



BEN H. STONE, Chairman
Gulfport

WALLEY R. NAYLOR,
Vice Chairman
Madison

BILLY R. POWELL, Secretary
Madison

WILLIAM R. WHEELER, JR.
Tupelo

ROBERT G. CLARK
Pickens

PAUL V. BREAZEALE
Jackson

BRENDA T. REDFERN
Richland

DANA S. STRINGER
Brandon

MISSISSIPPI ETHICS COMMISSION

Post Office Box 22746
Jackson, Mississippi 39225-2746
Telephone: 601-359-1285
Telecopier: 601-359-1292
www.ethics.state.ms.us

TOM HOOD
Executive Director and Chief Counsel

ADVISORY OPINION NO. 13-023-E

March 8, 2013

Question Presented: May a candidate for city council, if elected, accept a real estate commission related to a land purchase contract between private parties that is contingent upon an action taken by the city council before the candidate takes office?

Brief Answer: Yes. If the city council takes any and all necessary actions that will result in the removal of all contingencies before the candidate takes office, no violation of Section 109, Miss. Const. of 1890, or Section 25-4-105(2), Miss. Code of 1972, should occur. The exception in Section 25-4-105(4)(d) will prevent a violation of Section 25-4-105(3)(a) and the requestor's recusal will prevent a violation of Section 25-4-105(1).

The Mississippi Ethics Commission issued this opinion on the date shown above in accordance with Section 25-4-17(i), Mississippi Code of 1972, as reflected upon its minutes of even date. The Commission is empowered to interpret and opine only upon Article IV, Section 109, Mississippi Constitution of 1890, and Article 3, Chapter 4, Title 25, Mississippi Code of 1972. This opinion does not interpret or offer protection from liability for any other laws, rules or regulations. The Commission based this opinion solely on the facts and circumstances provided by the requestor as restated herein. The protection from liability provided under Section 25-4-17(i) is limited to the individual who requested this opinion and to the accuracy and completeness of these facts.

I. LAW

The pertinent Ethics in Government Laws to be considered here are as follows:

Section 109, Miss. Const. of 1890.

No public officer or member of the legislature shall be interested, directly or indirectly, in any contract with the state, or any district, county, city, or town thereof, authorized by any law passed or order made by any board of which he may be or

may have been a member, during the term for which he shall have been chosen, or within one year after the expiration of such term.

Section 25-4-103, Miss. Code of 1972.

(c) “Business” means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, holding company, self-employed individual, joint stock company, receivership, trust or other legal entity or undertaking organized for economic gain, a nonprofit corporation or other such entity, association or organization receiving public funds.

(d) “Business with which he is associated” means any business of which a public servant or his relative is an officer, director, owner, partner, employee or is a holder of more than ten percent (10%) of the fair market value or from which he or his relative derives more than Two Thousand Five Hundred Dollars (\$2,500.00) in annual income or over which such public servant or his relative exercises control.

(f) “Contract” means:

(i) Any agreement to which the government is a party; or

(ii) Any agreement on behalf of the government which involves the payment of public funds.

(g) “Government” means the state and all political entities thereof, both collectively and separately, including but not limited to:

(i) Counties;

(ii) Municipalities;

(iii) All school districts;

(iv) All courts; and

(v) Any department, agency, board, commission, institution, instrumentality, or legislative or administrative body of the state, counties or municipalities created by statute, ordinance or executive order including all units that expend public funds.

(h) “Governmental entity” means the state, a county, a municipality or any other separate political subdivision authorized by law to exercise a part of the sovereign power of the state.

(i) “Income” means money or thing of value received, or to be received, from any source derived, including but not limited to, any salary, wage, advance, payment, dividend, interest, rent, forgiveness of debt, fee, royalty, commission or any combination thereof.

(k) "Material financial interest" means a personal and pecuniary interest, direct or indirect, accruing to a public servant or spouse, either individually or in combination with each other. Notwithstanding the foregoing, the following shall not be deemed to be a material financial interest with respect to a business with which a public servant may be associated:

(i) Ownership of any interest of less than ten percent (10%) in a business where the aggregate annual net income to the public servant therefrom is less than One Thousand Dollars (\$1,000.00);

(ii) Ownership of any interest of less than two percent (2%) in a business where the aggregate annual net income to the public servant therefrom is less than Five Thousand Dollars (\$5,000.00);

(iii) The income as an employee of a relative if neither the public servant or relative is an officer, director or partner in the business and any ownership interest would not be deemed material pursuant to subparagraph (i) or (ii) herein; or

(iv) The income of the spouse of a public servant when such spouse is a contractor, subcontractor or vendor with the governmental entity that employs the public servant and the public servant exercises no control, direct or indirect, over the contract between the spouse and such governmental entity.

(l) "Pecuniary benefit" means benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain. Expenses associated with social occasions afforded public servants shall not be deemed a pecuniary benefit.

(n) "Property" means all real or personal property.

(o) "Public funds" means money belonging to the government.

(p) "Public servant" means:

(i) Any elected or appointed official of the government;

(ii) Any officer, director, commissioner, supervisor, chief, head, agent or employee of the government or any agency thereof, or of any public entity created by or under the laws of the state of Mississippi or created by an agency or governmental entity thereof, any of which is funded by public funds or which expends, authorizes or recommends the use of public funds; or

(iii) Any individual who receives a salary, per diem or expenses paid in whole or in part out of funds authorized to be expended by the government.

Section 25-4-105, Miss. Code of 1972.

(1) No public servant shall use his official position to obtain, or attempt to obtain, pecuniary benefit for himself other than that compensation provided for by law, or to obtain, or attempt to obtain, pecuniary benefit for any relative or any business with which he is associated.

(2) No public servant shall be interested, directly or indirectly, during the term for which he shall have been chosen, or within one (1) year after the expiration of such term, in any contract with the state, or any district, county, city or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member.

(3) No public servant shall:

(a) Be a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent, other than in his contract of employment, or have a material financial interest in any business which is a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent.

(4) Notwithstanding the provisions of subsection (3) of this section, a public servant or his relative:

(d) May be a contractor, subcontractor or vendor with any authority of the governmental entity of which he is a member, officer, employee or agent or have a material financial interest in a business which is a contractor, subcontractor or vendor with any authority of the governmental entity of which he is a member, officer, employee or agent: (i) where such goods or services involved are reasonably available from two (2) or fewer commercial sources, provided such transactions comply with the public purchases laws; or (ii) where the contractual relationship involves the further research, development, testing, promotion or merchandising of an intellectual property created by the public servant.

II. FACTS

Facts provided by the requestor are set forth below, with identifying information redacted, and are considered a part of this opinion.

The purpose of this correspondence is to request an ethics opinion under the following scenario:

I am a candidate for Councilman. I am also a Licensed Real Estate Agent. At this current time, I represent several landowners as their agent to sell a specific piece of real property to a certain buyer group. I also have a dual agency confirmation disclosure wherein I am an agent for both the landowner sellers and the buyer group.

At this present time, the buyer group has presented this specific tract of land to the City in response to a request for proposals for a land application waste water treatment option the City is currently entertaining. The City would not own this particular piece of land. The buyer group would continue to own the land; however, there is the potential that the City may choose this buyer group to be a service provider to the City for waste water treatment. There is the potential the contract to purchase these particular pieces of land may close prior to the start of the new term of office in June, and there is also the potential that these contracts may not close until after the new term starts. Additionally, if the buyer group becomes the service provider that is successful in obtaining a contract with the City to provide waste water treatment, there will need to be votes in the future on matters of rate implementation, rate adjustments, etc.

I have a few specific issues I am requesting the commission address, but would also like the commission's opinion on any other potential conflicts of interest in this scenario, which I may have overlooked.

1. If elected, would it be appropriate to accept a real estate commission from the land deal if it does not close until after the term of office begins?
2. Understanding there are conflict of interest issues, if elected, I assume I would not be able to vote on a contract between the City and the buyer group as a service provider. If that is correct, would there be a certain time limitation that I could not vote on said contract?
3. Also, if elected, and assuming this buyer group is successful in obtaining a service provider contract with the City, would I be able to vote on future matters regarding this service provider, including rate implementation or rate adjustments?
4. Additionally, would I be able to vote on other waste water treatment issues that are not connected to this particular buyer group? For example, if a water main in the middle of downtown broke and needed to be repaired in an emergency situation.

The requestor confirmed the closing of the buyer group's purchase of the land is contingent on the city approving the site for the wastewater treatment project. The requestor's interest in this transaction is limited to the real estate commission related to the land purchase contract between the buyer group and the current landowner. The buyer group purchase contract and all related real estate commission agreements were entered prior to the requestor becoming a candidate for councilman. The requestor will receive no compensation related to the city's selection of the buyer group as a service provider, and the requestor will not be involved in the ongoing wastewater project. The real estate commission will exceed \$5,000. The city received two or fewer responses to the request for proposals advertised by the city concerning the wastewater project. The requestor entered the real estate commission agreement before he or she became a candidate for public office.

III. ANALYSIS

Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, both quoted above, prohibit a member of a public board from having any direct or indirect interest in a contract with the government funded or otherwise authorized by that board during his or her term or for one year thereafter. Frazier v. State, ex rel. Pittman, 504 So.2d 675, 693 (Miss. 1987). Here, the city will enter one or more contracts with the buyer group related to the selection of the site for the wastewater treatment project and the operation of the site by the service provider. The requestor has an interest in the site selection because the requestor's real estate commission is contingent, in part, on the city's selection of the site. If the city selects the site after the requestor is elected and takes office and the requestor receives a real estate commission related to the purchase of the land by the buyer group, a violation of Section 109 and Section 25-4-105(2) will occur.

A recusal will *not* prevent or ameliorate a violation of Section 109 and Section 25-4-105(2), as they do *not* require any affirmative act by an individual member but merely action by the board. Towner v. Moore ex rel. Quitman County School Dist., 604 So.2d 1093, 1100 (Miss. 1992), and Waller v. Moore ex rel. Quitman County Sch. Dist., 604 So.2d 265, 266-267 (Miss. 1992). Therefore, if the city selects the site after the requestor is elected and takes office, the requestor will be prohibited from receiving a commission related to the purchase of the land by the buyer group. Likewise, a violation of Section 109 and Section 25-4-105(2) will occur if the buyer group's purchase contract and the closing are contingent upon any action by the city council after the requestor takes office. If, however, the city selects the site, the council approves all contract documents related to site selection, and all contingencies are removed from the buyer group's purchase contract prior to the requestor taking office, no violation of Section 109 or Section 25-4-105(2) should occur. Additionally, should the closing take place prior to the requestor taking office, no violation of Section 109 or Section 25-4-105(2) should occur.

The requestor must also be mindful of Section 25-4-105(3)(a) which prohibits all public servants of the city, including a councilman, from having a "material financial interest" in a business which is a contractor, subcontractor or vendor to the city, subject to some limited exceptions set forth in Section 25-4-105(4). "The term contractor is generally used in the strict sense of one who contracts to perform a service for another and not in the broad sense of one who is a party to a contract." Moore, ex rel. City of Aberdeen v. Byars, 757 So.2d 243, 248 (¶ 15) (Miss. 2000). Clearly, the buyer group will be a contractor to the city if selected by the council as a wastewater service provider. Because the requestor will receive in excess of \$5,000 in aggregate annual net income from the buyer group, then he or she has a material financial interest in the buyer group. See Section 25-4-103(k)(ii) above.

However, it appears the exception listed in Section 25-4-105(4)(d) applies to the facts provided by the requestor. This exception would allow the buyer group to serve as a wastewater provider "where such . . . services involved are reasonably available from two (2) or fewer commercial sources, provided such transactions comply with the public purchases laws." If the city received two or fewer responses to the request for proposals after having diligently sought responses and all applicable public purchase laws are followed, the city may select the buyer group as a wastewater service provider under this exception, and no violation of Section 25-4-105(3)(a) should result.

The requestor also asks whether he or she may vote on the service provider contract between the buyer group and the city if the buyer group is selected as a service provider. As set forth in Section 25-4-105(1), Miss. Code of 1972, a councilman cannot use his or her position in city government to obtain any pecuniary benefit for a “business with which he [or she] is associated.” That term is defined in Section 25-4-103(d) as any business from which he or she derives annual income of \$2,500 or more. The buyer group will be a business with which the requestor is associated. To avoid a violation of Section 25-4-105(1), the requestor, if elected, must fully and completely recuse himself or herself from any matter coming before the city council concerning the buyer group, including the service provider contract. This restriction will apply for twelve months after the requestor receives the final payment from the buyer group.

A total and complete recusal requires the councilman leave the meeting room before the matter comes up for discussion and remain absent until the vote is concluded. The councilman must not only avoid debating, discussing or taking action on the subject matter during official meetings or deliberations but must also avoid discussing the subject matter with anyone in municipal government. This restriction includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. An abstention is considered a vote with the majority and is not a recusal. Furthermore, any minutes or other record of the meeting should state the recusing councilman left the room before the matter came before the board and did not return until after the vote.

The requestor also asks whether he or she may vote on other matters involving wastewater treatment that are unrelated to the buyer’s group. As an example, the requestor asks whether he or she may vote on a matter related to emergency repairs to a water main. Certainly the requestor *may* vote on measures which do *not* result in a pecuniary benefit for the buyer’s group. As stated above, the requestor may *not* vote on measures which *do* benefit for the buyer’s group within one year of receiving his or her last payment from the buyer’s group.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel