

SEC AO2009-005

May 20, 2009

**SUBJECT:** SCHOOL DISTRICT TRUSTEES CONTRACTING WITH THEIR SCHOOL DISTRICT

**SUMMARY:** School district trustees may contract with their school district to provide construction services under the guidelines of Section 8-13-775 which requires the removal of the trustees from the procurement process and recusals thereafter on matters related to the contract. Finally, such a contractual relationship would have to be disclosed on the school district trustee's annual Statement of Economic Interests form.

**QUESTIONS:** Whether school district trustees may contract with their school district on its capital construction for new schools as well as renovations, additions and conversions of existing buildings?

**DISCUSSION:**

The State Ethics 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 2-17-5 et seq. and Section 8-13-100 et seq., as amended, 1976 Code of Laws of South Carolina). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation. Failure to disclose relevant information may void the opinion.

Section 8-13-700(B) provides in part:

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 of the statement 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 8-13-725 provides in part:

(A) No public official, public member, or public employee may use or disclose confidential information gained in the course of or by reason of his official responsibilities in any way that would affect an economic interest held by himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated.

Section 8-13-775 provides:

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 the contract. This section is not intended to infringe on or prohibit public employment contracts with this State or a political subdivision of this State nor does it prohibit the award of contracts awarded through a process of public notice and competitive bids if the public official, public member, or public employee has not performed an official function regarding the contract.

Section 8-13-775 prohibits a public official from having an economic interest in a contract with the State or its political subdivisions, if the public official is authorized to perform an

official function relating to the contract. Official functions include writing or preparing the contract specifications, acceptance of bids, award of the contract, or other action on the preparation or award of the contract. If the contract is awarded through a public and competitive bidding process and the public official does not perform an official function, then the conflict is avoided. In addition, the public official must recuse pursuant to the procedure set out in Section 8-13-700(B) when a matter involving the contract comes before the public body.

Section 8-13-725 provides that a public official may not use or disclose confidential information gained in the course of or by reason of his official responsibilities in any way that would affect an economic interest held by himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated. The disclosure of confidential information is not, in and of itself, a violation of the Ethics Reform Act. The disclosure of confidential information to affect the economic interest of the public official is a violation.

As to official function, general capital needs planning and building program planning appear to not go beyond project generalities; however, project-specific pre-bid matters seem to be just that, project specific and would be an official function regarding the specific project under review. As such, a school district trustee who is contemplating bidding on the project would be advised to recuse himself from project-specific pre-bid matters pursuant to Section 8-13-700(B) and, if the recusal were to be made in executive session, then the school district trustee would also leave the room in order to avoid a potential Section 8-13-725 violation of confidentiality.

Section 8-13-775 governs the contract between the school district trustee and the school district. Sub-contracts do not normally fall within the confines of Section 8-13-775. If the construction manager at risk chooses to use a process of public notice and competitive bids, that use would still not fall with the jurisdiction of the Ethics Reform Act.

#### CONCLUSION:

Accordingly, school district trustees may contract with their school district to provide construction services under the guidelines of Section 8-13-775 which requires the removal of the trustees from the procurement process and recusals thereafter on matters related to the contract. Finally, such a contractual relationship would have to be disclosed on the school district trustee's annual Statement of Economic Interests form, pursuant to Section 8-13-1120(A)(8).

KEY WORDS: official functions, contracting with agency by agency member, confidentiality, school district trustees, Statement of Economic Interests form
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ANNOTATIONS: 8-13-700(B), 8-13-725, 8-13-775, 8-13-1120(A)(8)
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