

**Louisiana Board of Ethics
LaSalle Building - First Floor
617 North 3rd Street
Baton Rouge, Louisiana**

**December 18, 2009
9:00 a.m.**

GENERAL

Appearances

- G8.** Appearance by the Division of Administrative Law in reference to the selection of administrative law judges to serves on the Ethics Adjudicatory Board.
- G9.** **Docket No. 07-609**
Appearance in connection with a request for reconsideration of an advisory opinion as to the propriety of a candidate for State Representative, District 94 amending a prior campaign finance disclosure report to reflect the receipt of a personal loan rather than a contribution.
- G10.** **Docket No. 09-377**
Appearance in connection with consideration of a request for an advisory opinion on whether an architecture firm that has entered into contracts with the State of Louisiana through the Office of Facility Planning would be subject to the Code of Ethics.
- G11.** **Docket No. 09-378**
Appearance in connection with consideration of a request for an advisory opinion on whether an architecture firm that has entered into contracts with the State of Louisiana through the Office of Facility Planning would be subject to the Code of Ethics.

G12. Docket No. 09-816

Appearance in connection with a request that the Board reconsider its decision not to waive the \$150 late fee assessed against Tracy Smith, for failure to timely file a Legislative ER-5/09 lobbying report.

G13. Docket No. 09-935

Appearance in connection with consideration of a request for an advisory opinion as to the propriety of the Office of Coastal Protection and Restoration (OCPR) hiring a person whose spouse works for an engineering firm that has contracts with the OCPR.

- G8.** Appearance by the Division of Administrative Law in reference to the selection of administrative law judges to serve on the Ethics Adjudicatory Board.

General Item

Ethics Board Docket No. BD 2007-609 12/18/2009

RE:

Appearance in connection with a request for reconsideration of an advisory opinion as to the propriety of a candidate for State Representative, District 94 amending a prior campaign finance disclosure report to reflect the receipt of a personal loan rather than a contribution.

Relevant Statutory Provisions, Advisory Opinions:

18:1505.1C, 18:1505.2I, and BD 95-192, 95-201, 99-034, 99-866, 00-272, 02-273, and 04-184

Comments:

Representative Nick Lorusso was a successful candidate for State Representative, District 94, in the April 5, 2003 election. Rep. Lorusso originally reported the receipt of \$30,000 in personal funds as a contribution, rather than a loan. Rep. Lorusso stated that the \$30,000 was erroneously reported as a contribution. The Board has consistently declined to permit a candidate to amend his report to change a contribution to a loan, since the amendment would result in the filing of an inaccurate report. The Board rendered an opinion that Rep. Lorusso could not amend his report. (KMA)

Recommendations:

Affirm prior opinion rendered.

JOHNSON, JOHNSON, BARRIOS & YACOUBIAN

A PROFESSIONAL LAW CORPORATION

701 POYDRAS STREET, SUITE 4700
NEW ORLEANS, LOUISIANA 70139-7708
Telephone: (504) 528-3001
Facsimile: (504) 528-3030
WWW.JJBYLAW.COM

NICHOLAS J. LORUSSO
NJL@jjbylaw.com

December 21, 2007

VIA FAX (225-763-8780)

Louisiana Board of Ethics
ATTN: Kathleen Allen
2415 Quail Drive, Third Floor
Baton Rouge, LA 70808

RE: **Docket # BD 2007-609**

Dear Ms. Allen,

As we previously discussed, I would like to request a hearing before the Louisiana Board of Ethics for reconsideration of its decision in the above referenced matter. However, I have not received a hearing date to appear before the Board.

As a result, I would greatly appreciate it if you would advise me of the procedures for formally placing this matter on the Board's docket, as well as the available dates for such a hearing. Thank you for your assistance in this matter and Merry Christmas!

Sincerely,


Nicholas J. Lorusso



STATE OF LOUISIANA
DEPARTMENT OF STATE CIVIL SERVICE
LOUISIANA BOARD OF ETHICS

2415 QUAIL DRIVE
THIRD FLOOR
BATON ROUGE, LA 70808
(225) 763-8777
FAX: (225) 763-8780
1-800-842-6630
www.ethics.state.la.us

September 14, 2007

The Honorable Nicholas J. Lorusso
Johnson, Johnson, Barrios & Yacoubian
701 Poydras Street, Suite 4700
New Orleans, LA 70139-7708

Re: Ethics Board Docket No. 2007-609

Dear Representative Lorusso:

The Louisiana Board of Ethics, acting as the Supervisory Committee on Campaign Finance Disclosure, at its September 13, 2007 meeting, considered your request for an advisory opinion concerning the propriety of you amending your 10-P campaign finance report filed in connection with your campaign for State Representative, District 94 in the March 10, 2007 election. You stated that you erroneously listed \$30,000 in personal funds as a contribution to your campaign, rather than a loan.

The Board concluded, and instructed me to inform you, that the Campaign Finance Disclosure Act would prohibit the amendment you described. Because you originally reported the funds as a contribution, repayment is not allowed. The amendment and repayment would result in a violation of the Campaign Finance Disclosure Act, since the information would have been inaccurately reported at a time it was pertinent to the voters.

The Board issues no opinion as to laws other than the Campaign Finance Disclosure Act. If you have any questions, please call me at (800) 842-6630 or (225) 763-8777.

Sincerely,

LOUISIANA BOARD OF ETHICS

A handwritten signature in black ink, appearing to read "Kathleen M. Allen".

Kathleen M. Allen
For the Board

EB:KMA

JOHNSON, JOHNSON, BARRIOS & YACoubIAN

A PROFESSIONAL LAW CORPORATION

701 POYDRAS STREET, SUITE 4700
NEW ORLEANS, LOUISIANA 70139-7708
Telephone: (504) 528-3001
Facsimile: (504) 528-3030
WWW.JJBYLAW.COMNICHOLAS J. LORUSSO
NJL@jjbylaw.com

August 28, 2007

VIA FAX (225-763-8780)Louisiana Board of Ethics
ATTN: Kathleen Allen
2415 Quail Drive, Third Floor
Baton Rouge, LA 70808RE: Request For Correction of
Clerical Error

Dear Members of the Louisiana Board of Ethics,

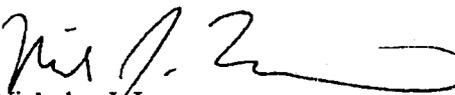
It has recently been brought to my attention that I made a clerical error on a Candidate's Report during my candidacy for the District 94 State Representative seat. As a result, I am requesting your permission to correct my report.

Specifically, on February 11, 2007, I wrote a personal check out of my private checking account in the amount of \$30,000.00 to my campaign fund. (A copy of this cancelled check has been requested and will be provided upon receipt) The amount of my personal check was duly recorded on the Summary Page of my "10th Day Prior to Primary" report (See Exhibit #1, p. 3, "Special Transactions," Line 21). However, this \$30,000.00 was erroneously listed on Schedule A-1 as a contribution (See Exhibit #1, p. 4), when in fact it should have been properly designated as a personal loan to my campaign fund on Schedule B.

Therefore, I respectfully request that I be allowed to file a Supplemental Candidate's Report to properly reflect on Schedule B that the \$30,000.00 personal check I wrote out of my private checking account was in fact a loan, instead of a contribution.

Finally, I would greatly appreciate it if you would place this request on your **September 13, 2007** agenda. If you have any questions, please do not hesitate to contact me. Thank you in advance for your consideration in this matter.

Sincerely,


Nicholas J. Lorusso

Enclosures

CANDIDATE'S REPORT

(to be filed by a candidate or his principal campaign committee)

OFFICE USE ONLY

3/10/07

10-P
3/1

0702451

1. Qualifying Name and Address of Candidate

Nicholas J.
LORUSSO
1133 Robert E. Lee
New Orleans, LA 70124

2. Office Sought (include title of office as well as parish, city, town and/or election district)

Louisiana State
House of Representatives
District 94

3. Date of Primary

This report covers from JANUARY 30, 2007 through February 17, 2007

4. Type of Report:

- 180th day prior to primary
- 90th day prior to primary
- 30th day prior to primary
- 10th day prior to primary
- 10th day prior to general
- 40th day after general
- Annual (future election)
- Supplemental (past election)
- Amendment to prior report

5. FINAL REPORT if:

N/A

- Withdrawn
- Filed after the election AND all loans and debts paid
- Unopposed

Missing numbered pages were blank and had no information on them.

6. Name and Address of Financial Institution (You are required by law to use one or more banks, savings and loan associations, or money market mutual fund as the depository of all campaign funds.)

LA F. Tel. City, N. L.
P.O. Box 65540
New Orleans, LA 70124

7. Full Name and Address of Treasurer

Rick LaRoche
29 Heron Street
New Orleans, LA
70124

9. Name of Person Preparing Report

Nicholas J. LORUSSO

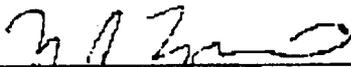
Daytime Telephone 504-588-3001

2007 MAR - 7 AM 11:56

STATE OF LOUISIANA
CAMPAIGN FINANCE
DISCLOSURE

10. WE HEREBY CERTIFY that the information contained in this report and the attached schedules is true and correct to the best of our knowledge, information and belief, and that no expenditures have been made nor contributions received that have not been reported herein, and that no information required to be reported by the Louisiana Campaign Finance Disclosure Act has been deliberately omitted.

This 22nd day of February, 2007.


Signature of Candidate/Chairperson
(To be signed by Chairperson only if report by principal campaign committee)

504-588-3001
Daytime Telephone


Signature of Treasurer

504 359 5126
Daytime Telephone

8. FOR PRINCIPAL CAMPAIGN COMMITTEES ONLY
a. Name and address of principal campaign committee, committee's chairperson, and subsidiary committees, if any (use additional sheets if necessary).

EXHIBIT

1

SUMMARY PAGE

RECEIPTS	This Period
1. Contributions (Schedule A-1)	\$34,750.00
2. In-kind Contributions (Schedule A-2)	- 0 -
3. Campaign paraphernalia sales of \$25 or less	- 0 -
4. TOTAL CONTRIBUTIONS (Lines 1 + 2 + 3)	\$34,750.00
5. Other Receipts (Schedule A-3)	- 0 -
6. Loans Received (Schedule B)	- 0 -
7. Loan Repayments Received (Schedule D)	- 0 -
8. TOTAL RECEIPTS (Lines 4 + 5 + 6 + 7)	\$34,750.00

DISBURSEMENTS	This Period
9. Expenditures (Schedule E-1)	\$7,300.93
10. Other Disbursements (Schedule E-2)	- 0 -
11. Loan Repayments Made (Schedule B)	- 0 -
12. Funds Loaned (Schedule D)	- 0 -
13. TOTAL DISBURSEMENTS (Lines 9 + 10 + 11 + 12)	\$7,300.93

FINANCIAL SUMMARY	Amount
14. Funds on hand at beginning of reporting period (Must equal funds on hand at close from last report or -0- if first report for this election)	- 0 -
15. Plus total receipts this period (Line 8 above)	\$34,750.00
16. Less total disbursements this period (Line 13 above)	\$7,300.93
17. Less in-kind contributions (Line 2 above)	- 0 -
18. Funds on hand at close of reporting period	\$27,449.07

SUMMARY PAGE (continued)

INVESTMENTS	Amount
18. Of funds on hand at beginning of reporting period (Line 14, above), amount held in investments (i.e., savings accounts, CD's, money market funds, etc.)	N/A
20. Of funds on hand at close of reporting period (Line 18, above), amount held in investments	- 0 -

SPECIAL TRANSACTIONS	This Period
21. Candidate's personal funds (Use of personal funds as either a contribution or loan to the campaign should be reported on Schedules A-1 or B.)	\$30,000.00
22. Contributions received from political committees (From Schedules A-1 and A-2)	- 0 -
23. All proceeds from the sale of tickets to fundraising events (Receipts from the sale of tickets are contributions and must also be reported on Schedule A-1.)	- 0 -
24. Proceeds from the sale of campaign paraphernalia (Receipts from the sale of campaign paraphernalia are contributions and must also be reported on Schedule A-1 or Line 3, above.)	- 0 -
25. Expenditures from petty cash fund (Must also be reported on Schedule E-1.)	- 0 -

NOTICE

The personal use of campaign funds is prohibited. The use of campaign funds must be related to a political campaign or the holding of a public office or party position. However, campaign funds may be used to reimburse a candidate for expenses related to his campaign or office, to pay taxes on the interest earned on campaign funds or to replace articles lost, stolen, or damaged in connection with a campaign.

Excess campaign funds may be returned to contributors on a pro rata basis, given as a charitable contribution as provided in 26 USC 170(c), given to a charitable organization as defined in 26 USC 501(c)(3), expended in support of or opposition to a proposition, political party, or candidacy of any person, or maintained in a segregated fund for use in future political campaigns or activity related to preparing for future candidacy to elective office.

The prohibition on the personal use of campaign funds does not apply to campaign funds received prior to July 15, 1988.

Form 102 Rev. Rev. 3/00, Page Rev. 3/00

SCHEDULE A-1: CONTRIBUTIONS (Other than In-Kind Contributions)

The following information must be provided for all contributors to your campaign during this reporting period, except for in-kind contributions. Information on in-kind contributions is reported on SCHEDULE A-2: IN-KIND CONTRIBUTIONS. In Column 1, check if the contributor is a political committee or a party committee. Any personal funds a candidate contributes to his campaign must be reported on this schedule. Personal funds a candidate loans to his campaign should be reported on Schedule B. For anonymous contributions, see SCHEDULE F. Totals and subtotals are optional. Completion of totals and subtotals may assist in calculating totals that must be reported on the Summary Page.

1. Name and Address of Contributor	2. Contributions this Reporting Period		3. Total this Election
	a. Date(s)	b. Amount(s)	
Nicholas J. LaRusso 1133 Robert E Lee Boulevard New Orleans, LA 70124 POLITICAL COMMITTEE? <u>no</u> PARTY COMMITTEE? <u>no</u>	2/11/07	\$30,000.00	\$30,000.00
MARY M BRUNETT 44 SPANISH FORT Blvd. New Orleans, LA 70124 POLITICAL COMMITTEE? <u>no</u> PARTY COMMITTEE? <u>no</u>	2/11/07	\$1,000.00	\$1,000.00
Steve P. Tins 720 Arnothys Street New Orleans, LA 70124 POLITICAL COMMITTEE? <u>no</u> PARTY COMMITTEE? <u>no</u>	2/12/07	\$2,500.00	\$2,500.00
Thomas and Debbie FIERKE 22 THROUGH STREET New Orleans, LA 70124 POLITICAL COMMITTEE? <u>no</u> PARTY COMMITTEE? <u>no</u>	2/12/07	\$250.00	\$250.00
DR & MRS. Geneva M. Knight 8334 D'HANA COURT Baton Rouge, LA 70806-6513 POLITICAL COMMITTEE? <u>no</u> PARTY COMMITTEE? <u>no</u>	2/16/07	\$1,000.00	\$1,000.00
POLITICAL COMMITTEE? _____ PARTY COMMITTEE? _____			
POLITICAL COMMITTEE? _____ PARTY COMMITTEE? _____			
4. SUBTOTAL (this page)		\$34,750.00	NA
5. TOTAL (complete only on last page of this schedule)		\$34,750.00	NA
6. CONTRIBUTIONS FROM POLITICAL COMMITTEES:			
SUBTOTAL (this page) <u>- 0 -</u>		TOTAL (complete only on last page of this schedule) <u>- 0 -</u>	

Form 100, Rev. 3/09, Page Rev. 3/08

SCHEDULE E-1: EXPENDITURES

Use this schedule to report information on all campaign expenditures for this reporting period. An "expenditure" is any payment made for the purpose of supporting your election to public office and includes monies spent for the campaign's general operating expenses. Any payments made that are not "expenditures" should be reported on SCHEDULE E-2: OTHER DISBURSEMENTS. Totals and subtotals at bottom of page are optional. Completion of totals and subtotals may assist in calculating totals that must be reported on the Summary Page.

1. Name and Address of Recipient	2. Expenditures this Reporting Period		
	a. Date(s)	b. Purpose(s)	c. Amount(s)
U.S. Postal Service CARRINGTON STATION New Orleans, LA 70119	2/9/07	Post office Box	\$38.00
PRINT ALL, Inc. 7962 Hwy 23 Belle Cherie, LA 70037	2/15/07	CAMPAIGN STICKERS POL VOTER MAILING LIST	\$612.93
Grubbs Smith Moore 7818 St. Charles New Orleans, LA 70118	2/18/07	Web SITE	\$1,200.00
Political Consulting Group, LLC 2600 Jefferson Ave. New Orleans, LA 70115	2/18/07	CAMPAIGN CONSULTANT	\$5,000.00
CLERK OF SUPREME DISTRICT COURT	2/18/07	Qualifying Fee	\$450.00
3. SUBTOTAL (optional)			\$7,300.93
4. TOTAL (optional - complete only on last page of this schedule)			\$7,300.93

**1999-034**

Created By: Sylvia Scott on 03/04/99 at 04:30 PM
Category: Campaign Finance Advisory Opinions
Caption:
Dismissed Document:

February 12, 1999

Mr. Bryan "Scott" Linzay
13524 Highway 28 East
Deville, LA 71328

Re: Ethics Board Docket No. 99-034

Dear Mr. Linzay:

The Louisiana board of Ethics, at its February 11, 1999 meeting, considered your correspondence concerning your 10th day prior to the October 3, 1998 primary election campaign finance disclosure report, filed on September 21, 1999. On that report, you showed personal contributions to your campaign totaling \$369.66. On October 9, 1998, you submitted an amendment to that report, changing your \$369.66 in contributions to loans. You asked the Board to accept your amendment.

The Board instructed me to inform you that the amendment you submitted would not be accepted. You may not change the category of funds previously reported as contributions after the election. Acceptance of the amendment would result in a violation of the Campaign Finance Disclosure Act since you would have inaccurately reported the information at a time it was pertinent to the voters.

If you have any questions, please call me at (225) 922-1400.

Sincerely,

LOUISIANA BOARD OF ETHICS

Maris LeBlanc McCrory

**1999-866**

Created By: Sylvia Scott on 12/17/99 at 08:40 AM
Category: Campaign Finance Advisory Opinions
Caption:
Dismissed Document:

December 13, 1999

Mr. Douglas R. Cooley, Treasurer
Louis Martin Estes Campaign
P. O. Box 4753
Lake Charles, LA 70606

Re: Ethics Board Docket No. 99-866

Dear Mr. Cooley:

The Louisiana Board of Ethics, at its December 9, 1999 meeting, considered your request for an opinion concerning the propriety of amending a campaign finance disclosure report filed prior to the October 23, 1999 election. You stated that you were the treasurer for Louis Martin Estes, a candidate for Calcasieu Parish Police Jury, and that you reported the candidate's use of \$5,000 of his personal funds as a contribution, rather than a loan. The candidate has now collected contributions from others and has about \$2,500 left in his campaign account. You asked whether you could amend his report to change the contribution to a loan so that he could be repaid a portion of the personal funds used.

The Board, with Judge Guidry dissenting, instructed me to inform you that such an amendment would not be allowed. You may not change the category of funds previously reported as contributions after the election. An amendment would result in a violation of the Campaign Finance Disclosure Act since the information would have been inaccurately reported at a time it was pertinent to the voters.

If you have any questions, please call me at (225) 922-1400 or (800) 842-6630.

Sincerely,

LOUISIANA BOARD OF ETHICS

**2000-272**

Created By: Shemeka Johnson on 06/08/2000 at 11:55 AM
Category: Campaign Finance Advisory Opinions
Caption:
Dismissed Document:

April 17, 2000

Ramona Turner
45147 Teddy Babin Road, Apt. 16
St. Amant, LA 70774

Re: Ethics Board Docket No. 2000-272

Dear Ms. Turner:

The Louisiana Board of Ethics, at its April 14, 2000 meeting, considered your request for an advisory opinion concerning the propriety of amending a campaign finance disclosure report filed prior to the October 23, 1999 election. You stated that you were the treasurer for Harold Marchand, a candidate for Ascension Parish President, and that you reported the receipt of funds from Mr. Marchand to his campaign as a contribution, rather than a loan, using the same procedure that the treasurer before you had utilized. You asked whether you could amend his report to change the contribution to a loan.

The Board concluded, and instructed me to inform you, that such an amendment would not be allowed. You may not change the category of funds previously reported as contributions after the election. An amendment would result in a violation of the Campaign Finance Disclosure Act, since the information would have been inaccurately reported at a time it was pertinent to the voters.

If you have any questions, please call me at (225) 922-1400 or (800) 842-6630.

Sincerely,

LOUISIANA BOARD OF ETHICS

Kathleen M. Allen
For the Board

 2002-273

Created By: Claudia Holland on 05/20/2002 at 10:10 AM
Category: Campaign Finance Advisory Opinions
Caption:
Dismissed Document:

May 10, 2002

Dominic O. Weilbaecher
621 Daniel Street
Kenner, LA 70062

Re: Ethics Board Docket No. 2002-273

Dear Mr. Weilbaecher:

The Louisiana Board of Ethics, acting as the Supervisory Committee on Campaign Finance Disclosure, at its May 9, 2002 meeting, considered your request for an advisory opinion concerning amendments to your campaign finance disclosure reports. You were a successful candidate for Councilman-at-Large, Division B, City of Kenner in the April 6, 2002 election.

The Board concluded, and instructed me to inform you, that you are not allowed to amend your reports to change the contributions you reported to loans. You may not change the category of funds previously reported as contributions after the election. An amendment would result in a violation of the Campaign Finance Disclosure Act, since the information would have been inaccurately reported at a time it was pertinent to the voters.

The Board also concluded that the amendments you proposed to your special reports were not necessary. The only expenditures which must be reported on special reports are those made to persons required to file campaign finance reports who endorse candidates (typically political committees). Further, expenditures are reported according to the date paid or billed.

Finally, the Board instructed me to inform you that the amendment to your 10th day prior to the primary election campaign finance disclosure report to add your qualifying fee as an expenditure would be accepted.

If you have further questions, please call me at (225) 922-1400 or 1-800-842-6630.

**2004-184**

Created By: Kathleen Allen on 04/08/2004 at 04:05 PM
Category: Campaign Finance Advisory Opinions
Caption:
Dismissed Document:

April 12, 2004

A. R. Sims
339 Marion Sims Rd.
West Monroe, LA 71292

Re: Ethics Board Docket No. 2004-184

Dear Mr. Sims:

The Louisiana Board of Ethics, acting as the Supervisory Committee on Campaign Finance Disclosure, at its April 8, 2004 meeting, considered your request for an advisory opinion concerning the propriety of you amending your 10-P campaign finance report filed in connection with your campaign for Ouachita Parish School Board, District C in the April 5, 2003 election. You stated that you incorrectly reported the personal funds used in connection with your campaign as a contribution, rather than a loan.

The Board concluded, and instructed me to inform you, that the Campaign Finance Disclosure Act would prohibit the amendment you described. Because you originally reported the funds as contributions, repayment is not allowed. The amendment and repayment would result in a violation of the Campaign Finance Disclosure Act, since the information would have been inaccurately reported at a time it was pertinent to the voters.

Section 1505.2I of the Campaign Finance Disclosure Act sets forth the appropriate uses of surplus campaign funds. The enumerated acceptable uses include returning funds to contributors on a pro rata basis, contributing to other candidates - up to their limits, contributing to political committees or political parties, expending funds to support or oppose ballot issues, making charitable contributions as provided in 26 USC 170(c), or making contributions to a charitable organization as defined in 26 USC 501(c)(3). The Board issues no opinion as to laws other than the Campaign Finance Disclosure Act.

If you have any questions, please call me at (800) 842-6630 or (225) 763-8777.

Sincerely,

General Item

Ethics Board Docket No. BD 2009-377 12/18/2009

RE: Appearance in connection with consideration of a request for an advisory opinion on whether an architecture firm that has entered into contracts with the State of Louisiana through the Office of Facility Planning would be subject to the Code of Ethics.

Relevant Statutory Provisions, Advisory Opinions: 1102, 1113

Comments:

FACTS: The Division of Administration, Office of Facility Planning and Control (FPC) requests an advisory opinion on whether or not Washer Hill Lipscomb Cabaniss Architecture (Washer Hill) an architecture firm that has entered into a contract with FP&C to be the designer on the New Clinical Research Facility, LSU Pennington Biomedical Research Center (Pennington Project). As designer, Washer Hill is the representative of the owner and has the authority to act on behalf of the Owner during the construction phase of this project. As designer of record, Washer Hill's duties include, conducting site visits to evaluate the progress and the quality of the Contractor's work, conducting regular progress meetings, preparing and distributing minutes, and submitting monthly status reports with each pay request, verifying that the Contractor's Application for Payments reflects the status of work and the stored material, and recommending and preparing change orders to the contract. Michael Hill is a principal in Washer Hill. TTM submitted a bid for roof repair work on the Pennington Project. TTM was once owned by Michael Hill but was sold to the sons of Michael Hill. TTM withdrew their bid submission; however, the FP&C requests that the Board still render the opinion since TTM is requesting the return of its bid bond and the Board's opinion is necessary to decide that issue.

ISSUE #1: Is the request for an opinion moot since TTM withdrew their bid submission. IS FPC entitled to an opinion on this scenario in order to determine if TTM should receive a refund of the bid bond. Is FPC an "affected person" under the Code.

ANALYSIS: FPC states that it still desires an opinion be rendered regarding TTM since a determination that TTM could not bid on the project under the Code would provide guidance to FPC in making a decision as to pursuing the bid bond. Further, FP&C argues that an advisory opinion on the issue would be consistent with the primary objective of the Code by delineating situations that present too great a danger of a conflict of interest occurring. The FP&C may be faced with the same type of situation again and it requires the guidance of the Board as to how to handle these situations. Further, rendering the opinion will allow the Board to clarify its position on who is a public servant under the Code. Section 601 of the Rules for the Board of Ethics provides that the Board will only render advisory opinions to "affected persons." "Affected person" is defined in the Board's Rules as "any person or governmental agency, or the authorized representative of such person or agency with a demonstrable and objective interest in the Board's

interpretation, construction, and application of any law within the Board's jurisdiction." The staff recommends that the Board decline to issue the advisory opinion since the withdrawal of the bid renders this issue moot.

ISSUE #2: Michael Hill is a principal in Washer Hill. His sons own TTM roofing. Is there a conflict of interest if TTM is awarded a contract on the Pennington Project when Washer Hill is the design architect. Section 1113 of the Code prohibits a public servant, or member of such public servant's immediate family, or legal entity in which he has a controlling interest from bidding on or entering into any contract, subcontract or other transaction that is under the supervision or jurisdiction of the agency of such public servant. "Controlling interest" is an interest in a company either held individually or collectively by a member of his immediate family member that exceeds 25%. TTM Construction is wholly owned by Terence and Travis Hill. Each has a 50% ownership interest.

ANALYSIS: Since TTM Construction is a legal entity in which Michael Hill's immediate family own a controlling interest, it would be prohibited from bidding on or entering into a contract under the supervision and jurisdiction of Washer Hill. (AMA)

Recommendations: Decline to render the advisory opinion since the issue is moot now that the bid has been withdrawn.

BOBBY JINDAL
GOVERNOR



2009-377

ANGELE DAVIS
COMMISSIONER OF ADMINISTRATION

State of Louisiana
Division of Administration
OFFICE OF GENERAL COUNSEL

March 25, 2009

Louisiana Ethics Administration Program
P.O. Box 4368
Baton Rouge, Louisiana 70821

**Re: Request for Advisory Opinion on Project entitled Hurricane Gustav
Related Repairs, Pennington Biomedical Research Ctr., G19-609-09-
ORM, Part 1**

To: Members of Louisiana Ethics Administration Program

The Division of Administration, Office of Facility Planning and Control (FP&C), requests an advisory opinion on the following matter that has recently come to our attention. Because this matter involves roof repair as a result of Hurricane Gustav, time is of the essence, and if there is anything that can be done to expedite this matter, it would be appreciated.

Washer Hill Lipscomb Cabaniss Architecture, LLC

According to the records of the Louisiana Secretary of State, one of the principal members of Washer Hill Lipscomb Cabaniss Architecture, LLC (WHLC) is Michael W. Hill. On November 17, 2008, WHLC entered into a contract with FP&C to be the designer on the above-entitled project.

