

SUBJECT: EFFECT OF ETHICS REFORM ACT ON PROCUREMENT REVIEW PANEL

SUMMARY:

Members of the Procurement Review Panel are public members and are not prohibited from contracting with State agencies since the Panel does not perform an official function, as they are required to follow the provisions of Section 8-13-700 (B) on matters affecting such contracts.

QUESTION:

The Attorney for the Procurement Review Panel questions the applicability of Sections 8-13-775 and 8-13-785 (B) to the ability of the Panel members to continue serving. She questions:

(1) Does Section 8-13-775 require a Panel member to choose between accepting work on any future state contracts and serving on the Procurement Review Panel or may the Panel members continue the past practice of disclosure and recusal from a particular case if and when a conflict arises?

(2) If an initial choice is required, does Section 8-13-775 apply to existing, ongoing contracts (entered into prior to January 1, 1992) or may the member fulfill his obligations under those existing contracts while continuing to serve? (This question assumes that the past practice of disclosure and/or recusal will be followed if any of those existing contracts comes before the Panel).

(3) If a contract in which the member has an economic interest is outside the purview of the Consolidated Procurement Code by reason of an exemption listed in Section 11-35-710, does Section 8-13-775 apply given that the Panel has no jurisdiction over such contract?

(4) Does the requisite "economic interest" in a State contract, as that term is used in Section 8-13-775, exist in any of the following situations:

(a) a Panel member is a subcontractor on a project in which only the general or prime contractor has a contract directly with the State.

(b) A Panel member is a shareholder in a publicly traded corporation which contracts with the State, eq., IBM, AT&T, SCE&G or SCANA;

(c) A Panel member is a shareholder in a privately held corporation which contracts with the State.

(5) Does the term "public officials" as used in Section 8-13-785 (B) apply to

members of the Panel?

DISCUSSION:

This opinion is rendered in response to a letter dated December 17, 1991 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 of procedures which may apply to this situation.

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 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.

It does not appear from the facts as submitted or the responsibilities of the Procurement Review Panel that the Panel Members have an "official function" as defined in Section 8-13-775. The function of the Panel is to hear appeals on procurements rather than performing the contracting actions so defined. Consequently, it does not appear that Panel Members would be precluded from bidding on State contracts solely because of their Panel membership. Panel members would be required to follow the provisions of Section 8-13-700 (B) on matters coming before the Panel which affect their economic interests.

Section 8-13-700 (B) provides:

(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 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 such disqualification and the reasons for it to be noted in the minutes.

Thus, no choice is required as anticipated in question two, therefore, the Panel Members are advised to follow the provisions of Section 8-13-700 (B) on contracts in which they have an economic interest.

As to the third question, Section 8-13-775 applies if the Panel Member is involved in an official capacity in an official function with regard to such contract. It does not appear that membership on the Procurement Review Panel fits into the realm of official function regarding contracts as defined in Section 8-13-775.

With regard to the fourth question, Section 8-13-100 (11) (a) defines economic interest as:

"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.

Furthermore, business with which he is associated is defined in Section 8-13-100 (4) as:

"Business with which he is associated" means a business of which the person or a member of his immediate family is a director, an officer, owner, employee, a compensated agent, 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.

Thus, a subcontractor would have an economic interest in a contract assuming that the effect would benefit the subcontractor of \$50 or more. In order for a member who is a shareholder to have an economic interest, he must be a stockholder of \$100,000 or more and have an ownership interest constituting 5% or more of the total outstanding stock. If that member should be a director or officer of the corporation, he would be considered to have an economic interest. A panel member who is a shareholder in a privately held corporation would be considered to have an economic interest if he is an officer, director, or holder of stock worth \$100,000 or more and 5% or more of the outstanding shares.

As to question five, public member is defined in Section 8-13-100 (26) as:

"Public Member" means an individual appointed to a noncompensated part-time position on a State board, commission, or council. A public member does not lose this status by receiving reimbursement of expenses or a per diem payment for services.

Thus, members of the Procurement Review Panel are public members, not public officials.