



BEN H. STONE, Chairman  
Gulfport

WALLEY R. NAYLOR,  
Vice Chairman  
Madison

BILLY R. POWELL, Secretary  
Madison

PAUL V. BREAZEALE  
Jackson

## MISSISSIPPI ETHICS COMMISSION

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

BRENDA T. REDFERN  
Richland

DANA S. STRINGER  
Brandon

SEAN A. MILNER  
Clinton

RONALD E. CROWE  
Brandon

TOM HOOD  
Executive Director and Chief Counsel

### ADVISORY OPINION NO. 15-072-E

December 4, 2015

**Question Presented:** May a contract employee of a state agency have a material financial interest in a business which serves as a subcontractor to the agency?

**Brief Answer:** No. Section 25-4-105(3)(a), Miss. Code of 1972, prohibits a public servant of the state from having a material financial interest in a business that serves as a contractor, subcontractor or vendor to the state.

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.

(a) "Authority" means any component unit of a governmental entity.

(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.

(h) “Governmental entity” means the state, a county, a municipality or any other separate political subdivision authorized by law to exercise a part of the sovereign power of the state.

(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.

(k) “Material financial interest” means a personal and pecuniary interest, direct or indirect, accruing to a public servant or spouse, either individually or in combination with each other. Notwithstanding the foregoing, the following shall not be deemed to be a material financial interest with respect to a business with which a public servant may be associated:

(i) Ownership of any interest of less than ten percent (10%) in a business where the aggregate annual net income to the public servant therefrom is less than One Thousand Dollars (\$1,000.00);

(ii) Ownership of any interest of less than two percent (2%) in a business where the aggregate annual net income to the public servant therefrom is less than Five Thousand Dollars (\$5,000.00);

(iii) The income as an employee of a relative if neither the public servant or relative is an officer, director or partner in the business and any ownership interest would not be deemed material pursuant to subparagraph (i) or (ii) herein; or

(iv) The income of the spouse of a public servant when such spouse is a contractor, subcontractor or vendor with the governmental entity that employs the public servant and the public servant exercises no control, direct or indirect, over the contract between the spouse and such governmental entity.

(m) “Person” means any individual, firm, business, corporation, association, partnership, union or other legal entity, and where appropriate a governmental entity.

(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.

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

(3) No public servant shall:

(a) Be a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent, other than in his contract of employment, or have a material financial interest in any business which is a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent.

(e) Perform any service for any compensation for any person or business after termination of his office or employment in relation to any case, decision, proceeding or application with respect to which he was directly concerned or in which he personally participated during the period of his service or employment.

## II. FACTS

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

This is another request to ensure I am working within the confines and boundaries of the ethics laws. I am a retired employee, with 30 years of service for a state agency and I have been retired from the agency since June 2006 (approximately 9 ½ years). As a former Agency Division Chief, I never signed any contracts, never granted any permits, nor did I select any contractors to perform duties. I have never performed design or construction management duties. I am now the CEO of a private consulting company in the same field of work.

However, presently, I am also a contract employee for the state agency, working on specific assigned projects. I received an opinion from the Ethics Commission about 2 years ago and it was determined I could work as a contractor and a consultant, in the State of Mississippi. If it is considered unethical, I will discontinue my contract employee duties with the agency and will work solely as a sub-contractor for a firm to perform contract duties.

OPINION REQUEST QUESTIONS:

In the event my consulting company is approached by other prime contractors to perform subcontract duties as a consultant or a community engagement liaison, would it be considered illegal or unethical to:

- perform community engagement activities
- build and maintain relationships and collaborate with community stakeholders
- develop a minority contractors' database
- perform data interpretation
- set meetings
- ensure there will not be a disproportionate impact to human life in the field I work in
- ensure the community's quality of life will not be diminished

In the event I am approached by any other towns, cities and/or communities, would it be considered illegal or unethical to be a sub-contractor to work on other projects or system options in the State of Mississippi?

Would it be considered illegal or unethical to continue to obtain a subcontract with a contractor to maintain the integrity and trust of communities where relationships have already been built? The projects will be different, but the community will be the same? I will not charge any two companies for the same task on the same hours of the day (double dip).

Would it be considered illegal or unethical if my company was offered any consulting or sub-contracting position, while being a contract employee with the state agency (and if I don't work on the specific project as that of the state agency)?

In a telephone conversation with the commission's staff, the requestor reported that the potential future projects contemplated herein would be funded through the RESTORE Act, a federal program to distribute funds acquired after the British Petroleum - Deepwater Horizon oil spill, which occurred in 2010.

### III. ANALYSIS

In the prior opinion referenced above, Advisory Opinion No. 11-038-E, the requestor was not an employee of the state agency, having previously terminated all employment relationships. Here, the requestor has resumed an employment relationship with the state agency, necessitating a different analysis.

Section 25-4-105(3)(a), Miss. Code of 1972, prohibits all public servants of the state from having a "material financial interest" in a business which is a contractor, subcontractor or vendor to the state, subject to the narrow exceptions set forth in Section 25-4-105(4). The term "material financial interest" is defined very broadly as "a personal and pecuniary interest, direct or indirect, accruing to a public servant or spouse, either individually or in combination with each other." Section 25-4-103(k). The requestor has a material financial interest in the business, and the requestor is a public servant of the state as that term is defined in Section 25-4-103(p). See also

Advisory Opinion No. 13-095-E. Thus, Section 25-4-105(3)(a) prohibits the company from serving as a subcontractor to the state agency. However, Section 25-4-105(3)(a) would not prohibit the company from serving as a subcontractor to a city, town, or community which does not involve the state agency.

Moreover, the public servant could resign employment with the state and immediately begin working as a subcontractor to the state agency on state projects as proposed above. Section 25-4-105(3)(e), Miss. Code of 1972, addresses successive government and private sector employment. Section 25-4-105(3)(e) will not necessarily prohibit a former public servant from being employed by an entity which contracts with his or her former government employer. The law merely prohibits the former public servant from working in the private sector on any *matter* in which he or she was directly or personally involved while working for the government.

Therefore, if the former public servant was *not* directly concerned with and did *not* personally participate in the matter in question, then the former public servant may legally accept payment from the private entity to work on that matter. Elec. Data Sys. Corp. v. Miss. Div. of Medicaid, 853 So.2d 1192, 1204, 1205 (¶¶ 35, 39) (Miss. 2003). If the former public servant *was* directly concerned with and *did* personally participate in the matter in question, then the private entity may still contract with the government, but the former public servant may not be paid in relation to that matter. Id.

The requestor describes subcontracting as a consultant or community engagement liaison on future contracts between the state agency and prime contractors on contracts and projects which will arise in response to the Deepwater Horizon oil spill, long after the requestor's retirement from state government. If the requestor has had no personal or direct involvement concerning those contracts while employed with the state, then the requestor can resign his or her employment position with the state, and the requestor's company may serve as a subcontractor on those projects.

MISSISSIPPI ETHICS COMMISSION

BY: \_\_\_\_\_  
Tom Hood, Executive Director and  
Chief Counsel