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TOM HOOD
Executive Director and Chief Counsel

ADVISORY OPINION NO. 10-051-E

June 11, 2010

Question Presented: May a regional planning commission contract with a consulting firm which employs the fiancé of the commission's executive director?

Brief Answer: The regional planning commission may contract with the consulting firm only if the director fully recuses himself or herself from all dealings with the firm, in compliance with Section 25-4-105(1) and (3)(a), 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.

(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.

(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.

(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.

(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.

(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.

II. FACTS

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

As attorney for a Regional Planning Commission (RPC), request is hereby made for your official opinion as to whether or not the Regional Planning Commission, created under Mississippi Code of 1972, Annotated, §17-1-35, has taken the proper steps to not be in violation of §25-4-105 of the Mississippi Code of 1972, Annotated as Amended, (2008).

The Commission's Executive Director has become engaged to be married to an employee of a consulting firm that the agency, in the past, has contracted for planning/engineering services. At the present time, RPC has no contract with this firm; however, the Mississippi Department of Transportation does have a contract with an engineering/planning firm that has a sub-contract with this firm for work on the long range transportation plan which includes a plan for the Gulf Coast which RPC does have oversight of the work product. Upon learning of the engagement, the Board of Directors of the Regional Planning Commission directed its Executive Director to have no dealings with the firm that the fiancé is employed by and directed

a specific staff member of the Regional Planning Commission to handle any and all matters for the Commission in dealing with that firm.

III. ANALYSIS

No public servant may use his or her official position to obtain or attempt to obtain any pecuniary benefit for a “business with which he [or she] is associated,” as proscribed in Section 25-4-105(1), Miss. Code of 1972. A business which employs a public servant’s spouse is a business with which the public servant is associated. Therefore, after the marriage, the director of the regional planning commission may not take any action which results in a benefit to the consulting firm which employs his or her spouse. If the regional planning commission has future dealings with the consulting firm, the director must fully recuse himself or herself from those dealings.

A total and complete recusal requires the director avoid any action which would result in a pecuniary benefit to the firm, such as making recommendations, reviewing proposals, approving payments or any other action involving the firm. The director must not only avoid discussing or taking action on the subject matter during official meetings or deliberations but must also avoid discussing the subject matter with any other employees or officials of the regional planning commission. This includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. Furthermore, any minutes or other record of a meeting or other proceeding from which the director recuses should state the director left the room before the matter came before the public body and did not return until after the discussion and/or vote was concluded.

The director is also subject to the provisions of Section 25-4-105(3)(a), which prohibits the director from having a “material financial interest” in a business which is a contractor, subcontractor or vendor to the regional planning commission. Section 25-4-103(k)(iv), above, provides a “spousal exclusion” to the broad definition of “material financial interest.” The spouse’s employer may do business with the public body when “the public servant exercises no control, direct or indirect, over the contract.” If the director fully recuses himself or herself as described above, then the director will not exercise any control, directly or indirectly, over any contract between the regional planning commission and the consulting firm. Under those circumstances, no violation of Section 25-4-105(1) or (3)(a) should result.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel