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ADVISORY OPINION NO. 2021-01

Clay Carmichael
Selma City Council, Ward 3
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Conflict of Interest/Member of City Council/Voting on Matter in which Member of City Council or Family Member has a Financial Gain or Interest/Associated Business

Under the ethics laws, an associated business of a public official may continue to do business with the City of Selma provided he does not use his public position or influence to direct business to his associated business and is not involved in any transaction between his associated business and the City of Selma either as a public official or employee/owner of the business.

Under the ethics laws, a public official's associated business may conduct business with the agency which the public official serves provided that the transactions are either competitively bid, whether required or not, or there is evidence that makes it clear the business was not obtained because of their public position, which must be determined on a case-by-case basis, and the public official completely abstains from the issue. On this issue, further guidance should be sought from the Attorney General's office.

A copy of the contract between a business with which a public employee or official is associated that is paid in whole or in part with state, county, or municipal funds must be filed with the Ethics Commission within 10 days of the execution of the contract. If there is no formal contract, an invoice or purchase order should be filed with the Ethics Commission to comply with Ala. Code § 36-25-11.

This opinion only extends to the restrictions found within the Ethics Act. The Alabama Attorney General's Office can provide guidance as to whether any restrictions outside of the Ethics Act are applicable.

Dear Mr. Carmichael:

The Alabama Ethics Commission is in receipt of your request for an Advisory Opinion of this Commission, and this opinion is issued pursuant to that request.

FACTS

The facts as have been presented to this Commission are as follows:

Mr. Carmichael is a newly elected member of the Selma City Council. Mr. Carmichael's family has owned a concrete business, Cosby-Carmichael, Inc. (Cosby-Carmichael), since 1913. Mr. Carmichael's father and brother are the current owners of Cosby-Carmichael. Mr. Carmichael currently works in a sales and management position at Cosby Carmichael and expects to soon become a part-owner with his father and brother. Cosby-Carmichael has been doing business with the City of Selma since they opened by supplying sand, gravel, borrow materials, concrete, and concrete products to the city both directly and indirectly through contractors who do business with the city. It uses a standard pricing for every customer, including the city, based on the amount of materials requested. Cosby Carmichael is one of only two concrete suppliers in Selma and one of many aggregate/borrow suppliers; it is the only ALDOT-certified concrete plant in the area.

QUESTIONS PRESENTED

1. Whether Cosby-Carmichael may continue to do business with the City of Selma.
2. Whether Mr. Carmichael must abstain from voting on any contract or issue where Cosby-Carmichael would provide goods directly to the City of Selma.
3. Whether Mr. Carmichael must abstain from voting on any contract or issue involving contractors who specify that they plan to use materials purchased from Cosby-Carmichael.
4. Whether Mr. Carmichael must abstain from voting on any contract or issue involving contractors who may purchase materials from Cosby-Carmichael.
5. Whether Mr. Carmichael must abstain from voting on any contract or issue involving ALDOT concrete.

ANALYSIS

Mr. Carmichael is an elected member of the Selma City Council. Therefore, he is a public official.¹ Mr. Carmichael's father and brother are both family members as defined by the Ethics Act.² Cosby-Carmichael is a business with which Mr. Carmichael is associated because he is an employee and his father and brother are both part-owners of the business.³ The Ethics Act prohibits public officials and public employees from using their positions for personal gain for themselves, a family member, or any business with which they are associated.⁴ The business relationship between Cosby-Carmichael and the City of Selma existed for over a century before Mr. Carmichael became a public official. Therefore, the facts presented indicate that he did not use his

¹ Ala. Code § 36-25-1(27): PUBLIC OFFICIAL. Any person elected to public office, whether or not that person has taken office, by the vote of the people at state, county, or municipal level of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county, or municipal level of government or their instrumentalities, including governmental corporations. For purposes of this chapter, a public official includes the chairs and vice-chairs or the equivalent offices of each state political party as defined in Section 17-13-40.

