

CITY OF BIRMINGHAM
BOARD OF ETHICS ADVISORY OPINION
ADOPTED 10/07/03

J.H. HART URBAN FORESTRY ("JH HART") has requested an advisory opinion on three distinct practices, each of which arises from a different aspect of services that JH Hart provides to the **CITY OF BIRMINGHAM** ("City").

1. Under its contract with the City, JH Hart removes trees and tree limbs from City property, transports them to the City Department of Public Services yard, where it grinds them into wood chips. JH Hart uses the wood chips to make a mulch, which JH Hart sells at wholesale to various retailers who, in turn, sell the mulch containing City woodchips and other material to members of the public, some of whom might include residents, employees or elected officials of the City. JH Hart does not sell any mulch directly to consumers. The bid specifications to which JH Hart responded provide for the contractor to reduce the tree cutting debris to woodchips at the City yard, remove the woodchips from City property and dispose of the woodchips as the contractor sees fit. The City does not expect to receive revenue from the sale of the woodchips; rather, it hopes to reduce its tree care costs through allowing bidders to have the financial benefit of disposing of the woodchips.

The Board of Ethics concludes that this practice does not constitute a conflict of interest or otherwise violates the Ethics Ordinance. JH Hart is a "consultant" within the meaning of the City's Ethic Ordinance because it is a firm that provides services in the field of forestry, in which JH Hart has special knowledge or training. Ordinance No. 1810; Section 2-322(1). Accordingly, JH Hart must meet the ethical standards of an "city official or employee" under the Ethics Ordinance.

Section 2-324 of the Ethics Ordinance prohibits conflicts of interest. Under Ethics Ordinance Section 2-324.A.IX, a conflict of interest exists where there is "any financial or personal interest ... and such interest is or may be adverse to the public interest in the proper performance of said ... employee's governmental duties" (*Id*, §IX.A) or where the City employee "has reason to believe or expect that he or she will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his or her official activity" (*Id*, §IX.B). Initially, the Board of Ethics has determined that Section 2-324.A.IX(B) is not intended to apply to a contract with a consultant entered into after proper bidding. By their very nature, consultants enter into contracts with the City to make money. It would be

impossible for the City to ever have a contract with a consultant that did not involve direct monetary gain.

The Board of Ethics does not believe that there is anything in the situation described that constitutes a conflict of interest within the meaning of the Ordinance [see Section 2-324.A(I)-(VIII)], or otherwise within the common understanding of the term "conflict of interest". Where all bidders are given the same opportunity to utilize the by-products of tree cutting and tree trimming in formulating their bid, and where the contractor makes no direct sales to City officials, employees or residents, no conflict of interest is involved.

2. The City Forester, a salaried City employee, from time to time instructs JH Hart to remove or trim certain specified trees. In emergencies, the City's police or fire department may also direct JH Hart to provide emergency tree removal services. In all such cases, JH Hart removes or trims trees identified by others and provides its services at a pre-arranged, hourly rate. JH Hart may exercise professional judgment as to how much of a tree to remove and exactly how to accomplish the job.

JH Hart is concerned that applying its professional judgment in this situation may lead to a conflict of interest. The Board of Ethics finds that this does not constitute a conflict of interest. The fact that the trees which need to be removed or trimmed are identified by salaried City employees, and that the price for JH Hart's services is set in advance, eliminates concerns that might otherwise exist. The Board of Ethics might well be concerned if a tree consultant was free to determine itself, with reference to no specific standards, what trees to cut or trim, or if the contractor was able to adjust its rates to take advantage of emergency situations. In the facts presented to the Board of Ethics, neither of these situations exists. Therefore, upon review of the standards of Section 2-324 of the Ordinance, the Board of Ethics finds no conflict of interest.¹

3. The City is not JH Hart's only customer. JH Hart conducts a tree care business in several communities in Oakland County, including the City. JH Hart actively seeks private customers within and without the City. JH Hart occasionally is called upon by residents of Birmingham who happen to be "city officials or employees" within the meaning of the Ordinance. Section 2-322(I). Although JH Hart did not present the specific situation, it is also possible that JH Hart might be called upon to provide a bid or services to City employees who are not themselves residents of

¹ This is the first Advisory Opinion issued by the Ethics Board, so it is important to note that the Board's opinions are limited to the facts presented. Different facts, even slightly different facts, could lead to a different conclusion. For example, a contractor engaged for hourly compensation who provided plainly excessive services under the standards of his/her/its profession might well be engaging in unethical conduct under the Ordinance.

Birmingham. JH Hart has asked whether it constitutes a conflict of interest for it to provide tree services to City officials or employees as private property owners while, at the same time, serving as a consultant to the City.

Section 2-323 of the Ethics Ordinance requires City officials and employees to avoid any action which "might result in or create the appearance of giving or accepting preferential treatment" [2-323(II)] or "affecting adversely the confidence of the public ..." [2-323(V)]. More specifically, the Ethics Ordinance prohibits City officials or employees from soliciting or accepting anything of value which tends to influence the manner in which the official or employee performs his/her official duties [Ordinance 2-324.A(IV)]. Similarly, the Ethics Ordinance prevents City officials from profiting or benefiting financially from his/her official position. *Id, sub-section (I).*

The Board of Ethics questioned Mr. Hart, as representative of JH Hart, carefully about his practices in submitting bids for private work within and outside the City. The Board of Ethics is satisfied that JH Hart is careful to provide fair market bids for all services using the same formulae and standards to prepare all bids for all private work. Mr. Hart satisfied the Board of Ethics that he uses the same bidding methodology and provides the same fair market prices when submitting bids for work for persons who he may know to be City officials or employees as for those he does not know to be City officials or employees. Under the circumstances, the Board of Ethics believes this is not a conflict of interest. However, the Board of Ethics cautions JH Hart to maintain appropriate records to verify compliance with these standards should a question ever arise. The Board of Ethics believes it would be a conflict of interest under the Ethics Ordinance if JH Hart were to provide City officials or employees with preferential pricing for private services.

Approved by the Board of Ethics, this 11th day of November, 20






