June 8, 2006

Richard M. Hickman, Executive Director
Ohio School Facilities Commission
10 West Broad Street, Suite 1400
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SYLLABUS: 2006-027

1. The campaign contribution limits set forth in R.C. 3517.13(I) and (J) do not apply to professional design services contracts awarded by the board of education of a school district (acting collectively) and approved by the Ohio School Facilities Commission pursuant to R.C. 3318.091, or to construction management or other consulting contracts awarded by the Ohio School Facilities Commission (acting collectively) pursuant to R.C. 3318.30 and R.C. 3318.31.

2. Standard contractual language stating that the party contracting to provide professional design services, construction management services, or other consulting services "represents that it is familiar with all applicable ethics law requirements, including without limitation Sections 102.04 and 3517.13 of the Ohio Revised Code, and certifies that it is in compliance with such requirements," contained in a contract approved or awarded by the Ohio School Facilities Commission, does not require the contracting party to comply with the campaign contribution limits set forth in R.C. 3517.13(I) and (J).

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June 8, 2006

OPINION NO. 2006-027

Richard M. Hickman, Executive Director
Ohio School Facilities Commission
10 West Broad Street, Suite 1400
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Dear Executive Director Hickman:

We have received the request of the Ohio School Facilities Commission for a formal opinion of the Attorney General concerning the application of statutory campaign contribution limits set forth in R.C. 3517.13. The Commission has asked the following questions:

1) Whether the statutory campaign contribution limits set forth in R.C. 3517.13(I)-(J) apply to professional design services agreements awarded by school districts and approved by the Commission pursuant to R.C. 3318.091, or to construction management or other consulting agreements awarded by the Commission pursuant to R.C. 3318.30; and

2) Whether the contractual language, which had been set forth in Commission approved or awarded consulting contracts, requires vendors/consultants to comply with the campaign contribution limits set forth in R.C. 3517.13.

For the reasons discussed below, we conclude that the campaign contribution limits set forth in R.C. 3517.13(I) and (J) do not apply to professional design services contracts awarded by the board of education of a school district (acting collectively) and approved by the Ohio School Facilities Commission pursuant to R.C. 3318.091, or to construction management or other consulting contracts awarded by the Ohio School Facilities Commission (acting collectively) pursuant to R.C. 3318.30 and R.C. 3318.31. We conclude, further, that standard contractual language stating that the party contracting to provide professional design services, construction management services, or other consulting services "represents that it is familiar with all applicable ethics law requirements, including without limitation Sections 102.04 and 3517.13 of the Ohio Revised Code, and certifies that it is in compliance with such requirements," contained in a contract approved or awarded by the Ohio School Facilities Commission, does not

require the contracting party to comply with the campaign contribution limits set forth in R.C. 3517.13(I) and (J).

In reaching these conclusions, we do not purport to determine the rights or responsibilities of a particular party under a particular contract. *See, e.g.,* 2004 Op. Att'y Gen. No. 2004-022, at 2-186 (citing several Attorney General opinions in support of the proposition that "it is inappropriate to use a formal opinion of the Attorney General to make findings of fact or to attempt to determine rights between particular parties"); 1983 Op. Att'y Gen. No. 83-087, at 2-342 (the Attorney General is "without authority to render an opinion interpreting a particular agreement or contract. The determination of particular parties' rights is a matter which falls within the jurisdiction of the judiciary"); *see also* R.C. 3517.153(D) (Ohio Elections Commission is authorized to render advisory opinions concerning, *inter alia*, R.C. 3517.13, and an advisory opinion relating to a specific set of circumstances and stating that there is no violation provides a basis for reasonable reliance and immunity from criminal prosecution or civil action). Rather, we set forth our analysis of the interpretation and application of state statutes and standard contractual language for consideration and application to particular circumstances as appropriate.

