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***BOARD CERTIFIED CITY,
COUNTY
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LAW**

MEMORANDUM

**TO: C. Christopher Anderson, III, Executive Director and General Counsel
State of Florida Commission on Ethics 325 John Knox Road Building E, Suite 200
Tallahassee, FL 32303**

FROM: Lynne C. Rhode, Office of General Counsel, JEA Chief Legal Officer

**CC: Jason R. Gabriel, General Counsel, Office of General Counsel, City of Jacksonville
Lawsikia J. Hodges, Deputy Government Operations, Office of General Counsel,
City of Jacksonville**

RE: JEA Conflict of Interest Inquiry: ITN 127-19 Negotiation Team Members

DATE: November 13, 2019

I. INTRODUCTION

Pursuant to Rules 34-6.002 and 34-6.004, on behalf of Melissa Dykes, Herschel Vinyard, Jordan Pope, and Camille Lee-Johnson (the "ITN Negotiation Team Members"), and in accordance with their request, we are writing to request an informal written advisory opinion on the ethics laws inquiry set forth below. The ITN Negotiation Team Members have requested an opinion be issued by the Commission on Ethics as soon as possible. Please be advised that the Office of General Counsel has discussed this inquiry with you in prior telephone conversations.

II. FACTUAL BACKGROUND

A. *The ITN Process and Negotiation Team*

On July 23, 2019, the JEA Board of Directors (the “JEA Board”) approved Resolution 2019-07, authorizing the CEO of JEA to issue a competitive solicitation to investigate and pursue a non-traditional utility response as presented to the JEA Board at the July 23, 2019 JEA Board Meeting. Pursuant to this authority, on August 2, 2019, JEA issued Invitation to Negotiate #127-19, entitled “Strategic Alternatives” (the “ITN”), inviting interested parties to submit Replies detailing strategic alternatives that are aligned with JEA’s goal of maximizing customer, community, environmental, and financial value over the long term. Potential alternatives that could be proposed included, but were not limited to, operational changes, structural changes, joint ventures, development partnerships, community ownership, corporate ownership, an initial public offering, private placement, technology conversion, oil and gas conversion, utility conversion, or another recapitalization. Consistent with Resolution 2019-07, the ITN set forth certain process goals as minimum requirements for maximizing customer, community, environmental, and financial value over the long term. Those minimum requirements include (among others) protection of certain employee retirement benefits and maintenance of substantially comparable employee compensation and benefits for three years. Initial Replies to the ITN were received and a public bid opening meeting was held on October 7, 2019. Following the evaluation of the initial Replies as called for under the ITN, a Notice of Intent to Negotiate was posted on October 14, 2019, announcing JEA’s intent to negotiate with nine qualified Respondents.

Consistent with the terms of the JEA Procurement Code, Section 3.3.2 of the ITN calls for the appointment of a Negotiation Team consisting of at least three individuals to conduct negotiations with Respondents within the competitive range, review revised Replies and Best and Final Offers (“BAFOs”), and formulate a recommended award. Section 3.3.8 of the ITN contemplates that the Negotiation Team will review the final round of BAFOs and meet to determine which offer constitutes the best value to JEA based upon the Selection Criteria set forth in the ITN. Thereafter, the Negotiation Team will develop a recommendation that identifies the award that they assess will provide the best value to JEA based upon the Selection Criteria. The ITN recognizes that, following rendition of the Negotiation Team’s recommendation, the JEA Board of Directors will make the final decision as to which Respondent should be selected for award, if any, based on the recommendation of the Negotiation Team. This recommendation will be considered by the JEA Board in conjunction with additional possible alternative approaches, such as an initial public offering or the formation of a cooperative.

The JEA Board has significant discretion regarding how to handle the recommendation received from the Negotiation Team and can accept or reject the recommendation, request additional or further negotiations, request alternative terms, or reject the recommendation and determine that no contract resulting from the ITN should be pursued. In addition, the JEA Board can chose to move forward with any possible alternative approach or to move forward with no option and maintain the status quo.

In the event that the JEA Board approves moving forward with a transaction that would result in transferring any function or operation which comprises more than ten percent of the total of the utilities system by sale, lease or otherwise to any other utility, public or private, certain additional approvals are required. Specifically, Section 21.04(p) of the Charter of the City of Jacksonville provides that:

Nothing in this article shall authorize or be construed to authorize JEA to transfer any function or operation which comprises more than ten percent of the total of the utilities system by sale, lease or otherwise to any other utility, public or private without approval of the council; provided, however, that no approval by the council shall become effective without subsequent referendum approval of the terms and conditions of the sale.

Thus, in order for any proposed transaction which would result in the transfer of more than ten percent of the total utility system to occur, approval by the Jacksonville City Council and approval in a referendum of the electorate of the City of Jacksonville in addition to the JEA Board action would be necessary.

Consistent with the terms of Section 3.3.2 of the ITN, calling for the appointment of a Negotiation Team consisting of at least three individuals, JEA through its Chief Procurement Officer has appointed Melissa Dykes, Herschel Vinyard, and Jordan Pope to the Negotiation Team while stating on the record that it is seeking a conflicts review by the OGC and the Commission on Ethics and that such review is pending. Ms. Dykes is JEA's President and Chief Operating Officer. Mr. Vinyard is JEA's Chief Administrative Officer. Mr. Pope is JEA's Director of Economic Development and Real Estate. Each of these ITN Negotiation Team Members are current JEA employees and have been appointed to serve on the Negotiation Team solely in their capacity as JEA Employees.

In addition to the three above-referenced ITN Negotiation Team Members, JEA through its Chief Procurement Officer plans to appoint Ms. Camille Lee-Johnson, who is the current Chairperson of the JEA Board Compensation Committee (the "Committee Chair"), a member of the JEA Board of Directors, as a fourth member of the ITN Negotiation Team, and to vest the sole and exclusive responsibility for negotiating matters concerning employee compensation and benefits with the Committee Chair. The Committee Chair, by contrast to the other ITN Negotiation Team Members, is not a JEA employee and does not participate in JEA employee benefit programs. The Committee Chair receives no compensation or employment benefits for serving on the JEA Board and would receive no compensation or employment benefits for service on the ITN Negotiation Team.

B. Employee Retention Program and Executive Employment Agreements

At the July 23, 2019 meeting of the JEA Board, the JEA Board adopted Resolution 2019-09, approving an Employee Protection and Retention Program and a Form Non-CEO Executive Employment Agreement.

Resolution 2019-09, authorizing the Employee Protection and Retention Program, provides the JEA CEO or his designee with the authority to execute with each full-time employee who is actively employed with JEA on the date of the resolution an employment protection and retention program agreement on the terms and conditions set forth in the Employee Protection and Retention Summary attached to the Resolution. These terms and conditions generally provide, subject to the occurrence of a Recapitalization Event and the satisfaction of the conditions described in the Summary, that each eligible employee may receive a cash payment equal to 100% of his annual base salary in effect on July 23, 2019. Pursuant to the terms of the Summary, all full-time employees who are actively employed with JEA on July 23, 2019 are eligible to receive such cash payment. For purposes of the Summary, a “Recapitalization Event” is defined as follows:

the closing and funding of a transaction or a series of related transactions in accordance with Article 21 of the Charter of the City of Jacksonville and any other applicable law that results in either (i) unencumbered cash proceeds to the City of Jacksonville of at least Three Billion Dollars (\$3,000,000,000) or (ii) at least 50% of the net depreciated property, plant and equipment value of either JEA’s electric system or JEA’s water and wastewater system being transferred, assigned, sold or otherwise disposed of.

Resolution 2019-09 additionally approved the Form Non-CEO Executive Employment Agreement (Exhibit 3 to Resolution 2019-09). Both Mr. Vinyard and Ms. Dykes, as two of the fourteen JEA members of the Senior Leadership Team¹, have since executed their Executive Employment Agreement in substantially the same form as the Form Executive Employment Agreement. Those Agreements set forth the material terms and duties of the respective employees, including relevant termination-related provisions. They are not linked to, contingent upon, or associated with a Recapitalization Event. Exhibit A to those Agreements is a Separation and Transition Agreement subject to execution and mutual release and indemnification and providing that the employee shall serve as a consultant to JEA for a period of six months if terminated by JEA without cause or by employee for good reason. The consulting fee is calculated using an annualized amount equal to the combined total of all items reflected on the employee’s total compensation statement for the most recent 12-month period. No additional payment or benefits are due or payable to the employee consultant.

