

SUBJECT: COUNTY COUNCILMAN'S BUSINESS AS SUBCONTRACTOR ON COUNTY PROJECT

SUMMARY:

A county councilman who is authorized to perform an official function pertaining to a contract as delineated in Section 8-13-775 may not be a subcontractor to a business contracting with the county since the contract was not awarded in accordance with the Consolidated Procurement Code.

QUESTION:

The Lexington County Administrator inquires whether a business owned by a county councilman may subcontract to perform flooring work pursuant to a county contract. Lexington County Council appropriated funds to construct a fire station in the West Columbia/Lexington area of Lexington County. Funding was made available by a general obligation bond issued in the fall of 1991. A county council candidate's business submitted a bid to Contract Construction, Inc. on October 22, 1992. In November 1992, the candidate was elected to Lexington County Council. On February 22, 1993, after the councilman had taken office, Lexington County Council approved the award of the contract to Contract Construction, Inc., and the minutes from that meeting indicate that the councilman voted in favor of approving the contract. Contract Construction, Inc. wishes to utilize the councilman's business to do the flooring work for the Pine Grove Station project. As previously stated, the County Administrator seeks an advisory opinion as to whether the councilman's business can proceed as originally proposed.

DISCUSSION:

This opinion is rendered in response to a letter dated April 7, 1993 requesting an opinion from the State Ethics Commission. The Commission's jurisdiction is limited to the applicability of the Ethics, Government Accountability, and Campaign Reform Act of 1991 (Act No. 248 of 1991; Section 8-13-100 et seq., as amended, 1976 Code of Laws). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation.

The State Ethics Commission calls attention to Section 8-13-700(B), which provides in part as follows:

(B) No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest. A public official, public member, or public employee who, in the discharge of his official responsibilities, is required to take an action or make a decision which affects an economic interest of himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is

associated shall:

(1) prepare a written statement describing the matter requiring action or decisions and the nature of his potential conflict of interest with respect to the action or decision;

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(4) if he is a public official, other than a member of the General Assembly, he shall furnish a copy to the presiding officer of the governing body of any agency, commission, board, or of any county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause the disqualification and the reasons for it to be noted in the minutes.

Section 8-13-100(11) provides as follows:

(11)(a) 'Economic interest' means an interest distinct from that of the general public in a purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services in which a public official, public member, or public employee may gain an economic benefit of fifty dollars or more.

(b) This definition does not prohibit a public official, public member, or public employee from participating in, voting on, or influencing or attempting to influence an official decision if the only economic interest or reasonably foreseeable benefit that may accrue to the public official, public member, or public employee is incidental to the public official's, public member's, or public employee's position or which accrues to the public official, public member, or public employee as a member of a profession, occupation, or large class to no greater extent than the economic interest or potential benefit could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class.

Accordingly, the councilman's participation in matters affecting a contract on which his business may be a bidder would not be prohibited by this section, provided all such contractors would be equally affected by the contract, and provided further that the councilman is not authorized to perform an official function pertaining to the contract as delineated in Section 8-13-775. Absent the authorization to perform an official function, the county councilman would not be prohibited from bidding on and performing work pursuant to such contracts, provided that the requirements of Section 8-13-700(B) are followed.

Section 8-13-775 provides as follows:

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A public official, public member, or public employee may not have an economic interest in a contract with the State or its political subdivisions if the public official, public member, or public employee is authorized to perform an official function relating to the contract. Official function means writing or preparing the contract specifications, acceptance of bids, award of the contract, or other action on the preparation or award of such contract. This section is not intended to infringe on or prohibit public employment contracts with this State or a political subdivision of this State.

In an earlier advisory opinion, SEC AO92-048, the State Ethics Commission determined that "a subcontractor would have an economic interest in a contract ... [if] the effect would benefit the subcontractor \$50 or more." According to the facts presented, Lexington County Council approved the award of the contract to Contract Construction Inc. after the councilman had taken office. Thus, notwithstanding the date the councilman's business submitted its bid, the councilman was authorized to perform an official function within the meaning of Section 8-13-775 at the time the contract was approved. Accordingly, the State Ethics Commission advises that, subject to the provisions of Section 8-13-785(B), the county councilman may not have an economic interest in the fire station construction contract regardless of whether the requirements of Section 8-13-700(B) were followed.

Section 8-13-785(B) provides as follows:

The provisions of Articles 1 through 11 of this chapter do not prohibit a public official from contracting with the State or a governmental entity when the contract is awarded in accordance with Chapter 35 of Title 11.

Therefore, if a public official is authorized to perform any official function pertaining to the contract, he may have an economic interest in the contract **only** (emphasis added) if the contract is awarded in accordance with the provisions of Chapter 35 of Title 11 (the Consolidated Procurement Code). According to the facts presented, Lexington County did not award the fire station contract in accordance with the Consolidated Procurement Code, and for this reason, the county councilman may not have an economic interest in the contract.

The State Ethics Commission notes that legislation is currently pending which would allow a public official to have an economic interest in a contract with the State or its political subdivisions as long as the contract is awarded through a process of public notice and competitive bids, and the public official otherwise complies with Section 8-13-700(B). Assuming such legislation had been in effect on February 22, 1993, the Lexington County Councilman in question still would be prohibited from having an economic interest in the fire station construction contract, because he performed an official function regarding the award of the contract.