



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-005

April 30, 2015

The Honorable Andrea Lea
Auditor of State
Post Office Box 1342
Russellville, Arkansas 72811-1342

Dear Auditor Lea:

This is in response to your letter describing and asking for my opinion on the legality of certain arrangements and payments among the City of Russellville, the Russellville Chamber of Commerce, Arkansas Valley Alliance for Economic Development, Inc. ("AVAED"), and people affiliated with the Chamber and AVAED.

You state as background:

The City of Russellville levies a one-cent sales tax, and one-eighth of the revenues of that tax are dedicated to economic development. The city contracts with Arkansas Valley Alliance for Economic Development, Inc. (AVAED), a nonprofit organization, for advice on economic development matters. Please see attached Resolution No. 1382 and Agreement for Economic Development Services. Under the contract, the city pays \$90,000 per year for AVAED's services, which include advising the city concerning the use of the sales tax revenues that are dedicated to economic development. The city's payments under the contract are made from the sales tax revenues that are dedicated to economic development.

The staff of AVAED consists of two employees, both of whom are also employed by the Russellville Chamber of Commerce: Mr. Jeff Pipkin (president of both AVAED and the Chamber of Commerce) and Ms. Suzy Griffin (administrative assistant for AVAED and finance director for the Chamber of Commerce). AVAED uses the money it receives from the city

under the contract mentioned above to help pay these employees' salaries and expenses as president and finance director of the Chamber of Commerce. The Chamber of Commerce bills AVAED for work performed by Mr. Pipkin and Ms. Griffin, and AVAED pays the Chamber of Commerce from the funds received from the city. In the past, this has been done as part of a formal contract arrangement between AVAED and the Chamber of Commerce, but it is unclear whether a formal contract arrangement is in place today. In essence, AVAED outsources its duties under its contract with the city to the Chamber of Commerce so that the money flows from the city to the Chamber of Commerce with AVAED serving merely as a middleman.

In addition to the \$90,000 paid under the contract, the city also reimburses Mr. Pipkin for certain other expenses, including tickets to sporting events, a county club membership, civic club memberships, golf registration fees, meal expenses over the per diem rate, mileage for travel in addition to a vehicle allowance, fees for checking extra luggage such as golf bags, and room upgrades at hotels. These reimbursements are not made pursuant to a contract or other written agreement, and they are paid using the sales tax revenues that are dedicated to economic development.

Your questions are:

- 1) Are the city's payments to AVAED under the contract a legal use of the sales tax revenues dedicated to economic development?
- 2) In general, are the city's payments to AVAED that are in addition to the contract amount a legal use of public funds? Are these payments a legal use of the sales tax revenues dedicated to economic development?
- 3) Are AVAED's payments to the Russellville Chamber of Commerce for the activities of the Chamber of Commerce's president and finance director a valid use of the sales tax revenues dedicated to economic development? Is it legal for the city to enter into a contract with AVAED if (1) the payments under the contract will be made using the sales tax revenues dedicated to economic development and (2) the city knows that AVAED will outsource the work to the Chamber of Commerce?

- 4) Can the sales tax revenues dedicated to economic development be used to promote a renewal of the city sales tax, which is set to sunset?

RESPONSE

I respectfully decline to give opinions on these questions. Answering them would require me to determine further facts, and then interpret a City resolution, a ballot, a written contract between the City and AVAED, and – possibly – one or more oral contracts. In giving formal opinions, the Attorney General’s office is not equipped or authorized to be a factfinder.¹ Thus, the Attorney General’s office declines to interpret and apply local ordinances and resolutions, ballots, and contracts, because doing so involves significant questions of fact.² Furthermore, I will not opine on questions that are the subject of pending litigation.³ I will, however, briefly refer to legal issues and general propositions that are relevant to the questions.

The ballot in a city sales tax election may designate uses of tax revenues, which then can be applied only to those uses.⁴ It is up to the city council to determine legislatively whether a particular expenditure is within the ballot-designated purpose(s), and a court will not disturb its finding unless it is found to be “demonstrably arbitrary and unwarranted.”⁵ There are constitutional limitations on a city’s use of public funds to promote a particular legislative outcome (whether the legislative body is a representative one like the General Assembly, or the people themselves). Whether a city’s communication with its residents regarding a ballot question is protected speech or impermissibly partisan electioneering is a question that will depend substantially on the prevailing facts.⁶

¹ See, e.g., Op. Att’y Gen. 2014-045.

² See, e.g., Op. Att’y Gen. 2014-081 and opinions cited therein, 2012-127.

³ See, e.g., Op. Att’y Gen. 2014-033. Although the arrangements you describe are not, as far as I know, the subject of pending or threatened litigation, arrangements that appear to be similar in certain respects are at issue in *Lynch v. Stodola*, No. 60CV-13-360 (Pulaski County Circuit Court, Sixth Judicial Circuit, Seventeenth Division, Jan. 24, 2013).

⁴ See A.C.A. §§ 26-75--208(c)(1), -308(e)(1) (Supp. 2013); see also Ark. Const. art. 16, § 11 (“no moneys arising from a tax levied for any purpose shall be used for any other purpose.”)

⁵ *McAdams v. Henley*, 169 Ark. 97, 114, 273 S.W. 355 (1925).

⁶ See generally Op. Att’y Gen. 2007-189 and authorities cited therein.

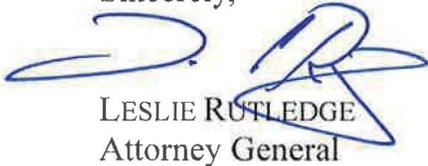
Economic development is a legitimate municipal goal, and a clear public purpose underlies a city's use of public funds to pursue that goal.⁷ A city generally may for a public purpose enter into and perform a contract supported by adequate consideration.⁸ Contract consideration's adequacy is a fact-intensive determination,⁹ as are the existence and terms of any oral contract alleged to exist.¹⁰ There is nothing inherently illegitimate about a city contract under which the counterparty subcontracts its performance obligations.¹¹

A city may not, however, "obtain or appropriate money" for a private person or entity.¹² It may not, in other words, simply donate money to a private party. And "donate," for this purpose, includes paying money under a contract without receiving adequate consideration.¹³

In sum, the questions you have submitted raise various legal issues that can only be resolved after significant fact finding. While I am consequently unable to provide answers, the foregoing will hopefully be of assistance in framing the necessary legal and factual review.

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

Sincerely,



LESLIE RUTLEDGE
Attorney General

LR/JMB:cyh

⁷ See Op. Att'y Gen. 2005-044 and authorities cited therein.

⁸ See Op. Att'y Gen. 2007-153 and authorities cited therein.

⁹ See *id.*

¹⁰ See, e.g., *Ward v. Williams*, 354 Ark. 168, 118 S.W.3d 513 (2003).

¹¹ See, e.g., Op. Att'y Gen. 2009-136 and A.C.A. § 22-9-204 (Supp. 2013).

¹² Ark. Const. art. 12, § 5.

¹³ See, e.g., Op. Att'y Gen. 2013-136 and authorities cited therein.