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TOM HOOD
Executive Director and Chief Counsel

ADVISORY OPINION NO. 13-115-E

December 6, 2013

Question Presented: May a university contract with an LLC when the university president's relative is an officer of the LLC's parent company?

Brief Answer: Yes, but the university president must fully recuse himself or herself from the procurement process to avoid violating Section 25-4-105(1), Miss. Code of 1972.

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

(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.

(i) "Income" means money or thing of value received, or to be received, from any source derived, including but not limited to, any salary, wage, advance, payment, dividend, interest, rent, forgiveness of debt, fee, royalty, commission or any combination thereof.

(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.

II. FACTS

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

I serve as the President of a University. By way of this letter, I am requesting an official advisory opinion from the Mississippi Ethics Commission regarding the following:

The University is currently under a contract with [a company] for campus dining and catering services. The University has provided [the company] with proper notice of termination in order to contract with another food service provider which better meets the needs of the University. A formal Invitation to Negotiate for campus dining and catering services was issued on July 2, 2013, pursuant to Mississippi contractor selection rules. As a result of the Invitation to Negotiate, bid proposals were received and evaluated. Based upon the evaluation scores, the food service provider selected as the best candidate for the new contract with the University for dining and catering services is [an LLC].

I am requesting an official ethics opinion because my daughter is married to the Executive Vice President of [a parent company] which owns 51% interest in [the LLC]. I recused myself and did not have any involvement in the procurement process. Rather, I delegated all and full authority to discuss, negotiate and execute any decisions related thereto to the [university's] Vice President for Finance and Business. A copy of said letter of delegation is attached hereto as Exhibit "A". Under Mississippi law, the award of the final contract must be approved by the Board of Trustees of the Mississippi Institutions of Higher Learning.

Please advise as to whether the University may contract with [the LLC] as its new campus dining and catering service provider under the facts as described herein. I am happy to provide you with any additional information you may require in order to issue an opinion. As the University will require a new dining service provider in December 2013, an expedited advisory opinion is most appreciated.

III. ANALYSIS

Pursuant to Section 25-4-105(1), Miss. Code of 1972, the requestor is prohibited from using his or her position with the university to obtain or attempt to obtain any "pecuniary benefit" for a "business with which he [or she] is associated." See Section 25-4-103(l) and (d). The parent company is a business with which the requestor is associated because the spouse of the requestor's child is an employee and officer of the company. See Section 25-4-103(q) and (d). Certainly, execution of the proposed contract will result in a pecuniary benefit for the LLC in the form of contract payments. Presumably, the parent company will also derive some pecuniary benefit from the contract payments as an owner of the LLC. Therefore, the requestor must have no involvement in awarding the contract to the LLC and must fully recuse himself or herself from any action by the university which would benefit the LLC or parent company.

A total and complete recusal requires that the university president refrain from making decisions, recommendations or evaluations regarding the various proposals for food service or the proposed contract and refrain from presenting the contract to the IHL Board of Trustees for approval. The president must not only avoid debating, discussing or taking action on the proposed contract during official meetings or deliberations but must also avoid discussing the subject matter with university and IHL officials or employees. This restriction includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means.

The letter submitted with this request in which the university president delegates all authority to the vice president regarding the proposed contract is dated August 8, 2013, and evinces an intention to fully recuse from the matter which should be continued for the duration of the contract period as described above. The commission notes that, pursuant to IHL Policy 401.0102, the president cannot terminate the employment of the vice president without IHL Board approval. This is an important factor in establishing autonomy for the official to whom authority is delegated, giving the delegation credibility and effect.

Additionally, if the contract is approved and entered into, the university president should also recuse himself or herself from oversight and management of the contractual relationship and from approving any payments made to the contractor. Those duties should be carried out by some other official on behalf of the university, such as the vice president. Nor should the president sign the contract. IHL Policy 707.02 allows the university president to delegate execution of the contract to another university officer, in this case the vice president.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel