

EXECUTIVE BRANCH ETHICS COMMISSION
ADVISORY OPINION 00-14
February 25, 2000

RE: May company co-owned by the spouse of a chief district engineer subcontract with or perform services for a company that has an agreement with the Transportation Cabinet?

DECISION: No, if such service will fulfill part of the agreement.

This opinion is in response to your February 5, 2000, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the February 25, 2000, meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. You are a chief district engineer for the Department of Highways, ("Department"), Transportation Cabinet. Your spouse co-owns a company (the "Company") that is involved in design, construction, demolition, excavation and coal mine reclamation work, and as such, it obtains the necessary easements, permits and licenses required for specific projects. The Company provides services for private companies, governmental entities and contractors for site-work, maintenance, excavation, slide removals, structure repairs, laying pipe or belt lines, public utility placement and various other construction related jobs. You ask whether the following situations present a conflict of interest between your job duties and your spouse's business.

- The Company currently is bidding on an equipment rental contract with Floyd County Fiscal Court;
- The Company wishes to perform bridge modifications for another company that has a cooperative agreement with the Department to construct and pay for improvements to a rural secondary state road in Knott County;
- The Company receives requests to perform work on state right of ways from individuals who have obtained encroachment permits from the Department of Highways; and
- The Company does business with individuals or groups that have agreements with or have obtained regulatory permits from the Department.

You state that specific guidelines from a procedures manual must be followed for approval of encroachment permits. Many applications for permits must be reviewed and recommended by the central office Permits Branch before the district office may approve them. However, in some cases, you approve encroachment permits based on your own judgment, without any review or recommendation from the central office Permits Branch.

Additionally, you state that most agreements between an individual or company and the Department require the Secretary of Transportation's approval. However, the Commissioner of Rural Roads within the Department may approve agreements involving county or rural secondary road projects. Additionally, you are authorized to approve agreements similar to encroachment permits that involve coal companies which request to provide and pay for work on state right of ways.

KRS 11A.020(1) and (3) provide:

(1) No public servant, by himself or through others, shall knowingly:

(a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;

(b) Use or attempt to use any means to influence a public agency in derogation of the state at large;

(c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or

(d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

...

(3) When a public servant abstains from action on an official decision in which he has or may have a personal or private interest, he shall disclose that fact in writing to his superior, who shall cause the decision on these matters to be made by an impartial third party.

Additionally, KRS 11.040(4), in part, 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, bid on, negotiate, 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.

The Commission concluded in Advisory Opinions 92-4 and 93-72 (copies of which are enclosed) that the above provisions in KRS 11A.040(4) apply to the spouse of a public servant, as well as the public servant, if the public servant benefits from his spouse or his spouse's ownership in a company. As such, if you will benefit from your spouse's ownership of the

Company, then the Company is prohibited from or enjoying a part of any contract or agreement with the Transportation Cabinet.

Advisory Opinions 94-25 and 96-38 (copies of which are enclosed) add to this conclusion in that an employee (or a company owned by him or his spouse) is prohibited from subcontracting with or providing services for an individual or entity that holds a contract with the state agency for which the employee works if the service that the employee provides fulfills part of the contract. Such an employee would be “enjoying” a part of a contract with the agency for which he works.

Accordingly, the Company would be prohibited from performing bridge modifications, or any other type of service, for an entity that has an agreement with the Transportation Cabinet if such service would be fulfilling a part of the agreement with the Transportation Cabinet. The Company would not be prohibited from providing services for such companies if the service to be provided was not to fulfill a part of an agreement with the Transportation Cabinet. However, in order to avoid any conflict of interest, you should abstain, as a part of your official duty as chief district engineer, from any matters, permitting or other, involving companies from which the Company receives compensation or payment. This abstention should be documented in writing pursuant to KRS 11A.020(3) above. Matters concerning these entities should be handled by someone not under your supervision.

The Company is not prohibited from doing business with individuals who have obtained right-of-way permits provided neither you, nor anyone under your supervision, has had any involvement with the approval or issuance of such permits. Additionally, the Commission believes the Company may bid on an equipment rental contract with the Floyd County Fiscal Court provided you have no involvement with the Floyd County Fiscal Court as a part of your official duty.

Enclosures: Advisory Opinion 92-4
Advisory Opinion 93-72