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Jackson

MISSISSIPPI ETHICS COMMISSION

STEPHEN W. BURROW
Pascagoula

DANA S. STRINGER, Secretary
Brandon

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

BOBBY WAITES
Brandon

SEAN A. MILNER
Clinton

SPENCER M. RITCHIE
Jackson

TOM HOOD
Executive Director and Chief Counsel

ETHICS ADVISORY OPINION NO. 20-038-E

October 2, 2020

Question Presented: May a city contract with an alderman's employer where the alderman will have no personal involvement in performing the contract, will receive no personal benefit from the contract and where the contractor is a large, regional corporation which is one of two or fewer sources for necessary goods and services?

Brief Answer: Under these particular facts, the alderman will not have a prohibited interest in the contract between the city and the contractor, and no violation of Section 109, Miss. Const. of 1890, or Section 25-4-105(2), Miss. Code of 1972, will result. The exception codified in Section 25-4-105(4)(d) will prevent a violation of Section 25-4-105(3)(a), and the alderman's recusal will avoid any violation of 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.

- (a) “Authority” means any component unit of a governmental entity.
- (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.
- (e) “Compensation” means money or thing of value received, or to be received, from any person for services rendered.
- (f) “Contract” means:
 - (i) Any agreement to which the government is a party; or
 - (ii) Any agreement on behalf of the government which involves the payment of public funds.
- (g) “Government” means the state and all political entities thereof, both collectively and separately, including but not limited to:
 - (i) Counties;
 - (ii) Municipalities;
 - (iii) All school districts;
 - (iv) All courts; and

(v) Any department, agency, board, commission, institution, instrumentality, or legislative or administrative body of the state, counties or municipalities created by statute, ordinance or executive order including all units that expend 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.

(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.

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.

(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.

(4) Notwithstanding the provisions of subsection (3) of this section, a public servant or his relative:

(d) May be a contractor, subcontractor or vendor with any authority of the governmental entity of which he is a member, officer, employee or agent or have a material financial interest in a business which is a contractor, subcontractor or vendor with any authority of the governmental entity of which he is a member, officer, employee or agent: (i) where such goods or services involved are reasonably available from two (2) or fewer commercial sources, provided such transactions comply with the public purchases laws; or (ii) where the contractual relationship involves the further research, development, testing, promotion or merchandising of an intellectual property created by the public servant.

II. FACTS

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

On May 13, 2019, I wrote your agency and requested an opinion. That Opinion was written and delivered August 2, 2019. (Ethics Advisory Opinion No. 19-023-E).

That request is being copied verbatim for convenience and then will be followed up with the new issues that have arisen, that requires a further opinion from your agency.

THE PRIOR REQUEST:

"I am the City Attorney for the City. I have been requested by the Mayor and City Auditor to seek an ethics opinion.

The City wants to Contract with [a private LLC] as a Network and IT provider. Some of the services provided by [the private LLC] would include the following:

- Technology for setting up a new Municipal Court System that would encompass all aspects of Municipal Court,
- Technology for a new Police Department System that would include e-ticketing, GPS locator for all vehicles, laptops for all vehicles,
- Technology system for the Tourism Department,
- City wide server to run all Departments,
- Computers, Monitors, and TV's,
- 24/7 Network Monitoring,
- Backup Solutions,
- User and Drive Support,
- Intrusion protection,
- Internet services,
- Phone services,
- And other services.

The Mayor and the Aldermen do not have any connections to [the private LLC].

As part of putting the IT packet together for [the City], [the private LLC] deals with multiple third parties in providing various products and services. One of those parties is [a telecommunications company]. We have an Alderman that is employed by [said telecommunications company].

The question is would our Alderman being employed by [the telecommunications company], prevent the City from entering into the Contract with [the private LLC]?

NEW ISSUES THAT REQUIRE FURTHER OPINION:

Since writing for the original opinion back in May of 2019, there has been significant delays in implementing the new computer systems, one of which is the Covid-19 Pandemic. Since the original request, the City has found out that its Contractor, [the private LLC], cannot provide the services offered by [the telecommunications company] as part of its overall IT packet to the City. The reasons given, was that [the telecommunications company] offers those services at State Contract Price, and that they, [the private LLC], cannot get those services at the State Contract price because they are a private company. They state that the City must enter an agreement with [the telecommunications company] to get those services at the State Contract Price. This brings us full circle as a current Alderman is still employed by [the telecommunications company].

By way of explanation, [the private LLC] provided the following information to me via e-mail.