According to the Louisiana Capital Improvement Projects Procedural Manual for Design and Construction – 2006 Edition, as the designer, WHLC is the representative of the Owner and has the “authority to act on behalf of the Owner” during the Construction Phase of this project. As the designer of record, WHLC’s duties include, but are not limited, to:

- a. Conducting site visits to evaluate progress and quality of the contractor’s work. As such, the designer “shall endeavor to guard the Owner against defects and deficiencies in the Work of the contractors”;
- b. Conducting regular progress meetings, preparing and distributing minutes, and submitting monthly status reports with each pay request;
- c. Verifying that the Contractor’s Application for Payments reflects the status of work and the stored material. This verification requires that the designer assert

¹ Louisiana Capital Improvement Projects Procedural Manual for Design and Construction – 2006 Edition: p. 13

Louisiana Ethics Administration Program
March 25, 2009
Page 2 of 3

- that the work and stored materials, to the best of his knowledge, are complete, acceptable and in accordance with the contract documents; and
- d. Recommending and preparing change orders to the contract.

TTM Construction Company, LLC (TTM)

On February 26, 2009, bids were opened on the Hurricane Gustav Related Repairs Project. The apparent low bidder was TTM Construction Company, LLC (TTM).

According to the records of the Louisiana Secretary of State, prior to June 3, 2008, Michael W. Hill, Travis C. Hill and Terrence W. Hill were members of TTM. On June 3, 2008, Michael W. Hill tendered his 51% membership in TTM to Travis and Terrence Hill. At present, the sole members of TTM, according to the Secretary of State, are Travis and Terrence Hill. Travis and Terrence Hill (TTM) are the sons of Michael W. Hill (WHLC).

On March 24, 2009, a letter was sent to TTM and WHLC requesting that they extend the deadline for awarding the contract to it by thirty (30) days while we seek an opinion from the Ethics Administration.

Issues in which the Office of Facility Planning and Control Requests an Opinion

We request an advisory opinion from the Louisiana Ethics Administration as to the following:

- (1) Under Louisiana Revised Statute 42:1102, a "public servant" is defined as a "public employee" or an "elected official", and a "public employee is defined as "anyone, whether compensated or not, who is... (c) Engaged in the performance of a governmental function." Previous case law and advisory opinions have indicated that this definition applies to contractors.² Based upon the duties of the architect as defined above, would Washer Hill Lipscomb Cabaniss Architecture, LLC, be considered a public servant under the Code of Governmental Ethics?
- (2) Under Louisiana Revised Statute 42:1113, no public servant or member of such a public servant's immediate family "shall bid on or enter into a contract ... that is under the supervision or jurisdiction of the agency of such public servant". An immediate family member, under the State Ethics Code, includes children of public servants. Based upon the facts described above, can TTM Construction Company, LLC bid on or contract with Facility Planning and Control when Washer Hill Lipscomb Cabaniss Architecture, LLC is the designer of record?
- (3) Under Louisiana Revised Statute 42:1112, no public servant shall participate in a transaction involving the governmental entity in which any of his "immediate family

² See *Commission on Ethics v. IT Corp.*, 423 So.2d 695 (La. App. 1 Cir. 1982), *In re T. Baker Smith & Son, Inc.*, Ethics Board Docket No. 2004-336

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March 25, 2009
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members" has a substantial economic interest. Based upon the information above, can Washer Hill Lipscomb Cabaniss Architecture, LLC, provide design services to Facility Planning & Control when TTM Construction Company, LLC is the lowest responsive bidder?

If you need any further information on these issues, please contact me.

Sincerely,



Pamela Miller Perkins
General Counsel

PMP/JB/eb

c: Washer Hill Lipscomb Cabaniss Architecture, LLC
TTM Construction Company, L.L.C.

BOBBY JINDAL
GOVERNOR



ANGELE DAVIS
COMMISSIONER OF ADMINISTRATION

State of Louisiana
Division of Administration
OFFICE OF GENERAL COUNSEL

April 29, 2009

VIA HAND DELIVERY

Louisiana Ethics Administration Program
P.O. Box 4368
Baton Rouge, LA 70821

RE: New Clinical Research Facility, LSU Pennington Biomedical Research Center,
Project No. 19-609-06S-01; and
Hurricane Gustav Related Repairs, Pennington Biomedical Research Center,
G19-609-09-ORM, Part 1

To Whom It May Concern:

This letter is in response to the recent letters regarding to the above- referenced matters submitted to this Board by Milton Womack, Inc., Washer Hill Lipscomb Cabaniss Architecture, LLC (WHLC) and Michael Hill, AIA Louisiana – The Louisiana Architects Association (AIA), and the Louisiana Association of General Contractors (AGC).

Prior to discussing the issues presented, the Division of Administration, Office of Facility Planning and Control (FP&C) would like to make clear that it has no ill-will towards any of these entities. FP&C's main objective in this request is the same as that of the Ethics Board. It is to ensure "impartiality, fairness and equality of treatment toward those dealing with government; assurance that decisions of public importance will not be influenced by private considerations; maintenance of public confidence in government (wherein enters the matter of appearances); and prevention of use of public office for private gain."¹

I. Current Status of Ethics Request

On March 25, 2009, on behalf of FP&C, the undersigned wrote two separate letters to this Board requesting an opinion on the following projects:

- (A) New Clinical Research Facility, LSU Pennington Biomedical Research Center, Project No. 19-609-06S-01 (Clinical Research Facility Project); and

¹ La. R.S. 42:1101(B). *Glazer v. Com'n on Ethics for Public Employees*, 431 So.2d 752, 755-56 (La.1983).

Office of General Counsel • Post Office Box 94095 • Baton Rouge, Louisiana 70804-9095
Claiborne Building • 1201 N. 3rd Street • Suite 7-211 • Baton Rouge, Louisiana 70802
(225) 342-7154 • Fax (225) 219-7572
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(B) Hurricane Gustav Related Repairs, Pennington Biomedical Research Ctr.,
G19-609-09-ORM, Part 1 (Roof Repair Project).

A. Roof Repair Project

Although FP&C has not withdrawn its request for an advisory opinion regarding the Roof Repair Project, no one has addressed the issue. Perhaps, it is because the responding entities believe there is no justiciable controversy. FP&C, however, respectfully disagrees.

After receiving notice that FP&C requested an Ethics Advisory Opinion from this Board on the two projects, on April 6, 2009, TTM Construction, L.L.C. (TTM), the low bidder on the Roof Repair Project, withdrew its bid. The withdrawal of the bid did not moot the issue for a number of reasons.

First, in its withdrawal, TTM requested that its bid bond be returned. FP&C still desires an advisory opinion from the Board on this particular situation. A determination that TTM could not bid on this project under the Ethics Code will provide guidance to FP&C in making a decision as to pursuing the bid bond.

Second, FP&C's request is for an advisory opinion, not a request for charges to be levied against a party.² An advisory opinion is not a decision on a formal charge.³ It is a non-binding interpretation of the law. An advisory opinion on this issue would be consistent with the primary objective of the Ethics Code, which is "to prevent not only the actuality of conflicts of interest, but also to prevent the occurrence of those situations that tend to create a perception of conflict of interest. It does this by delineating situations that present too great a danger of a conflict of interest occurring."⁴ When one considers the number of architects and contractors that do business with FP&C, the danger of this same type of situation occurring again is quite real. FP&C seeks guidance from the Ethics Board should it encounter a similar situation in the future.

Third, when one considers the difference between FP&C and the interested parties' interpretation of the Ethics Code and the difference in various opinions by the Board and the courts as to the provisions questioned, the current definition of "public employee" and "governmental function" obviously need further clarification. The facts involving the Clinical Research Facility Project are different from the facts involved in *In Re Taylor Porter*. For that matter, the facts involved in the Clinical Research Facility Project are different from the facts involved in the Roof Repair Project. As this Board noted in *In Re Taylor Porter* regarding the very issue presented in our request, "it is necessary that such a determination be made on a case-by-case basis".⁵

² La. R.S. 42:1134

³ *In Re Taylor Porter*, Opinion No. 2008-1150, page 6

⁴ *In Re Beychok*, 495 So.2d 1278, 1281 (La.1986)

⁵ *In Re Taylor Porter*, Opinion No. 2008-1150, page 7



LONG LAW FIRM L.L.P.
BATON ROUGE • WASHINGTON D.C.

C. Kris Kirkpatrick¹⁶
Michael A. Patterson¹⁶
Joseph E. Tuban
Albert Dale Clary¹⁷
David L. Guerry¹⁷
C. Stokes McConnell, Jr.¹⁷
J. Wendell Clark

James Hurst Wade
Adrian G. Nadeau
Jacques A. Pucheu
S. Brooke Barnett
Mark L. Barbee
Sebastian B. Caballero

Russell B. Long (1968-2009)
¹⁸ Lecturer and Director of Columbia
¹⁹ LL.M. Degree Recipient
²⁰ A Professional Law Corporation
²¹ A Limited Liability Company

May 11, 2009

VIA HAND DELIVERY

Louisiana Ethics Administration Program
617 North Third Street
LaSalle Building, 10th Floor
Baton Rouge, Louisiana 70802

Re: Response to Correspondence from the Division of Administration and the Office Facility Planning and Control regarding Request for Advisory Opinion on Project entitled New Clinical Research Facility, LSU Pennington Biomedical Research Center, Project No. 19-609-06S-01, Part 01.

To: Members of the Louisiana Ethics Administration Program:

Please accept these comments on behalf of Washer Hill Lipscomb Cabaniss Architecture, LLC (WHLC) and Michael Hill in response to the April 29, 2009 correspondence from the Division of Administration (DOA) Office of Facility Planning and Control (FPC). As you are aware, one of WHLC's principals is Michael Hill, and Terry Hill, the President of Womack, is his brother.

Roof Repair Project

DOA/FPC takes the position it will not withdraw its request for an advisory opinion regarding the roof repair project even though the contractor, TTM Construction, LLC, has withdrawn its bid. DOA/FPC suggests to the Board that the basis for its insistence is that it wishes to have assistance in making a decision whether to pursue TTM's bid bond. This can only be characterized as punitive. There is nothing pending which requires an advisory opinion. The Board should decline DOA/FPC's request.

Pursuant to WHLC's scope of services and the applicable case law and statutes, WHLC is not engaged in the performance of a governmental function.

Central to the questions before the Board of Ethics is whether WHLC, a private entity that contracted with the Division of Administration pursuant to a joint venture to perform architectural

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services for one of its many projects, is a government employee engaged in the performance of a governmental function under La. R.S. 42:1102 (18). For the reasons submitted to you before and for reasons more fully stated herein, the Board of Ethics' answer to this question should be no.

In the case of *Commission on Ethics for Public Employees v. IT Corporation*,¹ the court determined IT Corporation was a state employee engaged in the performance of a state function pursuant to state law. Act 334 of 1978 provided, "it is in the public interest and within the police powers of the state to establish a framework for the regulation, monitoring, and control of the generators, transportation, storage and disposal of such hazardous waste..." (emphasis added) IT had the duty of securing feasible sites for the storage and disposal of hazardous waste. Accordingly, IT was charged with one part of the framework in establishing where the storage and disposal of hazardous waste would be located. In finding IT was a state employee, the court did not use an expansive interpretation of being engaged in the performance of a state function, as is necessary to find WHLC is engaged in the performance of a governmental function.

The same was true with the case of *In Re: George Dyer and Fire Apparatus Specialists, Inc.*² The volunteer fire department contracted to be the sole provider of fire protection for the district; accordingly, the volunteer fire department, of which George Dyer was the fire chief, was engaged in the performance of a government function. (emphasis added) An expansive interpretation was again not needed to find that the sole fire fighters for the district were engaged in the performance of a governmental function. No government employees provided these services. In the instant matter, however, WHLC has architectural duties apart from the role of the DOA/FPC. It is not as though the work performed by the architects of WHLC is the same as or takes the place of the function of the DOA/FPC. Accordingly, the Board should not find WHLC is engaged in the performance of the governmental function assigned to the DOA/FPC. To find WHLC is a state employee requires an expansive interpretation of being engaged in the performance of a governmental function, which the Ethics Board has previously found to be inappropriate.

The DOA/FPC relies on *In Re: Kean Miller 2009-169*³ to suggest that WHLC is a state employee. While the case suggests that Kean Miller is a state employee, this case does not further the argument that WHLC is a state employee. There are many points of distinction which suggest WHLC is not a state employee.

¹ *Commission on Ethics for Public Employees v. IT Corporation*, 423 So.2d 695 (La. App. 1 Cir. 1982.)

² *In Re: George Dyer and Fire Apparatus Specialist, Inc.* 95 2297 (La. App 1. Cir. 6/28/96), 677 so.2d 1075.

³ *In Re: Kean Miller 2009-169*

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The rationale of the Board finding Kean Miller is a state employee is outlined in opinion 2009-154.⁴ Kean Miller was found to be a public employee pursuant to La. R.S. 42:1102-18 (a) (iii and iv). Kean Miller was hired to 1.) attend meetings of the OCD State Appeal Panels approximately three times a week, 2.) provide legal counsel to the Louisiana OCD State Appeals Panels as requested with regard to disposition of appeals before panels; 3.) draft proposed decision letters incorporating the decision of the Appeals Panels; and 4.) represent OCD in litigation arising out of the decision of the Appeal Panels. Following Hurricane Katrina, the OCD had approximately 5,000 appeals to be heard and four staff members to make recommendations to the panel. Kean Miller provided most of its services in the office of the OCD, including clerical/paralegal services. Kean Miller's staff also performed the same functions as the Road Home Program staff under the head of OCD and the head of the Road Home Program. The contract was entered into due to the volume of appeals.

WHLC did not contract with the state to address the volume of the DOA/FPC's work or to perform the same function of the DOA/FPC. WHLC as a joint venturer was hired to perform professional architectural services pursuant to contract with the Division of Administration for a Capital Outlay Project. The role of WHLC in performing architectural services is distinct, separate and apart from the administrative role of the DOA/FPC. Kean Miller's employees were performing the same functions as the agency staff due to the volume of appeals in the same office as the OCD and under the head of OCD and the head of the Road Home Program. WHLC does not perform its services in the offices of the DOA/FPC, and the architects of WHLC are supervised by and subject to the authority of WHLC. To find that the DOA/FPC has supervision or authority over the employees of privately owned companies who contract with the state for Capital Outlay Projects would lead to an absurd result. Where would the line of state employees end? The DOA/FPC functions as the owner of the project through a contract for services. A finding that Kean Miller is engaged in the performance of a governmental function based on these pertinent points does not further the argument that WHLC is a state employee pursuant to La. R.S. 42:1102 18 (a) (iii and iv).

The question is whether WHLC is "engaged in the performance of governmental function" in providing architecture services to the DOA/FPC for the Clinical Research Facility at LSU Pennington Biomedical Research Center pursuant to state law. The answer is no.

La. R.S. 39:1 creates the Division of Administration as a division of the Office of the Governor. La. R.S. 39:121 says the Division of Administration is to "exercise supervision over the expenditure of funds and the construction projects." La. R.S. 39:121(4) specifically provides, "the Division of Administration shall "[s]upervise construction, approve estimates, and select and employ engineers, architects, and other personnel necessary in connection with the administration of contracts for projects."

⁴ Opinion No. 2009-154

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Pursuant to La. R.S. 39:124, "facility planning and control section shall make periodic inspections at all stages of construction of any facility constructed pursuant to this Part and shall make detailed reports which shall be made available to the legislature and to the public. Such inspections shall include but not be limited to the close technical on-site examination of the materials, structure, and equipment and surveillance of the workmanship and methods used to insure reasonably that the project is accomplished in compliance with information given by the contract documents and good construction practices."

La. R.S. 39:125 also provides the "facility planning and control section shall be responsible for directing final payment for work done on each project. However, if upon final inspection of any project it shall be found that the plans, specifications, contract, or change orders for the project shall not have been fully complied with, the facility planning and control section shall, until such compliance shall have been effected or adjustments satisfactory to it shall have been made, refuse to direct such payment. Upon completion of the project the facility planning and control section shall release it to the agency. The facility planning and control section shall be responsible for making an inspection of the project prior to the expiration of the guarantee period to observe any defects which may appear within one year after completion of the contract. The facility planning and control section shall give prompt written notice to the contractor of defects which are due to faulty materials and workmanship."

Section 7 of the Louisiana Capital Improvements Projects Procedure Manual for Design and Construction (Procedure Manual) outlines the role of the architect.⁵ The array of services shows the

⁵ The role of the architect involves designing the project within the applicable legal requirements and cost constraints and advising the owner if this cannot be done. The designer is charged with providing the necessary geotechnical reports and surveys, and finalizing the time schedule. The designer is to submit a statement of probable costs, and a report based on the applicable codes for state owned buildings. The designer is responsible for the coordination of all documents and disciplines. The designer distributes construction documents and is required to comply with all provisions of Public Bid Law. The designer evaluates prior approval requests for substitution of materials, products and equipment required by the applicable statutes and owner procedures. The designer issues the agenda and modifies construction documents. The designer participates in a pre-bid conference in accordance with the contract documents. The designer provides a form to the owner to tabulate the bids. The designer analyzes the bids and makes a recommendation to the owner as to whether to award the bid to the low bid contractor or to reject all bids. The architect administers the construction documents and submits to the owner a cost data form for the owner's evaluation. The architect makes recommendations for the owner's approval in regard to testing. The architect advises and consults with the owner and communicates the owners instructions to the contractor. The designer can act on behalf of the owner as provided for the manual. The designer conducts a pre-construction conference. The designer and consultants must visit the site for inspections. The designer is to guard the owner against defects and deficiencies. Reports are required from the designer and consultants to the owner upon each visit. The designer agrees to qualifications, experience and training of his representatives in making decisions and interpreting construction documents. The designer is to confirm in writing all such decisions to the owner. The designer is also charged with replacing any representative the owner determines does not meet the qualifications. The designer issues certificates for payment upon determining the quality and progress of the contractor's work. The designer instructs the contractor to conduct monthly meetings in regard to project scheduling. The designer is to

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design professional functions in the role of an architect, which supports the supervisory governmental function of the DOA/FPC. The architect certainly assists the DOA/FPC, but the architect does not perform the function of the DOA/FPC. It is misleading to suggest otherwise. The DOA/FPC has its own supervisory role, its own inspections to perform, its own budgetary concerns to address, its own reports to write, its own contract administration to perform, its own duties to the legislature and the public arising from these projects, essentially, its own administration to perform separate, independent and apart from the work of the architect. While the DOA/FPC may rely on the information supplied by the architect in performing its tasks, to find that anyone whose work is relied upon by the government agency in performing its duties is engaged in the performance of a governmental function is overly broad. The Board of Ethics cannot find WHLC is a state employee without interpreting 42:1102 (18)(a)(iii) expansively.

This Board has said quite correctly and is worth again quoting here:

"The Board takes cognisance of the untold hundreds, if not thousands, of contracts between private entities and governmental agencies. The object of these contracts varies greatly. Some provide professional services (legal, accounting, architecture, landscape architecture, medical, engineering, etc.); some provide construction, renovation or repairs of buildings, roads, equipment, etc.; some provide social services, employment and management guidelines, insurance advice and policies, some provide products including consumables; the list is virtually endless. To hold that each of those private entities and their employees are public employees appears beyond the intent of the legislature in adopting Sec.1102(18)(a). If the legislature intended that result, it would simply have provided in Section 1102(18)(a) that "any

submit to the owner, user agency and contractor a monthly status report. The form of the report is supplied to the designer. The Designer's Statement for Professional Services and the Contractor's Certificate for payment shall be supplied to the owner. The designer is the impartial judge between the owner and contractor for the requirements of the contract documents. The designer can reject all work that is not in compliance with the contract documents. The designer reviews shop drawings, samples and submissions of the contractor only for conformance of the design concept. The designer is to respond to requests for information from the contractor. Only with the authorization of the owner shall the designer prepare change orders. The designer conducts an inspection with the owner, user agency and the contractor to determine if the contractor's work is in general accordance with the contract documents. When the owner desires to accept the work on full or substantial completion, the designer shall recommend such acceptance in writing, excepting the retained percentage, liquidated damages or the value of the punch list items. Upon receipt of the clear lien certificate, the designer makes the final inspection. The designer issues guarantees, operation and maintenance manuals, keys and other closing documents for the owner. After acceptance by the owner, the designer prepares a final report containing information requested by the owner and two sets of as built drawings. The designer reviews and approves the punch list. The designer follows up on items to be corrected during the warranty period.

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person who provides a service or product under contract to a governmental agency is deemed to be a public employee.⁶

A finding that WHLC is a state employee has far reaching ramifications. Each private architect who contracts from here on with the DOA/FPC for Capital Improvement Projects will be subject to the same strict confines of the ethics code applicable to state employees. The Procedure Manuel outlines the roles for all architects working on these projects, and the revised statutes applicable to the DOA/FPC apply in each instance as well. Accordingly, a finding that the architect is engaged in the performance of a governmental function in this instance would mean the same result for each architect engaged in services under any Capital Outlay Project.

Womack's bid is in the best interest of the tax payer

DOA/FPC claims the tax payer is at a great disservice when contractors bid on projects designed by immediate family members⁷. The DOA/FPC conveniently excluded from its analysis that through the vetting process of the public bid, Womack's bid was nearly \$400,000 less than the next highest bid. If WHLC is found to be a public employee and in turn Womack is precluded from proceeding with the project, an extra \$400,000 will be necessary to complete this project. We again caution against an expansive interpretation of WHLC being engaged in the performance of the governmental function for practical reasons such as this.

At the time WHLC became the architect, there were no ethical concerns to address regardless of whether WHLC is found to be a state employee or not. WHLC as the architect designed the plans, prepared the specifications to be bid, etc. It was not until after Womack bid the job and the DOA/FPC awarded the contract to Womack that the DOA/FPC claimed there was an ethical conflict. The DOA/FPC did not raise its ethical concerns until the job was approximately one year from completion. It would be a great disservice to the taxpayers of this state to nullify the contract of the architect and/or the contract of the contractor. Given most of the work has been completed, the parties request that neither contract be nullified, as no ethical impropriety grounded in fact has been found.

The DOA/FPC's assertions of ethical concerns arising from the work of WHLC and Womack are unfounded.

The DOA/FPC contends the primary objective of the ethics code is "to prevent not only the

⁶ *In Re: Taylor Porter 2008-1150*

⁷ April 29, 2009 correspondence from the DOA/FPC to the Board of Ethics page 6.

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actuality of conflicts of interest, but also to prevent the occurrence of those situations that tend to create a perception of a conflict of interest."⁸ In finding a conflict of interest under these circumstances and based on the assertions of the DOA/FPC, one would need to presume first of all, these actions are possible and secondly, WHLC is prepared to ignore the provisions of the Louisiana State Board of Architectural Examiners, cheat, lie and steal in order to further its interests and those of Womack. This is an extreme charge in order to find an ethical conflict, especially since any design professional would face legal and professional ramifications for the actions suggested by the DOA/FPC. The DOA/FPC's arguments for ethical conflict also ignore the fact that the architecture services were provided subject to a joint venture with Post Architects.

A. Closing Specifications

DOA/FPC contends that the designer could easily manipulate its design to favor the contractor by including a closing specification.⁹ The DOA/FPC is aware this type of manipulation did not occur. Section 7.1.4 of the Procedure Manual specifically addresses closing specifications. Generally, state law prohibits closing specifications with few exceptions. Section 7.1.4 (1)(b) of the Procedure Manual provides, "Any reason for closing specifications as provided for by law shall be brought to the attention of the owner in writing for review." Accordingly, any closing specification included in the plans would not be a secret. Further, for this specific project, the construction documents were developed with a closing specification, not at the insistence of the architect, but at the request of the user agency. The closing specification requested by the user agency involved the fire alarm and mechanical system, and this closing specification was approved by FPC when Womack bid the project. The DOA/FPC knows closing specifications are generally prohibited. The DOA/FPC also knows that if a closing specification is included in the plans, the owner will be aware of the specification and the specification will be subject to approval. Suggesting an ethical conflict based on closing specifications which are known by the owner and subject to approval is misleading.

B. Price Increases and Change Orders

The DOA/FPC contends an architect could approve cost increases and approve change orders to increase the contract price as a benefit to the contractor.¹⁰ An architect cannot unilaterally approve cost increases or change orders in favor of family members and to suggest that one can is again misleading, especially when dealing with charges of ethical impropriety. Section 7.1.6.15 of the Procedure Manual further provides, "Only with the authorization of the Owner, shall the Designer

⁸ April 29, 2009 correspondence from the DOA/FPC to the Board of Ethics page 2.

⁹ April 29, 2009 correspondence from the DOA/FPC to the Board of Ethics page 6.

¹⁰ April 29, 2009 correspondence from the DOA/FPC to the Board of Ethics page 6.

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prepare Change Orders. The designer shall obtain from the Contractor his estimate of cost and time changes in accordance with the contract documents for the Change Order, review and approve same and submit it to the Owner for approval before any changes are made in the Contract." There is no basis for the claims of the DOA/FPC in regard to ethical concerns over price increases and change orders. (Emphasis added)

C. Ignoring Delays Caused by the Contractor

The DOA/FPC argues that an ethical conflict may arise if the architect ignores delays caused by the contractor resulting in delays of occupancy and loss of the owner's right to contractually stipulated damages.¹¹ This argument ignores the fact that any weekly or monthly reports¹² from the architect are submitted to the owner for review, ignores the premise that the DOA is charged with performing its own inspections pursuant to La. R.S. 39:121(4) and ignores the fact that the facility planning and control section is to make periodic inspections at all stages of construction and is to make detailed reports available to the legislature and to the public pursuant to La. R.S. 39:124. The DOA/FPC seems to argue the WHLC has free reign, but there is owner oversight as to the status of the project on a strict and routine basis. Further, WHLC is providing its services subject to a joint venture with Post Architects. It is impractical to argue that long delays caused by the contractor would be ignored by the architect.

Further, the designer is to be the "impartial judge of the performance there under by both the Owner and Contractor,"¹³ and the designer shall "endeavor to guard the owner against defects and deficiencies in the work of the contractor."¹⁴ Accordingly, both WHLC and Post Architects can be sued for breach of contract and for professional negligence if the architects participate in the scheme alleged by the DOA/FPC. One who asserts an ethical conflict is present or potentially present must presume WHLC is engaged in professional negligence and is breaching its contract to the owner. The Board should not presume professionals are engaged in schemes of professional negligence and breaches of contract. No reasonable person would engage in these actions.

¹¹ April 29, 2009 correspondence from the DOA/FPC to the Board of Ethics page 6.

¹² Section 7.1.6.6 and 7.1.6.10 of the Louisiana Capital Improvements Projects Procedure Manual for Design and Construction

¹³ Section 7.1.6.11 of the Louisiana Capital Improvements Projects Procedure Manual for Design and Construction

¹⁴ Section 7.1.6.6 of the Louisiana Capital Improvements Projects Procedure Manual for Design and Construction

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D. Information Conveyed only to the Favored Contractor

DOA/FPC contends that an architect could convey information to a preferred contractor that would not be known by any other contractor bidding the job, which would allow for an unfair, competitive advantage in securing the bid.¹⁵ There are factual constraints to this argument, and again, no reasonable professional would engage in this activity.

Section 7.1.5 of the Procedure Manual establishes, "Upon receipt of written approval from the User Agency and other State regulatory agencies, receipt of corrected and completed Construction Documents, and approval of the Latest Statement of Probable Construction Costs, the Owner may advertise the project for bids and shall be assisted by the Designer in obtaining bids." Section 7.1.5.6 also establishes that "the architect provides the Owner with a form to assist the owner in tabulating the bids." Accordingly, the process for tabulating the bids is the same as to all submissions and based on the documents previously approved. It is unclear how secretive information could give one contractor an advantage over another if all of the contractors' bids are based on the same plans and specifications approved by the owner, user agency and state regulatory agencies, and if the criteria contained in the plans and specifications is used to evaluate the bids.

Any vagueness in the plans and specifications may be called into question by any of the contractors. Accordingly, this is simply another roadblock to any attempts by an architect to unethically favor a contractor.

The argument of the DOA/FPC also suggests that the owner would be completely unaware if the criteria upon which the bids were evaluated favored a particular contractor. We suggest this would be clear if an architect was brazen enough to do this.

It should be noted Womack presented a bid that was \$400,000 lower than any of the other contractors. This speaks to the integrity and professional reputations of WHLC and Womack in that the bid was not challenged by any of the other contractors. The potential challenge of other contractors in regard to a bid submission is a deterrent to any design professional from favoring one contractor over another.

It should not be presumed that professionals are engaged in these sorts of activities. There are strong deterrents to these practices as provided by the Louisiana State Board of Architectural Examiners and the laws of this state.

