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ETHICS ADVISORY OPINION NO. 25-003-E

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Question Presented: May a business with which a state agency head is associated through a relative continue to contract with local governmental entities when the state agency may be required to take actions related to those projects?

Brief Answer: Yes, but the agency head must fully recuse from any action which would result in a pecuniary benefit to the firm or the relative, in compliance with Section 25-4-105(1), Miss. Code of 1972.

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

(b) “Benefit” means any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.

(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.

(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.

(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.

(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.

(q) “Relative” means:

(i) The spouse of the public servant;

(ii) The child of the public servant;

(iii) The parent of the public servant;

(iv) The sibling of the public servant; and

(v) The spouse of any of the relatives of the public servant specified in subparagraphs (ii) through (iv).

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.

II. FACTS

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

I am writing to request an Ethics Opinion regarding certain matters that may arise as a result of my recent marriage, with respect to my position as [head of a state agency.] My [spouse] is an engineer and a minor shareholder in [his or her] father's private engineering firm, in which [his or her] father and another shareholder own the majority of shares ("the firm").

It is my understanding that the firm does not have any current contracts with the [state board which employs me], nor is it anticipated that such a contract would be contemplated or pursued under the current circumstances. For clarification, state law provides that the [board] is the legal entity that is a party to contracts, and the [board] executes its directives through [the agency]. When (and only when) the [board] authorizes (or in very rare cases, ratifies) the execution of a contract, those contracts are typically executed by the [person in my position] "on behalf of" the [agency]. However, under state law, [board] contracts may also be executed on behalf of the [board] by an [agency deputy]. See, generally, Mississippi Code Sections ... (setting forth the duties and responsibilities of the [board], [the agency], and [agency] executives).

As stated, there are no [board] contracts with the firm at issue. However, [this agency] is the agency designated to receive and distribute [certain types of] federal ... funds in Mississippi. As such, [the agency] does have certain responsibilities for the expenditure of federal ... funds or other funds for which [the agency] serves as the legal "conduit" for the ... projects of: (1) Local Public Agencies ("LPAs"), such as cities and counties, and (2) [a state office closely affiliated with this agency], which operates in coordination with the various counties. In addition, [the agency] is tasked by state law with, (3) distributing funds to various cities and counties receiving state funds for [certain urgent projects]. For all of these scenarios, there are multiple processes and procedures in place at [the agency], and the Executive Director has typically signed various documents indicating that the funds passing through [the agency] have been properly approved by the [board] and/or setting forth the applicable requirements on the locals under the federal regulations, state laws, or well-established [agency] procedures for the receipt of those funds. Those scenarios are more fully explained below.

1. LPA Projects: An example of an LPA project would be a congressional earmark for a city or county to build or upgrade a segment of [infrastructure]. In such a case, the federal money for the project comes through [the agency]. [The agency] would not select the engineers for that project or be a party to that engineering contract - the city or county would. [The agency] has in place a manual and other procedures (primarily governed by federal regulations), by which [the agency] reviews the procurement and administration of these LPA projects to help ensure that the LPAs comply with the requirements for the expenditure of federal ... funds that flow through [the agency]. [The agency]'s LPA procedures are approved by the Federal ... Administration and are designed to allow [the agency] to assist the locals in making sure that LPA project activities are conducted by the locals in such a manner as to be federally compliant and eligible for all federal funds available to the LPA that pass through [the agency] as the conduit. However, the procurement of any engineers who work on LPA projects, the management of those engineering contracts, and the implementation of the projects are the responsibility of the local entity (not [the agency]). Under the current procedures, the distribution of federal funds from [the agency] goes directly to the LPA; however, there are rare circumstances where the payment of federal funds owed by the LPA to an engineer (under a contract between the LPA and the engineer) may be made directly from [the agency] to the engineer for the benefit of the LPA.

It is my understanding that the firm is currently under contract with local entities for LPA projects and will most likely continue to submit proposals to local entities to be considered for work on LPA projects. [The agency]'s procedures dictate that LPA projects, including those that involve engineering services, are procured by the local entity. The [agency] Consultant Services Unit ("CSU") staff reviews the advertisement, scoring, and other aspects of the engineering services procurement and the CSU Director "concurs" that the solicitation and selection of the engineering firm were conducted in accordance with federal law (for the purposes of receiving the ... funds that flow through [the agency]). ... CSU also assists in the review of LPA expenditures on the project for federal compliance. In addition, the ... LPA Division, which reports to [the agency's] Director of [professional services], provides administrative assistance and oversight to help ensure that the work of the LPA progresses in a manner that remains eligible for federal funding. These tasks are conducted by the relevant [agency] divisions and related management staff. The Executive Director, with [board] authorization, does typically execute an MOU with the local government to establish the roles and responsibilities of [the board] and the LPA with respect to the use of federal funding that flows through [the agency]. [The board and agency] are not parties to the contracts between the LPAs and local engineers, contractors, and/or consultants for the implementation of an LPA project.

2. [State Office] Projects: There are certain [State Office] contracts that receive federal funding that flows through [the agency] (for example, ... services for [infrastructure] maintained by the respective counties). It is my understanding that

the firm is currently a party to such contract(s) procured and administered by [the State Office] and could be a party to additional [State Office] contracts in the future.