III. DISCUSSION

ISSUES

¹ Mr. Pope is a Director and is not covered under any comparable employment agreement.

(1) Whether a prohibited conflict of interest arises under section 112.313(7), Florida Statutes, for the ITN Negotiation Team Members, as a result of the Employee Protection and Retention Program or the Executive Employment Agreements?

(2) Whether a voting conflict arises under section 112.3143(3)(a), Florida Statutes, for the ITN Negotiation Team Members, as a result of the Employee Protection and Retention Program or the Executive Employment Agreements or, in the case of the Committee Chair, as a result of her service on the ITN Negotiation Team?

LAW

Section 112.313(7)(a), Florida Statutes, provides that:

No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

Additionally, section 112.3143(3)(a), Florida Statutes, prohibits a county, municipal, or other local public officer from voting in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Section 112.3143(1)(d), Florida Statutes, defines a “special private gain or loss” as follows:

an economic benefit or harm that would inure to the officer, his or her relative, business associate, or principal, unless the measure affects a class that includes the officer, his or her relative, business associate, or principal, in which case, at least the following factors must be considered when determining whether a special private gain or loss exists:

1. The size of the class affected by the vote.

2. The nature of the interests involved.
3. The degree to which the interests of all members of the class are affected by the vote.
4. The degree to which the officer, his or her relative, business associate, or principal receives a greater benefit or harm when compared to other members of the class.

The degree to which there is uncertainty at the time of the vote as to whether there would be any economic benefit or harm to the public officer, his or her relative, business associate, or principal and, if so, the nature or degree of the economic benefit or harm must also be considered.

ANALYSIS

A. There Is No Prohibited Conflict of Interest Under Section 112.313(7)(a)

Section 112.313(7)(a), Florida Statutes, generally prohibits agency employees from holding employment or contractual relationships with business entities or agencies that are subject to the regulation of, or do business with, the agency by which the individual is employed. This statute further prohibits agency employees from having employment or contractual relationships that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties. It appears clear that no conflict of interest under this provision can arise with respect to the ITN Negotiation Team Members.

As described above, the three ITN Negotiation Team Members are employees of JEA. The contemplated fourth Negotiation Team member, the Committee Chair, is a member of the JEA Board of Directors and chairs the JEA Board's Compensation Committee. Pursuant to section 21.03(a) of the Charter of the City of Jacksonville, the JEA Board is "[t]he governing body of JEA," and consists of seven members appointed by the mayor and confirmed by the City Council, and whose members, pursuant to section 21.03(b) of the Charter, are not entitled to compensation, pension, or other retirement benefits on account of service on JEA.

The "agency" of the ITN Negotiation Team Members is JEA, as the Negotiation Team is an advisory board that merely renders a recommended award (a recommendation) to JEA. *See* CEO 16-2 ("We have long held that the 'agency' of a member of an advisory board to a governing body is the governing body."); CEO 06-24 ("We also have found the 'agency' of board members whose boards were solely advisory in nature to be that unit of government which they serve."); CEO 94-36 ("[I]n determining an individual's 'agency' for purposes of the Code of Ethics, an advisory board to a governing body is a part of that body. . . . Referring to the definition of 'public officer,' above, if each 'advisory body' were an 'agency,' it would not have been necessary to specify that any person appointed to hold office in an agency includes 'any person serving on an advisory

body.’ In our view, an advisory body does not constitute a separate agency of government; instead it is a part of a larger government unit that exercises a governmental function.”). Thus, because the relevant “agency” of the ITN Negotiation Team Members for purposes of section 112.313(7)(a) is JEA, the ITN Negotiation Team Members’ employment by JEA, or service on the governing body of JEA, by definition, cannot constitute an employment or contractual relationship with a business entity or agency subject to the regulation of or doing business with JEA. Simply stated, JEA is neither subject to the regulation of, nor does it do business with, itself.

