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### ETHICS ADVISORY OPINION NO. 25-006-E

April 4, 2025

**Question Presented:** May a city complete its obligations under a contract with a general contractor which was authorized before a new city council member took office even though the new council member's employer is a subcontractor on the project?

**Brief Answer:** Yes. Under the particular facts presented in this opinion, the contract was authorized prior to the new council member's term of office and no violation of Section 109, Miss. Const. of 1890, or Section 25-4-105(2), Miss. Code of 1972, will result. Nevertheless, the new council member must fully recuse himself or herself from any matter regarding the contract in compliance with Section 25-4-105(1). Because the subcontractor completed all work before the new council member took office, the council member's employer is no longer a subcontractor to the city, and no violation of Section 25-4-105(3)(a) will occur.

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.

(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.

(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.

## II. FACTS

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

The City hereby requests that the Mississippi Ethics Commission consider the following facts and provide an opinion as to whether the City Council may approve payment of invoices submitted by a contractor of the City where a new City Council member is an employee of a subcontractor of the contractor or may vote on other matters related to an existing contract. We further seek your opinion as to the impact of the new City Council member's employment on the ability of the City to award a contract to the new Council member's employer (either as prime contractor or subcontractor).

### FACTS:

- In August 2024, the City Council of the City awarded a construction contract (hereinafter, "construction contract") to a contractor (Contractor X, for purposes of this letter) to complete a public works project within the City. It is our understanding that Contractor X engaged a subcontractor (Subcontractor A, for purposes of this letter) to complete a portion of the project. The construction contract is a unit price contract where the price is fixed for each component of the work, with the final cost of the project being driven by the quantities of each of the components.

- In December 2024, a change order to the construction contract was approved by the City Council pursuant to which the total contract amount was reduced by approximately \$450.00.
- On February 14, 2025, the Subcontractor A completed all work on the project and submitted its invoice to Contractor X.
- On February 18, 2025, the following occurred:
  - A special election was held in the City to fill an unexpired term on the City Council. Based on unofficial returns on the night of the election, a candidate received a majority of the vote. That candidate is employed by Subcontractor A as "Director of Project Operations & Sales" (he is a "W2 employee" with no ownership interest).
  - A change order to the construction contract was approved during the afternoon by the City Council pursuant to which the total contract amount was increased by approximately \$100,000.00. Notably, the amount for the work to be performed by Subcontractor A was actually reduced in this change order.
- On February 25, 2025, the [City] Election Commission certified the results of the special election with one candidate receiving a majority of the vote.
- On March 4, 2025, the candidate who received a majority of the vote was sworn in as a member of the City Council. As a result, a member of the City Council is employed by Subcontractor A in connection with the public works project noted above. The said project is ongoing at the present time.
- We anticipate that, on the April 8 or April 22, 2025, City Council agenda, the City Council will be asked to approve a payment to Contractor X which will include payment for 100% of the work completed by Subcontractor A, and the payment with respect to the work completed by Subcontractor A will be in the amount approved on February 18, 2025.
- We anticipate other payments to Contractor X for this project that will not include payment for any work completed by Subcontractor A.

As respects the existing contract:

Our office requests an opinion as to whether a violation of Miss. Code Ann. § 25-4-105(1), Miss. Code Ann. § 25-4-105(2) or Section 109 of the Mississippi Constitution or any other ethics laws would arise if the City Council were NOW to approve any payments to the contractor on the project referenced above? We, further, seek guidance as to those circumstances under which we can avoid or eliminate those violations. Further, we seek your opinion as to whether the City Council can now approve any further change orders on the referenced public works project and would it matter if the change order was for an increase or decrease in

project costs (please note, change orders do not change the unit price, but change the cost based on changes in quantities)? Further, we seek your opinion as to whether the City Council may now approve a Certificate of Substantial Completion on the referenced public works project? Assumed in all of these questions is the recusal of the new member of the City Council.

As respects future awards:

Our office requests an opinion as to whether a violation of Miss. Code Ann. § 25-4-105(1), Miss. Code Ann. § 25-4-105(2) or Section 109 of the Mississippi Constitution or any other ethics laws would arise if the City Council were NOW to award a contract to the employer of the new City Council member (with the employer either being the prime contractor or a subcontractor)? We, further, seek guidance as to those circumstances under which we can avoid or eliminate those violations. Finally, please outline the penalties associated with such violations as against the City Council as a body, the individual City Council members or the newly elected Council member.

If you require any further information before the Commission can render an opinion, please advise.

### 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 authorized by that board during his or her term of office or within one year thereafter. Frazier v. State, ex rel. Pittman, 504 So.2d 675, 693 (Miss. 1987). The new council member has an indirect interest in the contract between the city and the general contractor because the council member's employer is a subcontractor on the project. The question here is whether the contract was authorized prior to the council member's term of office or whether actions expected to be taken during the council member's term will authorize the contract.

According to the facts presented above, the contract was initially authorized by the council in August 2024, prior to the beginning of the new council member's term of office on March 4, 2025. Payments made after the initial approval of a contract can have the effect of reauthorizing the contract. See Advisory Opinions No. 13-111-E, 10-037-E and 06-097-E. However, where payments were approved before the new public official took office and no additional approval is required after the public official takes office, the contract does not necessarily violate Section 109 and Section 25-4-105(2). See Advisory Opinions No. 13-111-E, 13-051-E and 13-024-E.

Here the city council entered into a contract with a general contractor at a fixed price per unit. The general contractor, not the city council, selected the subcontractor in question. Under these particular facts, the contract in question was authorized prior to the beginning of the new council member's term of office, and progress payments made to the general contractor will not have the effect of reauthorizing the contract. Therefore, no violation of Section 109 or Section 25-4-105(2) will result if the city fulfills the contract by making payments to the general contractor.

The requestor notes that, in the future, the council will only make one final payment to compensate the subcontractor for work authorized and performed before the new council member took office. The commission finds that any change order to the existing contract which increases the amount paid to the subcontractor would constitute a new contract and would violate Section 109 and Section 25-4-105(2). Any change order which reduces or has no effect on the amount of the final payment to the subcontractor will not result in a violation. Consequently, the subcontractor is limited to the amount approved prior to the new council member taking office on March 4, 2025, and cannot receive any additional payments beyond the final payment contemplated in this paragraph. Likewise, approving change orders which do not affect the amount paid to the subcontractor and approving a certificate of completion will not result in a violation.

However, the new council member's employer is strictly prohibited from serving as a contractor or subcontractor to the city during the council member's term of office and for one year after leaving office, pursuant to Section 109 and Section 25-4-105(2). Alternatively, if the new council member terminates employment with the company and retains no interest in the company, including but not limited to ownership and income, then all restrictions discussed herein would terminate, and the company would no longer be prohibited from doing business with the city.

Yet any contract which violates Section 109 or Section 25-4-105(2) is null and void, and the contractor has no right to payment. Towner v. Moore, ex rel. Quitman County School District, 604 So.2d 1093, 1096 (Miss. 1992), quoting Smith v. Dorsey, 530 So.2d 5, 9 (Miss. 1988). The contractor and the public official would be jointly and severally liable to repay all amounts received. Towner at 1100. Normally, the other council members, who presumably have no economic interest in the contract, would have no liability under the Ethics in Government Law. Additionally, while recusal can be effective in preventing other violations as discussed below, recusal does not prevent or ameliorate violations of Section 109 or Section 25-4-105(2), as these sections do not require any affirmative act by an individual member but merely action by the public body. Id.

Pursuant to Section 25-4-105(1), the new council member is also prohibited from using his or her position to obtain any pecuniary benefit for the subcontractor, a business with which the new council member is associated, as defined in Section 25-4-103(d). The new council member may not participate in actions or discussions involving the construction project, including but not limited to approval of any payments which will benefit his or her employer, whether the payments are made directly or indirectly through the prime contractor or some other party. The new council member must fully recuse himself or herself from all matters involving the project, the contractor and the subcontractor.

A total and complete recusal requires the council member leave the meeting room before the matter comes up for discussion and remain absent until the vote is concluded. The council member 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 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 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 council member left the room before the matter came before the council and did not return until after the vote.

The new council member is also prohibited from having a “material financial interest” in a business which is a contractor, subcontractor or vendor to the city, as set forth in Section 25-4-105(3)(a). As a full-time employee, the new council member has a “material financial interest” in the subcontractor, as defined in Section 25-4-103(k). “The term contractor is generally used in the strict sense of one who contracts to perform a service for another and not in the broad sense of one who is a party to a contract.” Moore, ex rel. City of Aberdeen v. Byars, 757 So.2d 243, 248 (¶ 15) (Miss. 2000). Likewise, a subcontractor provides a service to the governmental entity pursuant to a contract with a general contractor.

However, according to the facts provided above, the subcontractor “completed all work on the project and submitted its invoice to” the general contractor on February 14, 2025, more than two weeks before the new council member took office. Consequently, the new council member’s employer is no longer providing services to the city and only awaits payment for services rendered prior to the new council member taking office. Therefore, no violation of Section 25-4-105(3)(a) will result if the city council merely approves payment to the contractor (which includes payment for work performed by the subcontractor) for work completed prior to the new council member taking office in the amount authorized prior to the new council member taking office.

MISSISSIPPI ETHICS COMMISSION

BY:

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Chief Counsel