Background and facts

The Ohio School Facilities Commission is an agency of state government and an instrumentality of the State of Ohio, created in 1997 pursuant to R.C. Chapter 3318 to administer the provision of financial assistance to school districts for the acquisition or construction of classroom facilities in accordance with R.C. Chapter 3318. R.C. 3318.30(A). The Commission consists of seven members, three of whom are voting members. The voting members are the Director of the Office of Budget and Management, the Director of Administrative Services, and the Superintendent of Public Instruction, or their designees. The other four members are appointed from the Ohio Senate and House of Representatives. R.C. 3318.30(B). Of the voting members, the Director of the Office of Budget and Management and the Director of Administrative Services are appointed by the Governor, with the advice and consent of the Senate, hold their offices during the term of the appointing Governor, and are subject to removal at the pleasure of the Governor, in accordance with R.C. 121.03. The Superintendent of Public Instruction is appointed by the State Board of Education – which consists of nineteen voting members, of whom eleven members are elected from districts within the state and eight members are appointed by the Governor with the advice and consent of the Senate – and serves at the pleasure of the State Board of Education. Ohio Const. art. VI, § 4; R.C. 3301.01; R.C. 3301.08.

The Ohio School Facilities Commission is empowered to carry out various powers and duties granted by statute, and to enter into contracts in order to perform its functions. *See* R.C. 3318.30(A) ("[t]he commission may . . . enter into contracts"); R.C. 3318.31(A)(2) (the Ohio School Facilities Commission may "[c]ontract with, retain the services of, or designate, and fix the compensation of, such agents, accountants, consultants, advisers, and other independent contractors as may be necessary or desirable to carry out the programs authorized under [R.C. Chapter 3318]"); R.C. 3318.31(A)(4) (the Commission may "[m]ake and enter into all contracts,

commitments, and agreements, and execute all instruments, necessary or incidental to the performance of its duties and the execution of its rights and powers under [R.C. Chapter 3318]"); 5 Ohio Admin. Code 3318-2-05(A). Two voting members of the Commission constitute a quorum, and the affirmative vote of two members is necessary for the approval of any action taken by the Commission. R.C. 3318.30(B).

The Commission is also empowered to delegate certain of its powers. "In its discretion and as it determines appropriate, the commission may delegate to any of its members, executive director, or other employees any of the commission's powers and duties to carry out its functions." R.C. 3318.30(A). Further, the Commission has express authority to authorize its executive director to enter into contracts with agents, accountants, consultants, advisers, and other independent contractors, R.C. 3318.31(A)(2), or to make and enter into contracts, commitments, and agreements, or execute instruments on behalf of the Commission, R.C. 3318.31(A)(4).

Among the powers of the Commission is the authority to enter into the contracts here under consideration. As part of the process of providing financial assistance to public school districts, the Commission is required to approve contracts for professional design services – that is, services within the scope of practice of an architect, landscape architect, or professional engineer or surveyor, *see* R.C. 153.65(C) – awarded by individual school district boards of education. The boards of education act pursuant to R.C. 3318.091, which states, in part: "the school district board, *with the approval of the commission* shall employ a qualified professional person or firm to prepare preliminary plans, working drawings, specifications, estimates of cost, and such data as the school district board and the commission consider necessary for the project." R.C. 3318.091(A) (emphasis added); *accord* 5 Ohio Admin. Code 3318-2-05(C) ("the employment of a qualified professional person or firm to provide professional design services for the project is subject to the approval of the commission"). In awarding the contracts for professional design services, the school district boards of education follow the competitive selection process established by the General Assembly in R.C. 153.65 to R.C. 153.71.[1]

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[1] A public authority (including a school district) that contracts for professional design services is subject to the provisions of R.C. 153.65 to R.C. 153.71. *See* R.C. 153.65(A); R.C. 153.71. When a public authority plans to contract for professional design services, it is instructed to encourage professional design firms to submit statements of qualifications. R.C. 153.66. When a contract becomes available, the public authority must make a public announcement of the project, the services and qualifications required, and the manner in which a qualified professional design firm may submit a statement of qualification in order to be considered for a contract. R.C. 153.67(A)-(C). Qualifications may include such matters as competence, indicated by training, education and experience; ability in terms of workload and available personnel, equipment, and facilities to perform services competently and expeditiously; and past performance as reflected by evaluations of previous clients with respect to such matters as control of costs, quality of work, and meeting of deadlines. R.C. 153.65(D). The public