For much the same reason, it appears clear the ITN Negotiation Team Members’ employment by JEA or status as a JEA Board of Directors member cannot constitute a contractual or business relationship that creates a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties as a JEA employee or Board of Directors member. It would simply be illogical to assert that an individual’s status as a JEA employee, who is by definition eligible for compensation and benefits solely by virtue of his or her JEA employment – or as a JEA Board member who is not eligible for JEA employee benefit programs at all – in some way constitutes an employment relationship that creates a continuing or frequently recurring conflict with his or her public duties under the very same employment or Board member relationship with JEA.

B. There Is No Voting Conflict Under Section 112.3143(3)(a)

Section 112.3143(3)(a), Florida Statutes, requires county, municipal, and other local public officers to abstain from voting upon any measure which would inure to his or her special private gain or loss, or which he or she knows would result in a special private gain or loss to certain other persons or entities with specified relationships with the officer.

i. Any gain or loss is remote and speculative

As the Commission has repeatedly and consistently found, section 112.3143(3)(a) “is not applicable when the gain or loss is ‘remote and speculative.’” CEO 12-01. Stated differently, “if there is uncertainty at the time of the vote as to whether the measure will directly affect the officer or any of the listed others and, if so, what the nature or magnitude of the gain or loss might be, the measure/vote does not require the officer’s declaration, abstention, and filing.” *Id.*

In CEO 12-01, the Commission reasoned that city commissioners who owned businesses frequented by cruise ship passengers were not required to abstain from voting upon a measure to seek a channel-widening feasibility study that could ultimately result in an increase in the number of cruise ship passengers visiting their business if additional intermediate steps necessary to actually undertake such a channel widening occurred, as any potential future gain to their businesses was remote and speculative. The Commission reasoned that there was “significant uncertainty” as to whether the vote would ever result in gain or loss to the Commissioners’ businesses, as a significant number of additional events and approvals – including Congressionally-sanctioned changes to regulations – would have to occur before any channel widening that could actually result in a gain or loss to the Commissioners could be completed. *See*

also CEO 05-15 (benefit to client developer from affordable housing ordinance was “remote and speculative” “given the many approvals and events that would have to occur for the client . . . to engage in a particular new project, such as DCA approval or planning board approval[.]”); CEO 06-21 (no special private gain or loss where there were still “innumerable hurdles before any profit could be realized” and individual “d[id] not stand to benefit in any direct way as a result of the measure under consideration.”).

This circumstance is very similar. While three of the ITN Negotiation Team Members (the employees), like all other roughly 2,000 full-time JEA employees, may stand to receive a monetary gain by virtue of the Employee Protection and Retention Program if a recapitalization of JEA were to ultimately occur², any actual recapitalization of JEA is so far removed, and requires so many additional uncertain steps and approvals to be taken, that any potential gain to those ITN Negotiation Team Members is remote and speculative. As described in the above factual background, the role of ITN Negotiation Team Members is simply to conduct negotiations with the Respondents to the ITN. Such negotiations for the competitive solicitation will be occurring while JEA meanwhile continues to explore at least four other strategic alternatives (including maintaining the status quo, pursuing certain significant cost-cutting and revenue increasing measures, an initial public offering, and a community ownership structure). Through the negotiation process, the ITN Negotiation Team Members will assess which Respondent (if any) is able to meet the Board-mandated minimum requirements and constitutes the best value to JEA and should be recommended for award. Furthermore, assuming *arguendo* the negotiation phase of the procurement even results in a recommendation, that recommendation of an award by the ITN Negotiation Team Members in no way results in a recapitalization of JEA occurring. It is merely a recommendation. The Board maintains full discretion and control over the outcome. Before any recapitalization of JEA could occur, the recommendation by the ITN Negotiation Team would first have to be approved by the JEA Board, which retains complete discretion to make the decision as to which Respondent should be selected for award considering the Selection Criteria of the ITN and the Negotiation Team’s recommendation or to elect to go in a different direction entirely and not award a contract resulting from the ITN. If the JEA Board accepted the recommendation of the ITN Negotiation Team and voted to award a contract resulting from the ITN, that contract would then require the approval of the Jacksonville City Council. If the Jacksonville City Council likewise voted to approve the contract, that contract would then require approval in a referendum by the electorate of the City of Jacksonville. Only after each of these analyses and approvals had occurred could any transaction close and a “Recapitalization Event” within the meaning of the Employee Protection and Retention Program actually occur. This factual scenario (even should it materialize) requiring the analysis and selection of the appointed JEA Board, approval of the