² Ala. Code § 36-25-1(15): FAMILY MEMBER OF THE PUBLIC OFFICIAL. The spouse, a dependent, an adult child and his or her spouse, a parent, a spouse's parents, a sibling and his or her spouse, of the public official.

³ Ala. Code § 36-25-1(2): BUSINESS WITH WHICH THE PERSON IS ASSOCIATED. Any business of which the person or a member of his or her family is an officer, owner, partner, board of director member, employee, or holder of more than five percent of the fair market value of the business.

⁴ Ala. Code § 36-25-5(a): No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain.

position as a Selma City Council member in violation of Ala. Code § 36-25-5(a) to obtain that business because it predated his election.

Cosby-Carmichael may continue to do business with the City of Selma provided Mr. Carmichael does not use his public position or his influence as a public official to direct business to Cosby Carmichael and is not involved in any transaction between the City of Selma and Cosby-Carmichael in either his public position or as an employee (or part-owner) of Cosby-Carmichael.⁵ Mr. Carmichael may continue to solicit business for Cosby-Carmichael from businesses or individuals who have historically purchased products from Cosby-Carmichael prior to Mr. Carmichael being an elected public official except for the following: (1) those individuals or businesses who are seeking official action by the City of Selma or its designated actors (such as the mayor or department heads); (2) those individuals or businesses who do business with the City of Selma; (3) those individuals or businesses who have interests that may be substantially affected by performance or nonperformance of the public official's official duties as a member of the Selma City Council based on their relationship to issues pending before the city (for example, a property owner who might benefit from re-zoning even though they are not the ones asking for it); (4) those entities who qualify as an organization and a majority of whose members are described in 1-3.⁶ Mr. Carmichael may also not solicit a lobbyist for anything other than a campaign contribution without violating Ala. Code § 36-25-23(c).⁷ Likewise, Ala. Code § 36-25-7(a) prohibits the solicitation or receipt of anything, whether a "thing of value" or not, for the purpose of corruptly influencing official action.⁸ Mr. Carmichael may not lobby on behalf of Cosby-Carmichael before any legislative body as doing so would violate Ala. Code § 36-25-23(a).⁹

All contracts with a public official or employee that are paid in whole or in part with state,

⁵ See Ethics Advisory Opinion No. 2019-10 (overruling previous advisory opinions holding that no associated business of a public official or public employee could conduct business with their public agency unless competitively bid or done at or below cost as far as they required either bidding when the law itself does not, or providing goods or services at or below cost).

⁶ See Ethics Advisory Opinion No. 2017-01.

⁷ Ala. Code § 36-25-23(c): No public official, public employee, or group of public officials or public employees shall solicit any lobbyist to give any thing whether or not the thing solicited is a thing of value to any person or entity for any purpose other than a campaign contribution.

⁸ Ala. Code § 36-25-7(a): No person shall offer or give to a public official or public employee or a member of the household of a public employee or a member of the household of the public official and none of the aforementioned shall solicit or receive anything for the purpose of corruptly influencing official action, regardless of whether or not the thing solicited or received is a thing of value.

⁹ Ala. Code § 36-25-23(a): No public official elected to a term of office shall serve for a fee as a lobbyist or otherwise represent a client, including his or her employer, before any legislative body or any branch of state or local government, including the executive and judicial branches of government, and including the Legislature of Alabama or any board, agency, commission, or department thereof, during the term or remainder of the term for which the official was elected. For purposes of this subsection, such prohibition shall not include a former member of the Alabama Judiciary who as an attorney represents a client in a legal, non-lobbying capacity.

county, or municipal funds must be competitively bid, unless exempt from the competitive bid laws or otherwise permitted by law and filed with the Commission within 10 days of execution.¹⁰ Whether any contract between Cosby-Carmichael is subject to the competitive bid laws or otherwise permitted by law is outside of the scope of this commission's authority. However, if any contract between Cosby-Carmichael and the City of Selma is not required to be competitively bid, Cosby-Carmichael may still conduct business, for profit, with the City of Selma provided the contract was awarded under circumstances that make it clear that the award was unrelated to Mr. Carmichael's position as a public official.

Until 2019, the Commission had prohibited a public employee or public official who is also a vendor from profiting on any business transaction with the public agency they serve unless those transactions were competitively bid, even when the competitive bid law did not require it.¹¹ The Ethics Commission held in Advisory Opinion No. 2019-10:

The mere fact that a public official or public employee's *associated business* is contracting with their public agency is not prohibited by the language of the Ethics Act...What is prohibited within the Ethics Act is using one's official position in order to acquire or create a business opportunity for personal gain or using one's official position in order to benefit an associated business or family member...[T]he test is whether the public employee or public official used their position or influence to obtain the opportunity and the transaction must occur under circumstances that make it clear the transaction is due to some reason other than the employee or official's public position and that must be determined on a case-by-case basis.

However, the Supreme Court of Alabama later addressed the above "compensation exclusion" in Ex parte Hubbard.¹² Hubbard held that "to meet this element of the compensation exclusion, the compensation must be provided solely for reasons unrelated to the official's or employee's public service, and that unrelatedness must be clear from the circumstances of the compensation." Additionally, the exceptions found in Ala. Code § 36-25-1(34)(b) also provide a "safe harbor" for public employees and officials who interact with lobbyists or principals and

¹⁰ Ala. Code § 36-25-11: Unless exempt pursuant to Alabama competitive bid laws or otherwise permitted by law, no public official or public employee, or a member of the household of the public employee or the public official, and no business with which the person is associated shall enter into any contract to provide goods or services which is to be paid in whole or in part out of state, county, or municipal funds unless the contract has been awarded through a process of competitive bidding and a copy of the contract is filed with the commission. All such contract awards shall be made as a result of original bid takings, and no awards from negotiations after bidding shall be allowed. A copy of each contract, regardless of the amount, entered into by a public official, public employee, a member of the household of the public employee or the public official, and any business with which the person is associated shall be filed with the commission within 10 days after the contract has been entered into.

¹¹ See Ethics Advisory Opinions Nos. 96-97, 98-23, 2000-54, 2012-01.

¹² Ex parte Hubbard, No. 1180047, 2020 WL 1814587 (Ala. Apr. 10, 2020).

individuals or businesses they inspect, regulate, or supervise. The facts presented here make it clear that Mr. Carmichael has not used his position to acquire this opportunity. The business relationship between the City of Selma and Cosby-Carmichael has existed for over 100 years. Regardless of the customer, Cosby-Carmichael sells its materials for a standard price that is based on the amount of materials requested. They are also the only ALDOT-certified concrete supplier in the Selma area. Mr. Carmichael will not interact with the City of Selma on behalf of Cosby-Carmichael or be involved in negotiating any contracts between the City of Selma and Cosby-Carmichael. For the purpose of this opinion, these facts clearly show that the transactions are solely for reasons unrelated to Mr. Carmichael's position but are the result of cost and availability. Provided Mr. Carmichael avoids any involvement in the transactions between the City of Selma and Cosby-Carmichael, Cosby-Carmichael is permitted to do business with the City of Selma and contractors doing business with the City of Selma.

"No member of any county or municipal agency, board, or commission shall vote or participate in any matter in which the member or family member of the member has any financial gain or interest."¹³ As a Council member, Mr. Carmichael may not vote, attempt to influence, or otherwise participate in any transaction, potential contracts, proposals, discussions, etc. between Cosby-Carmichael and the City of Selma. Therefore, Mr. Carmichael may not vote on any contracts involving Cosby-Carmichael, whether directly with the City or indirectly through other contractors who specify that they will purchase Cosby-Carmichael's product. Mr. Carmichael may also not vote on any contracts where he believes Cosby Carmichael would benefit from his vote. Cosby-Carmichael is the only ALDOT concrete supplier in the Selma area, and for that reason Mr. Carmichael may not vote on or participate in contracts or issues involving ALDOT concrete. Further, as a public official, Mr. Carmichael may not represent his employer in a "lobbying" capacity, which includes promoting or attempting to influence the award or grant of a contract with any department or agency of state government.¹⁴ This would prohibit Mr. Carmichael, personally, from directly selling to or interacting with ALDOT or any other State departments or agencies.