In addition to approving contracts of school district boards of education, the Commission also enters into contracts on its own behalf for the services of construction managers or other consultants, in accordance with the contractual authority granted by R.C. 3318.30 and R.C. 3318.31. The contracts for construction management services are awarded pursuant to the competitive selection process established in R.C. 9.33 to R.C. 9.332.[2]

You have informed us that the various contracts to which your questions relate contain the following language, included as part of the standard language of each contract:

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announcement must be sent to either: (1) each professional design firm that has a current statement of qualifications on file and is qualified to provide the required services; or (2) architect, landscape architect, engineer, and surveyor trade associations, the news media, and any publications or other public media deemed appropriate. R.C. 153.67(D). The public authority evaluates the statements of qualifications, and may hold discussions with particular firms to explore their qualifications and the nature of the services they would provide. R.C. 153.69; 2 Ohio Admin. Code 153:1-1-05(D) (discussions at "scope clarification meeting" are designed "to further explore the scope and nature of the services required, the various technical approaches the firms may take toward the project, unique project requirements, the project schedule, the conceptual schematic design and the project budget"). The public authority then selects and ranks no fewer than three firms that it considers to be "the most qualified to provide the required professional design services," unless fewer than three qualified firms are available. R.C. 153.69(A). The public authority must attempt to negotiate a contract with the firm ranked most qualified. If negotiations fail, the public authority informs the firm in writing of the termination of negotiations and enters into negotiations with the firm ranked next most qualified. The same procedure is followed with each next most qualified firm (with additional firms selected and ranked as necessary) until a contract is negotiated. R.C. 153.69(B)-(E). *See generally* 2 Ohio Admin. Code Chapter 153:1-1.

[2] Before entering into a contract to employ a construction manager, a public owner (including the state or any instrumentality of the state, such as the Ohio School Facilities Commission, *see* R.C. 9.33(C)) must advertise notice of its intent in a newspaper of general circulation in the county where the contract is to be performed, and may also advertise in trade journals or otherwise notify persons believed to be interested. The notice must include a description of the project and a statement of the services and qualifications required, and must invite interested parties to submit proposals for consideration. R.C. 9.331. The public owner evaluates the proposals through a process that may include discussions with individual construction managers, selects and ranks the construction managers considered most qualified, and attempts to negotiate a contract with the construction manager ranked most qualified. R.C. 9.332. The evaluation, ranking, and negotiation process set forth in R.C. 9.332 is essentially the same as that set forth in R.C. 153.69, outlined in note 1, *supra*.

> [The party contracting to provide services] represents that it is familiar with all applicable ethics law requirements, including without limitation Sections 102.04 and 3517.13 of the Ohio Revised Code, and certifies that it is in compliance with such requirements.

You have also informed us that, in each instance, the approval of a school district board of education's contract for professional design services or the award of the Commission's contract for construction management services or other consulting services has been made by the Commission as a whole, acting at its monthly meetings. This procedure is consistent with rules of the Commission that govern the awarding and approval of contracts. *See* 5 Ohio Admin. Code 3318-2-05(D).[3]

Campaign contribution limits of R.C. 3517.13(I) and (J)

Your first question is whether the statutory campaign contribution limits set forth in R.C. 3517.13(I) and (J) apply to professional design services agreements awarded by school district boards of education and approved by the Commission pursuant to R.C. 3319.091 or to construction management or other consulting agreements awarded by the Commission pursuant to R.C. 3318.30. The provisions of R.C. 3517.13 read, in part, as follows:

> (I) Subject to divisions (K), (L), (M), and (N) of this section, *no agency or department of this state or any political subdivision shall award any contract*, other than one let by competitive bidding or a contract incidental to such contract or which is by force account, for the purchase of goods costing more than five hundred dollars or services costing more than five hundred dollars *to any*

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[3] 5 Ohio Admin. Code 3318-2-05 states, in part:

> (D) Pursuant to the above three sections, the commission shall adhere to the following procedure for the approval of contracts.
>
> (1) The commission shall convene regular or special meetings, as called by the chair, to approve contracts.
>
> (2) The executive director or a designee shall present a recommendation to the commission for approval or disapproval of each proposed contract, as set forth in Chapter 3318 of the Revised Code. The executive director may present a listing of contracts to be approved that provides a description of the selection process, the name of each contractor, and the amount of the contract.
>
> (3) The commission will vote approval or disapproval of each contract request. The commission may approve multiple contracts listed on an appendix or exhibit in one vote.
>
> (4) Following approval of the contract, the commission may authorize the executive director or a designee to take actions necessary for the performance of the contract.

> *individual, partnership, association,* including, without limitation, a professional association organized under Chapter 1785. of the Revised Code, *estate, or trust if the individual has made or the individual's spouse has made, or any partner, shareholder, administrator, executor, or trustee or the spouse of any of them has made, as an individual, within the two previous calendar years, one or more contributions totaling in excess of one thousand dollars to the holder of the public office having ultimate responsibility for the award of the contract or to the public officer's campaign committee.*
>
> (J) Subject to divisions (K), (L), (M), and (N) of this section, *no agency or department of this state or any political subdivision shall award any contract,* other than one let by competitive bidding or a contract incidental to such contract or which is by force account, for the purchase of goods costing more than five hundred dollars or services costing more than five hundred dollars *to a corporation or business trust,* except a professional association organized under Chapter 1785. of the Revised Code, *if an owner of more than twenty per cent of the corporation or business trust or the spouse of that person has made, as an individual, within the two previous calendar years,* taking into consideration only owners for all of that period, *one or more contributions totaling in excess of one thousand dollars to the holder of a public office having ultimate responsibility for the award of the contract or to the public officer's campaign committee.* (Emphasis added.)

In general, division (I) of R.C. 3517.13 prohibits an agency or department of the state or any political subdivision from awarding a contract, other than one let by competitive bidding or by force account,[4] in an amount greater than five hundred dollars to any individual, partnership,

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[4] Divisions (I) and (J) of R.C. 3517.13 expressly exclude from their provisions contracts let by competitive bidding (or contracts incidental to a contract let by competitive bidding) and contracts let by force account. It does not appear that the contracts in question fall within these categories. The term "force account" applies to a situation in which the county engineer or other public official is statutorily authorized to act as contractor and the public body does the work itself, employing its own labor and purchasing its own materials, rather than using standard competitive bidding procedures to select a contractor to carry out the project. *See, e.g.,* R.C. 723.52 (municipal corporation); R.C. 5543.19 (county engineer); R.C. 5575.01 (township); R.C. 6137.05 (ditch maintenance); *Pincelli v. Ohio Bridge Corp.,* 26 Ohio Op. 2d 460, 463-66, 198 N.E.2d 483 (C.P. Athens County 1964) (history of force account); 1992 Op. Att'y Gen. No. 92-049, at 2-202 n.2. A board of education may act by force account in certain circumstances, such as in making repairs costing less than a specified amount, in cases of urgent necessity, or when required for the security and protection of school property. In such circumstances, the school district may do the work itself and competitive bidding is not required. *See* R.C. 3313.46(A); *Bolce v. Bd. of Educ.,* 4 Ohio Op. 423 (C.P. Hamilton County 1934); 1951 Op. Att'y Gen. No.

association, estate, or trust if the individual or the individual's spouse, or any partner, shareholder, administrator, executor, trustee, or spouse, has made, as an individual, within the two previous calendar years, one or more contributions totaling in excess of one thousand dollars to the holder of the public office having ultimate responsibility for the award of the contract, or

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200, p. 52. There is no statutory authority for a board of education to perform the professional design services in question through a force account procedure. *See* R.C. 3318.091.