² Neither the Employment Agreement nor attached Separation and Transition Agreement are in any way linked to, contingent upon, or associated with a Recapitalization Event. Should Melissa Dykes or Herschel Vinyard be terminated without cause or resign for good reason as a consequence of a Recapitalization Event, they would receive no consequential financial gain, only a potential contractual protection in the form of a 6-month transition consultancy, which may be triggered as it would under any other termination context.

elected Jacksonville City Council, and approval by a referendum of the electorate of the City of Jacksonville, appears to be even more distant and remote than that which the Commission determined to be “remote and speculative” in CEO 12-01 and numerous similar opinions.

ii. Any gain or loss is not a special private gain or loss

Even were the potential gain or loss not remote and speculative, however, based upon the Commission’s well-established precedent, it would not constitute a “special private gain or loss” to the ITN Negotiation Team Members.

In the context of the Employee Protection and Retention Program, such individuals are situated in a substantially similar way to a very large class – each of the approximately 2,000 employees of JEA. Each of these JEA employees stands to gain or lose in the same manner as the three employee ITN Negotiation Team Members under the Employee Protection and Retention Program if a recapitalization of JEA were to ultimately occur – through payment of a retention payment of 100% of his or her base salary under the Employee Protection and Retention Program at the time a Recapitalization Event occurred.

With respect to the Employment Agreement and attached Separation and Transition Agreement, should Melissa Dykes or Herschel Vinyard be terminated without cause or resign for good reason as a consequence of a Recapitalization Event, they would receive no consequential financial or other gain or loss. All that they have (as do all JEA Senior Leadership Team members) is a potential contractual protection in the form of a 6-month transition consultancy, which may be triggered as it would under any other termination context. Any such protection, even if *arguendo* standing alone may be considered a special gain or loss, would be subsumed by the Board’s minimum requirement to be built into the terms of any transaction of comparable salary and benefits to the large class of all employees for a minimum of three years. That minimum requirement would result in salary and benefits for any JEA employee comparable to his/her existing compensation and benefits, whatever those may be, should a Recapitalization Event occur. For example, while a union employee has multiple additional termination and other benefits under Collective Bargaining Agreements that are not applicable to an appointed employee, a pension-eligible employee has additional benefits to those not covered, and Senior Leadership Team members have a possible consultancy protection in the event of termination, all would receive compensation and benefits comparable to their current compensation and benefits.

Finally, out of an abundance of caution, the ITN Negotiation Team has been designed so that the Committee Chair will be the only team member negotiating employee compensation and benefits matters. Her role will be to conduct those particular negotiations. While the other three ITN Negotiation Team members will have knowledge of all terms proposed by Respondents, the Committee Chair alone will negotiate with Respondents on employee compensation and benefits terms and have exclusive internal jurisdiction over the outcome of those negotiations to be included in any final recommendation to the Board by the Negotiation Team. The Committee Chair is not a JEA employee, and pursuant to section 21.03(b) of the Charter is not entitled to compensation, pension, or other retirement benefits on account of her service, so she would not be

impacted in any way by the outcome of employee compensation and benefits negotiations with Respondents.

