

COMMISSIONERS
WILLIAM A. COATES, 4TH DISTRICT
CHAIRMAN
PAULA H. BETHEA, 1ST DISTRICT
SUE C. ERWIN, 2ND DISTRICT



COMMISSIONERS
REV. DAVID L. TERRY, 3RD DISTRICT
RANDOLPH MARSHALL TALLEY, 5TH DISTR.
FREDERICK A. HOEFER, II, 6TH DISTR.
CYNTHIA GRAHAM HOWE, MEMBER AT LARGE

State of South Carolina
State Ethics Commission

GARY R. BAKER
EXECUTIVE DIRECTOR

(803) 253-4192
FAX (803) 253-7539
5000 Thurmond Mall, Suite 250
P.O. Box 11926
Columbia, S.C. 29211

A094-008

September 15, 1993

SUBJECT: COMMISSION MEMBER'S BUSINESS SUBMITTING BID ON
COMMISSION PROJECT

SUMMARY:

Despite a public member's association with the firm that submitted the lowest bid on a commission project, the Ethics Reform Act does not prohibit this firm from being awarded the contract, provided it is awarded in accordance with the Consolidated Procurement Code and the commission member complies with the recusal provisions of Section 8-13-700(B).

QUESTION:

The Riverbanks Park Commission is a political subdivision, and the Commission Chairman requests an advisory opinion addressing the ethical implications of the following situation. Pursuant to the State Procurement Code, sealed bids were recently received for three separate contracts relating to the construction of the Zoo's botanical garden project. One of these contracts is for the construction of a bridge across the Saluda River linking the Zoo with the botanical garden. The low bid was submitted by a contracting business that is owned in part by another commission member. The commission member did not participate in the preparation of the bid package, nor was he privileged to any information regarding the bid that was not also available to all other bidders. The actual preparation of the bid package was done by the Zoo's architectural firm. The Commission is required to award contracts for major construction projects in accordance with the State Procurement Code. The Commission Chairman inquires whether the business that submitted the low bid may be awarded the contract.

DISCUSSION:

This opinion is rendered in response to a letter dated August 27, 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 2-17-5 et seq. and 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;

* * *

(5) if he is a public member, he shall furnish a copy to the presiding officer 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 shall 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.

September 15, 1993

"Business", as defined in Section 8-13-100(3), "means a corporation, partnership, proprietorship, firm, an enterprise, a franchise, an association [or] organization...."

"Business with which he is associated" is defined in Section 8-13-100(4) as a "business of which the person or a member of his immediate family is a director, an officer, owner, employee ... [or] holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class." Therefore, for the purposes of Section 8-13-700(B), the State Ethics Commission advises that the commission member's contracting firm is a business with which he is associated.

"Economic interest" is defined in Section 8-13-100(11) as "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."

According to the facts submitted, the commission member in question has not participated in any actions or decisions regarding the bridge contract. Nevertheless, because the members of the Riverbanks Park Commission appear authorized to perform official functions relating to contracts, the State Ethics Commission must call attention to Section 8-13-775, which 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 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.

The State Ethics Commission has previously advised that Section 8-13-775 prohibits public officials, public members and public employees from having economic interests in contracts in which they are authorized to perform official contractual functions. Moreover, it is the Commission's opinion that this restriction

September 15, 1993

applies regardless of whether the provisions of Section 8-13-700(B) are followed. Since the commission member is a principal owner in the firm that submitted the lowest bid, he appears to have a prohibited economic interest in the bridge construction contract. However, since the facts presented disclose that the bidding process was conducted in accordance with the Consolidated Procurement Code, the State Ethics Commission calls attention to Section 8-13-785(B), which 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 an official function pertaining to a contract, he may have an economic interest in the contract only (emphasis added) when it is awarded in accordance with the provisions of Chapter 35 of Title 11 (the Consolidated Procurement Code). Although the members of the Riverbanks Park Commission appear to be public members within the context of the Ethics Reform Act, the State Ethics Commission believes that the intent of Section 8-13-785(B) would allow public members as well as public officials to have an economic interest in a contract with the State or its political subdivisions, provided the contract is awarded through a process of public notice and competitive bids, and the public official or public member otherwise complies with Section 8-13-700(B). Accordingly, the State Ethics Commission advises that despite the commission member's association with the firm that submitted the lowest bid, the Ethics Reform Act does not prohibit this firm from being awarded the contract, provided it is awarded in accordance with the Consolidated Procurement Code and the commission member complies with the recusal provisions of Section 8-13-700(B).

* pu - 1/12/95 amendment