



STATE OF ALABAMA ETHICS COMMISSION



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February 7, 2007

ADVISORY OPINION NO. 2007-05

Mr. Jimmy O'Dell
Chairman
Water Works and Sewer Board
of the City of Anniston
131 West 11th Street
P.O. Box 2268
Anniston, Alabama 36202-2268

Conflict Of Interest/Member Of Water
Works And Sewer Board Contracting With
LLC, When The Contracting Work Involves
A Contract Entered Into Between The LLC
And The Water Works And Sewer Board

A member of the City of Anniston Water
Works and Sewer Board may submit a bid to
perform work for an LLC, when that project
involves a contract entered into between the
LLC and the Water Works and Sewer
Board; provided, that he did not vote,
attempt to influence or otherwise participate
in the original contract between the LLC and
the Water Works and Sewer Board when he
knew or had an understanding that he would
be awarded the bid, when he intended on
submitting a bid, or when he has had
discussions with the members of the LLC
regarding his interest in the bid prior to the
vote on the contract between the Water
Works and Sewer Board and the LLC.

Should the member of the Water Works and
Sewer Board be allowed to bid on the
project with the LLC, and should he be the
successful bidder, he may not vote, attempt

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to influence or otherwise participate in any aspect of the project while serving on the Water Works and Sewer Board.

A member of the City of Anniston Water Works and Sewer Board may not use confidential information obtained in the course of his service on the Water Works and Sewer Board to assist him in bidding on the project with the LLC.

This opinion addresses only the applicability of the Alabama Ethics Law to the facts as presented, and it does not discuss or attempt to interpret the applicability of 41-16-60, Code of Alabama, 1975.

Dear Mr. O'Dell:

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) "Whether such a contract between the Board member, Mr. Lloyd, and the Partners would constitute a conflict of interest under the standards of the Alabama Ethics Commission or under Title 41-16-60 (copy enclosed) Code of Alabama (1975)."
- 2) "The Board is concerned with the potential for an ethics violation if Mr. Lloyd contracts for the renovation work on said building. The Board is further concerned that a violation of Title 41-16-60 in the entry of said contract of construction would amount to a violation of said law constituting a criminal offense."

FACTS AND ANALYSIS

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

The Water Works and Sewer Board of the City of Anniston requests an Advisory Opinion from the Commission concerning a question of ethics and conflict of interest. The Board has also sent a letter requesting an opinion from the Attorney General on the same issue. The facts surrounding the potential conflict of interest and ethical issues are set out as follows:

1. The Board purchased the former Amsouth Bank building, a 10-story building in Anniston, Alabama, by Warranty Deed from the sole owner, a Dr. Suttles.
2. The Board anticipates selling the building for One Dollar (\$1.00) to a development consortium composed of some ten partners currently operating as Community Development L.L.C. (Partners). In further consideration of the sale, the Partners have agreed to do the following:
 - a. Lease the basement, a portion of the first floor and all of the second floor to the Board for ninety-nine (99) years for a price of One Dollar (\$1.00);
 - b. The Partners further agree to renovate those floors at their expense for a sum of up to Two Hundred Thousand Dollars (\$200,000.00) and such construction will be in accordance with plans and specifications approved by the Board and subject to final acceptance and approval by the Board;
 - c. Partners further agree to begin construction of the building within one hundred twenty (120) days from the date of sale; and
 - d. The Partners will renovate the balance of the building at their own expense in accordance with historic guidelines at an estimated cost of five to six million dollars.
3. Additionally, the Sales and Lease Agreements contain a "Right of First Refusal" for the Board should the Partners ever sell the building; and ownership of the building reverts to the Board should the Partners fail to perform any of the agreements of the Contracts.
4. James Lloyd is a general contractor in Anniston, Alabama, operating under the name of Colyer-Lloyd Company. Mr. Lloyd is a member of the Board. He desires to contract for the renovation work.
5. Mr. Lloyd's contract (if he is the successful candidate for the renovation) would be with the Partners, and the Board would not be a party to the construction contract itself.

Although the Board is not a party to the construction contract, some of the work performed as described above would be subject to approval and acceptance by the Board. In addition, there are common areas such as stairways, elevators, fire escapes and other spaces which would be subject to use by all tenants of the building.

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 36-25-5(c) states:

“(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.”

Section 36-25-8 states:

“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.”

It should be pointed out at the onset that this opinion in no way addresses or attempts to interpret 41-16-60, Code of Alabama, 1975, as its provisions are outside the scope of the Alabama Ethics Law. This opinion will limit itself to applying the Ethics Law to the facts as presented.

While the Ethics Law does not prohibit public officials and public employees from having outside financial interests, it does prohibit the use of one's office for personal gain. In addition, the Ethics Law prohibits public officials and public employees from using the influence of their office for their personal benefit. It appears, from the facts as presented, that Mr. Lloyd has had some discussions with individuals involved in this project regarding his interest in the renovation work prior to the contracts having been entered into. It also well may be that Mr. Lloyd has expressed his interest in obtaining the work prior to bids being let or open for public response.

In the facts before the Commission, Mr. Lloyd may not vote, attempt to influence or otherwise participate in any aspect of the contract between the Water Works and Sewer Board and the LLC if he has had discussions with the LLC about the proposed renovation work, or otherwise knows or anticipates that he will bid on the project.

While he is not prohibited from bidding on the project, he may not submit a bid and perform the work with the prior understanding that he will be awarded the contract.

On February 4, 2004, the Ethics Commission rendered Advisory Opinion No. 2004-01, which held that:

"A former member of the Alabama A & M University Board of Trustees may serve as a subcontractor for a business under contract with Alabama A & M University, provided, he was not involved in the negotiation of or awarding of the contract to the prime contractor while serving on the Board."

"For a period of two years after leaving the Alabama A & M University Board, the former member of the Board of Trustees may not interact with the University on behalf of the prime contractor to whom he is providing services."

CONCLUSION

A member of the City of Anniston Water Works and Sewer Board may submit a bid to perform work for an LLC, when that project involves a contract entered into between the LLC and the Water Works and Sewer Board; provided, that he did not vote, attempt to influence or otherwise participate in the original contract between the LLC and the Water Works and Sewer Board when he knew or had an understanding that he would be awarded the bid, when he intended on submitting a bid, or when he has had discussions with the members of the LLC regarding his interest in the bid prior to the vote on the contract between the Water Works and Sewer Board and the LLC.

Should the member of the Water Works and Sewer Board be allowed to bid on the project with the LLC, and should he be the successful bidder, he may not vote, attempt to influence or otherwise participate in any aspect of the project while serving on the Water Works and Sewer Board.

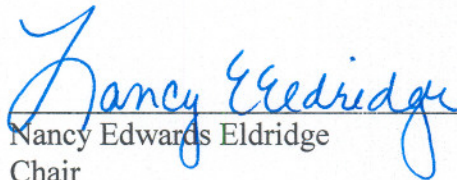
A member of the City of Anniston Water Works and Sewer Board may not use confidential information obtained in the course of his service on the Water Works and Sewer Board to assist him in bidding on the project with the LLC.

This opinion addresses only the applicability of the Alabama Ethics Law to the facts as presented, and it does not discuss or attempt to interpret the applicability of 41-16-60, Code of Alabama, 1975.

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AUTHORITY

By 3-0 vote of the Alabama Ethics Commission on February 7, 2007.


Nancy Edwards Eldridge
Chair
Alabama Ethics Commission