The term "competitive bidding" refers to a strict procedure of providing public notice and then accepting bids for specified goods or defined services. *See, e.g.,* R.C. 9.312 (state agency or political subdivision awarding contract to lowest responsive and responsible bidder); R.C. 153.50-.54 (competitive bidding on contracts for construction of public improvements); R.C. 307.86-.92 (county competitive bidding requirements); 2005 Op. Att'y Gen. No. 2005-029; 1991 Op. Att'y Gen. No. 91-002, at 2-10 to 2-12 (discussing essential elements of competitive bidding). In enacting the requirements of R.C. 153.65-.71 (then R.C. 153.65-.70) and R.C. 9.33-.332, the General Assembly referred to them as "qualifications-based competitive selection procedures and policies," and not as competitive bidding. 1987-1988 Ohio Laws, Part I, 941 (Sub. S.B. 185, eff. June 14, 1988) (title); 1987-1988 Ohio Laws, Part II, 3256 (Sub. H. B. 297, eff. May 31, 1988) (title). As described in notes 1 and 2, *supra*, these statutes establish a competitive process for awarding contracts, but they allow a certain amount of discretion in the selection of a contractor. An earlier Attorney General's opinion suggested that a similar competitive selection process might qualify as competitive bidding and remove a contract from the campaign contribution limits of R.C. 3517.13(I) and (J). *See* 1983 Op. Att'y Gen. No. 83-034, at 2-131 to 2-134. We question the validity of that argument and decline to apply it in the instant case. We find, instead, that although R.C. 153.65-.71 and R.C. 9.33-.332 establish competitive selection procedures, they do not provide for "competitive bidding" as that term is used in R.C. 3517.13(I) and (J). *See, e.g.,* R.C. 125.01(I) (for purchases of supplies or services by the Department of Administrative Services, "[c]ompetitive selection" includes competitive sealed bidding under R.C. 125.07, competitive sealed proposals under R.C. 125.071, and reverse auctions under R.C. 125.072); R.C. 125.071 (the Director of Administrative Services "may make purchases by competitive sealed proposal whenever the director determines that the use of competitive sealed bidding is not possible or not advantageous to the state," indicating that competitive sealed proposal procedures are exceptions to competitive bidding requirements); R.C. 306.43 (for regional transit authority, competitive sealed bidding is preferred method of procurement; next is two-step competitive bidding, consisting of a technical proposal and a separate, subsequent sealed price bid from those submitting acceptable technical proposals; then procurement by competitive proposals; and services of a construction manager are to be procured pursuant to R.C. 9.33-.332); 2005 Op. Att'y Gen. No. 2005-029, at 2-305 (request for proposals or negotiated contract is a more open selection process than competitive bidding); Ohio Elections Comm'n, Advisory Op. No. 87-11 (process involving qualification statements and submission of proposals is used when contracts are exempted from competitive bidding); Ohio Elections Comm'n, Advisory Op. No. 87-2, at 3 (divisions (I) and (J) of R.C. 3517.13 apply to contracts involving a deliberative process or the exercise of discretion).

to the public officer's campaign committee. Division (J) establishes a similar prohibition against awarding a contract to a corporation or business trust if an owner of more than twenty percent of the corporation or business trust or the spouse of that person has made, as an individual, within the two previous calendar years, one or more contributions totaling in excess of one thousand dollars to the holder of the public office having ultimate responsibility for the award of the contract, or to the public officer's campaign committee.

The general prohibitions contained in division (I) and (J) might appear to apply to contracts awarded by the Ohio School Facilities Commission, or to contracts awarded by boards of education and approved by the Commission. However, divisions (I) and (J) are expressly made subject to divisions (K), (L), (M), and (N), which establish significant exceptions to these prohibitions. In order to determine the applicability of divisions (I) and (J) to the contracts in question, it is necessary also to consider the provisions of these other divisions – in particular, division (M).

Exceptions set forth in division (M) of R.C. 3517.13

Division (M) of R.C. 3517.13 makes it clear that the prohibitions of divisions (I) and (J) do not apply to the Ohio School Facilities Commission. Division (M) states:

> (M)(1) *Divisions (I) and (J) of this section do not apply to contracts awarded by* the board of commissioners of the sinking fund, municipal legislative authorities, *boards of education*, boards of county commissioners, boards of township trustees, or other boards, *commissions*, committees, authorities, councils, boards of trustees, task forces, *and other such entities created by law*, by the supreme court or courts of appeals, by county courts consisting of more than one judge, courts of common pleas consisting of more than one judge, or municipal courts consisting of more than one judge, or by a division of any court if the division consists of more than one judge. *This division shall apply to the specified entity only if the members of the entity act collectively in the award of a contract for goods or services.*
>
> (2) Divisions (I) and (J) of this section do not apply to actions of the controlling board. (Emphasis added.)

