

CONFLICTS OF INTEREST

APPLICATION OF SOLE SOURCE EXEMPTION TO CITY COUNCILMAN'S CONTRACTUAL RELATIONSHIP WITH THE CITY

*To: Kirby Oberdorfer, Director of the Office of Ethics, Compliance and Oversight, and Mike Gay,
City Councilman (City of Jacksonville)*

SUMMARY:

Under the particular circumstances presented, due to the applicability of the "sole source" exemption found in Section 112.313(12)(e), Florida Statutes, a prohibited conflict of interest would not be created under Section 112.313(7)(a), Florida Statutes, were a City Councilman's company to perform sports lighting installation services, under the Councilman's personal professional license, pursuant to a subcontract with a third party with which the City has contracted. CEO 18-16, CEO 18-3, CEO 16-8, CEO 11-6, CEO 08-8, CEO 05-14, and CEO 94-37 are referenced.

QUESTION:

Will the "sole source" exemption codified in Section 112.313(12)(e), Florida Statutes, apply to negate any potential violations of Section 112.313(7)(a), Florida Statutes, were a City Councilman's company to contract with a third party, with which the City contracted for the installation of stadium lighting, where the work is done under the Councilman's personal professional license?

This question is answered in the affirmative.

In communications with the Office of the General Counsel of the Florida Commission on Ethics, you have explained that, more than twenty years ago, the City of Jacksonville ("the City") decided to contract exclusively with Musco Sports Lighting, LLC ("Musco") for all of the sports lighting needs it had at the time because Musco's systems are high quality and easy to use. While this contract is not ongoing, you indicate that, since then, the City has used Musco's services on a regular basis to maintain standardized and uniform parts and equipment across all of the City's sports lighting systems. When the need for a new sports lighting project arises, and the City Council approves funding for it, the City's Director of Parks, Recreation, and Community Services follows a standardized procurement process as follows: (1) obtain a quote from Musco based on the specific needs of the project, (2) submit an award for approval to the City's Procurement Division and General Government Awards Committee, (3) once the award is approved, have it executed by the Mayor or the Mayor's designee, and (4) sign a contract between Musco and the City.

You have also explained that, for at least the last fifteen years, Musco has subcontracted exclusively with M. Gay Constructors, Inc. ("MGCI"), for all of its projects in Northeast Florida. This is because MGCI is the only certified electrical contractor in Duval County that has the multi-trade, specialized labor and equipment required to install Musco's lighting systems, such as cranes, crane operators, drill rigs, electricians, and personnel with the requisite commercial driver's licenses required to transport and deliver the equipment required for installation. MGCI is owned by City Councilman Mike Gay, a licensed electrical contractor, who was elected less than one year ago.¹ You also explain that, in order for MGCI to engage in electrical contracting work in compliance with Section 489.521, Florida Statutes, it must have a qualifying agent, who would be

¹ Councilman Mike Gay was elected on May 16, 2023.

legally qualified to act on behalf of MGCI in matters related to electrical contracting and to supervise the work performed. Councilman Gay is MGCI's only qualifying agent. You further state Musco has advised that there are other certified installers located in Tampa, Miami, Pensacola, and Southeast Georgia, but utilizing one of those subcontractors would increase costs due to the need for them to mobilize the large equipment necessary for installation.

The City's Department of Parks, Recreation, and Community Services is now planning for two future sports lighting projects that will be put through the standardized procurement process to obtain sports lighting in contracts with Musco, for which MGCI would be the subcontracting installer. With this factual background, you ask whether the "sole source" exemption, codified in Section 112.313(12)(e), Florida Statutes, will apply to negate any prohibited conflicts of interest under Section 112.313(7)(a), Florida Statutes. This Commission finds that the exemption applies.

Conflicts of interest are generally prohibited by Section 112.313(7)(a), Florida Statutes, which states:

CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP. —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, an agency of which he or she is an officer or employee . . . ; 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.

The first clause of this statute prohibits a public officer or employee from having any employment or contractual relationship with a business entity or an agency that is regulated by or is doing business with his or her agency. The second clause of this statute prohibits a public officer from having employment or a contractual relationship that would create a continuing or frequently

recurring conflict of interest or would create an impediment to the full and faithful discharge of his or her public duties. According to Zerweck v. State Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982), the second clause is designed to prohibit a situation that creates a "temptation to dishonor" one's public responsibilities. The statute is entirely preventative and does not require an actual transgression to occur for a conflict of interest to be found. See CEO 05-14.

At first glance, Councilman Gay appears to be one step removed from a conflict of interest because he has employment with his company, which subcontracts from Musco, but does not contract directly with the City. However, we have found that where services are provided under a personal professional license, a contractual relationship is established between the license holder and the recipient of the services. See CEO 11-6, CEO 08-8, and CEO 94-37. In this case, the City would be receiving services provided under the personal professional license of Councilman Gay, meaning that a contractual relationship would exist between the City and Councilman Gay in his private capacity as a certified electrician, which makes the conflict of interest apparent.

An exemption, however, provided in Section 112.313(12)(e), Florida Statutes, negates the conflict under Section 112.313(7)(a) and makes the contract permissible. In this regard, Section 112.313(12)(e) states:

. . . no person shall be held in violation of subsection (3) or subsection (7) if: . . .
(e) [t]he business entity involved is the only source of supply within the political subdivision of the officer or employee and there is full disclosure by the officer or employee of his or her interest in the business entity to the governing body of the political subdivision prior to the purchase, rental, sale, leasing, or other business being transacted.

The Commission has applied this exemption in the past to negate facially-apparent conflicts of interest under Section 112.313(7)(a). In CEO 16-8, the exemption applied to permit the employment of a County Commissioner by an auto parts store doing business with the County,

because the store was the only source within the County that had the particular parts the County needed. In CEO 18-3, the exemption was applied to negate conflicts arising from a Duval County Deputy Sheriff selling badge holders to his own agency because he was the only source of the badge holders within the consolidated City of Jacksonville/Duval County. In CEO 18-16, the exemption was applied to permit the sale of advertising space on billboards owned by a Sebring City Council member to the Sebring Community Redevelopment Agency, despite the existence of other billboards within the City, because the chosen billboards were optimally located to serve the CRA's needs. Notably, in that opinion the Commission reiterated its stance that it will not second-guess or micromanage determinations, regarding which sources of supply meet the needs of the agency, so long as those choices are well-supported.

Here, Musco has determined that MGCI is the only company within the political subdivision that has the necessary qualifications, personnel, and equipment required to complete the projects. In other words, MGCI is the sole source for installation services for Musco lighting systems and products in Duval County. In keeping with past opinions, this Commission will not second-guess those determinations made regarding companies' qualifications for installing sports lighting systems. The other available certified electrical contractors with the requisite personnel and equipment are located in Tampa, Miami, Pensacola, and Southeast Georgia, which are outside of the political subdivision, do not affect the application of the "sole source" exemption. Therefore, the "sole source" exemption applies to permit future contracts and subcontracts as described above, so long as MGCI remains the only company within the political subdivision with the above-described qualifications for performing the installation of Musco sports lighting systems and products. To comply with the statute granting the exemption, Councilman Gay must complete and

file CE Form 4A (Disclosure of Business Transaction, Relationship, or Interest) prior to entering into any of the new contracts.

Finally, you also stated that the procurement process begins when the City Council approves funding for a new sports lighting project. To avoid voting conflicts, Councilman Gay will need to be aware of Section 112.3143(3)(a), Florida Statutes, which states:

No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.

Furthermore, "special private gain or loss" is defined by Section 112.3143(1)(d), Florida Statutes, which states:

"Special private gain or loss" means an economic benefit or harm that would inure to the officer, his or her relative, business associate, or principal, unless the measure affects a class that includes the officer, his or her relative, business associate, or principal, in which case, at least the following factors must be considered when determining whether a special private gain or loss exists:

1. The size of the class affected by the vote.
2. The nature of the interests involved.
3. The degree to which the interests of all members of the class are affected by the vote.
4. The degree to which the officer, his or her relative, business associate, or principal receives a greater benefit or harm when compared to other members of the class.

The degree to which there is uncertainty at the time of the vote as to whether there would be any economic benefit or harm to the public officer, his or her relative, business associate, or principal and, if so,

the nature or degree of the economic benefit or harm must also be considered.

Though there are no written exclusivity clauses between the parties, you state that there is a pattern of exclusivity in contracting for sports lighting projects between the City and Musco, and between Musco and MGCI, that reaches back at least fifteen years. It logically follows that Councilman Gay has reasonable notice that votes awarding funding for sports lighting projects to Musco will or might inure to the special private gain or loss of himself and his company, which is a principal by which he is retained. Therefore, when votes on sports lighting projects come before the City Council, Councilman Gay must announce the nature of his voting conflict to the assembly prior to the vote being taken, recuse himself from the vote, and file a CE Form 8B with the person responsible for recording the meeting minutes within fifteen days of the vote.

Your inquiry is answered accordingly.

AL/jcb/ks

cc: Kirby Oberdorfer and Mike Gay