

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 05-169

Direct Appropriation Grant to Corporation for which Legislator is President

QUESTIONS

This request concerns a direct appropriation grant to the Memphis Business Development Corporation (the "Corporation") under 2005 Tenn. Pub. Acts Ch. 503, the appropriations act. Gary Rowe, who was elected to the Tennessee House of Representatives on September 15, 2005, is President of the entity that received the grant.

1. Does the receipt of the grant by the Corporation in August violate state law?
2. Does the receipt of the grant violate state law because the funds for the grant may be used for or to supplement the salary of an elected state representative?

OPINIONS

1. Assuming the Corporation is the same entity as Minority Enterprise Development; is in good standing under state corporate law; and complied with all the conditions to receive the grant, disbursement of the grant in August violated no state law. Until his election September 15, Mr. Rowe was not a state legislator.

2. No, assuming payment of grant proceeds to a state official such as a legislator does not violate the grant agreement. The letter agreement under which the grant was disbursed does not prohibit grant funds from being used for this purpose. But, by acting as President of the Corporation, the representative could be violating 2005 Tenn. Pub. Acts Ch. 102 (the "Ethics Act") if the duties for which he receives compensation from the Corporation include "consulting services" as defined in the Ethics Act.

ANALYSIS

1. Grant to Memphis Business Development Corporation

This opinion concerns a grant to the Memphis Business Development Corporation under Section 7, Item 10, of 2005 Tenn. Pub. Acts Ch. 503, the appropriations act. This provision states:

Department of Economic and Community Development in Section 1, Title III-8, the amount of \$100,000.00 is to be paid to the Nashville Business Development Center and the amount of \$100,000.00 is to be paid to the Memphis Business Development Corporation as direct appropriation grants.

Section 1, Title III-8, of the act contains the amount appropriated to the Department of Economic and Community Development (the "Department"). Section 66 of the appropriations act states:

Notwithstanding any provision of this act to the contrary, a direct appropriation to a non-governmental agency or entity shall not be disbursed until the recipient has filed with the head of the agency through which such disbursement is being made a plan specifying the proposed use of such funds and the benefits anticipated to be derived therefrom. As a prerequisite to the receipt of such direct appropriation, the recipient shall agree to provide to the agency head, within ninety (90) days of the close of the fiscal year within which such direct appropriation was received, an accounting of the actual expenditure of such funds including a notarized statement that the report is true and correct in all material respects; provided, however, that the head of the agency through which such disbursement is being made may require, in lieu of the accounting as provided above, an audited financial statement of the non-governmental agency or entity. A copy of such accounting or audit, as the case may be, shall be filed with the office of the Comptroller of the Treasury.

Gary Rowe, who was elected to the Tennessee House of Representatives in a special election held September 15, 2005, is the President of the Corporation. The appropriation contains no other conditions that the Corporation must satisfy to receive the grant. The request indicates that the Department received documentation from the Corporation outlining the intended uses of the appropriation. The Department has also provided this Office with a Letter of Agreement dated July 27, 2005, addressed to Mr. Rowe as President of the Corporation outlining conditions governing the grant. The letter agreement bears Mr. Rowe's signature dated July 28, 2005. The letter agreement is on a form developed by the Department of Finance and Administration that was distributed to agencies administering direct appropriation grants.

The first question is whether the Corporation's receipt of grant funds in August violated any state law. Since Mr. Rowe was not elected to the General Assembly until September 15, he was not a state legislator in August. But there appears to be some confusion about the Corporation's name and status. Mr. Rowe filed the Plan of Action to receive the grant as President of "Minority Enterprise Development." Further, he signed the Letter of Agreement as President of "Minority Enterprise Development, formerly known as Memphis Business Development Corporation." Thus, although there are two business names, the entities appear to

be the same. Research indicates that the “Memphis Business Development Corporation” may have had its charter revoked in 2003 under Tenn. Code Ann. § 67-4-2116 for failure to file a franchise and excise tax return. A corporation that has been administratively dissolved may not carry on any business except that necessary to wind up and liquidate its business. Tenn. Code Ann. § 48-24-202(c). Further, under Tenn. Code Ann. § 9-6-604, no person may receive state funds until its debts to the State have been paid. The charter may be reinstated upon the filing of all reports and payment of fees, taxes, penalty, and interest due the State. Tenn. Code Ann. § 67-4-2116(c). Where a corporation is reinstated under Tenn. Code Ann. § 48-24-203, the reinstatement relates back and takes effect as of the effective date of the dissolution. Tenn. Code Ann. § 48-24-203(c). Assuming the Corporation is the same entity as Minority Enterprise Development; is in good standing under state corporate law; and complied with the conditions required to obtain the grant, disbursement of the grant in August violated no state law.

