

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 02-3

January 25, 2002

RE: May a company employing a professional services vendor respond to competitive solicitation prepared by the vendor?

DECISION: Yes, however, the Commission cautions against an appearance of a conflict.

This opinion is in response to your December 6, 2001, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the January 25, 2002 meeting of the Commission and the following opinion is issued.

You ask the following:

- (1) *If a professional services vendor works to prepare a competitive solicitation (Request For Proposals ("RFP"), Strategic Alliance Services ("SAS"), etc.) as part of his responsibility for a state agency, may the company through which he contracts respond to the solicitation?*
- (2) *If not, were the vendor's contractor to leave the employment of the company, for what period of time would the company be prohibited from bidding on the RFP on which he worked?*

As a professional services vendor, an individual is generally not considered a public servant subject to the provisions of KRS Chapter 11A, the Executive Branch Code of Ethics ("code of ethics"), unless the individual is performing on a full-time basis, for not less than six months, the function of an officer as defined in KRS 11A.010(7) provided below:

(7) "Officer" means all major management personnel in the executive branch of state government, including the secretary of the cabinet, the Governor's chief executive officers, cabinet secretaries, deputy cabinet secretaries, general counsels, commissioners, deputy commissioners, principal assistants, division directors, members and full-time chief administrative officers of the Parole Board, Board of Tax Appeals, Board of Claims, Kentucky Retirement Systems board of trustees, Public

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Service Commission, Worker's Compensation Board and its administrative law judges, the Occupational Safety and Health Review Commission, the Kentucky Board of Education, the State Board for Adult and Technical Education, the Council on Postsecondary Education, and any person who holds a personal service contract to perform on a full-time basis for a period of time not less than six (6) months a function of any position listed in this subsection;

Thus, a company employing an individual to perform as a professional services vendor for an agency would not be prohibited by the code of ethics from responding to a competitive solicitation that the professional services vendor prepares.

However, such action certainly does not appear to be ethical, and is in fact a conflict of interest for the professional services vendor. Thus, the Commission cautions agency management against an appearance of impropriety. The Commission believes that agency management should comply with the Model Procurement Code (KRS Chapter 45A) in deciding whether to allow a professional services vendor to be involved in the preparation of competitive solicitations to which the company employing him may respond. Such action by management would ensure the independence and impartiality of the processes of state government.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: Cynthia C. Stone, Esq.