

OPINION NO. 73-053

Syllabus:

A former member of a city board of zoning appeals, who is a building contractor, is not precluded by the provisions of R.C. 2919.10 from bidding competitively on a building contract for the city within the year following his resignation from the board.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: William J. Brown, Attorney General, June 6, 1973

I have before me your request for my opinion which may be stated as follows:

Mr. A. has been in the construction business for fifteen years. He is presently the President of a construction firm which bears his name. The firm has served as general contractor in northern Ohio generally, and particularly in and around the City of Berea, Ohio. Mr. A. is neither an engineer nor an architect by profession.

In January, 1971 Mr. A was appointed by the Mayor of the City of Berea as a member of the Board of Zoning and Building Code Appeals of the City for a term of five years. He served as a member of the Board until January, 1973, when he resigned. At no time during his service on the Board of Zoning and Building Code Appeals was Mr. A the Chairman.

Under the Charter of the City of Berea the Board of Zoning and Building Code Appeals is empowered to hear and decide appeals for exceptions and variances in the application of the zoning ordinances and regulations of the City of Berea, and to hear and decide appeals of orders and decisions of officials designated by ordinances to enforce the building code of the City of Berea.

The City of Berea now contemplates the alteration and remodeling of a building owned by the City to be used for government offices. Because the property is already zoned for the intended use, this project was not considered by the Board of Zoning and Building Code Appeals at any time, nor will it be. Mr. A has not performed any services, either public or private, with respect to this project. If the City of

Berea decides to go forward with this construction Mr. A's construction firm would like to bid on the project. Under its Charter the City of Berea will only contract for this construction on the basis of competitive bids.

Based on the foregoing facts the following question arises:

Is a general contractor precluded from bidding competitively on a City of Berea construction project within one year after his resignation as a member of the Board of Zoning and Building Code Appeals of the City, and may the City of Berea award the contract to the general contractor if he is the lowest and best bidder within one year after such resignation?

The only provision of the Revised Code which restricts the activities of former municipal officials after resignation is R.C. 2919.10. That Section provides as follows:

No officer of a municipal corporation or member of the council thereof or a member of a board of township trustees, shall be interested in the profits of a contract, job, work, or services for such municipal corporation or township, OR act as commissioner, architect, superintendent, or engineer, in work undertaken or prosecuted by such municipal corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employee of the contractor of such contract, job, work, or services while in office.

Whoever violates this section shall forfeit his office and be fined not less than fifty nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both. (Emphasis added.)

Since this is a penal statute, it must, of course, be strictly construed. State v. Winterich, 157 Ohio St. 414, 419 (1952): R.C. 1.11. In Opinion No. 73-052, Opinions of the Attorney General for 1973, I discussed the applicability of the Section to a municipal employee who had resigned. In that Opinion, I concluded that the phrase, "or for one year thereafter", restricts only those who qualify as "commissioners, architects, superintendents, or engineers", from having an interest in work undertaken by the city after termination of their public employment.

I fail to see how the president of a construction firm can be included under any of these four classifications. You state that he is neither an architect nor an engineer, and it is clear that he is not a commissioner. Nor does it appear how the president of a construction firm can be classed as a superintendent. But, regardless of how he is classed, what is involved here is a contract by an outside firm "for" the city, which falls under the first clause of R.C. 2919.10 and is not prohibited by the "for one year thereafter" phrase of the second clause. The prohibition of the second clause is designed to prevent a

city official from becoming a commissioner, architect, superintendent or engineer "in work undertaken or prosecuted by" the city. These four are well recognized city positions (see, e.g., Wright v. Clark, 119 Ohio St. 462, 467-468 (1928)), and the prohibition must mean that a former city official may not return to city employment in one of these capacities for at least a year after leaving office. But it does not apply to a former city official who becomes an architect or engineer for a firm which has a contract to do work for the city.

Finally, it is important to note here that the former city official is bidding competitively on the city construction project as required by the city charter. The award will go to the lowest and best bidder on the contract. This procedure obviates the possibility that there might be any use of inside information to secure the contract. See Richardson v. Township Trustees, 6 Ohio N.P. (n.s.) 505 (1908). In addition, as the request notes, the zoning of this particular project was never considered by the board of zoning appeals while this particular individual was a member.

In specific answer to your question it is my opinion, and you are so advised, that a former member of a city board of zoning appeals, who is a building contractor, is not precluded by the provisions of R.C. 2919.10 from bidding competitively on a building contract for the city within the year following his resignation from the board.