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June 7, 2017

ADVISORY OPINION NO. 2017-09

April B. Danielson
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& BRANDT, LLC
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Conflict of Interest/City continuing to use engineering services when the son-in-law of the recently-elected Mayor is an employee of said firm

Gonzalez-Strength, Inc. may continue to contract with the City of Hoover even though Mayor Brocato's son-in-law is an employee and could be a partner in the future so long as the mayor has no involvement in the contract negotiations, discussions, drafting, and does not participate in any other way regarding hiring or retaining Gonzalez-Strength, Inc. or the terms of the contract itself. Additionally, because Gonzalez-Strength, Inc. is a "business with which the person is associated," a copy of the contract must be filed with the Ethics Commission within 10 days of entering into the contract.

Dear Ms. Danielson:

The facts as they have been presented to the Commission are as follows:

QUESTION PRESENTED

May the City of Hoover continue to utilize the engineering services of Gonzalez-Strength & Associates, Inc., an engineering firm the city has done business with for several years, when the son-in-law of the recently-elected mayor is an employee and/or partner at the firm?

FACTS AND ANALYSIS

Mayor Brocato was elected as Mayor of the City of Hoover in August 2016 and requests an opinion on the following matter.

The City of Hoover is a Class 8 municipality consisting of a seven (7)-member Council. The Mayor is not a voting member of the City Council. Mayor Brocato's son-in-law is an employee of an engineering firm, Gonzalez-Strength & Associates, Inc., located in Hoover, Alabama and has been employed by the firm for ten years or more.

The City of Hoover has used this engineering firm, along with other firms, for many years to perform engineering work for the City. As engineering services are professional services, these services are not competitively bid by the City. The Mayor would like to ensure that there are no ethics issues present if the City utilizes Gonzalez-Strength, along with other engineers, for engineering projects. The Mayor does not select the engineering firm that will perform work for the City and will not attempt to influence or in any manner participate in any contracts, discussions, etc. between Gonzalez-Strength and the City.

The selection of an engineering firm to perform projects for the City is normally handled by the City's Executive Director, Chief Operating Officer and/or City Engineer. The Mayor's son-in-law may perform work for the City through his employment with Gonzalez-Strength and may, at some point, be named a partner in the firm.

The Mayor of Hoover is considered a "public official." Ala. Code §36-25-1(27). His son-in-law is a "family member of the public official." Ala. Code §36-25-1(15). The company for whom the "family member of the public official" works, in this case Gonzalez-Strength, Inc., is a "business with which [the mayor] is associated." Ala. Code § 36-25-1. Because of these relationships, it is important to analyze the involvement the Mayor will have regarding any contracts entered with Gonzalez-Strength, Inc.

Ala. Code §36-25-5(a), states that no public official may use his or her position to obtain personal gain for themselves, a family member, or a business with which they are associated (which includes the son-in-law's business). From the facts provided, Mayor Brocato did not take office until August 2016. Before that time, he was the Fire Battalion Chief for Hoover but did

not have the authority to influence the award of any contracts. The City of Hoover has contracted with Gonzalez-Strength since 1999. It stands to reason that contracts entered into prior to the mayor taking office were not awarded to Gonzalez based on the mayor's official position because he was not the mayor until August 2016. For that reason, absent additional facts not given to the Commission, the Mayor's family connection with Gonzalez, likewise, is irrelevant to the City's desire to retain their services.

Moving forward, however, Mayor Brocato cannot be involved in contract negotiations, discussions, drafting, or have any other involvement in the decision-making process regarding Gonzalez-Strength, Inc.. This includes encouraging others to vote to retain their services. Ala. Code §36-25-9(c) requires that "[n]o 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." Because Mayor Brocato's son-in-law is a "family member" employed with Gonzalez-Strength, Inc. and has a financial interest in the contract, then under this section, as well, Mayor Brocato may not be involved to any degree with those negotiations.

According to Ala. Code §36-25-11, "[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." It is also a requirement of Ala. Code §36-25-11 that "[a] copy of each contract, regardless of the amount, entered into by...any business with which the person is associated shall be filed with the commission within 10 days after the contract has been entered into." As previously discussed, Gonzalez-Strength is a "business with which the person (Mayor Brocato) is associated" because a "family member" of the mayor is an employee with that business, his son-in-law. Therefore, any contract entered into by Gonzalez-Strength paid for in whole or in part with public money, must be filed with the Commission within 10 days of the contract being entered into.

The issue of whether contracts that are exempt from the state bid laws must be filed with the Commission has been addressed twice by previous Commissions. In Advisory Opinion 2001-29 the Commission unanimously held,

Section 36-25-11 states that a copy of any contract, regardless of the amount, which is entered into by a public official, public employee, a member of their household, or a business with which they are associated, must be filed with the Ethics Commission within ten (10) days after the contract has been entered into. The language, "regardless of the amount" seems to indicate that the contract must be filed with the Ethics Commission regardless of whether or not it is competitively bid. In other words, the fact that a contract is competitively bid, does not alleviate the filing requirement.

In addition, Section 36-25-11 states that these contracts shall not be entered into unless the contract has been awarded through a process of competitive bidding and a copy of the contract is filed with the Commission. As previously stated, if the contract is not filed with the Ethics Commission, neither the Commission nor the public would have a practical method of determining which public officials, etc., were contracting with public entities.

Likewise, in Advisory Opinion 2008-19 the Commission unanimously held,

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.

That reasoning remains sound. Given the disclosure requirements of the Act, it seems unlikely that the Legislature would require the disclosure of contracts which are already subject to public inspection under the bid law, but exempt from disclosure contracts entered into by officials that are not subject to public inspection through the competitive bid process.

Insofar as the execution of any contracts entered into by Hoover and Gonzalez-Strength, Mayor Brocato can only sign those contracts upon the approval of the city council by resolution. If payment is requested by invoice with no contract, then a purchase order is issued by the City's Finance Department and the Mayor and City Clerk will execute the check in payment of the invoice. These functions performed by the mayor are ministerial in nature and cannot be performed without the City Council's resolution and/or a request by the Finance Department without the mayor being involved in any way in either process. The ministerial function of the mayor signing the contract does not make him the person or a "public official" contracting with Gonzalez-Strength as contemplated in Ala. Code §36-25-11. He is simply the agent for Hoover that is tasked with executing contracts on behalf of the city and the city council. To the extent he has discretionary authority, he cannot exercise that authority so as to benefit Gonzales.

CONCLUSION

Gonzalez-Strength, Inc. may continue to contract with the City of Hoover even though the recently-elected mayor's son-in-law is an employee and could be a partner in the future so long as the mayor has no involvement in future contract negotiations, discussions, drafting, and does not participate in any other way regarding hiring or retaining Gonzalez-Strength, Inc. or the terms of the contract itself. Additionally, because Gonzalez-Strength, Inc. is a "business with

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which the person is associated with," a copy of the contract must be filed with the Ethics Commission within 10 days of entering into the contract.

AUTHORITY

By 4-0 vote of the Alabama Ethics Commission on June 7, 2017.


Jerry L. Fielding, Ret. Sr. Circuit Judge
Chair
Alabama Ethics Commission