

SUBJECT: BOARD MEMBER WITH INTEREST IN AGENCY CONTRACT

SUMMARY: A Board member is not prohibited from offering free advice and recommendations concerning commission computer software needs. His employer is not prohibited from contracting with the commission if he is not authorized to perform an official function regarding such contracts.

DISCUSSION:

This opinion is rendered in response to a letter dated March 26, 1992 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 or procedures which may apply to this situation.

The Executive Director of the Greenville County Commission on Alcohol and Drug Abuse indicates that plans are developed to request bids from local consultants to analyze some of the computer software needs and develop specific applications for agency use. One of the Board members does such work for the firm by which he is employed. He is willing to offer some advice and recommendations at no charge, but could not develop the software without charging. The Director questions:

(1) Should we permit the board member to provide his free advice and recommendations?

Section 8-13-700 provides:

- (A) No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated. This prohibition does not extend to the incidental use of public materials, personnel, or equipment, subject to or available for a public official's, public member's, or public employee's use which does not result in additional public expense.
- (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 such disqualification and the reasons for it to be noted in the minutes.

Section 8-13-100(11) provides as follows:

- (11)
 - (a) "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.
 - (b) This definition does not prohibit a public official, public member, or public employee from participating in, voting on, or influencing or attempting to influence an official decision if the only economic interest or reasonably foreseeable benefit that may accrue to the public official, public member, or public employee is incidental to the public official's, public member's, or public employee's position or which accrues to the public official, public member, or public employee as a member of a profession, occupation, or large class to no greater extent than the economic interest or potential benefit could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class.

The Board member would not be prohibited from providing free advice or recommendations since he has no economic interest in offering such advice or recommendations.

- (2) Can the company he works for respond to our request for bids?

The State Ethics Commission notes that 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.

The Board member's employer is prohibited from contracting with the Commission if he is authorized to perform any official function on the contract through writing or preparing specifications, acceptance of bids, award of the contract, or other action on the preparation or award of such contract, regardless of whether he followed the provisions of Section 8-13-700. The Board member is advised that his employer may contract with the commission if the official functions are not authorized to be performed by the Board. He is further advised to follow the provisions of Section 8-13-700(B) on matters coming before the Board which affect such contracts.

- (3) If the answer to #2 is yes and that firm should receive the award, would not the board member need to file a Statement of Economic Interests Form?

The requirement for filing a Statement of Economic Interests is based upon the position held by the member, not based upon any business transactions with the Board. From the facts as submitted, the Board member is not required to file a Statement of Economic Interests.

- (4) Should the board member enter into discussions about the submitted bids?

If the Board member's employer is allowed to bid on the contract in accordance with the advice rendered in response to question #2, the Board member is required to follow the disclosure and disqualification procedures of Section 8-13-700(B) concerning the contract.