



STATE OF ALABAMA ETHICS COMMISSION



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October 7, 2009

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ADVISORY OPINION NO. 2009-10

Mr. Cory E. Rushing
Managing Member
TECS, LLC
1072 County Road 109
Brundidge, Alabama 36010

Conflict Of Interest/Business Owned By
Spouse Of Assistant County Transportation
Engineer For Alabama Department Of
Transportation (ALDOT) Serving As
Subcontractor On A State Project

A company owned by the spouse of the Assistant County Transportation Engineer for the Seventh Division of ALDOT, may serve as subcontractor on a state project; provided, the Assistant County Transportation Engineer has played no part in assisting her husband's company in obtaining the work as subcontractor, including but not limited to providing confidential information obtained in the course of her employment to her husband's company, or otherwise been involved in the awarding of the contract, when she knew her husband's company may serve as subcontractor, nor may she inspect any work performed by TECS, or enforce any contracts when TECS is a subcontractor.

A copy of a contract to provide services entered into by a public official, public employee, member of the household of the public official/public employee or a business with that person is associated, which is to be

paid in whole or in part out of state, county or municipal funds must be filed with the Ethics Commission within ten (10) days after the contract has been entered into, regardless of the amount of that contract, or whether or not the contract was obtained through competitive bid.

Dear Mr. Rushing:

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.

QUESTION PRESENTED

May the company owned by the spouse of the Assistant County Transportation Engineer for ALDOT work as a subcontractor for a local general contractor on state, municipal or county projects?

FACTS AND ANALYSIS

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

Cory Rushing is part owner of TECS, LLC. His wife is the Assistant County Transportation Engineer in the Seventh Division of ALDOT in Troy, Alabama. Mr. Rushing is concerned because he has heard that an ethics complaint has been filed against him and his wife concerning his company potentially doing erosion control and grassing work as a subcontractor on a state project. He states they did provide a price to perform said work to the general contractor. This project was released for competitive bid on the ALDOT Homepage for the July letting.

Being made aware of a potential ethics complaint by another contractor, TECS has decided to withdraw their name from this project. No work has begun or formal contracts signed as of September 14, 2009. No other formal contracts on projects involving local, state or federal funds will be entered into until they can receive an informal and formal Advisory Opinion from the Ethics Commission.

The situation is as follows:

1. Mr. Rushing's wife is the Assistant County Transportation Engineer for the Seventh Division of the Alabama Department of Transportation in Troy, Alabama. Her duties require her to supervise employees who perform both pre-construction and construction job duties on county and city projects which involve state and federal monies reimbursement. This involves supervision of plan review (pre-construction) and also construction and engineering inspection (construction) on these aforementioned projects. She is not directly or indirectly involved in the competitive bidding process or the awarding of contracts for either locally-let projects or state-let projects and has no interaction with the subcontractors.
2. TECS, LLC is a legally formed Limited Liability Company and licensed as a subcontractor through the State of Alabama Licensing Board for Contractors. Fifty percent (50%) is owned by Cory E. Rushing (Managing Member/Financial Officer), husband to the public employee described above, and fifty percent (50%) is owned by Greg S. Garner (Managing Member/President). TECS performs erosion and sediment control work and supply on grassing projects as subcontractor/vendor for general contractors and private entities. Mr. Rushing's spouse has no knowledge of the company business; receives no money, other than that which would be received due to the fact that her spouse is employed; nor has any ownership or voting stock in the company.

Mr. Rushing asks if it is a conflict of interest or a violation of the Ethics Law for a subcontractor to perform work or supply material for local general contractors who are under contract with the Alabama Department of Transportation, municipalities, or county agencies for state or federally funded projects within or outside the Seventh Division which are advertised for competitive bid, when the spouse of the subcontractor is employed by ALDOT.

While the fear of a potential ethics complaint precipitated this request for an opinion, they are interested in being able to do public business in the future.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(23) defines a public employee as:

“(23) PUBLIC EMPLOYEE. Any person employed at the state, county, or municipal level of government or their instrumentalities, including governmental corporations and authorities, but excluding employees of hospitals or other health care corporations including contract employees of those hospitals or other health care corporations, who is paid in whole or in part from state, county or municipal funds. For purposes of this

chapter, a public employee does not include a person employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time employee's income."

Section 36-25-1(2) defines a business with which the person is associated as:

"(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."

Section 36-25-1(11) defines a family member of the public employee as:

"(11) FAMILY MEMBER OF THE PUBLIC EMPLOYEE. The spouse or a dependent of the public employee."

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.”

Section 36-25-11 states:

“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.”

Opinions of the Alabama Ethics Commission do not address matters that have already occurred, nor do they address complaints which may have been filed.

Therefore, this opinion will only address the propriety of TECS performing public business in the future, while the owner's wife is employed as an Assistant County Transportation Engineer.

There is nothing in the Ethics Law which prohibits the family member of a public official/public employee from doing business with the public, including the entity which employs the family member.

What is prohibited is the public official/public employee using his or her position, the influence of his or her position, information obtained in the course of his or her employment or anything else obtained by virtue of his or her public employment to assist the family member in obtaining the public business.

In the scenario before the Commission, there is nothing which would prohibit TECS, LLC from serving as a subcontractor on state, municipal or county projects; provided, that the spouse (the Assistant County Transportation Engineer) plays no part in TECS acquiring the business or the opportunity.

It appears from the facts set forth in the request for an opinion, that all subcontracting work obtained by TECS will be done through a bid process. In order for the law to not be violated, Mr. Rushing's wife may not participate in the bid process if she knows TECS is involved, nor may she inspect any work performed by TECS, or enforce any contracts when TECS is a subcontractor.

Based on the facts as provided and the above law, a company owned by the spouse of the Assistant County Transportation Engineer for the Seventh Division of ALDOT, may serve as subcontractor on a state project; provided, the Assistant County Transportation Engineer has played no part in assisting her husband's company in obtaining the work as subcontractor, including but not limited to providing confidential information obtained in the course of her employment to her husband's company, or otherwise been involved in the awarding of the contract, when she knew her husband's company may serve as subcontractor, nor may she inspect any work performed by TECS, or enforce any contracts when TECS is a subcontractor.

Further, a copy of a contract to provide services entered into by a public official, public employee, member of the household of the public official/public employee or a business with that person is associated, which is to be paid in whole or in part out of state, county or municipal funds must be filed with the Ethics Commission within ten (10) days after the contract has been entered into, regardless of the amount of that contract, or whether or not the contract was obtained through competitive bid.

CONCLUSION

A company owned by the spouse of the Assistant County Transportation Engineer for the Seventh Division of ALDOT, may serve as subcontractor on a state project; provided, the

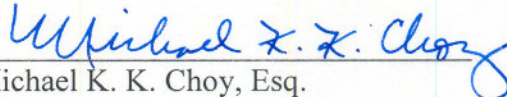
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Assistant County Transportation Engineer has played no part in assisting her husband's company in obtaining the work as subcontractor, including but not limited to providing confidential information obtained in the course of her employment to her husband's company, or otherwise been involved in the awarding of the contract, when she knew her husband's company may serve as subcontractor, nor may she inspect any work performed by TECS, or enforce any contracts when TECS is a subcontractor.

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AUTHORITY

By 4-0 vote of the Alabama Ethics Commission on October 7, 2009.


Michael K. K. Choy, Esq.
Chair
Alabama Ethics Commission