

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 06-26

October 31, 2006

RE: May potential candidate, if elected Governor, contract or enjoy a part of a contract with executive branch agencies?

DECISION: No.

This opinion is issued in response to your August 21, 2006 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the August 25 and October 31, 2006 meetings of the Commission and the following opinion is issued.

You provide the following relevant facts as follows. You represent a businessman who is considering becoming a candidate for the Office of Governor in next year's election. The potential candidate is chairman of the board and 100% owner of a company that owns a majority interest in companies that provide general construction, surface concrete construction, steel fabrication, and ready mix concrete services (the "affiliates"). Effective October 1, 2006, the potential candidate will reduce his ownership in the company to approximately 80%, however; the company will then own 100% of the affiliates detailed above.

Occasionally, one of the affiliates may contract with the Commonwealth of Kentucky to provide services, may serve as a subcontractor with a prime contractor that has a contract with the Commonwealth, or may supply materials to prime contractors or subcontractors who hold contracts with the Commonwealth. After reviewing KRS 11A.040(2) and KRS 11A.040(4), you ask the following:

- 1) Since the Governor has ultimate supervision over all agencies of the Commonwealth, if the potential candidate is elected Governor, would KRS 11A.040(2) or KRS 11A.040(4) prohibit any of the affiliates from:
 - a) entering into a contract with the Commonwealth;
 - b) entering into subcontract with a prime contractor who has a contract with the Commonwealth; or
 - c) providing materials to a prime contractor or subcontractor who is under contract with the Commonwealth?

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- 2) If the Governor does not supervise all agencies of the Commonwealth, what involvement in the activities would be sufficient to constitute supervision by the Governor sufficient to place the contracts of the agency within the prohibition found in KRS 11A.040(4)?
- 3) Would the Governor be an "employee of an agency" for purposes of KRS 45A.340, which is referenced in KRS 11A.040(4)?
- 4) If the Governor is determined to be an "employee of an agency" for purposes of KRS 45A.340, and if the potential candidate is elected Governor, would any of the affiliates be permitted to:
 - a) enter into a contract with the Commonwealth;
 - b) enter into subcontract with a prime contractor who has a contract with the Commonwealth; or
 - c) provide materials to a prime contractor or subcontractor who is under contract with the Commonwealth, so long as the contract with the Commonwealth was made or let after public notice and competitive bidding?
- 5) Would any of the prohibitions found in KRS 11A.040 and 45A.340 be applicable to the potential candidate during the time that he is a candidate for office?

Pertinent to your questions, KRS 11A.040(2), (3), and (4) provide:

- (2) A public servant shall not knowingly receive, directly or indirectly, any interest or profit arising from the use or loan of public funds in his hands or to be raised through any state agency.
- (3) A public servant shall not knowingly act as a representative or agent for the Commonwealth or any agency in the transaction of any business or regulatory action with himself, or with any business in which he or a member of his family has any interest greater than five percent (5%) of the total value thereof.
- (4) A public servant shall not 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. 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; or
- (d) Purchases from a state agency that are available on the same terms to the general public or that are made at public auction.

After reviewing an initial draft of this advisory opinion, you further supplement your initial request with the following concerns. You believe that the prohibition in KRS 45A.340 is applicable only to the agency by which a public servant is employed or over which he or she exercises supervision. Further, you ask if one of the affiliates is the sole source for a product in a certain area of Kentucky, would the prohibitions in KRS 11A.040 or KRS 45A.340 apply.

Please find enclosed several previously issued advisory opinions relating to a public servant having an interest in a company that contracts or subcontracts with an executive branch agency. Such advisory opinions consistently advise that a public servant or any business in which he owns or controls more than a five percent (5%) interest may not contract with the state agency by which he is employed (or any state agency prior to a statutory revision in July 1996).

Further, the law requires a public servant to comply with KRS 45A.340 which requires that for a public servant to contract or have an agreement with a state agency the contract or agreement must be less than \$25 or be competitively bid. The Commission believes that KRS 11A.040(4) prohibits a public servant from holding or enjoying a contract with the state agency by which he is employed or over which he supervises even if the contract is competitively bid. If the law is interpreted to mean that KRS 45A.340 applies only to the agency by which a public servant is employed or over which he or she exercises supervision, which you propose, then KRS 11A.040(4) would have no effect. The Commission does not believe this is what the legislature intended. Prior to July 1996, KRS 11A.040(4) prohibited public servants from having a contract or an agreement, or enjoying part of a contract or agreement, with any state agency. In 1996, the Commission worked to have the very broad law changed to prohibit a public servant only from enjoying a contract or agreement with his own agency, but noted that the Model Procurement Code would still apply in contracts or agreements between a public servant and other state agencies. Thus, the language in KRS 11A.040(4) was the result of such revision to loosen the restrictions for state employees, but still comply with the Model Procurement Code in contracts or agreements with other agencies.

The Commission believes, consistent with its previous interpretation, that because the Governor has "ultimate authority" over every executive branch agency, and thus ultimately

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supervises every executive branch agency, neither he nor any business in which he holds at least a five percent (5%) interest should hold or enjoy part of a contract awarded by any executive branch agency. For a list of executive branch agencies, please refer to the enclosed "Guide to the Executive Branch Code of Ethics."

Although for the purpose of acceptance of gifts the Commission allowed an exception, authorized under KRS 11A.045(1), that the Governor is not considered to be employed by or supervising every executive branch agency and may accept gifts greater than \$25 if not directly involved in the interests of a particular agency, such an exception for KRS 11A.040(4) is not authorized, or considered by the Commission to be necessary.

The Commission believes that the provisions stated above would prohibit the potential candidate, if elected Governor, and any business in which he owns or controls an interest of more than five percent (5%), from knowingly holding a contract with, subcontracting with a prime contractor to provide services that will fulfill part of a contract with, or selling materials to a prime contractor or subcontractor to fulfill part of a contract with an executive branch agency. Thus, because the potential candidate controls more than a five percent (5%) interest in the affiliates, such restrictions would apply, even if one of the affiliates is a sole source. However, such restrictions would not apply during the candidacy period of the potential candidate.

The Commission further advises that, if elected Governor, the potential candidate notify the affiliates of such restrictions. The affiliates would not be prohibited from subcontracting with a contractor of an executive branch agency or selling materials to a contractor or subcontractor if such services or materials would not be fulfilling part of a contract with an executive branch agency.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: John A. Webb

Enclosures: Advisory Opinion 94-67
Advisory Opinion 96-38
Advisory Opinion 00-20
Guide to the Executive Branch Code of Ethics