the board's contracts for services.

Second, it is important to note that these statutes impose restrictions on the officers of clean energy development boards, and do not necessarily impose any specific requirements on the board as a body. However, the Commission advises the board to consider utilizing public notice and competitive bidding in all instances where there may be bidding by an officer or a business associated with an officer. Officers of these boards are prohibited by sections 105.454.1(1) and (2), RSMo, from providing services or property to the board unless there is public notice and competitive bidding. And, if the officer's bid is accepted, it must be the lowest offer received.

Similarly, section 105.454.1(3), RSMo, effectively extends this requirement for public notice and competitive bidding to business dealings with the officer's spouse, dependent children, and any business with which the officer is associated. Notably, this statute is only applicable if these business dealings exceed \$500 per transaction or \$5,000 per year. And, it may go without saying, but if the company associated with this officer is ultimately selected, it must have submitted the lowest bid.

Third, as a member of the board, this officer must be cognizant of the prohibition in Section 105.454.1(3), RSMo. That statutory provision would prohibit any attempt to influence the board's decision to enter into a contract by "participat[ing] in the matter, directly or indirectly" when the contract would result in "consideration in excess of five hundred dollars' value per transaction or five thousand dollars' value per annum" to a "business with which he or she is associated."

The Commission perceives the phrase "participating in the matter, directly or indirectly" to include voting and any attempts to influence the votes of other officers.

Fourth, the Commission directs the officer's attention to the prohibition in section 105.454.1(4), RSMo, which cautions that the officer should not accept compensation from anyone – including his own company – for attempting to influence the board's decision to enter into a contract with the company.

A similar prohibition is found in section 105.452.1(1), RSMo, which prohibits the officer from acting or refraining from acting "by reason of any payment, offer to pay, promise to pay, or receipt of anything of actual pecuniary value paid or payable . . . made or received in relationship to or as a condition of the performance of an official act[.]"

Finally, while these statutory provisions prohibit the officer from allowing his or her outside business interests to influence actions taken on behalf of the board, comparable prohibitions in 105.454.1(5) and (6), RSMo, prohibit the officer from using information obtained from service on the board to attempt to influence the board's decisions after he or she leaves. Subsection (5) prohibits a former officer from accepting any compensation to try and influence the board's decisions for one year post termination. With respect "to any case, decision, proceeding or application" that directly concerned the officer or "in which he or she personally participated," subsection (6) imposes a lifetime prohibition.

Conclusion

With consideration for and incorporation of the preceding discussion, the Commission provides the following summarized responses to your questions.

If an officer of a clean energy development district (a "District") owns a greater than 10 percent interest in a company that has a services contract with the District, must that contract (if in excess of \$500 per transaction or \$5,000 per year) be awarded after public notice and competitive bidding and must the bid be the lowest received?

Yes. A clean energy development board should utilize public notice and competitive bidding under these specific circumstances if it intends to consider the bid from the company associated with its officer. And, the board may only accept the bid from this company if it is the lowest received.

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services rendered on District approved construction projects if the contract for those services (if in excess of \$500 per year) is awarded after public notice and competitive bidding and the bid is the lowest received?

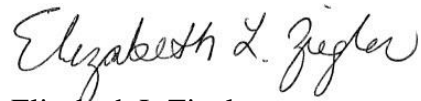
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No. An officer may not participate directly or indirectly in such matters.

To be fair, it may be difficult for the officer to divorce his personal and business interests from the interests of the board, so the Commission recommends that the officer always consider abstaining from any participation in board decisions where his personal and business interests are involved. For additional guidance, the Commission recommends that the officer consult previously issued MEC advisory opinions that address these specific issues.

Sincerely,



Elizabeth L Ziegler
Executive Director