

Executive Branch Ethics Commission

ADVISORY OPINION 07-40

December 14, 2007

RE: May the naming rights for the Kentucky Horse Park's new indoor arena be sold?

DECISION: Yes, provided the selling of the naming rights is competitively bid and the sale has an overriding public benefit.

This opinion is issued in response to your October 10, 2007, request for an Advisory Opinion from the Executive Branch Ethics Commission ("Commission"). This matter was reviewed at the December 14, 2007, meeting of the Commission and the following opinion is issued.

On behalf of the Finance and Administration Cabinet (the "Cabinet") you are seeking guidance as to what, if any, ethical considerations should be taken into account regarding the possible sale of naming rights for the Kentucky Horse Park's indoor arena currently under construction. You state that the naming rights to the new indoor arena would be competitively bid in accordance with the provisions of the Model Procurement Code set forth in KRS Chapter 45A. The purpose behind selling the naming rights is to create an additional source of revenue for the Commonwealth in order to help cover the costs of the arena that have not been covered by appropriations from the General Assembly and to help the park "put its best foot (hoof?) forward" for the 2010 Alltech FEI World Equestrian Games.

KRS 11A.005(1)(a) provides:

(1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:

(a) A public servant be independent and impartial;

(b) Government policy and decisions be made through the established processes of government;

(c) A public servant not use public office to obtain private benefits; and

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(d) The public has confidence in the integrity of its government and public servants.

Additionally, KRS 11A.020(1)(d) provides:

(1) No public servant, by himself or through others, shall knowingly:

...

(d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

The Commission would like to point out that state agencies are represented by public servants who make the recommendations and decisions on behalf of the state agencies by which they are employed. Thus, any action taken or allowed by a state agency is a result of a decision or recommendation made by a public servant. As the statute requires public servants to be independent and impartial, it can be construed that state agencies represented by public servants should be independent and impartial, and also that state agencies should not be used to create privileges or advantages for others in derogation of the public interest at large.

The Commission has previously concluded that “whether or not a state agency may enter into a partnership with a private company is a policy decision that is dependent on many factors. The ethics code requires that state officials be independent and impartial in carrying out duties for the Commonwealth. This factor is paramount in considering such partnering. State officials have an inherent duty to avoid any appearance of favoritism. Another factor to consider is the benefit the partnership will provide for the citizens of the Commonwealth and the benefit for the state’s economic development.” (Advisory Opinion 02-21)

The Commission has determined that a state agency may partner with a private company to promote a state program if there is an overriding public benefit and if such partnering is open to any company interested. In addition, a state agency also may solicit corporate donations for state-sponsored programs as long as the donating entities have no business or regulatory relationship with the agency and are not lobbying or seeking to influence matters of the state agency. Such donations may be recognized by a plaque or marker to identify the sponsorship but should not be publicly recognized otherwise. See Advisory Opinions 02-21, 02-33 and 07-27, attached.

You state that the naming rights for the arena, which would create a public/private partnership, are to be competitively bid pursuant to the Model Procurement Code. Pursuant to KRS 45A.010(2), the underlying purposes and policies of the Model Procurement Code include the following:

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...

(d) To provide for increased public confidence in the procedures followed in public procurement;

(e) To insure the fair and equitable treatment of all persons who deal with the procurement system of the Commonwealth;

..., and

(g) To provide safeguards for the maintenance of a procurement system of quality and integrity.

The Model Procurement Code is consistent with the goals of the Executive Branch Code of Ethics in providing for integrity and fair treatment. However, since the sale of the naming rights is not an expenditure of public funds or a disposal of property, the Commission is uncertain whether the sale of the naming rights would be required to be competitively bid pursuant to the Model Procurement Code in KRS 45A.020. The Commission commends you for applying the provisions of open competition and competitive bidding, whether or not required by the Model Procurement Code, in order to open the donations to any interested parties.

The Commission has in the past held that the competitive bid process does serve to alleviate KRS Chapter 11A concerns, such as in Advisory Opinion 06-21, where the Commission stated that the inclusion of an employee discount in the state's open bid for competition served to eliminate KRS 11A.045(1) concerns regarding gifts to public servants. It is the Commission's opinion that the same would be true with the case at hand. If the naming rights are sold through the competitive bid process, then the process would be open to any interested individual or business and the contract would be awarded in an independent and impartial manner, even though such a public/private partnership may be with an entity that might have a business or regulatory relationship with the Kentucky Horse Park.

Furthermore, as addressed in your letter, it is apparent that the proposal to sell the naming rights provides an overriding public benefit to the Commonwealth. As stated in Advisory Opinion 02-21, public/private partnerships may not be prohibited when a state agency partners with a private company, or a public official appears in an advertisement for a program co-sponsored by a private company, to promote a state program that will benefit the entire Commonwealth or will promote economic development or tourism in the state. If the goal of such partnering is not to promote the private company, but to benefit the people of the Commonwealth, then any benefit to the private company is secondary. This would be the case with the selling of the naming rights to the new arena and thus creating a public/private partnership. When a state agency wishes to partner with a private company to promote a state

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program that has overriding public benefit, it may do so, provided such partnering is open to any company interested in such partnering.

In conclusion, since the naming rights are to be competitively bid, and thus are open to any interested person or business, which serves to avoid any appearance of favoritism by the Commonwealth, and since the Commission believes that the overriding public benefit from the partnership is sufficient to justify any benefit to and/or endorsement of the private company, the Kentucky Horse Park is not prohibited from partnering with a private company to name the indoor arena through a public/private partnership. The Commission does warn however that although such a public/private partnership to name buildings is allowable in this case and will be awarded in a fair and impartial manner, it is a trend that is somewhat disturbing to the Commission as it does reflect an endorsement that will forever remain with the state agency.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Vice Chair: E. Patrick Moores

Attachments: Advisory Opinion 02-21
Advisory Opinion 02-33
Advisory Opinion 07-27
Advisory Opinion 06-21