



BALTIMORE CITY BOARD OF ETHICS
Ethics Opinion 17-001
(June 7, 2017)

A City agency has requested an opinion from the Ethics Board about the propriety of a request for services made to a controlled donor. In the situation giving rise to this request, the controlled donor has a legally binding agreement with the City requiring it to undertake certain actions. These actions are not in every case precisely defined. The agency that made the request for services believes that its request was for something that would allow the controlled donor to meet one or more of its obligations under the agreement it has with the City. However, the request was made by an official in the course of discussion about an unrelated topic, and the specific provisions of the agreement that the agency believes cover the request were not referenced at the time of the request.

This scenario touches on issues addressed previously by this Board in Opinions 11-001 and 12-001. In Opinion 11-001 the Board reiterated that exchanges based on a valid contract typically do not implicate the Ethics Code's gift provisions. There we said:

Generally, the Ethics Board does not review City contracts to determine if they are in fact gifts. Instead, it relies on market forces to dictate the value of services that the City may provide, and the Board of Estimates to set service charges and approve contracts at rates that provide adequate consideration to both parties to an exchange. Since the Ethics Board is not in a position to systematically evaluate the value of the consideration in every transaction involving the City, it must presume, absent evidence to the contrary, that contracts openly entered into under market conditions and approved by the Board of Estimates are genuine, provide adequate consideration on both sides, and are not disguised gifts.

In Opinion 12-001 the Board discussed a situation where a contract stipulated that the City had a right to a certain clearly defined amount of property but a City agency was habitually requesting that more than the amount stipulated in the contract be provided to it. At that time we held that where a request clearly exceeds the bounds of a contract it can be considered a solicitation for a gift under Ethics Code § 6-26 {"Solicitation prohibited"} since the required "adequate and lawful consideration" for the transfer is not present when the bounds of a contract are clearly exceeded.

In the situation giving rise to this request, the provisions of the agreement with the City that may cover the request are much less precise than was the case for the contract discussed in



Opinion 12-001. Determining whether or not the requested service does in fact fall within the agreement would require the Ethics Board to make the type of comprehensive review of a contract, its negotiating history, and the subsequent practices of the parties that the Board rejected as unnecessary and impractical in regards to determining adequacy of consideration in Opinion 11-001.

Where an agency raises a colorable argument that a request is for something required by a valid, openly entered into, agreement, the parties to the agreement, or, if a dispute is raised, the courts or other factfinders stipulated in the agreement, are the proper judges of whether or not the request is covered by the agreement. Absent any evidence of wrongdoing, the Ethics Board should not take it upon itself to interpret a lawful agreement that it is not a party to.

As discussed in Opinion 12-001, the mere existence of an agreement with an entity does not allow the City to request anything that it wants from that entity without violating Ethics Code § 6-26 {"Solicitation prohibited"}. However, when the thing requested is of the type contemplated by an agreement, and the terms of the agreement do not on their face call for something less than is being requested, the propriety of the request is a matter of contract law rather than an issue under the Ethics Code.

It is the Opinion of the Ethics Board that, where a request is made by a City entity to a controlled donor under a colorable claim that the request is for something required by a contract or other legal agreement between the entity and the controlled donor, absent any evidence that either the agreement or the request are a sham to allow a disguised gift, the request should not be treated as an impermissible solicitation of a gift. Any dispute about whether or not the request is in fact valid under the agreement should be resolved in the manner specified or otherwise contemplated by the agreement, rather than by the Ethics Board.

In Opinion 12-001 we concluded by urging the City to "take care to ensure that any future arrangements it makes with any entity that allow any City agency to request free items, are explicitly spelled out in, and governed by, a valid contract". Similarly, more explicit discussion of each party's responsibilities in these kinds of agreements, or ensuring that requests intended to fall under an existing agreement more specifically reference the provisions of an agreement that the request is being made pursuant to, would do much to avoid creating a situation where any question arises about whether or not a gift is being impermissibly solicited.