As the statute expressly recognizes, and as the Commission repeatedly has found, where the potential gain or loss to a local government officer is but a small part of the matter under consideration, and would inure to the gain or loss of a large class of which the officer is a member, there is no “special private gain or loss” within the meaning of the statute. *See, e.g.*, CEO 12-06 (city councilmember who was one of 78 retired firefighters who would be immediately impacted by a decision on the amount of the health insurance subsidy or other pension benefits under collective bargaining agreement was not presented with a voting conflict regarding ratification of the proposed collective bargaining agreement because there was no “special private gain or loss” to the commissioner relative to the other retired firefighters in the class and the agreement contained provisions not limited to retired firefighters); CEO 11-01 (city councilmember not presented with voting conflict when voting on collective bargaining agreement affecting approximately 150 police officers, including her husband, because her husband’s gain or loss was not “special” within the meaning of the statute); CEO 00-13 (city commissioner participating in Firefighter Retirement System not prohibited from voting on ratification of collective bargaining agreement or ordinance changes necessary to effectuate changes to the Retirement System because class consisted of 88 individuals and gain or loss to commissioner would not be “special”). As the Commission has noted, it has “typically . . . concluded that no voting conflict was presented in situations where the interests of the public official involved one percent or less of the class.” *Id.*; *see also* CEO 78-96 (38 out of 5,000 acres involved); CEO 84-80 (1 out of 500 persons whose property would be down zoned); CEO 85-5 (90% of 250 residents affected); CEO 87-18 (300 out of 29,000 acres); CEO 87-27 (involving the rezoning of a town having a population of 210); CEO 87-95 (650 property owners affected); CEO 91-18 (385 other property owners in the area affected by varying degrees); CEO 92-20 (land-use measures affecting 1,000 condominium units and specifically 500 which could have their northerly view impeded by high-rise construction on their north); CEO 92-52 (owner of two five-acre parcels out of 276 parcels of varying size affected by a 4.5 mile road-widening project); CEO 93-12 (297 persons is not so small a class that gain to a firefighter pension board trustee, as an individual member of the class, would be “special”); and CEO 96-12 (owner of four non-residential parcels out of 605 similar parcels affected by a proposed convention center project).

This reasoning is equally applicable here, where three of the ITN Negotiation Team Members are members of a class consisting of the majority of JEA’s approximately 2,000 employees and one is a JEA Board member, not an employee. Each of the three ITN Negotiation Team Members represents a negligible percentage of the large class, consisting of all JEA full-time employees, who stand to potentially gain if a Recapitalization Event occurs within the meaning of the Employee Protection and Retention Program. Even assuming *arguendo* that the recommendation of the ITN Negotiation Team could somehow result in a gain or loss (which it could not, in light of the aforementioned remote and speculative nature of any gain or loss given the numerous additional approvals required before any transaction could occur), the gain or loss to the ITN Negotiation Team Members would not be “special” within the meaning of the statute. Finally, again assuming *arguendo* that the recommendation of the ITN Negotiation Team could somehow

result in a gain or loss and that the gain or loss, *arguendo*, could be considered “special,” the only ITN Negotiation Team member who will have any control whatsoever over employee compensation and benefits discussions is not an employee, is not entitled to compensation, pension, or other retirement benefits, and thus could not conceivably stand to gain or lose as a result of the ITN Negotiation Team recommendation.

iii. No voting conflict for the Committee Chair

Finally, there is no basis to conclude that the Committee Chair’s ability to vote on the ITN Negotiation Team’s recommendation as a member of the JEA Board is in any way impacted by her service on the ITN Negotiation Team. Section 21.03(b) of the Charter of the City of Jacksonville expressly provides that members of the JEA Board are subject to section 286.012, Florida Statutes, which provides that a member of a board who is present at a meeting may not abstain from voting unless there is, or appears to be, a possible conflict of interest under enumerated statutes. AGO 74-31, which has previously been relied upon by the Commission, is instructive in this regard. In that opinion, the Attorney General’s Office considered whether a county commissioner who also served on the board of a mental health board may abstain from voting on a county contract with the mental health board when it came before the county commission. The Attorney General concluded that he could not, as his only interest was the public interest represented by his membership on the mental health board, and he did not stand to personally benefit. This circumstance is similar, as the Committee Chair has no possible personal interest in any transaction the Board may approve as a result of her service as an uncompensated member of the ITN Negotiation Team.