This language states plainly that divisions (I) and (J) do not apply to contracts awarded by the various bodies named in the statute, including commissions. The Ohio School Facilities Commission – created pursuant to R.C. 3318.30, designated as a commission, and performing duties prescribed by statute – clearly comes within this exception. *See Black's Law Dictionary* 264 (7th ed. 1999) (defining "commission" as "[a] body of persons acting under lawful authority to perform certain public services"); Ohio Elections Comm'n, Advisory Op. No. 95-3, at 3 (an entity is a board or commission for purposes of R.C. 3517.13 if it is created by statute, is authorized to perform essential state functions, and consists of a group of persons possessing

independent authority and autonomy);[5] Ohio Elections Comm'n, Advisory Op. No. 87-11. Division (M) specifies, however, that the exceptions it establishes apply only if the members of one of the named bodies "act collectively" in the award of a contract for goods or services. Hence, the exception from divisions (I) and (J) established for the Ohio School Facilities Commission applies only when the Commission acts as a body, through the collective action of its members. The actions here at issue – namely, actions taken by the vote of the members of the Commission at their monthly meetings – come within this exception. Accordingly, the exception established by division (M) applies to contracts awarded by the Ohio School Facilities Commission through the collective action of the members of the Commission.

It is evident, also, that boards of education are not subject to the campaign contribution limits of divisions (I) and (J) of R.C. 3517.13 when they enter into contracts for professional design services. Division (M), quoted above, renders divisions (I) and (J) inapplicable to "contracts awarded by . . . boards of education," provided that the members of the board act collectively in the award of the contracts. Hence, the exception established by division (M) applies to professional design services contracts awarded through the collective action of a board of education and approved by the Commission.

We conclude, accordingly, that the campaign contribution limits set forth in R.C. 3517.13(I) and (J) do not apply to professional design services contracts awarded by the board of education of a school district (acting collectively) and approved by the Ohio School Facilities Commission pursuant to R.C. 3318.091, or to construction management or other consulting contracts awarded by the Ohio School Facilities Commission (acting collectively) pursuant to R.C. 3318.30 and R.C. 3318.31.

We turn now to consideration of the other divisions of R.C. 3517.13 expressly referenced in divisions (I) and (J).

Provisions of divisions (K), (L), and (N) of R.C. 3517.13

Division (K) of R.C. 3517.13 states:

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[5] Ohio Elections Comm'n, Advisory Op. No. 95-3 states that the intent of division (M) is "to ensure that a 'board' is composed of more than one person, performs a [public] function, and possesses sufficient independent authority and autonomy so that it is not simply a mouthpiece for a single elected official." The Advisory Opinion finds, on the facts there under consideration, that this intent is met when a board consists of a majority of members who may be removed only for cause. The removal aspect is not addressed by statute, and we do not find it to be an essential element of a board or commission under division (M) of R.C. 3517.13. *See also* R.C. 35171.3(K) (excluding from the Governor's responsibility contracts awarded by members of boards or commissions appointed by the Governor).

> (K) For purposes of divisions (I) and (J) of this section, if a public officer who is responsible for the award of a contract is appointed by the governor, whether or not the appointment is subject to the advice and consent of the senate, *excluding members of boards, commissions, committees, authorities, councils, boards of trustees, task forces, and other such entities appointed by the governor*, the office of the governor is considered to have ultimate responsibility for the award of the contract. (Emphasis added.)

This division provides, in general, that, if a public officer who is responsible for the award of a contract is appointed by the Governor, then the Office of the Governor is considered to have ultimate responsibility for the award of the contract. Thus, a Governor's appointee is prohibited from awarding an unbid contract to persons or businesses that have made certain contributions to the Governor or the Governor's campaign committee. However, division (K) contains an express exclusion for members of boards, commissions, committees, authorities, councils, boards of trustees, task forces, and other such entities appointed by the Governor.

Two voting members of the Ohio School Facilities Commission (the Directors of Administrative Services and the Office of Budget and Management) were appointed by the Governor to the positions they hold, but not specifically to the Commission. The other voting member of the Commission was appointed by the State Board of Education, which has elected officials as eleven of its nineteen voting members and members appointed by the Governor as its other eight voting members. The four nonvoting members are officials elected to the General Assembly. When the Commission acts collectively, it is excluded from divisions (I) and (J) by the operation of division (M).

It appears that, if a Commission member acts in a capacity other than member of the Commission, the official is subject to the terms of R.C. 3517.13 as those terms apply to the capacity in which the official acts. Thus, the Director of Administrative Services or the Director of the Office of Budget and Management, having been appointed by the Governor, would come within the provisions of division (K) when entering into a contract on behalf of the Department of Administrative Services or the Office of Budget and Management, and would not be excluded because of membership on the Commission. Accordingly, the fact that a Governor's appointee is an ex officio member of the Commission would not eliminate the Governor's responsibility for actions taken by the appointee acting as director and remove those actions (unrelated to Commission activity) from the applicability of the campaign contribution limits of divisions (I) and (J). In contrast, the Superintendent of Public Instruction, who was not appointed by the Governor, could not in any circumstances trigger the operation of division (K).

It is also possible that a member of the Commission might act on behalf of the Commission but without the collective action of the Commission. *See* R.C. 3318.30(A) ("[i]n its discretion and as it determines appropriate, the commission may delegate to any of its members, executive director, or other employees any of the commission's powers and duties to carry out its functions"). In that case, the exception of division (M) would not apply, because there would not be collective action of the Commission, and there is some question as to how

division (K) might apply. It is not clear if division (K) would exclude Governor-appointed members of the Commission from the operation of divisions (I) and (J) if the officials acted as members of the Commission but with individual responsibility, delegated by the Commission as authorized by statute. There is ambiguity in the language excluding "members of . . . commissions . . . appointed by the governor," and there may be some question as to whether it applies to the Directors of Administrative Services and the Office of Budget and Management, who are appointed to their offices as directors and serve ex officio on the Ohio School Facilities Commission. Further, it is not clear if a member acting without the collective action of the Commission, pursuant to delegated authority, is "responsible" for the award of the contract within the meaning of division (K). Because you have informed us that the contracts in question were all either (1) awarded by the Commission as a body, acting collectively, or (2) awarded by local boards of education acting collectively and approved by the Commission as a body, acting collectively, it is unnecessary to attempt to resolve these issues at this time.

Division (L) of R.C. 3517.13 contains the same provisions as division (K), but makes them applicable to a public officer appointed by the elected chief executive officer of a municipal corporation, a charter county, or a county operating under an alternative form of county government. It is not relevant to the questions here under consideration.

Division (N) of R.C. 3517.13 contains provisions pertaining to the timing of the campaign contribution limits set forth in divisions (I) and (J). It addresses the time during which, and persons to whom, contributions must be made to come within those limits. It also addresses the time during which a person must have held a described position or status in order to come within the provisions of divisions (I) and (J). These matters are not at issue in the instant case.

Effect of contractual language referring to R.C. 3517.13

Your second question is whether the language of the contracts in question operates to make the campaign contribution limits of divisions (I) and (J) applicable to parties contracting to provide services, even though those limits are not applicable pursuant to the provisions of R.C. 3517.13. As discussed above, the language at issue in each contract is a provision stating that the party contracting to provide services "represents that it is familiar with all applicable ethics law requirements, including without limitation Sections 102.04 and 3517.13 of the Ohio Revised Code, and certifies that it is in compliance with such requirements."