"[Private LLC] chose [the telecommunications company] as the vendor to provide phone equipment and services, internet, and cellular services for the City. This selection requires for the City to enter into a contract directly with [the telecommunications company]. [The private LLC] will manage the relationship and contract on behalf of the City but these services must be purchased directly from [the telecommunications company] by the City. The services [the private LLC] is suggesting the city to purchase from [the telecommunications company] includes:

1. MS ITS State Contract 5000 phone equipment and services. [The telecommunications company's] rate is \$9.55 per phone and [the telecommunications company] was the single awarded vendor for this category. (see attachment - ITS and Contract 5000-1 or by clicking this link ITS Contract 5000-1)
2. Internet service. This service could be purchased through different vendors but [the telecommunications company] proves to provide the best service and the best price including stability and customer service.
3. Cellular services for smartphones and mobile routers. [The telecommunications company] is one of two state contract awardees for Mississippi ITS State Contract 3820. For this service as well, there are two options but [the telecommunications company] proves again to be the best

service and best pricing. (see attachment - ITS Contract 3820 or by clicking this link ITS Contract 3820)

As an IT Service provider, our goal is to truly manage services and vendors for our customers, opting for Mississippi based business wherever possible and with a focus of cutting costs and increasing efficiency. Please let me know if you have any clarifying questions for the information provided above."

I have attached a copy of that e-mail as an exhibit.

QUESTION:

The City still has an alderman that is employed by [a telecommunications company]. Given this new information, may the City enter into this agreement with [the telecommunications company], so that it may complete its New Technology system, that includes both police and fire systems?

If you need any additional information, I would be happy to provide the same.

In conjunction with the prior request, which produced Advisory Opinion No. 19-023-E, the requestor provided the following supplemental facts which the commission again relies upon in issuing this opinion:

In response to questions from the commission's staff, the requestor's office reported that the alderman is a salaried employee of Company B (the telecommunications company) who will have no involvement in services provided to Company A (the private LLC) by Company B, that Company A and not the board of aldermen nor any other city official, identified and selected Company B to provide services, and that the city will not pay Company B for any services rendered to Company A but that only Company A will pay Company B for those services. The requestor also provided a written statement from the chief technology officer of Company A explaining that Company B is the sole vendor under multiple state contracts for various telecommunications and network services and one of only two state contract vendors for certain wireless telecommunications services.

III. ANALYSIS

Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, prohibit a member of a public board from having any direct or indirect interest in a contract with the government which is 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). The Ethics Commission has previously held when the contracting business is large, the amount of the contract payment is relatively small and the public servant's position in the business is not directly related to the contract, the board member's interest in the contract, if any, may be so remote that it does rise to the level of a prohibited interest. See Ethics Advisory Opinions No. 19-023-E, 06-094-E, 05-105-E, and 05-008-E. Such is the case here.

The alderman is a salaried employee of the telecommunications company who will have no personal involvement in delivering services under this contract. The alderman's employer, is a large and diverse company providing residential and commercial telecommunications services with a service area including all of Mississippi and a number of other states in the Southeastern Region. Under these particular facts, the alderman does not have a prohibited interest in the contract between the city and his employer, and no violation of Section 109 or Section 25-4-105(2) will occur.

Pursuant to Section 25-4-105(3)(a), no public servant of the city can have a material financial interest in a business which is a contractor, subcontractor or vendor to the city. See Section 25-4-103(p), (k), (c) and (h) for definitions. As a full-time salaried employee of the business, the alderman has a material financial interest in the telecommunications company. See also Section 25-4-103(k)(ii). The employer will be a contractor to the city. See Moore, ex rel. City of Aberdeen v. Byars, 757 So.2d 243, 248 (¶ 15) (Miss. 2000). The only statutory exception which could apply here is Section 25-4-104(d) which requires that the "goods or services involved are reasonably available from two (2) or fewer commercial sources, provided such transactions comply with the public purchases laws." Based upon the facts provided, the alderman's employer, the telecommunications company, is one of two or fewer sources for the necessary services to be procured by the city. Therefore, no violation of Section 25-4-105(3)(a) will result if the city uses the alderman's employer for the services described above.

Finally, the alderman is strictly prohibited by Section 25-4-105(1) from using his position on the board to obtain or attempt to obtain any monetary benefit for his employer, which is a "business with which he is associated." See Section 25-4-103(d). The alderman must fully recuse himself from any action which would result in a monetary benefit to his employer. Such action include, but are not limited to, selecting the alderman's employer and paying the alderman's employer.

A total and complete recusal requires that the alderman not only avoid debating, discussing or taking action on the subject matter during official meetings or deliberations, but he must also avoid discussing the subject matter with other city officials or employees. This restriction includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. An abstention can be considered a vote with the majority and is not a recusal. Furthermore, the minutes of the meeting 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