

Ethical Principles and Code of Conduct Opinion

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Issue

The University is preparing to issue an Advertisement for design of space for the College of Design (CoD). It is anticipated that several local architects or architectural firms will submit proposals in response to the Advertisement. Lexington is a relatively small city with a relatively large university. It is anticipated that an architect or at least one or more employees of an architectural firm will have some employment relationship with the University or, specifically, with the CoD. This opinion is intended to address some of the major issues that are likely to arise when local architects or firms respond to the Advertisement. The general issue will be whether or not the relationship between the architect or architectural firm and the University is violative of (1) Kentucky Revised Statutes KRS 164.390 or (2) Ethical Principles and Code of Conduct (EPCOC) GR XIV.B.10 Conflict of Interest.

Facts

The University Capital Planning, Design and Construction Department, along with the CoD, will be issuing an Advertisement for the renovation of the Reynold's # 1 building which will become the new home of the CoD. With a relatively small local community of architecture and design firms, it is highly likely that some employees of the local firms submitting responses will have some employment relationship with the CoD.

Applicable Law from Kentucky Revised Statutes

Kentucky Revised Statutes KRS 164.131(7) provides as follows: "Unless specifically approved by the board of trustees under provisions of KRS 164.367, no member of the administrative staff of the university shall be directly or indirectly interested in any contract with the university for the sale of property, materials, supplies, equipment, or services with the exception of the compensation to the two (2) faculty members, and the one (1) nonteaching personnel member."

KRS 164.390 provides as follows: "Unless specifically approved by the board of an institution under the provisions of KRS 164.367, no president, professor, teacher, member of the executive council, or other officer or employee shall be interested in any contract or purchase for the building or repairing of any structure or furnishing of any supplies for the use of a university or college."

KRS 164.367 provides as follows:

- "(1) For the purposes of this section, 'business' has the same meaning as defined in KRS 11A.010.
- (2) The governing board of each postsecondary education institution may adopt regulations establishing the condition under which and the procedures whereby the board may approve a specific instance of an employee having an interest in a contract between the institution and a business.
- (3) Each governing board shall forward, as soon as practicable, a copy of the regulations it adopts under the provisions of this section to the Legislative Research Commission. A board shall also forward any subsequent changes to the regulations to the Commission."

Pursuant to KRS 164.367, the Board of Trustees approved Governing Regulation GR XIV.B.14 "Financial Advantage" which states, in part, the following:

"Except as specifically approved by the Board, purchases and contracts shall not be made with an employee of the University for any item of supply, equipment, or service, nor may an employee have any interest, directly or indirectly, in any purchase made by the University . (See BPM B.2.C, KRS 164.131, and KRS 164.367.) An indirect interest may be defined as a real or perceived use of a university position or office with respect to a purchase or contract, leading to financial or other benefits to the individual or a member of his or her family. An indirect interest includes situations where a business owned or controlled by a family member does business with the University area where the employee is assigned.

An employee seeking approval under this section shall first make an application to the University Ethics Committee (UEC) by submitting in writing a full disclosure of all aspects of his or her relationship with the contracting company or business. The Ethics Committee shall make a recommendation to the President, who shall forward to the Board the Committee's recommendation together with his or her recommendation. In recommending approval of a contractual relationship, the Committee shall determine that:

- a. the contractual relationship is in the best interest of the University;
- b. the employee has taken whatever actions are necessary to avoid any conflict of interest or any appearance of a conflict of interest;
- c. if the conflict is subject to the provision of KRS Chapter 45A, the employee's contract shall be the lowest price bid or otherwise provides the best value to the University;
- d. the employee's interest in the contract does not present a conflict with the employee performing his or her job; and,
- e. the nature of the contract and the nature of the employee's interest in the contract or business shall be fully disclosed to the University community by as broad communications as feasibly possible.

Action taken by the Board shall be in open session, by affirmative vote. The action item shall fully disclose the nature of the conflict, and the reasons for the action."

Discussion/Rationale Concerning Kentucky Revised Statutes KRS 164.131(7), KRS 164.390, and KRS 163.367:

In this Discussion/Rationale, there will be discussion of several hypothetical situations that may occur during this Advertisement process, the related laws and University regulations, and how the UEC may view and rule on such situations. Since this opinion is based on hypothetical situations, it is advisory in nature and does not represent any final ruling of the UEC.

It is likely that one or more architects of a local firm will hold a faculty title in the "Adjunct Title Series." If one simply has an appointment in the Adjunct Series and is not actually teaching and getting paid, then the person is not an employee for purposes of the statute that prohibits a University employee from having an interest in a contract with her/his university. However, if one has an appointment as adjunct faculty, is teaching and getting paid, then one is an employee for purposes of this statute. Thus, an architect or other employee of a local firm who is teaching and receiving pay from UK will be an employee with an interest in a contract with the University if the firm where s/he is employed is awarded a contract with the University.

Usually, adjunct faculty teach one course and are part-time employees of the University. A simple solution to this situation is that the person who has the adjunct appointment and is teaching resigns from the adjunct position for the period of the contract. If the dean of the CoD determines that instruction by the local architect (or other employee of the architectural firm) is so important to the curriculum of the CoD that the person should not resign from her/his adjunct appointment, then firm should divulge that employment relationship in its response. If that firm's response is well enough received for the firm to become a finalist in the Advertisement process, then the matter of that employment relationship would be reviewed by the UEC. The UEC would review under the criteria in GR XIV.B.14. Although the members of the UEC would have to review each of the criteria and make a recommendation to the President, it seem logical that the nature of a part-time teaching job in the CoD would be unlikely to present any significant conflict of interest issues that could not be managed. The rationale for the law concerning employees' having contracts with the University is to prevent an employee from using her/his employment position for corruption or abuse; it seems that there is little likelihood that the position of a part-time adjunct teacher could be used for corruption or abuse in this Advertisement process or even during the contract period. An adjunct series faculty employee is not a part of a college's administrative decision-making processes and is not even a member of the college faculty assembly.

Another possible hypothetical situation is that a regular full-time employee of University has a part-time employment with a local bidding firm. Again, that situation would have to be reviewed by the UEC. It seems unlikely that a part-time employee of a local firm would play a significant role in a large-scale renovation of the Reynolds Building, and it seems likely that any conflict in such a situation could be managed by lessening the part-time employee's role at that local firm.

Again in a relatively small Lexington community where the University is located, it is likely that one or more employees of a firm submitting a response to the Advertisement will have spouses who are employees of the University. It has been the consistent interpretation of the UEC that, under a theory of joint/share spousal/partner income, the University employee has at least an indirect interest in a contract with a vendor (firm) when the spouse is an owner, share-holder, or partner with the vendor. Such a relationship and the exact nature of that relationship must be disclosed by the vendor in the response to the Advertisement process. The UEC would need to review the facts and ascertain if the relationship may be mitigated so it may be approved pursuant to the applicable University regulation. Probably, the mitigating factor would be for the dean to ensure that the University employee has no role in the evaluation of the responses to the Advertisement, in crafting the contract, or a continued role in the contract once it has been awarded.

There are other possibilities of an employment relationship between local firms and the University. Again, those situations would have to be reviewed by the UEC under the criteria of GR XIV.B.14.

Applicable Section(s) of Ethical Principles and Code of Conduct:

- (1) In GR XIV.B.10. Conflict of Interests, the document states, "The public's respect and confidence in the University of Kentucky must be preserved. Confidence in the University of Kentucky is put at risk when the conduct of University members does, or may reasonably appear to, involve a conflict between private interests and obligations to the University. All University members shall avoid conduct that might in any way lead members of the general public to conclude that he or she is using an official position to further professional or private interests or the interests of any members of his or her family. In conducting or participating in any transaction, full disclosure of any real or perceived conflict with personal interests and removal from further participation in such matters is required."

- (2) In GR XIV.B.14. Financial Advantage, the document states: "Members of the University community must exhibit personal integrity, honesty and responsibility in all actions. Official position or office shall not be used to obtain financial gain or benefits for oneself or members of one's family or business associates. Any action that creates the appearance of impropriety should be avoided. Purchases and contracts shall not be made with an employee of the University of Kentucky for any item of supply, equipment, or service, nor may an employee have any interest, directly or indirectly, in any purchase made by the University of Kentucky. An indirect interest may be defined as a real or perceived use of a University position or office with respect to a purchase or contract, leading to financial or other benefits to the individual or a member of his or her family. An indirect interest includes situations where a business owned or controlled by a family member does business with the University area where the employee is assigned."
- (3) In GR XIV.B.13. Financial Advantage, the document states: "The University is committed to responsible stewardship. The Board of Trustees, President, executive officers, administrators, deans, department chairs, directors, principal investigators, and all others functioning as area or unit heads are responsible for setting a tone of accountability and high ethical standards in financial matters. All employees are expected to comply with the requirements outlined in:
- GR Part I, The University of Kentucky (Definition);
 - UK Ethical Principles and Code of Conduct;
 - A01-005, UK HealthCare Code of Ethics;
 - AR 3:9, External Consulting, Other Outside Employment and Internal Overload Activity;
 - AR 7:2, Research Conflict of Interest and Financial Disclosure Policy; and
 - AR 7:9, Institutional Conflicts of Interest Involving Research.

All organizational units (e.g., administrative area, college, department, division, center, or office) are expected to maintain a strong internal control environment for the University as defined in the *Business Procedures Manual*. (See BPM E-1-3, Fiscal Roles and Responsibilities, and E-1-4, Internal Control.)

Each organizational unit head is accountable for the sound financial management of the unit and retains this fiscal responsibility if authority for transactional processing, record keeping, approving and monitoring is delegated to others."

Discussion/Rationale Concerning the Ethical Principles and Code of Conduct:

The nature of a conflict of interest is that a decision-maker would tend to make a decision in favor of a party because the decision-maker has some financial interest or some financial gain for her/himself or a family member. Thus, the results would be that a decision-maker would make a decision on behalf of her/his own interest, and that decision would be contrary to the University's interest. As noted earlier, it is highly likely that there will be other relationships, beside employment, between employees of local architectural/design firms and of the University. It is highly likely that more than one employee of firm will be a graduate of the University; it is likely that one or more employees of the firm will be active members of the UK Alumni Association or the CoD Alumni Association. It is likely that an employee of a submitting firm will serve on a CoD committee. Committee membership may be on matters such as philanthropy, hiring new faculty or senior CoD administrators, advisory in matters such as course design, strategic direction of the college, or other type committees.

As already stated, the Capital Planning, Design and Construction Department is getting ready to issue an Advertisement for a CoD remodeling/construction project. An evaluation committee will be

appointed by the AVP Capital Planning, Design, and Construction, after consultation and consideration with the Dean of the CoD's thoughts. The chair of the evaluation committee will be an employee of the AVP Capital Planning, Design and Construction Department. Two members of the committee will be employees of the CoD and the remaining members of the Committee will be employees from UK Facilities. It would be highly unusual for anyone other than a University employee to serve on the evaluation committee. There is little or no likelihood that an employee of a local architect/design firm will be on the evaluation committee. Thus, there is little possibility of a conflict of interest with a member of the evaluation committee in the vendor selection process.

At the initial meeting of the evaluation committee, the Chair of the committee will have a discussion with the committee members concerning conflicts of interest. It is highly likely that every member of the committee will know one or more employees of a submitting vendor. The Chair will inform the committee members that, from the date of appointment on the committee until after the bid award process has ended, they should not have any conversation about the project with anyone outside of the selection process.

Since this architect/design community is relatively small, and since the CoD is also relatively small, it is the recommendation of the UEC that all members of the evaluation committee and all senior administrators of the CoD (dean, associate deans, assistant deans, directors of schools, etc.) limit as much as possible any contact and communications with employees of local firms that may be submitting on the project during the Advertisement and the construction process. During this time, those noted University employees should ensure that all communication with local architects and employees of those firms that may submit proposals or be awarded the contract does not involve any discussion of the process or the construction project.

Other relationships or fact patterns may arise before, during, and after the bid process, and the UEC will be available to make recommendations or decision as those may arise. Early disclosure and transparency are of paramount importance in the process. All involved parties must understand that ethical conduct must be exhibited to "...maintain the public's trust in the integrity of the University...." GR XIV.B. Code of Conduct is meant to assist those involved in determining "...what conduct is expected and to help individuals determine what behaviors should be avoided."

Recommended Course of Action:

The dean of the CoD should be cautious and carefully consider if asked to recommend possible members of the evaluation committee. The Dean should carefully consider communicating to CoD employees who may have a role in the process or the construction project the ethical standards of the University.

The senior administrator in AVP Capital Planning, Design and Construction Department should exhibit equal caution when appointing members of the evaluation committee.

Opinion

This opinion is based on hypothetical fact situations and is thus only meant as a guideline and general advice. Actual fact situations would need to be reviewed by the UEC.

Members of the Ethics Committee

Issued on 01/31/2019 by the University Ethics Committee

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