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ETHICS ADVISORY OPINION NO. 20-016-E

May 1, 2020

Question Presented: May a school district contract with its employee in relation to providing computer software which is not reasonably available from any other commercial source?

Brief Answer: Yes. While Section 25-4-105(3)(a), Miss. Code of 1972, prohibits an employee of a public school district from being a contractor, subcontractor or vendor to the district, under these particular facts, the software is not reasonably available from any other commercial source. Therefore, the exception codified in Section 25-4-105(4)(d) will apply, and no violation will occur.

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.

(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.

(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.

(j) “Intellectual property” means any formula, pattern, compilation, program, device, method, technique or process created primarily as a result of the research effort of an employee or employees of an institution of higher learning of the State of Mississippi.

(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.

(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.

(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.

Please accept this as a request for an ethics opinion submitted on behalf of our client, [the] County School District (the "District").

Operative Facts

A few years ago, a District employee began developing software for use in and by the District. This development was done primarily in his free time, but used District data. Further, the District was used as a testing environment for the software as it

was developed. The database for the software is hosted elsewhere, and to date the employee has paid the hosting fees out of his pocket.

The employee has now created a limited liability company, and is selling the software to at least one other district through that company. As of today, the District has paid nothing for this software for the many years it has had use of it.

The employee would like to recover some of his expenses through his LLC by selling the software to other districts, and at least break even on hosting fees and other expenses, but not from the District, as he will not charge the District anything at any time to even recover his expenses. Separately, the District would like to put a contract in place to require the implementation of certain security measures, purchasing of insurance, and other provisions standard in contracts with entities who have access to District data.

The two pieces of software in question are considered by the District to each be single source items for the unique combination of services they provide. In other words, the District believes it would have to purchase three programs from three different vendors to do what each of these programs do individually. The District could break down the components of each piece of software and buy software to replace it, but this would require multiple purchases and would far exceed the cost of covering a portion of the expenses the employee's company is incurring on a going-forward basis.

Questions and Issues

As you know, among other restrictions, Miss. Code Ann. § 25-4-105 prohibits public servants from contracting with a governmental entity of which he is an employee. However, there are a limited number of exceptions to the prohibitions contained in the statute. Included among these, Miss. Code Ann. § 25-4-105(4)(d) provides that a public servant:

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.

Here, the contractual relationship would involve further testing and development of the intellectual property (the software) created by the public servant. However, Miss. Code Ann. § 25-4-103(j) includes in the definition of "intellectual property" a requirement that it be "created primarily as a result of the research effort of an

employee or employees of an institution of higher learning of the State of Mississippi." Therefore the facts at hand would not seem to satisfy the requirements of (ii) under Miss. Code Ann. § 25-4-105(4)(d). Please let us know if you believe that interpretation is correct.

More likely, we believe the contract would be permissible under (i) of Miss. Code Ann. § 25-4-105(4)(d), as the services (software) involved are not reasonably available from another commercial source. While the District could conceivably replicate the services provided by the software by purchasing or licensing a number of software packages from a number of different vendors, such a cobbling together of software to replicate the functions of one package does not seem reasonable, and would be apparently more costly. Therefore it appears to us that the contract would be acceptable under this exception. Please let us know if you believe that interpretation is correct.

As a practical matter, the contract represents a significant financial benefit to the District and the taxpayers. Not only will this contract necessitate the licensing or purchase of fewer software products, but also the cost is inherently reduced as the employee's company will not charge the District, and will instead recover costs through sales and licensing to other districts. Therefore the cost is expected to be significantly less than that the District would incur to license or purchase separate pieces of software to recreate the functionality of these two pieces of software.

Please also let us know if there are any issues or exceptions potentially applicable.

III. ANALYSIS

Section 25-4-105(3)(a), Miss. Code of 1972, prohibits an employee of a public school district from being a contractor, subcontractor or vendor to the district and from having a "material financial interest" in a "business" which is a contractor, subcontractor or vendor to the district, subject to the limited exceptions found in Section 25-4-105(4). See also Section 25-4-103(k) and (c). Under the facts provided above, it is not clear whether the employee or his LLC will actually be a contractor or vendor to the district since no consideration will be paid. "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). Nevertheless, an analysis of the facts and questions presented above is appropriate.

The requestor is correct in concluding that the part of the exception codified in Section 25-4-105(4)(d) and involving "the further research, development, testing, promotion or merchandising of an intellectual property" is not applicable in this situation. That clause and the definition of "intellectual property" found in Section 25-4-103(j) relate to the Mississippi University Research Authority Act, Sections 37-147-1 through 37-147-15.

However, the requestor also makes a compelling argument that these facts satisfy the other requirements outlined in Section 25-4-105(4)(d). Based upon those facts, the software created by the district employee is unique and constitutes a single source. It would not be reasonable for the

district to purchase multiple programs to perform the functions this software package can accomplish at no cost to the district. Therefore, the commission concludes that even if the proposed agreement between the district and its employee does make the employee a contractor or vendor to the district, no violation of Section 25-4-105(3)(a) will occur under these facts because the exception found in Section 25-4-105(4)(d) will apply.

MISSISSIPPI ETHICS COMMISSION

BY: _____

Tom Hood, Executive Director and
Chief Counsel