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February 2, 2005

ADVISORY OPINION NO. 2005-04

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Conflict Of Interest/Business Employing
Member Of Alabama State Port Authority
Board Of Directors Bidding On Lease to
Operate Port Authority Terminal

A business employing a member of the Alabama State Port Authority board of directors may bid on a lease to operate a Port Authority terminal; provided, that the board member does not vote, attempt to influence or otherwise participate in any aspect of the transaction; that the design, building and lease are awarded through some type of bid process/request for proposals; that the board member does not use confidential information obtained in the course of his service on the Port Authority to assist his company in being the successful bidder; and, that if his company is the successful bidder, a copy of the transactions is filed with the Ethics Commission within ten days after being entered into.

Dear Mr. Givhan:

The Alabama Ethics Commission is in receipt of your request for an Advisory Opinion of this Commission, and this opinion is issued pursuant to that request.

QUESTION PRESENTED

May a business employing a member of the Alabama State Port Authority respond to a request for proposal to operate a terminal owned by the Alabama State Port Authority?

FACTS AND ANALYSIS

The facts as have been provided to this Commission are as follows:

The law firm of Hand Arendall represents the Alabama State Port Authority. The Alabama State Port Authority is an Authority of the State of Alabama established pursuant to Chapter 1 of Title 33 of Alabama Code, 1975, (the "Authority"). The Authority is governed by a nine member board of directors whose duties are set forth in Alabama Code, Section 33-1-8(g) and which include setting policies for the Authority. Pursuant to the Authority's bylaws, its board of directors is further responsible for approving (1) the disposition of all property, equipment and facilities of the Authority, (2) the acquisition, construction, improvement, renovation, maintenance and management of property of the Authority, and (3) all contracts for the acquisition of materials or services proposed to be entered into by the Authority.

The Authority intends to issue a request for proposals (RFP) seeking sealed proposals from world-class terminal operators desiring to lease approximately 120 acres of real property from the Authority at Choctaw Point in Mobile, Alabama (the "Premises"), and to design and build the certain improvements thereon, which, when completed, will comprise the Choctaw Point Container Terminal (the "Terminal"), and to operate and maintain the Terminal throughout the term of the lease through a Concession Agreement to be entered into with the Authority (the "Agreement"). The RFP will be sent out only to firms who have been pre-qualified by submitting a response to a Request for Expressions of Interest in which firms were required to outline their interest, approach and technical qualifications. The responses to the RFP will be evaluated by the Director of the Authority and senior managers with assistance from the project consultants. The Director will then make a recommendation for selection to the Legal and Planning Committee of the Authority's Board of Directors, who will then make a recommendation to the full Board of Directors for approval. The Authority intends to award the Agreement to the pre-qualified respondent that offers the most attractive and realistic financial proposal.

While the terms of the Agreement required under the RFP are still under consideration and subject to negotiation with whichever operator the Authority selects to enter into the Agreement (the "Operator"), it expects the Agreement to include terms and conditions substantially similar to the following:

1. The term of the Agreement will be for multiple years of up to 30 years with options for extensions.
2. The Authority will construct certain substructure improvements on the Premises necessary for the operation of the Terminal prior to the commencement of the lease term, which improvements may be paid for partially out of federal funds received by the Authority, partially out of State funds, and partially out of other funds furnished by the Authority.
3. The Operator will be obligated (1) to design, build, operate and maintain all such other improvements as may be necessary to operate the Terminal, (2) supply all equipment and personnel for operation of the Terminal, and (3) to otherwise ensure the continuous operation of the Terminal for its intended purpose for the entire term of the Agreement.
4. The Operator will have the sole right and obligation to operate the Terminal, which obligation will include certain minimum financial guarantees as to the amount of commercial activity to be generated at the Terminal.
5. The Operator and the Authority will jointly plan and coordinate marketing and public relation activities related to the Terminal, but the Operator will accept all market risk for the operation of the Terminal.
6. The Operator will be obligated to pay a specified amount of minimum rent for each year of the term of the Agreement, as well as a specific amount of additional rent, which will be a percentage of the volume of commercial activity that the Operator is able to cause to be conducted in the Terminal.
7. Upon termination of the Agreement, the Operator will be allowed to remove the equipment which it furnished and installed on the Premises, but otherwise will be obligated to leave the Premises and all improvements constructed thereon in good operating condition for the intended use of the Terminal.

David Cooper is a member of the Authority's board of directors. Mr. Cooper also is the President and serves on the board of directors and is a principal shareholder of Cooper/T. Smith Corporation. One of the firms that have pre-qualified is CSA, which is 50% owned by Cooper/T. Smith Corporation. It is anticipated that CSA, either alone or jointly with another company, will seek the right to lease and operate the Terminal.

Mr. Givhan states that the Authority is specifically exempted under Alabama law from any requirement to competitively bid the sale or lease of any of its property, equipment or facilities. Additionally, pursuant to Chapter 2 of Title 39 of the Alabama Code, the Authority is also exempted from any requirement under Alabama law to competitively bid the construction, repair, renovation, or maintenance of public buildings, structures, sewers, waterworks, roads, bridges, docks, underpasses, and viaducts as well as any other improvement to be constructed, repaired, renovated, or maintained on public property and to be paid, in whole or in part, with public funds. Accordingly, the Authority is exempt from having to competitively bid the proposed Agreement and may or may not comply with the technical requirements of Alabama's competitive bid law. Nonetheless, as indicated above, the Authority intends to award the Agreement through an RFP process to the pre-qualified respondent that offers the most attractive and realistic financial proposal.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(24) defines a public official as:

"(24) PUBLIC OFFICIAL. Any person elected to public office, whether or not that person has taken office, by the vote of the people at state, county, or municipal level of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county, or municipal level of government or their instrumentalities, including governmental corporations. For purposes of this chapter, a public official includes the chairs and vice-chairs or the equivalent offices of each state political party as defined in Section 17-16-2."

Section 36-25-1(2) defines a business with which the person is associated as:

"(2) BUSINESS WITH WHICH THE PERSON IS ASSOCIATED. Any business of which the person or a member of his or her family is an officer, owner, partner, board of director member, employee, or holder of more than five percent of the fair market value of the business."

Section 36-25-1(8) states:

"(8) CONFLICT OF INTEREST. A conflict on the part of a public official or public employee between his or her private interests and the official responsibilities inherent in an office of public trust. A conflict of interest involves any action, inaction, or decision by a public official or public employee in the discharge of his or her official duties which would materially affect his or her financial interest or those of his or her family members or any business with

which the person is associated in a manner different from the manner it affects the other members of the class to which he or she belongs."

Section 36-25-5(a) states:

"(a) No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain."

Section 36-25-11 states:

"Unless exempt pursuant to Alabama competitive bid laws or otherwise permitted by law, no public official or public employee, or a member of the household of the public employee or the public official, and no business with which the person is associated shall enter into any contract to provide goods or services which is to be paid in whole or in part out of state, county, or municipal funds unless the contract has been awarded through a process of competitive bidding and a copy of the contract is filed with the commission. All such contract awards shall be made as a result of original bid takings, and no awards from negotiations after bidding shall be allowed. A copy of each contract, regardless of the amount, entered into by a public official, public employee, a member of the household of the public employee or the public official, and any business with which the person is associated shall be filed with the commission within 10 days after the contract has been entered into."

The Ethics Commission has long held that public officials and/or public employees, who have outside business interests, may do business with the entity on which they serve or by whom they are employed; provided, several criteria are met. Those criteria are:

- 1) There must be some type of competitive bid process.
- 2) The public official/public employee involved may not be personally involved in any aspect of the transaction including, but not limited to, drawing specifications, enforcing the contract, etc.

- 3) In addition, the public official/public employee may not have had any conversations regarding the transaction with his or her fellow board/commission members or, in the case of a public employee, with the individual responsible for determining the successful bidder.

By way of example, on April 4, 2001, the Ethics Commission rendered Advisory Opinion No. 2001-26, which holds that:

“A member of the Town Council of Lisman, Alabama, who is in the septic tank and sewage business, may bid on a project with the Town of Lisman, when the project will be paid for through a grant administered by the Town; provided, that all aspects of the project are done through competitive bid, and that the member of the Town Council of Lisman is not involved in the drawing of the specifications, the awarding of the bid, or the enforcement of the contract.”

In accord, is Advisory Opinion No. 97-38, rendered on May 14, 1997, which holds that:

“An employee with the North-central Alabama Regional Council of Governments may enter into a contract to perform janitorial and lawn care services for that agency; provided, the services are not related to his or her normal duties; that the contract is done through the competitive bid process; that the employee has no input or influence on the bid or contract compliance process; that a copy of the contract is filed with the Alabama Ethics Commission within ten (10) days of its execution; that all work in performing the contract is done after hours or on annual leave; and provided further, that no public equipment, facilities, time, materials, human labor, or any other public property under his discretion or control are used in any manner that would benefit the contract holders or assist them in performing the contract.”

Likewise, the Reconsideration of Advisory Opinion No. 95-107, rendered on April 30, 1997, holds that:

“A business owned by a member of the Board of Education may do business with the Cullman City School System; provided, all competitive bid laws are strictly adhered to; that no confidential information obtained in the course of his service as a School Board Member be used to influence the bid process; and that the School Board Member not otherwise use or attempt to use his position on the School Board to obtain business for his office supply company.”

The Commission has consistently held that a public official or a public employee is not precluded from doing business with the entity on which he or she serves, or by which he or she is employed; provided, said guidelines are met. The purpose is to establish as level a playing field as possible.

In the facts before the Commission, it would not violate the Ethics Law for Cooper/T. Smith Corporation, d.b.a SCA, to lease property from the Alabama State Port Authority; provided, that David Cooper, the member of the Port Authority board of directors, does not participate in any aspect of the transaction; and, that requests for proposals are submitted and evaluated.

Based on the facts as provided and the above law, a business employing a member of the Alabama State Port Authority board of directors may bid on a lease to operate a Port Authority terminal; provided,

- 1) that the board member does not vote, attempt to influence or otherwise participate in any aspect of the transaction;
- 2) that the design, building and lease are awarded through some type of bid process/request for proposals;
- 3) that the board member does not use confidential information obtained in the course of his service on the Port Authority to assist his company in being the successful bidder; and,
- 4) that if his company is the successful bidder, a copy of the transactions is filed with the Ethics Commission within ten days after being entered into.

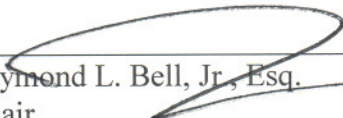
CONCLUSION

A business employing a member of the Alabama State Port Authority board of directors may bid on a lease to operate a Port Authority terminal; provided, that the board member does not vote, attempt to influence or otherwise participate in any aspect of the transaction; that the design, building and lease are awarded through some type of bid process/request for proposals; that the board member does not use confidential information obtained in the course of his service on the Port Authority to assist his company in being the successful bidder; and, that if his company is the successful bidder, a copy of the transactions is filed with the Ethics Commission within ten days after being entered into.

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AUTHORITY

By 4-0-1 vote of the Alabama Ethics Commission on February 2, 2005.



Raymond L. Bell, Jr., Esq.
Chair
Alabama Ethics Commission