

Wade L. Robison's Commentary on "Gifts From a Supplier"

Commentary On
Gifts From a Supplier

I

The question is raised of what Scott should say because of a potential conflict of interest. Presumably a vendor is competing against other vendors for sales, and if Larry does Scott a favor, then he may well presume, and he may be correct in presuming, that Scott will feel that he is under some obligation to return the favor in some way when bids are made to Upscale. One might see how there could be a problem in this way.

Suppose that Larry and another vendor both put in a bid for parts, and that the bids are essentially the same--same material, same costs--so that no objective observer could choose between the two and would even think, if he or she did not know that the two bids came from different vendors, that they are the same bid: they are at least interchangeable. How is Scott to choose between the two? If the two bids are identical, then he has no objective way of making a choice. He can draw straws or flip a coin, decide, that is, in some way that makes the choice undetermined by any additional feature of either vendor. But if Larry has done Scott a favor, and Scott does feel an obligation to do a favor in return, what better chance will he have? He will not be harming the company in giving Larry the bid because the company will be equally served by Larry or the other vendor getting the bid. And the other vendor cannot complain that he or she had a better bid that was turned down for favoritism.

But what he will have done is harm the other vendor by making the choice between the two vendors on some basis other than chance. The choice will be determined by some additional feature of one of the vendors, namely, that Larry plays in the same golf league as Scott and so saw him so he could make an offer to him of his uncle's

condo and that he did make such an offer. If the other vendor does not ever see Scott socially, then Larry has an advantage in bidding that the other vendor does not have, namely, being able to do Scott favors that Scott feels that he has to return. So the question is what Scott should do if Larry offers to check out the condo for Scott. There seems to be no harm in Larry checking with his uncle to see if the condo is available and how much the rental will be--provided that Scott tells him up front that he is not able, because of his position, to return the favor in any way in making decisions about what bids to accept or not.

II

A crucial assumption underlying the position just articulated is that the only favor Larry is doing is letting Scott know about his uncle's condo. If Larry fixes it so that the rent is cheaper than normal, then that would be a different situation. For then Larry would be effectively putting money into Scott's pocket, and the presumption any objective observer would make is that Scott's decisions could well be less than objective regarding which bids to accept.

That is, even if Scott's decisions were perfectly proper, even given what Larry has done, if he gets a condo for him more cheaply, they will not necessarily be perceived as perfectly objective by any other vendor. Scott will have lost the trust vendors have a right to impose in him that his decisions be determined by the bids made rather than the favors offered and accepted. So when Larry tells Scott that the condo is \$100 a week, Scott should tell him that he cannot accept the offer--even if, as Larry says, his uncle just wants someone to help a bit with taxes and operating expenses. He should ask what the usual rate is when Larry's uncle rents: what does he charge those who are not recommended to him by his nephew? And he could check, as presumably he has checked, on what the normal cost of renting a condo is in that season where he wants to go. Presumably the cost of the latter is more than \$100 per week, and under that circumstance, Scott ought not to accept the offer even if Larry's uncle normally does rent to those Larry recommends at such a low rate. For other vendors would still perceive the offer as a favor. And if Larry's uncle did usually rent the condo for more, the case is even clearer.

So, under the principles so far articulated, Scott would not accept the offer. Were he to do so and begin making plans for his vacation, he would be in difficulty should

Upscale announce a new policy that says, among other things, that accepting incentives from vendors is strictly prohibited. He could argue that he made the decision to accept the favor before the new policy was announced, that it is now too late to refuse without insulting the vendor, which presumably the company would not want, and without causing him great problems, since he would now have to get another place to stay at the last minute. Or he could argue that he did not, strictly speaking, accept an incentive from Larry since he has no intention of having Larry's offer make any difference at all to what he will do in any event regarding bids. After all the policy presumably prohibits employees from accepting something from vendors that would be an incentive to provide preferential treatment, and Scott does not intend to treat Larry preferentially.

But the difficulty is that he is likely to be perceived as treating Larry preferentially and that it is no doubt the perception as much as the reality that the company wants to avoid. After all, if it allows gifts and disallows only those that bias the judgment of those accepting bids, it will be in the terrible position of having to make complex judgments about who accepted what for what.

These are always difficult judgments to make, and they are time-consuming and expensive: no company ought to want to put itself in a position where it has to make such determinations. So the new policy is undoubtedly intended to preclude any gift or favor that might be perceived as an incentive. Scott could no doubt make a case to the Vice President that what he is doing is not an appropriate object of concern--not that much of a favor and initiated before the policy went into effect--and he might try, as a last course, to talk to the Vice President to see if he can go in any case. That gives him one more course of action, and if the Vice President says that it is acceptable to go, then he can go--though he, and the Vice President and the company, will have to live with the perception of others that Scott's decisions may be biased by such a favor. But if Scott asks the Vice President, any decision will be on the Vice President's head, not on his, and if the Vice President says it is acceptable to go, then he may.