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ADVISORY OPINION NO. 2003-44

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Conflict Of Interest/Member Of Local
Housing Board Leasing A Commercial
Building To A Subcontracting Engineering
Firm That Has Performed Engineering Work
For An Engineering Contractor Who Has
Successfully Bid To Perform Certain Work
For The Housing Board

A member of the Mobile Housing Board
may lease a commercial building to a
subcontracting engineering firm that has
performed engineering work for an
engineering contractor who has successfully
bid to perform certain work for the Mobile
Housing Board without a conflict of interest,
as the subcontracting engineering firm was
not the bidder on the project.

Conflict Of Interest/Member Of The Mobile
Housing Board Voting On Matters Before
The Board That May Award Contracts To
An Engineering Contractor Who May
Engage A Commercial Tenant Of The
Member Of The Board As A Subcontractor

A member of the Mobile Housing Board
may vote on matters before the Board that

may award contracts to an engineering contractor who may engage a commercial tenant of the member of the Board as a subcontractor; provided, that the member of the Mobile Housing Board does not know the tenant will be the subcontractor, nor is the awarding of the bid based on the subcontractor being hired by the engineering contractor.

A member of the Mobile Housing Board may not vote on matters before the Board that may award contracts to an engineering contractor who may engage a commercial tenant of the member of the Board as a subcontractor, when the member of the Board knows that the tenant/subcontractor will be the subcontractor on the project.

Conflict Of Interest/Member Of The Alabama State Docks Authority Voting On Matters Before The Board Of The Authority That May Award Contracts To An Engineering Subcontractor Who May Engage A Commercial Tenant Of The Member Of The Board As A Subcontractor

A member of the Alabama State Docks Authority may vote on matters before the Board of the Authority that may award contracts to an engineering contractor who may engage a commercial tenant of the member of the Authority as a subcontractor; provided, that the member of the Alabama State Docks Authority does not know the tenant will be the subcontractor, nor is the awarding of the bid based on the subcontractor being hired by the engineering contractor.

A member of the Alabama State Docks Authority may not vote on matters before the Board of the Authority that may award contracts to an engineering contractor who may engage a commercial tenant of the member of the Authority as a subcontractor, when the member of the Authority knows that the tenant/subcontractor will be the subcontractor on the project.

Dear Sirs:

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.

QUESTIONS PRESENTED

- 1) May a member of the Mobile Housing Board lease a commercial building to a subcontracting engineering firm that has performed engineering work for engineering contractors who have successfully bid to perform certain work for the Housing Board?
- 2) May a member of the Mobile Housing Board vote on matters before the Board that may award contracts to engineering contractors who may engage a commercial tenant of the member of the Board as a subcontractor (assuming the client can lease the premises to the subcontractor)?
- 3) May a member of the Alabama State Docks Authority lease a commercial building to a subcontracting engineering firm that has performed engineering work for engineering contractors who have successfully bid to perform certain work for the Alabama State Docks Authority?
- 4) May a member of the Alabama State Docks Authority vote on matters before the Board of the Authority that may award contracts to engineering contractors who may engage a commercial tenant of the member of the Board as a subcontractor (assuming the client can lease the premises to the subcontractor)?

FACTS AND ANALYSIS

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

The law firm of Kennedy, Bell & Adams, P.C. represents a member of their local Housing Board and the Board of a State agency. He owns several commercial buildings in the area. In the past, the client has voted on matters before both the Housing Board and the State agency that have resulted in contracts to be awarded to engineering contractors. In the performance of the work by the engineering contractors, the engineering contractors have employed smaller engineering firms. One of the smaller engineering firms has performed work for multiple engineering contractors who have bid work to the Housing Board and the State agency. The smaller engineering firm has been identified in multiple bid proposals presented by various engineering contractors. This smaller engineering firm has contacted a representative of the firm's client, inquiring as to leasing one of the client's commercial properties.

The firm understands that, in each instance of the awarding of the contracts, the smaller firms were identified, that it is not unusual for a bid to have multiple subcontracting firms identified, and that the involvement of the smaller firms is always at the discretion of the engineering contractors bidding for the work. The firm also states that the handling of all bids is done by the staff, and that the staff presents recommendations to the Board for action. The firm further understands that the engineering firm will continue to be included in bids for work to the Housing Board and possibly the State agency. It is also likely that the smaller firm may be engaged to perform certain portions of future contracts that may be awarded to the engineering contractors, because the engineering contractors have previously engaged the smaller firm on several other contracts.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(24) defines a public official as:

“(24) 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 17-16-2.”

Section 36-25-1(8) defines a conflict of interest as:

"(8) CONFLICT OF INTEREST. A conflict on the part of a public official or public employee between his or her private interests and the official responsibilities inherent in an office of public trust. A conflict of interest involves any action, inaction, or decision by a public official or public employee in the discharge of his or her official duties which would materially affect his or her financial interest or those of his or her family members or any business with which the person is associated in a manner different from the manner it affects the other members of the class to which he or she belongs."

Section 36-25-5(a) states:

"(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."

Section 36-25-9(c) states:

"(c) 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."

In the facts presented to the Commission, it appears that the engineering firm approached the public official regarding the lease of the property. It also appears that it was an arms-length transaction.

However, in those situations where the subcontracting engineer/tenant is identified in the bid, the Board member, whether serving on the Mobile Housing Board or the Alabama State Docks Authority, should abstain from voting, attempting to influence or otherwise participating in the matter due to the fact that if the subcontracting engineering firm is the subcontractor for the successful bidder, the Board member would be providing an indirect benefit to himself, as he would be benefitting one of his tenants.

On the other hand, in those situations where the subcontractors are not identified, it would not pose a problem for the Board member to vote on those matters.

Based on the facts as provided and the above law, a member of the Mobile Housing Board may lease a commercial building to a subcontracting engineering firm that has performed engineering work for an engineering contractor who has successfully bid to perform certain work for the Mobile Housing Board without a conflict of interest, as the subcontracting engineering firm was not the bidder on the project.

Further, a member of the Mobile Housing Board may vote on matters before the Board that may award contracts to an engineering contractor who may engage a commercial tenant of the member of the Board as a subcontractor; provided, that the member of the Mobile Housing Board does not know the tenant will be the subcontractor, nor is the awarding of the bid based on the subcontractor being hired by the engineering contractor.

Additionally, a member of the Mobile Housing Board may not vote on matters before the Board that may award contracts to an engineering contractor who may engage a commercial tenant of the member of the Board as a subcontractor, when the member of the Board knows that the tenant/subcontractor will be the subcontractor on the project.

Also, a member of the Alabama State Docks Authority may vote on matters before the Board of the Authority that may award contracts to an engineering contractor who may engage a commercial tenant of the member of the Authority as a subcontractor; provided, that the member of the Alabama State Docks Authority does not know the tenant will be the subcontractor, nor is the awarding of the bid based on the subcontractor being hired by the engineering contractor.

Finally, a member of the Alabama State Docks Authority may not vote on matters before the Board of the Authority that may award contracts to an engineering contractor who may engage a commercial tenant of the member of the Authority as a subcontractor, when the member of the Authority knows that the tenant/subcontractor will be the subcontractor on the project.

CONCLUSION

A member of the Mobile Housing Board may lease a commercial building to a subcontracting engineering firm that has performed engineering work for an engineering contractor who has successfully bid to perform certain work for the Mobile Housing Board without a conflict of interest, as the subcontracting engineering firm was not the bidder on the project.

A member of the Mobile Housing Board may vote on matters before the Board that may award contracts to an engineering contractor who may engage a commercial tenant of the member of the Board as a subcontractor; provided, that the member of the Mobile Housing Board does not know the tenant will be the subcontractor, nor is the awarding of the bid based on the subcontractor being hired by the engineering contractor.

A member of the Mobile Housing Board may not vote on matters before the Board that may award contracts to an engineering contractor who may engage a commercial tenant of the member of the Board as a subcontractor, when the member of the Board knows that the tenant/subcontractor will be the subcontractor on the project.

A member of the Alabama State Docks Authority may vote on matters before the Board of the Authority that may award contracts to an engineering contractor who may engage a commercial tenant of the member of the Authority as a subcontractor; provided, that the member of the Alabama State Docks Authority does not know the tenant will be the subcontractor, nor is the awarding of the bid based on the subcontractor being hired by the engineering contractor.

A member of the Alabama State Docks Authority may not vote on matters before the Board of the Authority that may award contracts to an engineering contractor who may engage a commercial tenant of the member of the Authority as a subcontractor, when the member of the Authority knows that the tenant/subcontractor will be the subcontractor on the project.

AUTHORITY

By 3-0 vote of the Alabama Ethics Commission on October 1, 2003.


J. Harold Sorrells
Chair
Alabama Ethics Commission