



BEN H. STONE, Chairman
Gulfport

WALLEY R. NAYLOR,
Vice Chairman
Madison

BILLY R. POWELL, Secretary
Madison

WILLIAM R. WHEELER, JR.
Tupelo

ROBERT G. CLARK
Pickens

PAUL V. BREAZEALE
Jackson

BRENDA T. REDFERN
Richland

DANA S. STRINGER
Brandon

MISSISSIPPI ETHICS COMMISSION

Post Office Box 22746
Jackson, Mississippi 39225-2746
Telephone: 601-359-1285
Telecopier: 601-359-1292
www.ethics.state.ms.us

TOM HOOD
Executive Director and Chief Counsel

ADVISORY OPINION NO. 13-081-E

September 6, 2013

Question Presented: May a company owned by an alderman's financially independent brother-in-law serve as a vendor to the city?

Brief Answer: Yes. If the alderman and the brother-in-law are indeed financially independent, no violation of Section 109, Miss. Const. of 1890, or Section 25-4-105(2), Miss. Code of 1972, should occur. However, the alderman must recuse himself or herself from any matter which would result in a pecuniary benefit to the brother-in-law's business to comply with Section 25-4-105(1).

The Mississippi Ethics Commission issued this opinion on the date shown above in accordance with Section 25-4-17(i), Mississippi Code of 1972, as reflected upon its minutes of even date. The Commission is empowered to interpret and opine only upon Article IV, Section 109, Mississippi Constitution of 1890, and Article 3, Chapter 4, Title 25, Mississippi Code of 1972. This opinion does not interpret or offer protection from liability for any other laws, rules or regulations. The Commission based this opinion solely on the facts and circumstances provided by the requestor as restated herein. The protection from liability provided under Section 25-4-17(i) is limited to the individual who requested this opinion and to the accuracy and completeness of these facts.

I. LAW

The pertinent Ethics in Government Laws to be considered here are as follows:

Section 109, Miss. Const. of 1890.

No public officer or member of the legislature shall be interested, directly or indirectly, in any contract with the state, or any district, county, city, or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member, during the term for which he shall have been chosen, or within one year after the expiration of such term.

Section 25-4-103, Miss. Code of 1972.

(b) "Benefit" means any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.

(c) "Business" means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, holding company, self-employed individual, joint stock company, receivership, trust or other legal entity or undertaking organized for economic gain, a nonprofit corporation or other such entity, association or organization receiving public funds.

(d) "Business with which he is associated" means any business of which a public servant or his relative is an officer, director, owner, partner, employee or is a holder of more than ten percent (10%) of the fair market value or from which he or his relative derives more than Two Thousand Five Hundred Dollars (\$2,500.00) in annual income or over which such public servant or his relative exercises control.

(l) "Pecuniary benefit" means benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain. Expenses associated with social occasions afforded public servants shall not be deemed a pecuniary benefit.

(p) "Public servant" means:

(i) Any elected or appointed official of the government;

(ii) Any officer, director, commissioner, supervisor, chief, head, agent or employee of the government or any agency thereof, or of any public entity created by or under the laws of the state of Mississippi or created by an agency or governmental entity thereof, any of which is funded by public funds or which expends, authorizes or recommends the use of public funds; or

(iii) Any individual who receives a salary, per diem or expenses paid in whole or in part out of funds authorized to be expended by the government.

(q) "Relative" means:

(i) The spouse of the public servant;

(ii) The child of the public servant;

(iii) The parent of the public servant;

(iv) The sibling of the public servant; and

(v) The spouse of any of the relatives of the public servant specified in subparagraphs (ii) through (iv).

Section 25-4-105, Miss. Code of 1972.

(1) No public servant shall use his official position to obtain, or attempt to obtain, pecuniary benefit for himself other than that compensation provided for by law, or to obtain, or attempt to obtain, pecuniary benefit for any relative or any business with which he is associated.

(2) No public servant shall be interested, directly or indirectly, during the term for which he shall have been chosen, or within one (1) year after the expiration of such term, in any contract with the state, or any district, county, city or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member.

II. FACTS

Facts provided by the requestor are set forth below, with identifying information redacted, and are considered a part of this opinion.

We serve as City Attorney. In that capacity, we request a formal opinion based on the facts set forth below.

The City currently has an elected alderman whose brother-in-law, via marriage to the alderman's sister, is the owner of a business that serves as a current vendor to the City. Obviously, this relationship presents issues as set forth by Miss. Code 25-4-103(q)(5). However, the alderman has no common financial interest with the vendor or the brother-in-law. Based on the fact that the alderman has no common financial interest with the vendor or brother-in-law and the Ethics Commission prior opinion specifically Opinion No. 11-021-E (May 6, 2011), it seems that the vendor may still be able to do work and be paid by the City; however, the alderman will have to recuse himself or herself from any and all claims presented by the vendor to the City. In addition, the vendor's invoice could be handled via a separate vote from the entire claims docket and the minutes would reflect that the alderman recused himself or herself. With this understanding, may the City continue to use the vendor provided that the above procedures regarding the claims docket are followed by the City?

III. ANALYSIS

Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, both quoted above, prohibit a member of a public board from having any direct or indirect interest in a contract with the government funded or otherwise authorized by that board during his or her term or for one year thereafter. Frazier v. State, ex rel. Pittman, 504 So.2d 675, 693 (Miss. 1987). Where an alderman and another person, here a brother-in-law, share a common financial interest, the alderman may have a prohibited interest in that person's contracts with the city. See Waller v. Moore ex rel. Quitman County School Dist., 604 So.2d 265, 266-67 (Miss. 1992).

Examples of common financial interests precluding total financial independence include, but are not limited to, the alderman's sister, the brother-in-law, or the brother-in-law's company leasing

or renting property from the alderman, owing money to the alderman, living on property owned by the alderman, sharing liquid assets with the alderman or co-owning a business with the alderman. The facts presented in this opinion indicate the alderman and the brother-in-law are financially independent from each other. Therefore, no violation of Section 109 or Section 25-4-105(2) should arise if the city continues to purchase from the vendor.

Additionally, Section 25-4-105(1), Miss. Code of 1972, prohibits an alderman from using his or her official position to obtain or attempt to obtain a pecuniary benefit for his or her “relative” or a “business with which [the alderman] is associated.” The term “relative” is defined in Section 25-4-103(q) and includes the alderman’s sister and the sister’s spouse (i.e. the alderman’s brother-in-law). Moreover, the brother-in-law’s company is a “business with which [the alderman] is associated” under the definition set forth in Section 25-4-103(d). Therefore, the alderman cannot participate in any matter which would create a monetary benefit for the brother-in-law or the brother-in-law’s business.

Actions in which the alderman should not participate include, but are not limited to, selection of the brother-in-law’s company as a vendor to the city, approval of any contract with the company, decisions by the city to purchase products which will be supplied by the company, review or payment of invoices or claims submitted by the company, and review of the company’s performance. As noted by the requestor, the city may wish to separate claims payable to the brother-in-law’s company from other claims so that the alderman may participate in voting on claims for which he does not have a potential conflict of interest. However, the alderman must fully recuse himself or herself from any matter that would result in a monetary benefit to the brother-in-law or the brother-in-law’s company.

A total and complete recusal requires the alderman leave the meeting room before the matter comes up for discussion and remain absent until the vote is concluded. The alderman must not only avoid debating, discussing or taking action on the subject matter during official meetings or deliberations but must also avoid discussing the subject matter with other aldermen or other city officials. This restriction includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. An abstention is considered a vote with the majority and is *not* a recusal. Furthermore, any minutes or other record of the meeting or other proceeding should state the recusing alderman left the room before the matter came before the board and did not return until after the vote.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel