



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-104

December 29, 2014

The Honorable Andrea Lea
State Representative
Post Office Box 1342
Russellville, Arkansas 72811

Dear Representative Lea:

This is my opinion on your questions about a law regulating city officials' interests in municipal contracts:

Question 1: Pursuant to the state law concerning interest in offices or contracts prohibited, A.C.A. § 14-42-107(b)(1), would an alderman, council member, official or municipal employee be considered to be interested indirectly in the profits of any municipal contract for services, equipment, or supplies with a company, business or corporation when the spouse of either an alderman, council member, official or municipal employee holds either an executive or managerial office or holds a controlling interest in the company, business or corporation contracted to provide services, equipment or supplies to the municipality?

Question 2: Pursuant to provisions of A.C.A. § 14-42-107(b)(1), would an alderman, council member, official or municipal employee be considered to be interested indirectly in the profits of any contract if the spouse of either an alderman, council member, official or municipal employee holds either an executive or managerial office, or holds a controlling interest in a company, business or corporation which subcontracts to fulfill a portion of a contract with a company, business or corporation which has contracted with the municipality to furnish supplies, equipment or services?

The law you cite provides in relevant part:

(1) No alderman, council member, official, or municipal employee shall be interested, directly or indirectly, in the profits of any contract for furnishing supplies, equipment, or services to the municipality unless the governing body of the city has enacted an ordinance specifically permitting aldermen, council members, officials, or municipal employees to conduct business with the city and prescribing the extent of this authority.

(2) The prohibition prescribed in this subsection shall not apply to contracts for furnishing supplies, equipment, or services to be performed for a municipality by a corporation in which no alderman, council member, official, or municipal employee holds any executive or managerial office or by a corporation in which a controlling interest is held by stockholders who are not aldermen or council members.¹

In this opinion, I use the word “control” to refer to the status of being an executive or manager of, or holding a controlling interest in, a business contracting or subcontracting with a municipality; and I use the word “official” to refer to an alderman, council member, municipal official, or municipal employee. I assume for purposes of this opinion that, while an official’s spouse controls the contractor or subcontractor, no official or group of officials controls the contractor or subcontractor. I assume for purposes of your second question that the prime contractor is a corporation not controlled by an official or group of officials. Finally, I assume the municipality has not enacted an ordinance of the kind described in (1) above.

RESPONSE

In my opinion, the mere fact of marriage does not necessarily mean that an official has an interest in a municipal contract with an entity controlled by his spouse or with an entity subcontracting with an entity controlled by his spouse. I expect, however, that in most cases the spouses’ financial affairs will in all likelihood be such that a court apprised of all relevant facts would conclude that such an interest exists. But ultimately the question is one that will require determination of the

¹ A.C.A. 14-42-107(b) (Repl. 2013).

facts of each case and whose answer will depend on those facts. If the contractor or subcontractor is not a corporation, the statute prohibits such an interest. If, however, the contractor (with respect to your first question) or the subcontractor (with respect to your second question) is a corporation, the law's exception applies and the contract is not prohibited regardless of any interest therein the official might have.

DISCUSSION

Question 1: Pursuant to the state law concerning interest in offices or contracts prohibited, A.C.A. § 14-42-107(b)(1), would an alderman, council member, official or municipal employee be considered to be interested indirectly in the profits of any municipal contract for services, equipment, or supplies with a company, business or corporation when the spouse of either an alderman, council member, official or municipal employee holds either an executive or managerial office or holds a controlling interest in the company, business or corporation contracted to provide services, equipment or supplies to the municipality?

Predecessors in this office have opined that the mere fact of marriage does not necessarily mean that a public official has an interest in a government contract in which his spouse is clearly interested.² My predecessors and I have instead said consistently that the question whether an interest exists in such a case is one of fact.³

While it is thus impossible to say that an interest does or does not invariably exist, I believe it is true that most married couples pool their incomes, assets, and liabilities, and operate as a single economic unit, facts that strongly suggest an interest's presence.⁴ Accordingly, I believe it is reasonable to surmise that a court

² Op. Att'y Gen. 87-429, 85-171, 76-162; *see also* Op. Att'y Gen. 2013-134 (“[T]he mere existence of a family relationship ordinarily would not, standing alone, establish a violation of A.C.A. § 14-14-1202(c)(1) [a law similar to the one at issue and binding county officials]. The existence of a family relationship could, nevertheless, in some cases undoubtedly be relevant to the factual question whether an officer or employee is ‘interested’ in a county contract or transaction . . .”).

³ *See supra* note 2.

⁴ The Tennessee Attorney General has opined, for instance, that an official does have an indirect interest in a governmental contract with his spouse if the two commingle assets. Tenn. Op. Att'y Gen. 05-017, 00-152.

apprised of all relevant facts would conclude in most cases that an official has at least an indirect interest in a municipal contract in which his spouse is clearly and directly interested. I emphasize, however, that a factual determination will be required in each case and that I do not opine here that an interest will be present in every case.

But the law at issue contains an exception, quoted above, that permits the interest if no official or group of officials controls the corporate contractor. The exception does not condition its availability on the absence of a spouse's control. Given the statute's overall thrust and its general prohibition on indirect interests, there may be some question whether the General Assembly actually intended to provide an exception in circumstances like these, and the General Assembly may wish to revisit the issue. But I am constrained to interpret the statute just as it reads. The exception's clear and unambiguous language⁵ indicates that it applies unless officials themselves – not their spouses – control the corporate contractor.

On the facts given and assumed here, no official or group of officials controls the contractor. I thus conclude that the exception applies notwithstanding any interest the official has in the contract, provided the contractor is a corporation.

You ask about a “company, business or corporation” as contractor. In my view, the law's exception discussed above applies only if the contractor is organized as a corporation and will not apply if the contractor is, for example, a partnership, limited liability company, or sole proprietorship. Again it appears possible that the exception may not reflect the General Assembly's actual intent but, by using in the exception the words “corporation” and “stockholders,” the legislature unambiguously made the exception available only if the contractor is a corporation.⁶

⁵ “The basic rule of statutory construction is to give effect to the intent of the legislature. Where the language of a statute is plain and unambiguous, this court determines legislative intent from the ordinary meaning of the language used. In considering the meaning of a statute, this court construes it just as it reads, giving the words their ordinary and usually accepted meaning in common language. . . . If the language of a statute is clear and unambiguous and conveys a clear and definite meaning, it is unnecessary to resort to the rules of statutory interpretation.” *Simpson v. Cavalry SPV I, LLC*, 2014 Ark. 363, *4, 440 S.W.3d 335.

⁶ See *supra* note 5.

An official facing this situation should be mindful of another law:

No public servant shall use or attempt to use his or her official position to secure special privileges or exemptions for himself or herself or his or her spouse, child, parents, or other persons standing in the first degree of relationship, or for those with whom he or she has a substantial financial relationship that are not available to others except as may be otherwise provided by law.⁷

This provision applies to city officials⁸ and, under certain facts, could be contravened by an official facing this situation. Whether the provision applies in a given case is a fact-intensive inquiry I cannot undertake.⁹

Question 2: Pursuant to provisions of A.C.A. § 14-42-107(b)(1), would an alderman, council member, official or municipal employee be considered to be interested indirectly in the profits of any contract if the spouse of either an alderman, council member, official or municipal employee holds either an executive or managerial office, or holds a controlling interest in a company, business or corporation which subcontracts to fulfill a portion of a contract with a company, business or corporation which has contracted with the municipality to furnish supplies, equipment or services?

I earlier opined that an official who controls a corporation acting as a subcontractor in connection with a municipal contract has an interest in the contract.¹⁰ Given that conclusion, and by the reasoning stated above, I am of the view that, while each case must be decided on its own facts, an official whose spouse controls a subcontractor in connection with a municipal contract would in all probability be found by a court to have at least an indirect interest in the contract.

Under the facts given and assumed, however, the statutory exception applies and the contract is not prohibited if the subcontractor is organized as a corporation,

⁷ A.C.A. 21-8-304(a) (Supp. 2013).

⁸ See Op. Att’y Gen. 94-283.

⁹ See, e.g., *id.*

¹⁰ See Op. Att’y Gen. 2009-136.

The Honorable Andrea Lea
State Representative
Opinion No. 2014-104
Page 6

regardless of any interest the official may have. Once again, there may be some question whether the statute accurately reflects the General Assembly's actual intent, but the statute as it currently exists clearly provides an exception.

An official facing this situation also should be mindful of the law, quoted above, prohibiting the use of office to secure special privileges for his spouse.

Assistant Attorney General J.M. Barker prepared this opinion, which I approve.

Sincerely,

A handwritten signature in black ink, appearing to read "Dustin McDaniel", written over a faint, light-colored signature line.

DUSTIN MCDANIEL
Attorney General

DM/JMB:cyh