

SEC AO2008-005

January 16, 2008

SUBJECT: POST-EMPLOYMENT CONTRACT WITH AGENCY

SUMMARY: Greenville Housing Authority employees are not prohibited from submitting a bid as long as they have had no involvement in the procurement process and, in the event of being awarded the contract, of providing management services under the contract after their termination. The post-employment restrictions of Sections 8-13-755 and 8-13-760 are not applicable to the facts. Section 8-13-775 requires removal from the procurement process and that has been done by the GHA Board.

QUESTIONS: Whether the former Greenville Housing Authority executive director and director of planning and development may bid on a contract with the GHA to serve as program managers to oversee development projects as independent contractors and whether they may be awarded the contract if the GHA determines their bid is the best bid?

DISCUSSION:

The State Ethics 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 of South Carolina). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation. Failure to disclose relevant information may void the opinion.

The Greenville Housing Authority (GHA) is completing two revitalization projects, Arcadia Hills and the Nicholtown neighborhood. The GHA seeks through a closed bid process to

hire an independent contractor to oversee the completion of the two revitalization projects. Two current employees will be leaving the GHA's employ soon and are considering submitting a bid pursuant to the RFP prior to their leaving. The GHA Board has mindfully removed the soon to be former employees from all actions surrounding this RFP.

Section 8-13-755 provides:

A former public official, former public member, or former public employee holding public office, membership, or employment on or after January 1, 1992, may not for a period of one year after terminating his public service or employment:

(1) serve as a lobbyist or represent clients before the agency or department on which he formerly served in a matter which he directly and substantially participated during his public service or employment; or

(2) accept employment if the employment:

(a) is from a person who is regulated by the agency or department on which the former public official, former public member, or former public employee served or was employed; and

(b) involves a matter in which the former public official, former public member, or former public employee directly and substantially participated during his public service or public employment.

This prohibition applies to any employee who was employed by a public agency or department within South Carolina on or after January 1, 1992. This restriction includes a prohibition against serving as a lobbyist or representing clients before the former department for a period of one year on matters on which the employee directly and substantially participated.

Based on the facts submitted, it does not appear that the former GHA employees would be lobbying GHA or representing clients before GHA. Rather, the former employees would be submitting a sealed bid to provide program management services for the two revitalization projects.

In addition, Section 8-13-755(2) does not apply in that the GHA is not a regulatory agency. For these reasons, the State Ethics Commission advises that Section 8-13-755 would not prohibit the former GHA employees from submitting a sealed bit to provide program management services for the two projects or being awarded the contract.

Additionally, Section 8-13-760 provides:

Except as permitted by regulations of the State Ethics Commission, it is a breach of ethical standards for a public official, public member, or public employee who is participating directly in procurement, as defined in Section 11-35-310(22), to resign and accept employment with a person contracting with the governmental body if the contract falls or would fall under the public official's, public member's, or public employee's official responsibilities.

Section 11-35-310(22) provides:

"Procurement" means buying, purchasing, renting, leasing or otherwise acquiring any supplies, services or construction. It also includes all functions that pertain to the obtaining of any supply, service or construction, including description of requirements, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration.

Section 8-13-100(23) provides:

"Official responsibility" means the direct administrative or operating authority, whether intermediate or final and whether exercisable personally or through subordinates, to approve, disapprove, or otherwise direct government action.

The former GHA employees do not seek to work for a private company contracting with the GHA. They seek to submit a bid and perhaps eventually contract with the GHA to provide management services; therefore, Section 8-13-760 is inapplicable.

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 the contract. This section is not intended to infringe on or prohibit public employment contracts with this State or a political subdivision of this State nor does it prohibit the award of contracts awarded through a process of public notice and competitive bids if the public official, public member, or public employee has not performed an official function regarding the contract.

The GHA Board has mindfully removed the soon to be former employees from all actions surrounding this RFP which is being competitively bid through public notice.

CONCLUSION:

Accordingly, Greenville Housing Authority employees are not prohibited from submitting a bid as long as they have had no involvement in the procurement process and, in the event of being awarded the contract, of providing management services under the contract after their termination. The post-employment restrictions of Sections 8-13-755 and 8-13-760 are not applicable to the facts. Section 8-13-775 requires removal from the procurement process and that has been done by the GHA Board.

KEY WORDS: post-employment

ANNOTATIONS: 8-13-755, 8-13-760, 8-13-775