The [the head of the State Office] procures and executes these contracts. [He or she] is appointed by the Governor and is subject to removal by the Governor. He reports to the Governor, and by statute: "All duties, powers and responsibilities for the administration and management of the Office ... shall be vested in and performed exclusively by [the head of the State Office]." See Miss. Code [sections]. For [State Office] contracts receiving federal funds that flow through [the agency], the ... CSU and Legal Division assist [the head of the State Office] in ensuring that the procurement and the contracts are federally compliant; however, the selection of engineers for those contracts and the execution/administration of those contracts is the exclusive statutory responsibility of [the head of the State Office]. For contracts using federal ... funds that are procured and executed by [the State Office], the [agency] Executive Director normally "concur" in any agreements related to the expenditure of the federal funds that flow through [the agency]. This pro forma concurrence indicates that the federal funds are available and the [board] has approved the use of those funds by [the State Office] for the purposes stated in the agreement that is executed by [the head of the State Office]. This determination and signature could easily be provided by an [agency] Deputy Executive Director or other appropriate [agency] personnel, but, historically, the procedure has been for the [agency] Executive Director to do so when present.

3. [Urgent] Projects: In 2018, the Legislature established the [a certain] Fund and the parameters for its use. In compliance with this law and subsequent amendments thereto, [the board and the agency] set up a program for the administration of [those] Funds and continue to operate the program as required by law. See Mississippi Code Sections Generally speaking, that program works as follows: (1) the local entities apply for state ... funding of projects for the emergency repair of their [infrastructure]; (2) the amount of funding for the project is approved by a majority of the [board] (with the advice of the ... Fund Advisory Board, the composition of which is statutory); (3) [the board] and the local entity execute a Memorandum of Agreement ("MOA") for the transfer of the funds from [the agency], which is typically executed by [the agency] Executive Director on behalf of the [board];(4) [the agency] transfers the ... funds to the local entity for use on the project in accordance with the MOA; and (5) the local entity implements the project using the money from the ... Fund, in accordance with the MOA.

Under the [Urgent Projects] statutory requirements, [the agency] basically acts as the Bank where local entities may withdraw funds for their local projects. However, the local entity procures, executes, and administers the engineering and [other] contracts for each ... project. The standard ... MOA between the [agency] and the local entity requires the local entity to submit the name of the Engineer for the project and provides that the fees for any project engineering services are capped at actual costs or a percentage of the ... bid price. The ... projects are not selected to receive ... funding based on the engineer for the project. [Board/Agency] does

not select the engineer and is not a party to any contract with the engineer. The amounts allowed to be paid to the engineer are calculated based on factors external to [Board/Agency].

There are some ... projects where the local entities have contracted for engineering services with the firm. Additionally, it is anticipated that there could be future instances where a local entity receiving ... funds through [the agency] selects the firm and executes a contract with the firm to provide engineering services on an ... project.

4. Actions Taken and Proposed Next Steps: To reiterate, after diligent inquiry, it is my understanding that there are no current [board] contracts with the firm. I do not anticipate any such contracts in the future, under the current circumstances. There are, however, as indicated above, certain scenarios where the firm is under contract for projects that involve funding that flows through [the agency] for the benefit of other entities.

On the advice of [agency] General Counsel at the time of my marriage, I removed myself from the process of signing or concurring in any agreements or other documents, as well as any decisions/discussions arising related to any contractual issue or question on projects involving the firm (whether LPA, [State Office], or [Urgent Projects]) that may require the attention of [agency] upper-level management. Specifically, I have issued a verbal directive that any required signatures/reviews/decisions for projects involving the firm are to be handled independently by the [agency] Deputy Executive Director..., the [agency] Chief of Staff, or other appropriate [agency] staff - without my involvement. Ultimately, I plan to issue a written directive that formally documents my removal from any issue or matter involving the firm. I would like to base that written directive on the language and requirements contained in the Ethics Opinion that is issued in response to this request.

Thank you for reviewing this matter. As I noted, there are numerous manuals, procedures, template agreements, and other documents used by [the agency] to meet its responsibilities for the programs listed above. The contents of these documents are mostly federally required/approved and are the same, regardless of who holds the position of [agency] Executive Director. I would be happy to provide those or discuss those with you, if you feel that any of those documents are needed to respond to this request. If you have any questions or need any additional information or documentation regarding this request, please do not hesitate to contact me.

III. ANALYSIS

Section 25-4-105(1), Miss. Code of 1972, prohibits all public servants of state and local government from using their position in government to obtain or attempt to obtain a “pecuniary benefit” for any “relative” or a “business with which he [or she] is associated.” See definitions in Section 25-4-103(l), (q) and (d). The agency head’s spouse is a relative, and the firm is a business

with which the agency head is associated. Therefore, the agency head may not take part in any agency action which would result in a monetary benefit to the spouse or to the firm, even when the spouse would not benefit.

To prevent a violation, the agency head must fully recuse from any such action. Normally, the Ethics Commission recommends that a recusing public employee ask his or her supervisor to assign the task to another employee. However, when the recusing public employee is the head of the public body, deferring to a supervisor is not possible. Instead, the agency head should, as contemplated above, compose written instructions for handling agency actions involving this firm. Those instructions should fully delegate, without reservation or limitation, independent authority and discretion to take appropriate agency actions involving the firm, its shareholders, employees, projects and clients.

Agency management, such as deputy directors, must not consult the agency head on such matters, and the agency head must not communicate with agency management on those matters. This restriction includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. In cases where the state board takes action related to the firm, the agency head must not discuss the matter with board members, should leave the board meeting before the matter comes before the board and should not return until the matter is concluded. Furthermore, the minutes of the board meeting should accurately reflect the recusal, even though the agency head is not a member of the board.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel