

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 96-39

September 5, 1996

- RE: 1) May design engineer subcontract with roadway contractor who holds contract with the Transportation Cabinet?
 2) May design engineer provide consulting engineering services for local governments?
- DECISION: 1) No.
 2) Yes, however approval may be required by the Commission.

This opinion is in response to your July 7, 1996, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the September 5, 1996, meeting of the Commission, and the following opinion is issued.

You state the relevant facts as follows. You represent two individuals who work for the Transportation Cabinet as design engineers. In addition, they also work on weekends as land surveyors. Recently, your clients were offered two separate business opportunities which they would like to pursue, however they are concerned about the possible appearance of impropriety which may result because of the state positions they hold. You ask for an opinion regarding the ethical ramifications of the following two situations.

1) Does the Executive Branch Code of Ethics or KRS 45A.340 et.seq., prohibit a Transportation Cabinet design engineer from providing engineering services as a subcontractor to a roadway contractor who holds a contract with the Transportation Cabinet for a roadway project? You state that the contract has been properly awarded through the competitive bid process and the design engineer has no duties in his official position which affect the progress or disposition of the project. In addition, the design engineer will not be involved in discussions or decisions concerning the project as part of his official duty. However, the design engineer's service as part of his subcontract will involve work on the project.

2) Is a design engineer employed by the Transportation Cabinet prohibited from providing consulting engineering services as an independent contractor for either a city or county government for projects which do not directly involve the Transportation Cabinet. The design engineer will not be involved, as part of his official duty, in discussions or decisions concerning the projects.

KRS 11A.040(4) provides:

(4) No public servant shall knowingly himself or through any business in which he owns or controls an interest of more than five percent (5%), or by any other person for his use or benefit or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract, agreement, lease, sale, or purchase made, entered into, awarded, or granted by the agency by which he is employed or which he supervises, subject to the provisions of KRS 45A.340. This provision shall not apply to:

(a) A contract, purchase, or good faith negotiation made pursuant to KRS Chapter 416 relating to eminent domain; or

(b) Agreements which may directly or indirectly involve public funds disbursed through entitlement programs; or

(c) A public servant's spouse or child doing business with any state agency other than the agency by which the public servant is employed or which he supervises.

The Commission believes that if the design engineer subcontracts with an individual or entity which holds a contract with the agency for which the engineer works, and the engineer performs a service for the contracted project, the engineer will be "enjoying" a part of the contract made with the agency by which the engineer is employed. Accordingly, the Commission advises the design engineer not to subcontract to provide a service which is part of the project for the agency for which he is employed.

The design engineer is not prohibited from subcontracting with an individual or entity to provide a service as part of a contract awarded through competitive bid to another state agency as long as the said contract is in compliance with the Model Procurement Code in KRS 45A.340. Because the Commission is not authorized to interpret KRS 45A.340, you should seek advice concerning the interpretation of that law from the Finance and Administration Cabinet.

Regarding your second question, the design engineer is not prohibited from providing consulting engineering services to local governments if he is not involved in any discussions or decisions concerning the local governments as part of his official duty. However,

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if the local government receives funding from or is regulated by the Transportation Cabinet, the agency for which the design engineer works, then the design engineer should seek approval for such outside employment from the Commission as provided by KRS 11A.040(9) below:

(9) Without the approval of the commission, no public servant shall accept outside employment from any person or business that does business with or is regulated by the state agency for which the public servant works or which he supervises, unless the outside employer's relationship with the state agency is limited to the receipt of entitlement funds. The commission shall promulgate administrative regulations to establish a procedure for the approval of outside employment of a public servant, including a requirement that the public servant and his appointing authority state in writing that the public servant is not in a position to influence any agency decision relating to the outside employer.

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BY: Ruth H. Baxter, Chair