By its terms, this language provides a representation by the contracting party that the contracting party is familiar with all applicable ethics law requirements, and a certification that the contracting party is in compliance with "such" requirements – that is, with all applicable ethics law requirements. R.C. 102.04 and R.C. 3517.13 are named as ethics laws included among those that might be applicable; the sections are named "without limitation," indicating that there may be other applicable laws that are not listed. The language of the contract does not provide a requirement that the contracting party comply with all ethics provisions contained in the two named statutes, but rather that the contracting party comply with all ethics law requirements that are "applicable" to the contracting party, whether the requirements appear in

the two named statutes or elsewhere. Thus, the contractual language provides a representation that the contracting party is familiar with its ethical obligations and is in compliance with them. The reference to R.C. 3517.13 does not require the contracting party to comply with provisions of R.C. 3517.13 unless those provisions, by their terms, are applicable to the contracting party in the circumstances covered by the contract. Thus, the contractual language does not create an independent obligation to observe the campaign contribution limits. It requires only that the contracting party certify compliance with applicable law.

As discussed above, under the provisions of R.C. 3517.13, the campaign contribution limits set forth in divisions (I) and (J) do not apply to professional design services contracts awarded by the board of education of a school district (acting collectively) and approved by the Ohio School Facilities Commission pursuant to R.C. 3318.091, or to construction management or other consulting contracts awarded by the Commission (acting collectively) pursuant to R.C. 3318.30 and R.C. 3318.31. The standard contractual language containing a reference to R.C. 3517.13 does not operate to make these campaign contribution limits applicable to the party contracting to provide services. Therefore, contracts for professional design services, construction management services, or other consulting services that contain the language in question do not require the service providers to comply with the campaign contribution limits set forth in R.C. 3517.13.

We conclude, accordingly, that standard contractual language stating that the party contracting to provide professional design services, construction management services, or other consulting services "represents that it is familiar with all applicable ethics law requirements, including without limitation Sections 102.04 and 3517.13 of the Ohio Revised Code, and certifies that it is in compliance with such requirements," contained in a contract approved or awarded by the Ohio School Facilities Commission, does not require the contracting party to comply with the campaign contribution limits set forth in R.C. 3517.13(I) and (J). This means that a contracting party may donate amounts in excess of $1,000 to a public officer's campaign committee and, if the contracting party is doing public work only with the Commission or with a board of education subject to the Commission's approval, and not with another public agency to which R.C. 3517.13 applies, the contracting party will be able to certify that it is not in violation of R.C. 3517.13.

The conclusion that the standard contractual language considered in this opinion is ineffective to create an independent obligation to observe the campaign contribution limits of R.C. 3517.13 does not mean that such a result cannot be achieved. If the Commission, in the exercise of its discretion, wishes to require parties with which it contracts, or parties whose contracts it approves, to refrain from making campaign contributions in excess of the amounts set forth in R.C. 3517.13(I) and (J), it may do so by insuring that the contracts include language that clearly imposes this requirement. *See* R.C. 3318.091; R.C. 3318.30; R.C. 3318.31. Language of this sort would create a contractual obligation, rather than a statutory obligation, that the contracting parties comply with the campaign contribution limitations set forth in R.C. 3517.13(I) and (J). Further, the discretionary inclusion of this contractual language would assist

the Commission in avoiding any appearance of impropriety in the awarding or approval of contracts.

Conclusions

For the reasons set forth above, it is my opinion, and you are advised, as follows:

1. The campaign contribution limits set forth in R.C. 3517.13(I) and (J) do not apply to professional design services contracts awarded by the board of education of a school district (acting collectively) and approved by the Ohio School Facilities Commission pursuant to R.C. 3318.091, or to construction management or other consulting contracts awarded by the Ohio School Facilities Commission (acting collectively) pursuant to R.C. 3318.30 and R.C. 3318.31.

2. Standard contractual language stating that the party contracting to provide professional design services, construction management services, or other consulting services "represents that it is familiar with all applicable ethics law requirements, including without limitation Sections 102.04 and 3517.13 of the Ohio Revised Code, and certifies that it is in compliance with such requirements," contained in a contract approved or awarded by the Ohio School Facilities Commission, does not require the contracting party to comply with the campaign contribution limits set forth in R.C. 3517.13(I) and (J).

Respectfully,

JIM PETRO
Attorney General