¹³ Ala. Code § 36-25-9(c)

¹⁴ Ala. Code § 36-25-23(a): No public official elected to a term of office shall serve for a fee as a lobbyist or otherwise represent a client, including his or her employer, before any legislative body or any branch of state or local government, including the executive and judicial branches of government, and including the Legislature of Alabama or any board, agency, commission, or department thereof, during the term or remainder of the term for which the official was elected. For purposes of this subsection, such prohibition shall not include a former member of the Alabama Judiciary who as an attorney represents a client in a legal, non-lobbying capacity.

Ala. Code § 36-25-1.1: Lobbying includes promoting or attempting to influence the awarding of a grant or contract with any department or agency of the executive, legislative, or judicial branch of state government.

No member of the Legislature, for a fee, reward, or other compensation, in addition to that received in his or her official capacity, shall represent any person, firm, corporation, or other business entity before an executive department or agency.

See also Ethics Advisory Opinions Nos. 2019-03; 2016-31.

This opinion only addresses the restrictions found within the Ethics Act. Mr. Carmichael should also contact the Alabama Attorney General's Office to determine whether there are any applicable restrictions outside of the Ethics Act. This opinion is specific to these facts and to Mr. Carmichael and his associated business. It does not address potential violations that could arise in similar circumstances such as use of public materials or confidential information.¹⁵ Any public official or employee who has an associated business that wishes to conduct business with their agency outside of the competitive bid laws and above cost should seek an opinion from this Commission and contact the Alabama Attorney General's office.

CONCLUSION

Under the Ethics laws, an associated business of a public official may continue to do business with the City of Selma provided he does not use his public position or influence to direct business to his associated business and is not involved in any transaction between his associated business and the City of Selma either as a public official or employee/owner of the business.

Under the ethics laws, a public official's associated business may conduct business with the agency which the public official serves provided that the transactions are either competitively bid, whether required or not, or there is evidence that makes it clear the business was not obtained because of their public position, which must be determined on a case-by-case basis, and the public official completely abstains from the issue. On this issue, further guidance should be sought from the Attorney General's office.

A copy of the contract between a business with which a public employee or official is associated that is paid in whole or in part with state, county, or municipal funds must be filed with

¹⁵ Ala. Code § 36-25-5(c): No public official or public employee shall use or cause to be used equipment, facilities, time, materials, human labor, or other public property under his or her discretion or control for the private benefit or business benefit of the public official, public employee, any other person, or principal campaign committee as defined in Section 17-22A-2, which would materially affect his or her financial interest, except as otherwise provided by law or as provided pursuant to a lawful employment agreement regulated by agency policy. Provided, however, nothing in this subsection shall be deemed to limit or otherwise prohibit communication between public officials or public employees and eleemosynary or membership organizations or such organizations communicating with public officials or public employees.

Ala. Code § 36-25-8: No public official, public employee, former public official or former public employee, for a period consistent with the statute of limitations as contained in this chapter, shall use or disclose confidential information gained in the course of or by reason of his or her position or employment in any way that could result in financial gain other than his or her regular salary as such public official or public employee for himself or herself, a family member of the public employee or family member of the public official, or for any other person or business.

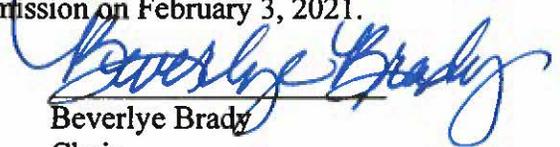
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the Ethics Commission within 10 days of the execution of the contract.¹⁶ If there is no formal contract, an invoice or purchase order should be filed with the Ethics Commission to comply with Ala. Code § 36-25-11.

This opinion only extends to the restrictions found within the Ethics Act. The Alabama Attorney General's Office can provide guidance as to whether any restrictions outside of the Ethics Act are applicable.

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on February 3, 2021.


Beverlye Brady
Chair
Alabama Ethics Commission

¹⁶ Ala. Code § 36-25-11