

SEC AO2010-003

March 17, 2010

SUBJECT: UNIVERSITY FOUNDATION MEMBER BIDDING ON UNIVERSITY BUILDING PROJECTS

SUMMARY: A university foundation member may bid on university building projects under the guidelines of Section 8-13-775 which requires the removal of the foundation member from the procurement process at the outset and recusals thereafter on matters related to the bid.

QUESTION: An architect is a member of a university affiliated foundation and the university asks whether the public member may bid on a university building project?

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.

Section 8-13-700(B) provides in part:

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 8-13-725 provides in part:

(A) No public official, public member, or public employee may use or disclose confidential information gained in the course of or by reason of his official responsibilities in any way that would affect an economic interest held by himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated.

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.

Section 8-13-775 prohibits a public member from having an economic interest in a contract with the State or its political subdivisions, if the public member is authorized

to perform an official function relating to the contract. Official functions include writing or preparing the contract specifications, acceptance of bids, award of the contract, or other action on the preparation or award of the contract. If the contract is awarded through a public and competitive bidding process and the public member does not perform an official function, then the conflict is avoided. In addition, the public member must recuse pursuant to the procedure set out in Section 8-13-700(B) when a matter involving the contract comes before the public body.

Section 8-13-725 provides that a public member may not use or disclose confidential information gained in the course of or by reason of his official responsibilities in any way that would affect an economic interest held by himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated. The use of confidential information to affect the economic interest of the public member is prohibited. The public member would need to physically remove himself from those closed-door discussions of building projects on which the public member might consider bidding.

CONCLUSION:

Accordingly, a university foundation member may bid on a building project with his university under the guidelines of Section 8-13-775 which requires the removal of the public member from the procurement process at the outset and recusals thereafter on matters related to the bid. If the university foundation has had input on this specific building project, then the university foundation member must have recused during that discussion in order to not have performed an official function.

KEY WORDS: official functions, contracting with agency by agency member, confidentiality, public member

ANNOTATIONS: 8-13-700(B), 8-13-725, 8-13-775
--