



STATE OF ALABAMA ETHICS COMMISSION



COMMISSIONERS

Brig Gen (R) Edward F. Crowell (USAF), Chair
V. Larkin Martin, Vice-Chair
James Jerry Wood, Esq.
Stewart Hill Tankersley, M.D.
Jerry L. Fielding, Ret. Sr. Circuit Judge

MAILING ADDRESS
P.O. BOX 4840
MONTGOMERY, AL
36103-4840

STREET ADDRESS
RSA UNION
100 NORTH UNION STREET
SUITE 104
MONTGOMERY, AL 36104

Thomas B. Albritton
Director

TELEPHONE (334) 242-2997
FAX (334) 242-0248
WEB SITE: www.ethics.alabama.gov

February 3, 2016

ADVISORY OPINION NO. 2016-04

Dennis R. Bailey, Esquire
Rushton, Stakely, Johnson & Garrett
184 Commerce Street
Montgomery, Alabama 36104

Conflict Of Interest/Business Owned By
Member Of The Fairhope Airport Authority
Entering Into A Lease Agreement With The
Airport Authority

A business owned by a member of the Fairhope Airport Authority may enter into a lease agreement with the Airport Authority, provided the member does not vote, attempt to influence or in any manner participate in the bid process, including but not limited to drafting the bid specifications, determining the lowest responsible bidder, or otherwise enforcing the bid.

The Airport Authority member may not use confidential information gained by virtue of his position on the Airport Authority to benefit his company and their submitted bid.

A copy of any contract/lease agreement entered into between the Board member and the Airport Authority must be filed with the Alabama Ethics Commission within ten days of its having been entered into.

Dennis R. Bailey, Esquire
Advisory Opinion No. 2016-04
Page two

Dear Mr. Bailey:

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

QUESTION PRESENTED

May a business owned by a member of the Fairhope Airport Authority enter into a contract for ground leasing and hangar construction on property belonging to the Fairhope Airport Authority?

FACTS AND ANALYSIS

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

Dennis R. Bailey, Esq. represents H. Ray Hix, Jr., the co-founder and principal of Hix Snedker Companies (HSC) headquartered in Daphne, Alabama. HSC is interested in ground leasing and constructing a hanger and fuel farm on property belonging to the Fairhope Airport Authority. Mr. Hix was appointed to serve on the Fairhope Airport Authority by the Mayor of Fairhope in April of 2015. Mr. Hix currently serves as the Secretary/Treasurer of the Authority and is not compensated for his service.

It should be pointed out that the facts regarding RFPs, the letting of bids, etc. occurred prior to this opinion being requested. The question is prospective in that, while the bid process had been completed and Mr. Hix's company was the successful bidder, the contract has not been signed, pending review by the Alabama Ethics Commission. Execution of the lease is contingent upon a favorable opinion from the Commission.

The Authority owns and manages airport facilities used by the general aviation community in Fairhope. One of the services of the Authority is providing airplane hangars for lease and the sale of aviation fluid.

Prior to Mr. Hix being appointed to the Authority, the Authority determined that a new hangar was needed and entered into a lease/build agreement with an unrelated private party for what was called Pad Site No. 2. That individual failed to timely begin construction of the proposed hanger and on September 15, 2015, the Authority decided to publicly advertise for new Requests for Proposal for the ground lease. Mr. Hix did not attend this meeting and was not involved in that decision. Mr. Hix played no role in the drafting of the specifications for the bid.

On September 25, 2015, the Authority issued a "Notice for Request for Bids." The Notice was publicly advertised and competitively bid.

In response to the Notice for Request for Bids, HSC submitted a response on October 12, 2015. At a public meeting on October 20, 2015, the Authority opened three sealed bids that had been received. Mr. Hix was present at the meeting but left after the Authority opened the bids, and he was asked a few questions about his bid. Mr. Hix was not present for any discussion about either of the other two bids.

On November 4, 2015, the three bidders were sent requests for "Additional Inquiries." HSC timely responded to this request for additional information.

Without any input from Mr. Hix, the Authority formed an *ad hoc* committee to review the bids and responses. On November 17, 2015, the Authority met to hear the report of the *ad hoc* committee. Mr. Hix recused himself from the meeting at that point in time and did not return to the meeting. He has been involved in no discussions or decisions regarding the bid process.

A lease document has been drafted and approved; however, it has not been signed contingent upon the Commission rendering this Advisory Opinion. Mr. Hix took no part in drafting, recommending the terms of, or approving the lease agreement.

The Ethics Law provides that public officials and public employees should be allowed the same financial opportunities available to the general public, provided a conflict of interest does not exist. In most cases, a conflict may be resolved by placing certain restrictions on the activities of the public official/public employee involved.

Mr. Hix acknowledges that he is a public official subject to the Alabama Ethics Law.

Ala. Code § 36-25-2(b) (1975) states:

"It is also essential to the proper operation of government that those best qualified be encouraged to serve in government. Accordingly, legal safeguards against conflicts of interest shall be so designed as not to unnecessarily or unreasonably impede the service of those men and women who are elected or appointed to do so. An essential principle underlying the staffing of our governmental structure is that its public officials and public employees should not be denied the opportunity, available to all other citizens, to acquire and retain private economic and other interests, except where conflicts with the responsibility of public officials and public employees to the public cannot be avoided."

Central to the Alabama Ethics Law is the prohibition against the use of one's public office, or the influence of that position, to provide a personal benefit to yourself, a business with which you are associated or a member of your family. Ala. Code § 36-25-5(a) (1975) states:

“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.”

As stated, Mr. Hix is a public official and HSC is a business with which he is associated as defined by Section 36-25-1(2).

Ala. Code § 36-25-1(2) (1975) states:

“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.”

This issue has been addressed repeatedly by the Commission over the years, and the following criteria set out:

- 1) Provided the work/project is done through some type of bid process, the public official may submit a bid on a contract with the entity on which they serve. However,
- 2) That public official may not vote, attempt to influence or in any manner participate in the bid process;
- 3) The public official may not participate in the drafting of the specifications of the bid, the awarding of the bid to the lowest responsible bidder, or otherwise enforcing the bid;
- 4) The public official may not use confidential information received by virtue of their position to influence the bid process;
- 5) In those situations where the bid laws do not apply, the product must be sold to the employer at invoice price, with the public official making no profit on the transaction; and,
- 6) Any contract paid in whole or in part out of public funds must be filed with the Alabama Ethics Commission within ten days of the contract having been entered into.

On April 3, 2013, the Commission rendered Advisory Opinion No. 2013-06, which held that:

“A business owned by a County Commissioner may submit bids on contracts with the County; provided, that the County Commissioner does not vote, attempt to influence or otherwise participate in the transaction, either as a County Commissioner, or as a representative of the business.”

“The County Commissioner may not use confidential information received during her service as a County Commissioner to provide inside information regarding bids to her company.”

Likewise, Advisory Opinion No. 2002-23 held that:

“Andalusia Cable 12, a private cable company, which is owned in part by a supervisor with the City of Opp's TV6, may only do business with the City of Opp's cable company through a competitive bid process.”

“Should Andalusia Cable 12, a privately owned cable company, desire to bid on business with the City of Opp's TV6, the supervisor for the City of Opp's television station, who is a part owner of the private cable company, may not participate in any aspect of the negotiations or business dealings between the private cable company and his employer, the City of Opp, Alabama.”

Based on the facts as provided and the above law, a business owned by a member of the Fairhope Airport Authority may enter into a lease agreement with the Airport Authority, provided the member did not vote, attempt to influence or in any manner participate in the bid process, including but not limited to drafting the bid specifications, determining the lowest responsible bidder, otherwise enforcing the bid, or determining any other terms upon which the lease would be extended.

The Airport Authority member may not have used confidential information gained by virtue of his position on the Airport Authority to benefit his company and their submitted bid.

A copy of any contract/lease agreement entered into between the Board member and the Airport Authority must be filed with the Alabama Ethics Commission within ten days of its having been entered into.

CONCLUSION

A business owned by a member of the Fairhope Airport Authority may enter into a lease agreement with the Airport Authority, provided the member does not vote, attempt to influence

Dennis R. Bailey, Esquire
Advisory Opinion No. 2016-04
Page six

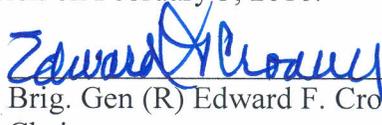
or in any manner participate in the bid process, including but not limited to drafting the bid specifications, determining the lowest responsible bidder, or otherwise enforcing the bid.

The Airport Authority member may not use confidential information gained by virtue of his position on the Airport Authority to benefit his company and their submitted bid.

A copy of any contract/lease agreement entered into between the Board member and the Airport Authority must be filed with the Alabama Ethics Commission within ten days of its having been entered into.

AUTHORITY

By 3-0 vote of the Alabama Ethics Commission on February 3, 2016.



Brig. Gen (R) Edward F. Crowell (USAF)
Chair
Alabama Ethics Commission