

# Palm Beach County Commission on Ethics

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Alan S. Johnson

December 1, 2011

Mr. Walter Fleming, Public Works Director  
Town of Palm Beach Shores  
330 Linda Lane  
Palm Beach Shores, FL 33404

Re: RQO 11-090  
Contractual Relationships/Misuse of Office

Dear Mr. Fleming,

The Palm Beach County Commission on Ethics (COE) considered your request for an advisory opinion on November 3, 2011 and again on November 30, 2011, and rendered its opinion at a public meeting held on November 30, 2011.

YOU ASKED in your letter dated September 22, 2011, whether a prohibited conflict of interest is created if your spouse bids for and is awarded a contract to provide lawn and landscape services to the Town of Palm Beach Shores (the Town) for which you serve as Public Works Director.

IN SUM, you may not use your official position to give or influence others to give your spouse's business a special financial benefit. In addition, the code prohibits you, your outside employer or business, *or a business of which a member of your household has at least a five percent ownership share* from contracting with your public employer. However, there is an exception to the contractual relationship prohibition. The code provides an exemption for contracts entered into under a process of sealed, competitive bidding, where your spouse is the lowest bidder, provided that you have not participated in the bid specifications or determination of the lowest bidder, have not used your position in any way to influence your colleagues, and have disclosed the nature of your interest in the business submitting the bid. Therefore, based upon the facts you have submitted, the code does not prohibit S&W Professional Services from contracting with the Town.

THE FACTS you submitted are as follows.

You are the Public Works Director for the Town of Palm Beach Shores (the Town). Your wife is the sole owner and proprietor of S&W Professional Services and has provided lawn maintenance service to the Town since 2005. S&W's contract expired on September 30, 2011. The Town advertised an invitation to bid for Lawn and Landscape Maintenance Services with a formal submission deadline of Tuesday, September 27, 2011 for sealed bids. The underlying contract is under the supervision of the Town manager; you were not involved in preparing the bid specifications, nor would you provide oversight,

management, enforcement or otherwise be involved with the contract or her services. Prior to the submission of the sealed bid, you filed a statement with the supervisor of elections and the Commission on Ethics, disclosing your wife's ownership interest in S&W Professional Services. In the time since your initial request for an opinion, commission staff was notified by the Town's attorney that S&W was not the low-bid and therefore, was not awarded the contract.

THE LEGAL BASIS for this opinion is found in the following relevant sections of the Palm Beach County Code of Ethics:

Section 2-443(a) prohibits you, as a public employee from using your official position, or influencing others to take or fail to take any action, that would result in a special financial benefit not shared with similarly situated members of the general public, for yourself, your spouse or domestic partner or an outside business of yours or your spouse or domestic partner, among other listed persons or entities.

Section 2-443(d) prohibits you from entering into any contract or other transaction for goods or services with your public employer, directly or indirectly, or through your outside business or employer.

An official or employee's outside business is defined in §2-442(2) as any entity doing business with, or being regulated by, their government employer in which the official or employee has an ownership interest. For the purposes of this opinion, an ownership interest means at least five (5) percent of the total assets *owned by you, your spouse or a member of your household.*

Therefore, §2-443(a), *misuse of office*, prohibits you from using your office or influencing other employees and officials to take or fail to take any action that would give your spouse a special financial benefit.<sup>1</sup> Section 2-443(d) prohibits you, your outside employer or business *or an outside employer or business of which your spouse or a member of your household has at least a five (5) percent ownership share* from entering into contracts or other transactions for goods or services with the Town, unless one of several exceptions apply.

Unless an exemption applies, as sole owner and proprietor of S&W Professional Services, your spouse would be prohibited from contracting with your public employer. However, §2-442(e)(1) provides an exception for contracts awarded under a system of sealed, competitive bidding, where your spouse is the lowest bidder. The sealed bid exception applies so long as the public official or employee does not 1) participate in the determination of bid specifications, 2) use their official position to influence or persuade their government entity other than by the mere submission of the bid and 3) files a statement with the Supervisor of Elections and the Commission on Ethics disclosing the nature of the interest in the outside business prior to submitting the bid. Based upon the information you provided, you were not involved in the bid process in any way, have not used your official position to influence or persuade your colleagues or Town elected officials and filed a statement with both the Supervisor of Elections and the Commission on Ethics declaring your spouse's ownership interest in S&W Professional Services, complying with the requirements of §2-443 (e)(1)a, b, and c.

<sup>1</sup> RQO 11-037 (where a private resident inspector is a sibling of the town building inspector, the best practice would be to assign oversight responsibility to another town employee or official)

IN SUMMARY, as a public employee you may not use your official position to give a special financial benefit to your spouse's outside business. In addition, neither you, nor your spouse or a household member, may enter a contract for goods or services with your government employer, if any of you maintains an ownership interest of at least five percent in the contracting business, unless an exception applies.

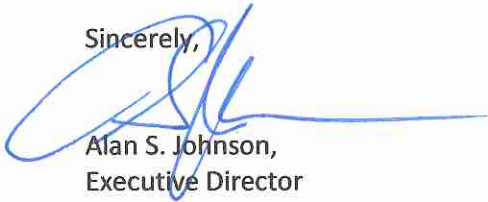
Based on the facts you have submitted your spouse would not be prohibited from participating in the bid process, and if successful, entering into a contract with your public employer pursuant to §2-443 (e)(1)a, b, and c.

Notwithstanding this exception to the contractual relationship prohibition, you have an ongoing responsibility to avoid using your official position to specially financially benefit your wife's business, as to do so would constitute a misuse of your official position.

This opinion construes the Palm Beach County Code of Ethics Ordinance, but is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at (561) 233-0724 should you have any further questions in this matter.

Sincerely,



Alan S. Johnson,  
Executive Director

ASJ/mr/gal