2. State Grant Funds to Pay State Representative

The second question is whether the Corporation’s receipt of the grant violates any state law to the extent that grant funds may be used for or to supplement the salary of an elected state representative. Some state contracts expressly prohibit contract or grant funds from being used to pay a state official or employee. But the letter agreement evidencing the grant to the Corporation contains no such provision. Payment of state grant funds to Mr. Rowe in this case, therefore, does not appear to violate the grant agreement.

Further, the arrangement does not appear to be prohibited under Tenn. Code Ann. § 12-4-101, the general conflict of interest law. Under Tenn. Code Ann. § 12-4-101(a)(1), a public official whose duty it is to “vote for, let out, overlook, or in any manner to superintend” a contract in which a public agency is interested may not be directly interested in such contract. “Directly interested” means any contract with the official personally or with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest. “Controlling interest” includes the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation. The last sentence of Tenn. Code Ann. § 12-4-101(a)(1) states:

The provisions of this subdivision shall not be construed to prohibit any officer, committeeperson, director, or any person, other than a member of a local governing body of a county or municipality, from voting on the budget, appropriation resolution, or tax rate resolution, or amendments thereto, unless the vote is on a specific amendment to the budget or a specific appropriation or resolution in which such person is directly interested.

Based on the facts available to this Office, we conclude that the grant to the Corporation does not violate this statute. First, Mr. Rowe was not in the General Assembly when the 2005 appropriations bill that included the grant was passed. Further, it is not clear whether the president of a corporation is “directly interested” in a contract between the State and the

corporation.¹ In any case, the statute does not prohibit a state legislator from having a direct interest in a contract with the State where the legislator merely votes on the general appropriations act that funds the contract. Op. Tenn. Att’y Gen. 03-034 (April 1, 2003).

By acting as President of the Corporation, however, the representative could be violating 2005 Tenn. Pub. Acts Ch. 102 (the “Ethics Act”) if his duties for the Corporation include “consulting services” as defined in the Ethics Act and he is compensated by the Corporation for those services. Under the Ethics Act, it is an offense for any member of the General Assembly, member-elect of the General Assembly, Governor, member of the Governor’s staff, Secretary of State, Treasurer, or Comptroller of the Treasury to knowingly receive a fee, commission, or any other form of compensation² for consulting services from any person or entity, other than compensation paid by the State, a county, or a municipality. Tenn. Code Ann. § 2-10-123(a). The statute defines “consulting services” as follows:

“Consulting services” with respect to an official in the legislative branch or an official in the executive branch means services to advise or assist a person or entity in influencing state legislative or administrative action as such term is defined in § 3-6-102(11), including, but not limited to, services to advise or assist a person or entity in maintaining, applying for, soliciting or entering into a contract with the state. The term “consulting services” does not mean the practice or business of law in connection with representation of clients by a licensed attorney in a contested case action, administrative proceeding or rule making procedure.

Tenn. Code Ann. § 2-10-122(1) (emphasis added). Whether any particular activity falls within this definition will depend on specific facts and circumstances. According to information obtained from the Secretary of State’s Office, the Corporation is a privately chartered for profit corporation, and not the State, a county, or a municipality. The legislator should review his duties for the Corporation to determine whether they include “consulting services” within this definition. Op. Tenn. Att’y Gen. 05-126 (August 22, 2005).³

¹ This Office does not know whether Representative Rowe has a controlling interest in the Corporation.

² The terms “fee, commission, or any other form of compensation” do not include anything of value that may be accepted under Tenn. Code Ann. § 2-10-116 or is identified in § 3-6-114(b) or (c). Tenn. Code Ann. § 2-10-122(3).

³ The Department received a Plan of Action for July 2005 through June 2006 from Mr. Rowe as President of Minority Enterprise Development. The plan includes providing “procurement assistance” to new and existing business. The term “consulting services” under the Ethics Act includes “services to advise or assist a person or entity in influencing state legislative or administrative action . . . including, but not limited to, services to advise or assist a person or entity in maintaining, applying for, soliciting or entering into a contract with the state.” If the legislator, as the President of the Corporation, has the duty to advise clients on how to obtain contracts with the State, then his receipt

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Matthew Kisber
Commissioner, Department of Economic and Community Development
William Snodgrass/Tennessee Tower Building, 11th Floor 312 8th Avenue North
Nashville, TN 37243

of compensation in the form of a salary from the Corporation would violate the Ethics Act.