aschaeffer@pselaw.com

l. michael bly

john e. clough3

kristina e. curry

frederick b. hatton

robert h. hollencamp

james l. jacobson1

james w. kelleher

joshua m. kin

michele l. king4

joseph p. mattera3

gerald l. mcdonald2

david h. montgomery

jon m. rosemeyer

michael w. sandner

alan b. schaeffer

donald g. schweller

jeffrey s. senney

matthew c. sorg

eli t. sperry

matthew d. stokely5

andrew c. storar

michelle t. sundgaard

paul j. winterhalter

paul e. zimmer

of counsel

shahrzad p. allen

james i. weprin

1 Also licensed in FL

2 Also licensed in FL and MI

3 Also licensed in NY

4 Also admitted in MA

5 Also admitted in NY and CT

December 27, 2016

Mayor Tom McMasters

Council Members, Richard Shaw

Janell Smith

Tyler Starline

Mark Campbell

Glenn Otto

Nancy Byrge

Judy Blankenship

Ed Lyons

|  |  |
| --- | --- |
| Re: | Complaint to the Ohio Ethics Commission |

Dear Mayor McMasters and honorable members of the Huber Heights City Council,

Let me start at the beginning. The last formal action taken by Council on the Energy Aggregation matter was the approval of legislation to award a contract to one of the four bidders who happened to also be the bidder recommended by staff.

The legislation calling for the award of contract included multiple qualifications requiring Staff to bring back to Council for final action.

The last formal action taken by the Mayor when legislation is passed is normally the signing of the legislation. In the case of the legislation passed by Council as recommended to it by staff on Energy Aggregation, it was vetoed by the Mayor and the Mayor’s veto has not been overridden by Council.

The veto by the Mayor leaves several options available to Council and/or Council in cooperation with the Mayor. 1. Council by two thirds majority can simply override the Mayor's veto. 2. The parties, in this case being staff on one third of the triangle, City Council on one third of the triangle and the Mayor on one third of the triangle can negotiate a resolution. 3. Council (as is always the case with any contract bid process prior to award) can reject all bids and call for a rebid.

The Mayor 's interchange and information sharing with a single bidder has clearly tipped the scale's in favor of a rejection of all bids and a rebid. With the Mayor's

veto a rejection of all bids and a rebid is a logical and fair result.

I would not suggest that this is a "no harm no foul" situation as the Mayor is on record as saying that a rejection of all bids and a rebid is not called for by his actions. Whether I agree with him or not is immaterial. The result being a rejection of all bids and a rebid is the appropriate result and by the Mayor's veto rejection of all bids and a rebid is clearly one of, and in fact is, the favored option.

You will recall that I rendered an opinion that as a result of the Mayor's intercourse with one of the bidders the bidding process arguably had been tainted thus changing the legally required "Level playing field" required in any competitive bidding process to guarantee that all bidders are treated equally. By the Mayor’s actions the playing field was made decidedly *uneven* wherein at least one of the bidders had information not made available to all of the bidders.

As a result of my legal opinion on the subject, a majority of Council directed me to file a complaint with the Ohio Ethics Commission with regard to the Mayor's actions.

I did so after sharing my communication with all of Council seeking their input first. I have now received a response.

 It is simple enough. The opinion states that based upon the facts presented the actions of the Mayor do not fall within the jurisdiction of the Ethics Commission for a decision. The Ethics Commission opinion further states that its opinion to not take jurisdiction of the matter does not constitute an opinion as to whether or not the facts set forth otherwise raise ethical or improper activity questions.

In retrospect, this entire matter may be judged *either* as nothing more than the overzealous efforts of an elected official to "do the right thing" *or* as a major breach of the bidding laws of Ohio consciously undertaken with an ulterior motive. There are many variations of the above in between. The latter interpretation would border on the dangerous as the facts as we now know them do not dictate such an assumption. The Mayor has demonstrated in the past on several occasions his over zealous efforts to achieve a result that he believes in strongly (I might add regardless of process or image the Council & City are left with).

Regardless of how I may feel personally about this matter my personal opinion is of no consequence. Based upon the facts as we know them today I find no reasonably supportable legal basis for pursuing any other thought than that what happen here is nothing more than the over zealous efforts of a single elected official acting on his own without the advice or consent of his colleagues and staff, the results of which have tainted the bidding process.

One can speculate until the cows come home what the motivation of the Mayor may have been in acting so zealously. The point is that over zealous behavior, especially when acting alone and without advice can have negative and unintended results, sometimes as here, severe unintended results.

Whether over zealous or otherwise the facts of this matter clearly result in a violation of the public bidding laws with the remedy being a rejection of all bids and a rebid.

Some of you are asking yourself why Schaeffer are you sending us a book when a few paragraphs would have covered the matter????

Because of my profound respect for the process of local government, how it can work to the advantage of all, the crucial role a City Council plays in the process, and how it can so easily be derailed.

For most of my tenure as law director we had a very compatible close knit Council which achieved some pretty amazing results over the last 13 years. Today the Huber Heights City Council consists of a good mix of new young blood complemented by seasoned, knowledgeable veterans. I see so much potential on Council. That which should be easiest is turning out to be the hardest which is for you all to see your own potential and acting upon it. There is no reason to think that the next 13 years can't be twice is good or more than the last 13 years but until you get over the hump of treating each other with disrespect, distrust and disinterest resulting in a total breakdown of being able to work together you will end up accomplishing little or nothing. And yet the potential is so great for the exact opposite result.

And this is why I write this stuff.

Signing off for probably my last official act in the waning days of my tenure with the City, it's nice to know that I may have made a difference in the past but I'm really hoping that I can help bring about positive change in the future. The past is over and done with. The present and the future is where all the action is.

Yours Very Truly,

PICKREL SCHAEFFER & EBELING CO., LPA

Alan B. Schaeffer

ABS:LAP