



COMMONWEALTH OF KENTUCKY
EXECUTIVE BRANCH ETHICS COMMISSION
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Executive Branch Ethics Commission
ADVISORY OPINION 18-02
May 14, 2018

RE:

1. Does a public servant violate the Executive Branch Code of Ethics by bidding on items offered for sale by his or her agency?
2. If yes, is the policy proposed by the agency sufficient to address these concerns?
3. If no, what further prohibitions should be required to ensure the Executive Branch Code of Ethics is not being violated?

DECISION:

1. Qualified No, so long as the bidding by the public servant is conducted during the public servant's approved, personal leave time, the public servant was not involved in setting up the auction on behalf of the agency holding the auction, and the public servant does not have knowledge that is generally unavailable to the public.
2. No, the proposed policy should be amended to conform with the Answer provided in answer to Question #1.
3. The proposed policy should be amended to conform with the Answer provided in answer to Question #1, above.

This opinion is issued in response to your March 27, 2018 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission") on behalf of the Department for Facilities and Support Services. This matter was reviewed at the May 14, 2018 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows: The Division of Surplus Properties ("Surplus") is a part of Facilities and Support Services ("Facilities") in the Finance and Administration Cabinet ("Cabinet"). Facilities is responsible for surplus property services. The state surplus property program disposes of excess federal and state surplus property in the most cost-efficient manner and in the best interest of the Commonwealth of Kentucky and its citizens.

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Surplus regularly disposes of surplus state and federal property through live and online auctions. Recently, the Commissioner of Facilities discovered that Surplus employees have been bidding on and purchasing items being sold by Surplus at live auctions and spot bid sales, with items later being resold for a profit by the employees. The employees participating in bidding on items in the auction were on state time and were present on behalf of Surplus to administer operation of the live auction or spot bid sales.

Believing these purchases were contrary to the Executive Branch Code of Ethics prohibitions against self-dealing and the Finance Cabinet's FAP 220-19-00 requiring that employees not "personally benefit from the disposal of surplus property," the Facilities Commissioner drafted a policy barring any on duty Surplus employee assigned to administer a surplus live auction or spot bid from purchasing items at that sale. Under this new policy, any Surplus employee wishing to bid at auctions must utilize leave time, approved by their supervisor, to attend the auction. Further, while employees may continue to purchase items from live and online auctions or spot sales, they may not do so if they were involved in posting items for sale, nor may they place bids using state computer resources or on state time.

You seek an opinion as to whether the Cabinet's policy is contradictory to KRS 11A.040(4)(d), which provides a carve out provision related to public auctions from the umbrella provision prohibiting self-dealing in the Executive Branch Code of Ethics.

The application of 11A.040(4)(d) to Surplus-hosted auctions raises heightened concerns because Surplus employees are directly responsible for administering public auctions, the same auctions these employees would like to participate as bidders. The nature of their duties may grant them special knowledge of the items up for auction as part of their regular job duties, even accounting for opportunities of other bidders to inspect items prior to bidding. Similarly, Surplus employees mixing their duty to administer state auctions with personal efforts to acquire specific items at an auction might undermine public perceptions that Surplus is administering its auctions in an objective and disinterested manner.

In order to eliminate any ambiguity going forward, Facilities requests an advisory opinion to respond to the following:

1. Does a Surplus employee violate the Executive Branch Code of Ethics by bidding on items offered for sale by their agency?
2. If yes, is the policy proposed by Facilities above sufficient to address these concerns?
3. If no, what further prohibitions should be required to ensure the Executive Branch Code of Ethics is not being violated?

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There are several provisions of the Executive Branch Code of Ethics (The Ethics Code) that are at play in your proposed scenario. First and foremost, the overarching statement of public policy provides as follows:

KRS 11A.005 Statement of public policy.

- (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
 - (d) The public has confidence in the integrity of its government and public servants.
- (2) The principles of ethical behavior for public servants shall recognize that:
 - (a) Those who hold positions of public trust, and members of their families, also have certain business and financial interests;
 - (b) Those in government service are often involved in policy decisions that pose a potential conflict with some personal financial interest; and
 - (c) Standards of ethical conduct for the executive branch of state government are needed to determine those conflicts of interest which are substantial and material or which, by the nature of the conflict of interest, tend to bring public servants into disrepute.

As such, your concerns are warranted when you have employees setting up a public auction and participating as bidders in the auction while on state time. The Commission applauds the Cabinet and Facilities for the desire to ensure that the processes of government are being carried out in a fashion to ensure conflicts of interest are kept at a minimum and employees are not perceived as abusing the public trust.

KRS 11A.020 provides prohibited conduct under which public servants can be charged with a violation of the Ethics Code.

- (1) No public servant, by himself or through others, shall knowingly:
 - (a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;
 - (b) Use or attempt to use any means to influence a public agency in derogation of the state at large;

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- (c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or
 - (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.
- (2) If a public servant appears before a state agency, he shall avoid all conduct which might in any way lead members of the general public to conclude that he is using his official position to further his professional or private interest.
- (3) When a public servant abstains from action on an official decision in which he has or may have a personal or private interest, he shall disclose that fact in writing to his superior, who shall cause the decision on these matters to be made by an impartial third party.

The very nature of the scenario you present begs the question of whether the employees are using their official positions to secure privileges for themselves when they bid on a public auction while on state time or by use of state resources. Your policy goes a long way to ensure that, at a minimum, the Surplus employees are not on state time while participating as bidders in a Cabinet-sponsored public auction.

The Ethics Code further provides provisions to prevent a public servant from engaging in self-dealing by use of his or her official position. KRS 11A.040(4) provides:

- (4) A public servant shall not knowingly himself or through any business in which he owns or controls an interest of more than five percent (5%), or by any other person for his use or benefit or on his account, undertake, execute, hold, bid on, negotiate, or enjoy, in whole or in part, any contract, agreement, lease, sale, or purchase made, entered into, awarded, or granted by the agency by which he is employed or which he supervises, subject to the provisions of KRS 45A.340. This provision shall not apply to:
- (a) A contract, purchase, or good faith negotiation made pursuant to KRS Chapter 416 relating to eminent domain; or
 - (b) Agreements which may directly or indirectly involve public funds disbursed through entitlement programs; or
 - (c) A public servant's spouse or child doing business with any state agency other than the agency by which the public servant is employed or which he supervises; or
 - (d) *Purchases from a state agency that are available on the same terms to the general public or that are made at public auction; or*
 - (e) Sales of craft items to a state park by interim state employees designated as craftspersons under KRS 148.257.

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(emphasis added). Yet, as you state above, KRS 11A.040(4)(d) does provide a carve-out provision that allows public servants to participate in public auctions. However, the Ethics Code merely sets minimum standards for agencies and public servants to follow. The Ethics Code does not prohibit an Executive Branch agency from establishing more restrictive standards than are established in the Ethics Code. Your agency may indeed have the necessity of enacting heightened standards of propriety to ensure that the public servants in your agency are not perceived as using their access to resources to obtain an unfair advantage over the public participating in such auctions.

As to the questions you have presented in your request, the Commission will answer each in turn as follows:

QUESTION #1: Does a Surplus employee violate the Executive Branch Code of Ethics by bidding on items offered for sale by their agency?

ANSWER: The answer to this question is dependent on many variables. If the public servant is participating as a bidder while on his or her own personal leave time, meaning the employee has scheduled with his or her management to take appropriate leave time, then the public servant may participate as a bidder at a public auction in line with the carve-out provision of KRS 11A.040(4)(d). If the public servant is on state time, then the public servant cannot participate in bidding at a public auction because it is not within the public servant's job duties to bid on public auctions for his or her own personal use or enjoyment.

Furthermore, a public servant should not be involved in setting up the auction on behalf of Facilities while also participating as a bidder in the auction. Additionally, any employee who has knowledge that is not generally available to the public should not participate as a bidder in the auction. These employees would have an unfair advantage over the public. As such, these employees, even if on their own time, would be participating in a state agency-sponsored event. As such, the conflict of interest provisions in KRS 11A.020(1)(a) and (d) and KRS 11A.020(3) would prohibit that public servant in participating in an auction that employee organized on behalf of Facilities. It behooves the agency to establish this policy to ensure that these auctions are operated in an independent manner.

QUESTION #2: If yes, is the policy proposed by Facilities above sufficient to address these concerns?

ANSWER: No, the proposed policy should be amended to conform with the Answer provided in answer to Question #1, above. Furthermore, an agency may implement more restrictive policies

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to ensure that the public interest is served and to limit conflicts of interest and perceived appearances of impropriety.

QUESTION #3: If no, what further prohibitions should be required to ensure the Executive Branch Code of Ethics is not being violated?

ANSWER: The proposed policy should be amended to conform with the Answer provides in answer to Question #1, see above.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

A handwritten signature in blue ink that reads "William G. Francis". The signature is written in a cursive style and is positioned above a horizontal line.

By Chair: William G. Francis