¹⁵ April 29, 2009 correspondence from the DOA/FPC to the Board of Ethics page 6.

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E. Ignoring Defective or Substandard Construction

The argument by the DOA/FPC that an architect might just ignore defective or substandard construction is completely unreasonable.¹⁶ **No architect wants problems with the construction of his project.** The architect is charged with protecting the owner from defects and deficiencies.¹⁷ Ignoring defective and substandard construction, no matter who the contractor is, would likely subject the architect to professional negligence and breach of contract claims resulting in damages, repair costs, emotional distress damages, etc. When there are legal and professional ramifications of this nature, it should not be presumed that these actions would occur. Especially in the case of a joint venture, it is not only WHLC that would be exposed to legal action, but also Post Architects.

The DOA/FPC's argument suggests it has no control over the project, but the DOA/FPC has total control. In fact, it has final acceptance. Pursuant to 7.1.6.15 of the Procedure Manual, R.S. 38:2241.1 gives the owner discretion to make acceptance on either full completion or substantial completion. The designer conducts an inspection with the Owner, User Agency, and Contractor to determine if the work is in general accordance with the contract documents. Accordingly, the agency conducts its own independent evaluation as to the construction.

Pursuant to La. R.S. 39:125, "facility planning and control section shall be responsible for directing final payment for work done on each project. However, if upon final inspection of any project it shall be found that the plans, specifications, contract, or change orders for the project shall not have been fully complied with, the facility planning and control section shall, until such compliance shall have been effected or adjustments satisfactory to it shall have been made, refuse to direct such payment. Upon completion of the project the facility planning and control section shall release it to the agency." There are so many reasons an architect would not ignore substandard construction regardless of who the contractor is that this argument is unfounded.

Lack of Capacity for Decision Making

Crucial to finding no ethical conflict in *In Re: Kean Miller*¹⁸ was that Kean Miller was not the decision maker.¹⁹ The OCD was to be the decision maker as to the outcome of the appeals and the decision as to what title company to use was made by IFC and the Road Home Applicant. As

¹⁶ April 29, 2009 correspondence from the DOA/FPC to the Board of Ethics page 6

¹⁷ Section 7.1.6.6 of the Louisiana Capital Improvements Projects Procedure Manual for Design and Construction

¹⁸ *In Re: Kean Miller* 2009-169

Louisiana Ethics Administration Program
May 8, 2009
Page 11

outlined in the Procedure Manual, the owner maintains approval over the plans and specifications, any change orders are subject the owner's approval, inspections are made by not only the architect, but by the government agencies as well, payments are made subject to the approval of the owner, and final acceptance of the project is subject to the approval of the owner. The owner, not the architect, makes the final decision on aspects crucial to the project, the same aspects the DOA/FPC seems to suggest lend to an ethical conflict.

Conclusion

WHLC should not be deemed a public employee. The DOA/FPC has set forth scenarios for ethical conflict that are neither factually, legally or ethically plausible. One would need to presume architects have complete control over the plans and acceptance of these state owned projects to assert an ethical conflict. Further, one would have to presume architects who have excellent reputations in their fields would partake in unprofessional actions which would subject them to professional ridicule and hardship as well as lawsuits in order to further an already independently successful contractor. These are not presumptions that should be made to find real ethical conflict exists.

Very truly yours,

LONG LAW FIRM, L.L.P.

MICHAEL A. PATTERSON
SEBASTIAN R. CABALLERO

MAP: src
cc: Mike Hill

General Item

Ethics Board Docket No. BD 2009-378 12/18/2009

RE: Appearance in connection with consideration of a request for an advisory opinion on whether an architecture firm that has entered into contracts with the State of Louisiana through the Office of Facility Planning would be subject to the Code of Ethics.

Relevant Statutory Provisions, Advisory Opinions: 1102, 1113

Comments:

FACTS: The Division of Administration, Office of Facility Planning and Control (FPC), requests an advisory opinion on whether Washer Hill Lipscomb Cabaniss Architecture (Washer Hill) an architecture firm that has entered into a contract with FPC to be the designer on the New Clinical Research Facility, LSU Pennington Biomedical Research Center (Pennington Project) is a public servant. In December 2007, the State of Louisiana, through the Division of Administration, entered into a contract with Washer Hill - Post Architects - A Joint Venture for design services in connection with the Pennington Project. As designer, Washer Hill is the representative of the owner and has the authority to act on behalf of the Owner during the construction phase of this project. Washer Hill's duties include, conducting site visits to evaluate the progress and the quality of the Contractor's work, conducting regular progress meetings, preparing and distributing minutes, and submitting monthly status reports with each pay request, verifying that the Contractor's Application for Payments reflects the status of work and the stored material, and recommending and preparing change orders to the contract. Michael Hill is a principal in Washer Hill. Terry Hill, the brother of Michael Hill, is the President of and partial owner of Milton J. Womack, Inc. Is there a conflict of interest if Milton J. Womack, Inc. is awarded a contract on the Pennington Project when Washer Hill is the design architect.

The Board concluded at the October 28, 2009 meeting that Washer Hill is a public employee and is therefore subject to the provisions of the Code of Governmental Ethics.

The remaining issue is whether Milton J. Womack, Inc. may be awarded a contract on the Pennington Project when Washer Hill is the design architect.

Michael Hill is a principal in Washer Hill. Terry Hill, the brother of Michael Hill, is the President of and partial owner of Milton J. Womack, Inc. Section 1113 of the Code prohibits a public servant, or member of such public servants immediate family, or legal entity in which he has a controlling interest from bidding on or entering into any contract, subcontract or other transaction that is under the supervision or jurisdiction of the agency of such public servant. "Controlling interest" is an interest in a company either held individually or collectively by a member of his immediate family member that exceeds 25%. Section 1112B provides no public servant shall participate in a transaction involving the governmental entity in which to his actual knowledge, any member of his immediate family has a substantial economic interest.

Terry Hill is President of Milton J. Womack, Inc. and has submitted affidavits stating that he does not have a controlling interest in Milton J. Womack, Inc. and that he is the sole member of his immediate family owning any common stock in Milton J. Womack, Inc. At no time has Terry Hill owned more than 23.6843% common stock in Milton J. Womack, Inc. The contract to Milton Womack has already been awarded therefore the prohibited transaction, if any, is past conduct. The Board does not issue advisory opinions regarding past conduct.

Michael Hill is Vice President of Washer Hill and is a 21.5% shareholder. No other member of Michael Hill's family has any ownership interest in Washer Hill. Michael Hill oversees the production of all the contract documents and construction administration of all projects for Washer Hill. On the Pennington project, he oversees Jason Bethany who handles the day to day construction administration of the project and attends all jobsite meetings with Mr. Bethany. Section 1112B provides no public servant shall participate in a transaction involving the governmental entity in which to his actual knowledge, any member of his immediate family has a substantial economic interest. (AMA)

Recommendations: Adopt proposed advisory opinion.

DATE

Pamela Miller Perkins
Division of Administration
Office of General Counsel
Post Office Box 94095
Baton Rouge, Louisiana 70804-9095

Re: Ethics Board Docket No. 2009-378

Dear Ms. Perkins:

At its October 28, 2009 meeting, the Louisiana Board of Ethics ("Board") considered your request for an advisory opinion on whether Washer Hill Lipscomb Cabaniss Architecture (Washer Hill) an architecture firm that has entered into a contract with the Division of Administration, Office of Facility Planning and Control (FPC) to be the designer on the New Clinical Research Facility, LSU Pennington Biomedical Research Center (Pennington Project) is a public employee and therefore subject to the provisions of the Code of Governmental Ethics. You further requested an opinion as to whether any conflict is presented if a company partially owned by the brother of Michael Hill, a principal in Washer Hill, is awarded a contract on the Pennington Project.

In December 2007, the State of Louisiana, through the Division of Administration, entered into a contract with Washer Hill Lipscomb Cabaniss Architecture - Post Architects - A Joint Venture for design services in connection with the Pennington Project. As designer, Washer Hill is the representative of the owner and has the authority to act on behalf of the owner during the construction phase of this project. Washer Hill's duties include, conducting site visits to evaluate the progress and the quality of the Contractor's work; conducting regular progress meetings, preparing and distributing minutes, and submitting monthly status reports with each pay request; verifying that the Contractor's Application for Payments reflects the status of work and the stored material; and recommending and preparing change orders to the contract. Michael Hill is a principal in Washer Hill. Terry Hill, the brother of Michael Hill, is the President of and partial owner of Milton J. Womack, Inc.

The Board concluded and instructed me to inform you that Washer Hill is a public employee by virtue of its contract with FPC for the limited purposes of the scope of the contract between FPC and Washer Hill and is subject to the provisions of the Code of Governmental Ethics. Section 1102 (18)(a)(iii) and (iv) of the Code define a "public employee" as any one compensated or not who is engaged in the performance of a governmental function or under the supervisory or authority of an elected official or another employee of the governmental entity. Black's Law dictionary defines a governmental function as a government agency's conduct that is expressly or impliedly mandated or authorized by constitutional law or other law that is carried out for the benefit of the general public. Washer Hill's responsibility is directly related to FPC's governmental function pursuant to its statutory duties under La. R.S. 39:121 namely that FPC exercises supervision over the expenditure of Capital Outlay Funds; supervises construction; approves estimates; selects personnel necessary for the administration of contracts for projects; performs periodic inspections of projects; directs

Ethics Board Docket No. 2009-378

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DATE

payment for work done on each project; determines whether contract documents have been fully complied with by inspecting the project during construction; makes a final inspection of the project during the warranty period; and gives prompt written notice to the contractor of defects in workmanship. Therefore, Washer Hill is performing a governmental function by providing the contractual services in overseeing, on behalf of the FPC, the Pennington Project.

The Board further concluded and instructed me to inform you that it has declined to issue an advisory opinion as to the award of the contract to Milton J. Womack, Inc. as it concerns past conduct. However, generally, Section 1113 of the Code prohibits a public servant, member of his immediate family, or legal entity in which he has a controlling interest from entering into any contract, subcontract or other transaction under the supervision or jurisdiction of the agency of such public servant. "Controlling interest" means any ownership in any legal entity, held by or on behalf of an individual or a member of his immediate family, either individually or collectively, which exceeds twenty-five percent of that legal entity.

In addition, Section 1112 of the Code prohibits a public employee from participating in transactions involving the governmental entity in which he or a member of his immediate family has a substantial economic interest. Michael Hill, as a principal in Washer Hill, is considered a public employee for the limited purposes of the scope of the contract between FPC and Washer Hill and the services that he provides pursuant to the contract, and is therefore subject to the participation restrictions contained in Section 1112 of the Code. As the Pennington Project proceeds, Michael Hill is prohibited from participating in any transactions involving Milton J. Womack, Inc. and/or Terry Hill. "Transaction involving the governmental entity" means any proceeding, application, submission, request for a ruling or other determination, contract, claim, case, or other such particular matter which the public servant or former public servant of the governmental entity in question knows or should know: (a) Is, or will be, the subject of action by the governmental entity. (b) Is one to which the governmental entity is or will be a party. (c) Is one in which the governmental entity has a direct interest. A transaction involving the agency of a governmental entity shall have the same meaning with respect to the agency.

This advisory opinion is based solely on the facts as set forth herein. Changes to the facts as presented may result in a different application of the provisions of the Code of Ethics. The Board issues no opinion as to past conduct or laws other than the Code of Governmental Ethics. If you have any questions, please contact me at (225) 219-5600 or (800) 842-6630.

Sincerely,

LOUISIANA BOARD OF ETHICS

Alesia M. Ardoin
For the Board

BOBBY JINDAL
GOVERNOR



ANGELE DAVIS
COMMISSIONER OF ADMINISTRATION

State of Louisiana
Division of Administration
OFFICE OF GENERAL COUNSEL

April 29, 2009

VIA HAND DELIVERY

Louisiana Ethics Administration Program
P.O. Box 4368
Baton Rouge, LA 70821

RE: New Clinical Research Facility, LSU Pennington Biomedical Research Center,
Project No. 19-609-06S-01; and
Hurricane Gustav Related Repairs, Pennington Biomedical Research Center,
G19-609-09-ORM, Part I

To Whom It May Concern:

This letter is in response to the recent letters regarding to the above- referenced matters submitted to this Board by Milton Womack, Inc., Washer Hill Lipscomb Cabaniss Architecture, LLC (WHLC) and Michael Hill, AIA Louisiana – The Louisiana Architects Association (AIA), and the Louisiana Association of General Contractors (AGC).

Prior to discussing the issues presented, the Division of Administration, Office of Facility Planning and Control (FP&C) would like to make clear that it has no ill-will towards any of these entities. FP&C's main objective in this request is the same as that of the Ethics Board. It is to ensure "impartiality, fairness and equality of treatment toward those dealing with government; assurance that decisions of public importance will not be influenced by private considerations; maintenance of public confidence in government (wherein enters the matter of appearances); and prevention of use of public office for private gain."¹

I. Current Status of Ethics Request

On March 25, 2009, on behalf of FP&C, the undersigned wrote two separate letters to this Board requesting an opinion on the following projects:

- (A) New Clinical Research Facility, LSU Pennington Biomedical Research Center, Project No. 19-609-06S-01 (Clinical Research Facility Project); and

¹ La. R.S. 42:1101(B). *Glazer v. Com'n on Ethics for Public Employees*, 431 So.2d 752, 755-56 (La.1983).

Office of General Counsel • Post Office Box 94095 • Baton Rouge, Louisiana 70804-9095
Claiborne Building • 1201 N. 3rd Street • Suite 7-211 • Baton Rouge, Louisiana 70802
(225) 342-7154 • Fax (225) 219-7572
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(B) Hurricane Gustav Related Repairs, Pennington Biomedical Research Ctr.,
G19-609-09-ORM, Part 1 (Roof Repair Project).

A. Roof Repair Project

Although FP&C has not withdrawn its request for an advisory opinion regarding the Roof Repair Project, no one has addressed the issue. Perhaps, it is because the responding entities believe there is no justiciable controversy. FP&C, however, respectfully disagrees.

After receiving notice that FP&C requested an Ethics Advisory Opinion from this Board on the two projects, on April 6, 2009, TTM Construction, L.L.C. (TTM), the low bidder on the Roof Repair Project, withdrew its bid. The withdrawal of the bid did not moot the issue for a number of reasons.

First, in its withdrawal, TTM requested that its bid bond be returned. FP&C still desires an advisory opinion from the Board on this particular situation. A determination that TTM could not bid on this project under the Ethics Code will provide guidance to FP&C in making a decision as to pursuing the bid bond.

Second, FP&C's request is for an advisory opinion, not a request for charges to be levied against a party.² An advisory opinion is not a decision on a formal charge.³ It is a non-binding interpretation of the law. An advisory opinion on this issue would be consistent with the primary objective of the Ethics Code, which is "to prevent not only the actuality of conflicts of interest, but also to prevent the occurrence of those situations that tend to create a perception of conflict of interest. It does this by delineating situations that present too great a danger of a conflict of interest occurring."⁴ When one considers the number of architects and contractors that do business with FP&C, the danger of this same type of situation occurring again is quite real. FP&C seeks guidance from the Ethics Board should it encounter a similar situation in the future.

Third, when one considers the difference between FP&C and the interested parties' interpretation of the Ethics Code and the difference in various opinions by the Board and the courts as to the provisions questioned, the current definition of "public employee" and "governmental function" obviously need further clarification. The facts involving the Clinical Research Facility Project are different from the facts involved in *In Re Taylor Porter*. For that matter, the facts involved in the Clinical Research Facility Project are different from the facts involved in the Roof Repair Project. As this Board noted in *In Re Taylor Porter* regarding the very issue presented in our request, "it is necessary that such a determination be made on a case-by-case basis".⁵

² La. R.S. 42:1134

³ *In Re Taylor Porter*, Opinion No. 2008-1150, page 6

⁴ *In Re Beychok*, 495 So.2d 1278, 1281 (La.1986)

⁵ *In Re Taylor Porter*, Opinion No. 2008-1150, page 7

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B. Clinical Research Project

Since the original request, FP&C has received letters from the above-named entities in response to the Clinical Research Facility Project. In their correspondence, they have focused almost exclusively on the Board's recent opinion of *In Re Taylor Porter*. They argue that designers who contract with FP&C are not public servants, and the project architect's role is to "indirectly support" FP&C's performance of its mandated governmental function. To hold otherwise, the respondents claim, would be an "expansive interpretation" of the Ethics Code. We respectfully disagree with these arguments for the reasons more fully discussed below.

II. Current Definition of "Governmental Function"

A. *In Re Taylor Porter*, Opinion No. 2008-1150

In Re Taylor Porter, this Board noted that the Ethics Code did not provide a definition of "governmental function" as it relates to a person or entity being classified as "public servant".⁶ Therefore, the Board turned to Black's Law Dictionary to determine the meaning of the term "governmental function", which states:

"A governmental agency's conduct that is expressly or impliedly mandated or authorized by constitution, statute or other law and that is carried out for the benefit of the general public."

The Board then examined First Circuit precedent regarding the meaning of the term "governmental function". The seminal case in this area is *Commission on Ethics for Public Employees v. IT Corporation*.⁷ In *IT Corporation*, a private company (IT Corporation) was awarded a contract by the Department of Natural Resources to conduct a feasibility study for a regional hazardous waste disposal facility. Under those facts, the court found IT Corporation was a state employee for purposes of the Ethics Code because it was "engaged in the performance of a state function". In making this determination, the court looked to the statutory law to determine whether the work for which IT Corporation contracted was assigned to the Department of Natural Resources by state law as one of its "governmental functions". Citing Act 334 of 1978, the court found that conducting a feasibility study was in fact a statutory responsibility of the Department of Natural Resources.⁸

In contrast, Taylor Porter's contract with LSU was limited to providing legal services to the university in order to assist it in negotiations with Our Lady of the Lake (another Taylor Porter client) in the creation of a teaching hospital. This Board stated that the particular function

⁶ La. R.S. 42:1102(18)

⁷ 423 So2d 695 (La. App. I Cir 1982)

⁸ Id.

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assigned by law to LSU is to provide "services for students studying to become physicians and the provision of health care for the benefit of the public," and that the "legal services to be provided by Taylor Porter will not provide a medical education or health care to the public; instead its legal services will indirectly support the LSU's performance of its legally mandated governmental function."⁹

B. *In Re Kean Miller, Opinion 2009-169 and Opinion 2009-154*

Since *In Re Taylor Porter*, this Board has again had the opportunity to examine the issue of whether a private law firm was performing a "governmental function". In this instance, however, the Board found that the law firm was performing a "governmental function" and thus was a public employee.¹⁰ In the *In Re Kean Miller* opinions¹¹, the law firm of Kean Miller, Hawthorne, D'Armond, McCowan & Jarman, L.L.P. (Kean Miller) requested an opinion as to whether it was a public employee if it entered into an agreement with the Office of Community Development (OCD) to provide legal and administrative assistance in the appeal process for the Louisiana Road Home Program.

OCD's governmental function is to provide financial assistance to citizens displaced by Hurricane Katrina. Kean Miller's contractual obligations to OCD were: (1) to attend meetings of the OCD three times per week; (2) provide legal counsel to the OCD appeals panels; (3) draft proposed decision letters and (4) represent the OCD in litigation arising out of the decisions.

The question arose because Kean Miller had a business relationship with First American Title Company, a subcontractor of the Road Home Program. First American's contractual relationship with OCD involved obtaining applicant background information, performing support functions for eligibility determinations, determining pre-storm values, appraising homes, searching titles, disbursing funds, and performing closing services. It was not the title company for the Road Home program. The relationship between Kean Miller and First American did not involve the Road Home program or residential real estate transactions. Kean Miller attorneys served as licensed agents for First American and sold title insurance policies in connection with commercial real estate.

On April 1, 2009, this Board issued an opinion pertaining to whether Kean Miller can provide services to OCD and at the same time continue representation of First American.¹² The Board held that Kean Miller's agency as it pertained to its contractual service with OCD was defined by the scope of the work it provided under its contract. And because the services provided under Kean Miller's contract with OCD and its contract with First American are separate and distinct and do not overlap, the Board found there was no violation of the Ethics Code. In its finding, the Board stated:

⁹ *In Re Taylor Porter*, Opinion No. 2008-1150, page 4

¹⁰ Opinion No. 2009-154

¹¹ 2009-169 and 2009-154

¹² Opinion No. 2009-169

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"Kean Miller's role with the Road Home Program will not be as a decision-maker. The OCD will be the decision-maker as to the outcome of the appeals. Further, the decision as to which title company to employ, regarding potential residential property under the Road Home Program, will be made by ICF and the Road Home applicant. In the event that an appeal calls for work to be completed by a title company, this decision is to be determined by the Road Home applicant or ICF."¹³

Absent from this decision, but implied within, is the determination of whether Kean Miller is a public employee. It is our understanding that the decision that Kean Miller is a public employee was requested and rendered, but has yet to be published. It is our understanding that this Board, in Opinion No. 2009-154 found the *Kean Miller* facts were inapplicable to those in *In Re Taylor Porter*. It also found that the Kean Miller facts were more analogous to the situation in *IT Corporation* because the services being performed by Kean Miller would directly benefit and be delivered to the public.

III. Various Issues Raised by the Other Parties

A. WHLC is Contractually Obligated to Perform FP&C's Statutorily Mandated Governmental Functions

Based upon the definition of "governmental functions" and holdings referred to above, the pivotal questions to be determined are: (1) what are the particular duties that a private contractor agrees to perform when entering into a contract with FP&C; (2) what are the governmental functions assigned by law to FP&C for the public's benefit, and (3) are the contractual services provided by Washer Hill and other private architects directly related to the governmental functions assigned to FP&C or are they services that only indirectly support the agency function?

As the attached chart¹⁴ demonstrates, the purpose of the design professional is much more than simply to design a set of plans to put out for public bid. The designer's responsibility is directly related to FP&C's governmental function of: exercising supervision over the expenditure of Capital Outlay Funds;¹⁵ supervising construction; approving estimates; selecting personnel necessary for the administration of contracts for projects;¹⁶ performing periodic inspections of projects; directing payment for work done on each project; determining whether contract documents have been fully complied with by inspecting the project during construction;¹⁷

¹³ Id at page 2.

¹⁴ See Attached Exhibit A

¹⁵ La. R.S. 39:121

¹⁶ La. R.S. 39:121(4)

¹⁷ La. R.S. 39:124

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making a final inspection of the project during the warranty period; and giving prompt written notice to the contractor of defects in workmanship.¹⁸

Design professionals are more susceptible to being involved in a conflict of interest because of the governmental functions they are contracting to perform, particularly when the conflict relates to family members whose work they are contractually obligated to review and supervise. While we are not accusing any of the parties of any wrong doing in this matter, these conflicts are not remote or inconsequential. They are real, and the possibilities for favoritism and corruption are infinite.

As the AGC's April 23, 2009, letter to the Board pointed out, "the Public Bid Law was enacted in the interest of the taxpaying citizens and has for its purpose their protection against contracts of public officials entered into because of favoritism and possibly involving exorbitant and extortionate prices."¹⁹ The taxpayers are at a disservice when contractors bid on projects designed by immediate family members. For example, the designer could easily manipulate its design to favor the related contractor by "closing a specification", i.e., writing a specification so that only the family member can perform. The manipulation could be so cleverly disguised that no one would even notice. The designer could also allow the contractor/family member to bid significantly lower than the other bidders that might not be privy to the same information that is known only to the design professional.²⁰ In fact, the present issues are the result of the second lowest bidder in the Roof Repair Project calling into question the relationship between TTM and WHLC.²¹

Moreover, after the contract is awarded, the architect could approve cost increases to favor his family members. He could ignore defective or substandard construction or construction that is not in compliance with the plans and specifications that he designed so as not to cause harm to his family members. The architect could approve change orders and increase the contract price so as to benefit the related contractor. He could ignore delays caused by the contractor resulting in delay in occupancy of the building and loss of the owner's right to contractually stipulated liquidated damages. He could disregard punch-list items that are not in compliance with the plans and specifications that he designed. And the designer could fail to hold the contractor accountable for warranty items prior to their expiration.

The architect's function on these two projects is more than to provide "indirect support" to FP&C. FP&C has to rely heavily upon architects such as WHLC to perform FP&C's statutorily mandated functions. And if the architects were to be derelict in these duties or show

¹⁸ La. R.S. 39:125

¹⁹ See p 4 of AGC letter citing *Bowell v. Department of Highways*, 203 La. 760, 14 So.2d 627 (La. 1943); *Haughton Elevator Division v. State, Division of Administration*, 367 So.2d 1161 (La. 1979)

²⁰ The AGC, in its letter at page 7, states that the difference between the Milton Womack bid and the second lowest bidder was \$400,000.00.

²¹ See Attached Exhibit B, March 2, 2009, Letter from Simon, Peragine, Smith & Redfeam on behalf of Crown Roofing Services, Inc.

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favoritism to the contractor at the expense of FP&C, then the taxpayers of this state suffer.²²

C. The Governmental Function of FP&C Is Not Solely to Operate a Facility Management Program and the Contractual Duty of the Architect Is Not Solely to Perform Design Services

In its April 23, 2009, letter, the AIA states that the governmental function of FP&C is to provide "facility management services". While facility management is one governmental function of FP&C, the AIA is incorrect in insinuating that this is its only function. To imply such is to ignore the provisions found within Title 39 that pertain to administering the capital outlay program and the construction and repair of state buildings.²³

The AIA letter also states that "during the construction phase, when a project architect functions as a representative of the building owner, he does so functioning as a project architect and does not supplant the administration, management and supervision functions of the building owner."²⁴ This statement is misleading.

As shown in the attached chart,²⁵ the Design Manual bestows upon the architect numerous administrative, management and supervisory powers over the construction phase of the project. Moreover, every contract between FP&C and the general contractor incorporates therein the AIA document entitled General Conditions of the Contract for Construction, AIA Document A201-1997.²⁶ In this document the contractor acknowledges and agrees: that the architect provides contract administration;²⁷ that communications between the two will be handled through the architect when they pertain to the Contract documents;²⁸ that the architect has the right to reject work that does not conform to the Contract documents;²⁹ that the Architect will prepare the Change Orders and Construction Change Directives and may authorize minor changes in the work;³⁰ that the architect will interpret and decide matters concerning performance under, and requirements of the Contract Documents.³¹ To state that FP&C has not given the architect administrative authority under a contract is to completely disregard FP&C's contract with both the architect and the general contractor.

²² In re Ark-La-Tex Antique and Classic Vehicles, Inc., App. 1 Cir.2006, 943 So.2d 1169, 2005-1931 (La.App. 1 Cir. 9/15/06), writ denied 948 So.2d 151, 2006-2509 (La. 1/12/07). (Among the multiple policy objectives of the Code of Governmental Ethics are impartiality, fairness, and equality of treatment toward those dealing with government, assurance that decisions of public importance will not be influenced by private considerations, maintenance of public confidence in government, and prevention of use of public office for private gain.)

²³ See attached Exhibit A and Attached Exhibit C, Louisiana Capital Improvement Projects Procedure Manual for Design and Construction (Design Manual)

²⁴ AGC, likewise argues in its letter that the function of the designer is not to supervise and oversee the work.

²⁵ See attached Exhibit A

²⁶ See attached Exhibit D, General Conditions of the Contract for Construction, AIA Document A201-1997.

²⁷ A201-1997, Section 4.2

²⁸ A201-1997, Section 4.2.4

²⁹ A201-1997, Section 4.2.6

³⁰ A201-1997, Section 4.2.8

³¹ A201-1997, Section 4.2.11

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Additionally, AIA's letter implies that FP&C retains the ultimate authority as owner and therefore, the architect is not truly performing administrative, managerial or supervisory functions. Ultimate authority, however, does not negate the fact that architects are still performing a "governmental function". In fact, in *In Re Kean Miller*¹², one of the determinative factors in deciding that Kean Miller could perform contractual legal services for OCD and still represent First American was the fact that Kean Miller was not the decision maker. Likewise, in *IT Corp v. Commission on Ethics*¹³, IT Corporation was employed to perform a feasibility study, nevertheless, DNR retained the right to proceed with the results of that study. Even a traditional state employee may not possess ultimate decision making authority, but that does not exempt a state employee from the Ethics Code.

D. There is No Blanket Exemption from the State Ethics Code For Architects and Engineers

1. *In Re Taylor Porter* Held Decisions as to the Classification of Private Companies as Public Servants Is To Be Made on a Case by Case Basis

Milton Womack and WHLC's letters suggest that this Board in *In Re Taylor Porter* exempted private architects from the Ethics Code. They quote, out of context, the Board's taking notice that there are thousands of contracts between private entities and government agencies, including professional services contracts with architects and engineers. They also quote the Board's comment that "to hold that each of those private entities and their employees are public employees appears beyond the intent of the Legislature in adopting Sec. 1102(18)(a)."¹⁴

Left out of their argument, however, is the final conclusion reached by this Board. In its conclusion, this Board made clear that it was not creating a blanket exemption for professional services. It stated: "'It is necessary that such a determination be made on a case-by-case basis' Likewise, our decision is premised on the facts found herein."¹⁵ Lastly, if the Board were creating a blanket exemption, then the decision in *In Re Kean Miller* would have had different results because private attorneys would already be exempt under *In Re Taylor Porter*.

2. *In Re Taylor Porter* Did Not Hold Private Professionals Subject to Separate Licensing Requirements are Not Subject to the State Ethics Code

In its correspondence to this Board, the AIA claims that architects are licensed and governed by the Louisiana State Board of Architectural Examiners. Therefore, it claims that application of the Ethics Code to architects is unnecessary because any potential conflict of

¹² Opinion No. 2009-169

¹³ 464 So.2d 284

¹⁴ Opinion No. 2008-1150, p. 4

¹⁵ Id at page 7

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interest or impartiality is resolved under LSBAE Rules of Conduct. It quotes the following from *In Re Taylor Porter*, to support its argument:

In the instant case, neither a conflict of interest nor improper private gain would be inherent in Taylor Porter's rendering legal services to LSU. As noted above, the potential professional conflict of interest will be resolved under the Rules of Professional Conduct for attorneys.³⁶

Again, the reference to the *Taylor Porter* decision is taken out of context. In the *Taylor Porter* decision, the Board was obviously referring to that specific set of facts, i.e., an attorney representing two clients on the same transaction. If the Board would have meant all attorneys are exempt from the State Ethics laws simply because there is a comparable Rule of Professional Conduct, then the *In Re Kean Miller* decision would have had different results.

Furthermore, this argument ignores prior court decisions on this topic. In the matter of *Midboe v. Commission on Ethics for Public Employees*,³⁷ the plaintiff sued the Commission on Ethics for Public Employees for a declaratory judgment as to the Constitutionality of the Ethics Code prohibiting him from pursuing employment opportunities as an attorney after his service as the former Secretary of DEQ ended.³⁸ He claimed that the Ethics Code infringed on the Supreme Court's exclusive power to regulate the practice of law. The Supreme Court, in finding the Ethics Code to be Constitutional, stated the Ethics Code merely supplemented the Rules of Professional Conduct for Attorneys, and it did not infringe upon the Supreme Court's powers. In its decision, the Supreme Court stated:

However, attorneys are subject to laws other than the Rules of Professional Conduct, and sometimes those laws relate to their actions as attorneys. A person who receives a license to practice law and adheres to the Rules of Professional Conduct is not insulated from other regulations and conditions under which the license may be used. *Mire*, 540 So.2d at 955; see also *DeSalvo v. State*, 624 So.2d 897, 902 (La.1993), cert. denied, 510 U.S. 1117, 114 S.Ct. 1067, 127 L.Ed.2d 386 (1994).

A person possessing a law license is not exempt from the duties of citizenship or ordinary state laws. *Mire*, 540 So.2d at 954. For example, a lawyer's business is affected and limited by local zoning ordinances, yet these regulations do not impede or frustrate this Court's authority over the practice of law. A lawyer who converts and commingles his clients' money may have violated this Court's disciplinary rules but is also subject to the state criminal

³⁶ Opinion No. 2008-1150

³⁷ 646 So.2d 351 (La. 1994)

³⁸ This case was abrogated by the Supreme Court for reasons not applicable to the issue at hand.

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theft laws. Similarly, an attorney who is a public official or employee is subject to the Rules of Professional Conduct, as well as the ethics code rules which apply to all public servants, as long as the ethics code provisions do not impede or frustrate this Court's authority to regulate the practice of law.³⁹

To say one profession is exempt from the Ethics Code because it is also bound by a professional code would be a very expansive interpretation of the Ethics Code and would result in some very absurd results. For example, a licensed attorney would be free to ignore the requirements of Section 1112, and 1113 as well, claiming the issue is addressed in the Rules of Professional Conduct.

To conclude, the Ethics Code's prohibitions do not prevent architects from practicing their trade nor does the Ethics Code conflict with Rules of Professional Conduct for Architects. However, when a person contracts with the State of Louisiana to perform governmental functions, he is required to also abide by the Ethics Code relative to that project.

3. Enforcement of the Ethics Code Does Not Result in Provisions of the Public Bid Law Becoming Meaningless or Absurd

Milton Womack and the AGC claim that the enactment of La. R.S. 38:2212.7 last year demonstrates the legislative intent not to include in the Ethics Code definition of public servants private architects, designers or other consultants who perform services on public works project. As shown below, the opposite is true. We respectfully disagree.

La. R.S. 38:2212.7 states:

Any person contracting with an agency for the purposes of developing bidding documents, requests for proposals, or any other type of solicitation related to a specific procurement shall be prohibited from bidding, proposing, or otherwise competing for award of that procurement. Such persons shall further be prohibited from participating as subcontractors related to the award of that procurement.

This statute is found within the Public Bid Law, and it goes without saying that Title 38 and Title 42 pertain to two separate and distinct areas of the law. As pointed out in *Midboe*, supra, one statute is not to be read to the exclusivity of the other nor is it meant to supplant the other. These two separate areas of law have two distinct purposes, and while both affect architects, each law affects them in a different manner.⁴⁰ Under La. R.S. 38:2212.7, an architect

³⁹ Id. at 359

⁴⁰ See Womack v. Louisiana Commission on Governmental Ethics, Sup. 1967, 250 La. 833, 199 So.2d 891 (distinguishes Civil Service Rules from Ethics Code)

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who bids on a public works project that he designs would be in violation of the Public Bid Law. The ramifications for violating the Public Bid Law are quite different from the penalties that may be imposed by the Board of Ethics. To say that there is no need for one provision under the Public Bid Law because there is an applicable provision under the Ethics Code would be as nonsensical as stating that there is no need for a criminal penalty for misapplication for payments of construction funds⁴¹ since there is a remedy available to pursue a claim for payment of funds under the Public Works Act.⁴²

4. The Ethics Code Should be Read So as to Employ a "Fair and Just" Reading of Each Provision and not in a Manner to Make One Section Meaningless or Mere Surplusage

This Board has made clear it will not adopt a standard of construction that does not employ a "fair and just" reading of each provision. Nevertheless, some of the arguments presented by some of the responding entities request that the Board employ a stretched view of the Ethics Code. If so employed, the interpretation would lead to conflicts within the Code itself and also expand the code in directions the legislature clearly never intended.

For example, the AGC suggest that if a private architect is deemed a public employee, then the Board would have to interpret La. R.S. 42:1121 to mean that a private architect firm cannot contract with FP&C for two years after the project is completed. Such an interpretation obviously would not be rational, and it certainly would not be a "fair and just" reading of this provision. Additionally, this hypothetical situation disregards the vast precedent to the contrary, including the recent decision of this Board in *In Re Kean Miller* that states the scope of a private firm's agency is limited to its contract with the public entity.⁴³

Milton Womack and AGC also urge this Board to read the recent amendment of La. R.S. 42:1113 (D)(1)(a)(i), to "specifically allow family members of [certain public officials] to be awarded a public contract by competitive bidding so long as the immediate family member is not a spouse". The subparagraph does not state this and to read such into it would be an "expansive interpretation of the ethics code". Reading the provision in the manner they suggest would result in a conflict between Part A and Part D of La. R.S. 42:1113. And as pointed out by AGC, "No law should be considered meaningless or mere surplusage."⁴⁴ The legislative intent in enacting Section A was to prevent public servants and their immediate family members from contracting within their agency, and the legislative intent in enacting Section D was to prevent heads of departments or high ranking public officials and their spouses from contracting with other agencies in state government.

⁴¹ La. R.S. 14:202

⁴² La. R.S. 38:2241

⁴³ Opinion 2009-169

⁴⁴ AGC correspondence, p. 6

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Also, Milton Womack suggests this Board has held in the past that when a contract is publicly bid by a class of companies and does not involve services or products that only one bidder can provide, there is "no substantial economic interest" and thus no violation of Section 1112. Such an interpretation of the law and this Board's precedent is neither "fair" nor "just". As stated above, when an architect is allowed to participate in transactions involving his immediate family members, the entire process, not just the award of the contract, is tainted. Potential violations of the Ethics Code can occur both before and after the actual bid. There is the possibility of pre-bid collusion, as well as questions of favoritism both during and after construction. The advisory opinion cited by Milton Womack, Opinion No. 2009-155, certainly did not address these issues nor does it address the host of other issues involved if this Board were to state that public bidding makes the Ethics Code inapplicable.

Lastly, AGC's argument that because this matter is publicly bid, the architect has no way of knowing who will be the lowest bidder should not be considered for the same reasons. There is still a possibility of bid collusion and post-bid misconduct. Further, each contractor bidding on a job must be familiar with the plans and specifications. Under Section 1113, the contractor should not bid on the project when he knows his father or brother is the designer.

E. The Architect is NOT Performing the Services for User Agencies; It is Performing Services for FP&C

In Milton Womack's letter, it states that the purpose of the architect in this matter is to "design a facility to house suites for exercise, testing, special procedures, metabolic chambers, metabolic cart studies and space for faculty and support personnel in order to support Pennington Biomedical Research Center's research and clinical missions. Pennington's mission is not to construct facilities".

This statement misses a crucial point. The design contract is between FP&C and the designer. The purpose of the contract is to fill a vital role that FP&C is statutorily obligated to perform for the user agency. While FP&C employs architects and engineers on staff that could do the work, due to limited resources and in an effort to employ the most efficient, cost-effective means possible, FP&C contracts this work out to private design firms (architects and engineers). This not only achieves a savings for the State, it insures that designers with specialties in certain areas such as laboratory design or roofing can be employed. FP&C is not statutorily obligated to contract with outside architects, but the inordinate volume of work makes it cost-prohibitive and extremely burdensome to add hundreds of architects and engineers to the State's payroll.

IV. Ownership of the Construction Companies

In addition to responding to our request, Milton Womack and the AGC also argue that Milton Womack is not in violation of La. R.S. 42:1113 because Terry Hill, the president of Milton Womack, does not have a controlling interest in the company.

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The ownership of TTM Construction Company was not addressed among the parties. According to the records of the Louisiana Secretary of State, prior to June 3, 2008, Michael W. Hill (a member of WHLC), Travis C. Hill, and Terrence W. Hill were members of TTM Construction. On June 3, 2008, Michael W. Hill tendered his 51% membership in TTM to Travis and Terrence Hill. Travis and Terrence Hill (TTM) are the sons of Michael W. Hill (WHLC). There is nothing that contests that Travis and Terrence Hill have a controlling interest in TTM and that they are the sons of the architect, Michael W. Hill of WHLC. Under the Ethics Code, they are prohibited from bidding on the Roof Repair Project.⁴⁵

A. Controlling Interest in Milton Womack

As to the ownership of Milton Womack, Inc., the AGC and Milton Womack do not contest that Michael W. Hill of WHLC and Terry Hill of Milton Womack are brothers. Nevertheless, they argue that La. R.S. 42:1113 does not apply to Milton Womack because Terry Hill, the president of Milton Womack, does not have a controlling interest

Louisiana Revised Statute 42:1113(A) provides:

- A. (1) No public servant, excluding any legislator and any appointed member of any board or commission and any member of a governing authority of a parish with a population of ten thousand or less, or member of such a public servant's immediate family, or legal entity in which he has a controlling interest shall bid on or enter into any contract, subcontract, or other transaction that is under the supervision or jurisdiction of the agency of such public servant.

A "controlling interest" is a defined term in the Ethics Code. It means "any ownership in any legal entity or beneficial interest in a trust, held by or on behalf of an individual or a member of his immediate family, either individually or collectively, which exceeds twenty-five percent of that legal entity."⁴⁶ The AGC and Milton Womack argue and submit an affidavit by Mark Gallegos, the Secretary/Treasurer of Milton Womack, claiming that Terry Hill owns only 23% of Milton Womack's common stock, and therefore, Section 1113 is not applicable to it.

This argument misinterprets the statute. Under this statute, the following persons are prohibited from bidding or entering "into a contract, subcontract or other transaction that is under the supervision or jurisdiction of the agency of such public servant".

- (1) A public servant
- (2) A member of the public servant's immediate family
- (3) A legal entity in which the public servant has a controlling interest

⁴⁵ Ethics Board Opinion No. 2002-149

⁴⁶ La. R.S. 42:1102 (8)

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The public servant involved herein is Michael Hill and/or WHLC. No one has stated that Michael Hill does not own a controlling interest in WHLC. To the extent that Milton Womack and AGC are claiming that Terry Hill does not have a "controlling interest" in Milton Womack as defined by the Ethics Code, the issue is irrelevant. The only issue is can Terry Hill, a member of the public servant's immediate family, bid or enter into contracts with FP&C.

Terry Hill is the president of Milton Womack, Inc. He holds the contractor's licenses that were used to bid on this project. Terry Hill printed his name and signed the bid form for the Clinical Research Facility Project.⁴⁷ Terry Hill's name is also listed as the authorized officer of Milton Womack on the bid form.⁴⁸ Milton Womack's attached corporate resolution authorizes and empowers Terry Hill to execute any and all contracts of whatever kind on behalf of the corporation.⁴⁹ Terry Hill signed the contract between Milton Womack and FP&C as president.⁵⁰

At the time of filing the request, the exact amount of stock owned by Terry Hill in Milton Womack was not known to FP&C. To this date, FP&C does not know exactly whether the 23% is a substantial number of the total stocks or not. It is unknown whether the 23% represents the majority of Milton Womack stocks held by any one individual or whether there are people who hold more of a controlling interest than Terry Hill. Likewise, it is unknown whether any other immediate family members own any portion of stock in Milton Womack.⁵¹

FP&C is not in a position to investigate such matters. However, even if it is found that Terry Hill's ownership interest results in Section 1113 found inapplicable to Milton Womack, the remaining issue involving the Clinical Research Facility Project also needs to be decided because if Terry Hill's interest is not a "controlling interest", it may be deemed a "substantial interest" under the Ethics Code. Under Section 1112, the public servant, WHLC/Michael Hill, is not allowed to participate in transactions in which any member of his immediate family has a "substantial economic interest." A substantial economic interest is "an economic interest which is of greater benefit to the public servant or other person than a general class or group of persons."⁵²

⁴⁷ See Attached Ex. E, Bid Form by Milton Womack

⁴⁸ Id

⁴⁹ Id

⁵⁰ See Attached Ex. F, Contract between FP&C and Milton Womack

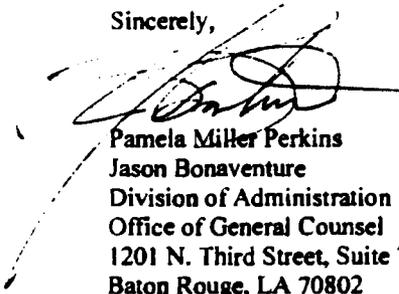
⁵¹ Opinion No. 2008-913

⁵² La. R.S. 42:1102 (21)

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If you have any questions or desire anything further from the Division of Administration in regards to this matter, please do not hesitate to contact our office.

Sincerely,



Pamela Miller Perkins
Jason Bonaventure
Division of Administration
Office of General Counsel
1201 N. Third Street, Suite 7-211
Baton Rouge, LA 70802

JB/eb

Enclosures

c: Russel W. Wray
James L. Ellis
Herman J. Gesser III
Michael A. Patterson
Jerry Jones
John Davis



LONG LAW FIRM L.L.P.
BATON ROUGE • WASHINGTON D.C.

C. Kris Kirkpatrick™
Michael A. Patterson™
Joseph E. Juban
Albert Dale Clary
David L. Guerry
C. Stokes McConnell, Jr.™
J. Wendell Clark

Samie Hurst Watts
Adrian G. Nadeau
Jacque A. Pucheu
S. Brooke Barnett
Mark L. Barbre

Russell B. Long (1918-2009)
* LL.M. University of Columbia
* LL.M. Duquesne University
* A Professional Law Corporation
* A Limited Liability Company

April 21, 2009

VIA HAND DELIVERY

Louisiana Ethics Administration Program
617 North Third Street
LaSalle Building, 10th Floor
Baton Rouge, Louisiana 70802

Re: Request for Advisory Opinion on Project entitled New Clinical Research Facility, LSU Pennington Biomedical Research Center, Project No. 19-609-06S-01, Part 01

To: Members of Louisiana Ethics Administration Program:

Please accept these comments on behalf of Washer Hill Lipscomb Cabaniss Architecture, LLC and Michael Hill, a principal of the firm, in response to the request for an advisory opinion by General Counsel for the Division of Administration concerning this project.

BACKGROUND

Pennington Foundation made a decision in the late 1990s to expand the research facilities at the Pennington Biomedical Research Center.

At that time, the expansion was to be privately funded. The Basic Science Building was privately bid in 2000 and was built.

The combined price of the Basic Science and Clinical Research projects exceeded the funds Pennington Foundation had available for construction. At that juncture, the Clinical Research Building was placed on hold. Subsequently, Pennington Foundation approached the State to obtain public funding for the Clinical Research Building.

In December, 2007, the State of Louisiana, through the Division of Administration, entered into a contract with Washer Hill Lipscomb Architecture - Post-Architects - A Joint Venture for the design services in connection with the Clinical Research Facility to be located at Pennington.

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Subsequently, the project was placed for competitive bids in 2008. There were thirteen (13) bids received on the project and Milton Womack, Inc. was the successful low bidder on the project (approximately \$400,000.00 lower than the second bid). The State of Louisiana entered into a contract for the construction of the Clinical Research Facility with Milton Womack, Inc.

One of the principals of Washer Hill Lipscomb Cabaniss Architecture, LLC is Michael Hill. His brother is one of the officers of Milton Womack, Inc. Mr. Hill's brother owns a minority interest in Milton Womack, Inc. Michael Hill has no ownership interest whatsoever in Milton Womack, Inc.

It should be noted that the request for advisory opinion only refers to Washer Hill Lipscomb Cabaniss Architecture, LLC when in fact a review of the design contract with the Division of Administration shows that the designer of record is a joint venture between Washer Hill Lipscomb Architecture and Post-Architects.

General Counsel for the Division of Administration has asked whether Washer Hill Lipscomb Cabaniss Architecture, LLC should be considered a public servant pursuant to the Code of Governmental Ethics. For the reasons discussed below, the answer to this question should be no. Washer Hill Lipscomb Cabaniss Architecture, LLC should not be considered a public servant.

DISCUSSION

The Clinical Research Facility is a building under construction on the existing Pennington campus. "The new facility will house suites for exercise testing, special procedures, two metabolic chambers, a metabolic cart studies and space for facility and support personnel."¹

Washer Hill Lipscomb Cabaniss Architecture, LLC is a private architectural firm, not a governmental entity.

The question posed by counsel for the Division of Administration is whether the work performed by Washer Hill Lipscomb Cabaniss Architecture, LLC cause it to be considered a public employee pursuant to La. R.S. § 42:1102(18)(a)(iii). The Board has very recently stated in *In Re: Taylor Porter*, 2008-1150 that "[a] fair reading of Section 18(a) shows that (iii) and (iv) above represent exceptions to generally accepted meaning of employee. Thus, those exceptions should not be given an expansive interpretation."

¹ Preliminary Program, New Clinic Research Facility, Pennington Biomedical Research Center, Project No. 19-609-06S-01

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The question here is the same as in *In Re: Taylor Porter*; whether Washer Hill Lipscomb Cabaniss Architecture, LLC would be "engaged in the performance of governmental function," in providing architecture services to the Division of Administration and, therefore, in violation of Section 1111(2)(d) (payment from nonpublic sources as compensation) and Section 1112B(2) (participation in certain transactions involving the public employees governmental entity).

The Code of Governmental Ethics provides no definition of governmental function. La. R.S. 39:1 creates the Division of Administration as a division of the Office of the Governor. La. R.S. 39:121 says the Division of Administration is to "exercise supervision over the expenditure of funds and the construction projects." La. R.S. 39:121(4) specifically provides, "the Division of Administration shall "[s]upervise construction, approve estimates, and select and employ engineers, architects, and other personnel necessary in connection with the administration of contracts for projects." (Emphasis added.)

Here, as in *In Re: Taylor Porter*, Washer Hill Lipscomb Architecture - Post-Architects - A Joint Venture is indirectly supporting the Division of Administration's performance of its legally mandated governmental function in administering contracts for projects. To find that a private architectural firm involved in one of the numerous projects overseen by the Division of Administration is engaging in the performance of a governmental function is an expansive view of a private entity being engaged in the performance of a governmental function.

This Board has said quite correctly and is worth quoting here:

"The Board takes cognisance of the untold hundreds, if not thousands, of contracts between private entities and governmental agencies. The object of these contracts varies greatly. Some provide professional services (legal, accounting, architecture, landscape architecture, medical, engineering, etc.); some provide construction, renovation or repairs of buildings, roads, equipment, etc.; some provide social services, employment and management guidelines, insurance advice and policies, some provide products including consumables; the list is virtually endless. To hold that each of those private entities and their employees are public employees appears beyond the intent of the legislature in adopting Sec. 1102(18)(a). If the legislature intended that result, it would simply have provided in Section 1102(18)(a) that "any person who provides a service or product under contract to a governmental agency is deemed to be a public employee." *In Re: Taylor Porter*.

As further noted by this Board the Preamble to the Code announces a policy against "creating unnecessary barriers to public service." Such a result would inevitably follow were an architectural firm such as Washer Hill Lipscomb Cabaniss Architecture, LLC to be deemed a public servant

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because of its design services in assisting the Division of Administration in performing its statutorily mandated duties.

Very truly yours,

LONG LAW FIRM, L.L.P.

MICHAEL A. PATTERSON

MAP:krc

cc: Mike Hill



LONG LAW FIRM L.L.P.
BATON ROUGE • WASHINGTON D.C.

C. Kris Kirkpatrick¹⁴
Michael A. Patterson¹⁵
Joseph E. Juban
Albert Dale Clary¹
David L. Guerry¹
C. Stokes McConnell, Jr.¹⁷
J. Wendell Clark

Jamie Hurst Wain
Adrian G. Nadreau
Jacque A. Pucheu
S. Brooke Barnett
Mark L. Barbee
Sebastian R. Caballero

Russell B. Long (1948-2009)
11 Louisiana and Director of Columbia
12 LL.M. (Osgood Brinkman)
13 A Professional Law Corporation
17 A Limited Liability Company

May 11, 2009

VIA HAND DELIVERY

Louisiana Ethics Administration Program
617 North Third Street
LaSalle Building, 10th Floor
Baton Rouge, Louisiana 70802

Re: Response to Correspondence from the Division of Administration and the Office Facility Planning and Control regarding Request for Advisory Opinion on Project entitled New Clinical Research Facility, LSU Pennington Biomedical Research Center, Project No. 19-609-06S-01, Part 01.

To: Members of the Louisiana Ethics Administration Program:

Please accept these comments on behalf of Washer Hill Lipscomb Cabaniss Architecture, LLC (WHLC) and Michael Hill in response to the April 29, 2009 correspondence from the Division of Administration (DOA)/Office of Facility Planning and Control (FPC). As you are aware, one of WHLC's principals is Michael Hill, and Terry Hill, the President of Womack, is his brother.

Roof Repair Project

DOA/FPC takes the position it will not withdraw its request for an advisory opinion regarding the roof repair project even though the contractor, TTM Construction, LLC, has withdrawn its bid. DOA/FPC suggests to the Board that the basis for its insistence is that it wishes to have assistance in making a decision whether to pursue TTM's bid bond. This can only be characterized as punitive. There is nothing pending which requires an advisory opinion. The Board should decline DOA/FPC's request.

**Pursuant to WHLC's scope of services and the applicable case law and statutes,
WHLC is not engaged in the performance of a governmental function.**

Central to the questions before the Board of Ethics is whether WHLC, a private entity that contracted with the Division of Administration pursuant to a joint venture to perform architectural

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services for one of its many projects, is a government employee engaged in the performance of a governmental function under La. R.S. 42:1102 (18). For the reasons submitted to you before and for reasons more fully stated herein, the Board of Ethics' answer to this question should be no.

In the case of *Commission on Ethics for Public Employees v. IT Corporation*,¹ the court determined IT Corporation was a state employee engaged in the performance of a state function pursuant to state law. Act 334 of 1978 provided, "it is in the public interest and within the police powers of the state to establish a framework for the regulation, monitoring, and control of the generators, transportation, storage and disposal of such hazardous waste..." (emphasis added) IT had the duty of securing feasible sites for the storage and disposal of hazardous waste. Accordingly, IT was charged with one part of the framework in establishing where the storage and disposal of hazardous waste would be located. In finding IT was a state employee, the court did not use an expansive interpretation of being engaged in the performance of a state function, as is necessary to find WHLC is engaged in the performance of a governmental function.

The same was true with the case of *In Re: George Dyer and Fire Apparatus Specialists, Inc.*² The volunteer fire department contracted to be the sole provider of fire protection for the district; accordingly, the volunteer fire department, of which George Dyer was the fire chief, was engaged in the performance of a government function. (emphasis added) An expansive interpretation was again not needed to find that the sole fire fighters for the district were engaged in the performance of a governmental function. No government employees provided these services. In the instant matter, however, WHLC has architectural duties apart from the role of the DOA/FPC. It is not as though the work performed by the architects of WHLC is the same as or takes the place of the function of the DOA/FPC. Accordingly, the Board should not find WHLC is engaged in the performance of the governmental function assigned to the DOA/FPC. To find WHLC is a state employee requires an expansive interpretation of being engaged in the performance of a governmental function, which the Ethics Board has previously found to be inappropriate.

The DOA/FPC relies on *In Re: Kean Miller 2009-169*³ to suggest that WHLC is a state employee. While the case suggests that Kean Miller is a state employee, this case does not further the argument that WHLC is a state employee. There are many points of distinction which suggest WHLC is not a state employee.

¹ *Commission on Ethics for Public Employees v. IT Corporation*, 423 So.2d 695 (La. App. 1 Cir. 1982.)

² *In Re: George Dyer and Fire Apparatus Specialist, Inc.* 95 2297 (La. App 1. Cir. 6/28/96), 677 so.2d 1075.

³ *In Re: Kean Miller 2009-169*

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The rationale of the Board finding Kean Miller is a state employee is outlined in opinion 2009-154.⁴ Kean Miller was found to be a public employee pursuant to La. R.S. 42:1102 18 (a) (iii and iv). Kean Miller was hired to 1.) attend meetings of the OCD State Appeal Panels approximately three times a week, 2.) provide legal counsel to the Louisiana OCD State Appeals Panels as requested with regard to disposition of appeals before panels; 3.) draft proposed decision letters incorporating the decision of the Appeals Panels; and 4.) represent OCD in litigation arising out of the decision of the Appeal Panels. Following Hurricane Katrina, the OCD had approximately 5,000 appeals to be heard and four staff members to make recommendations to the panel. Kean Miller provided most of its services in the office of the OCD, including clerical/paralegal services. Kean Miller's staff also performed the same functions as the Road Home Program staff under the head of OCD and the head of the Road Home Program. The contract was entered into due to the volume of appeals.

WHLC did not contract with the state to address the volume of the DOA/FPC's work or to perform the same function of the DOA/FPC. WHLC as a joint venturer was hired to perform professional architectural services pursuant to contract with the Division of Administration for a Capital Outlay Project. The role of WHLC in performing architectural services is distinct, separate and apart from the administrative role of the DOA/FPC. Kean Miller's employees were performing the same functions as the agency staff due to the volume of appeals in the same office as the OCD and under the head of OCD and the head of the Road Home Program. WHLC does not perform its services in the offices of the DOA/FPC, and the architects of WHLC are supervised by and subject to the authority of WHLC. To find that the DOA/FPC has supervision or authority over the employees of privately owned companies who contract with the state for Capital Outlay Projects would lend to an absurd result. Where would the line of state employees end? The DOA/FPC functions as the owner of the project through a contract for services. A finding that Kean Miller is engaged in the performance of a governmental function based on these pertinent points does not further the argument that WHLC is a state employee pursuant to La. R.S. 42:1102 18 (a) (iii and iv).

The question is whether WHLC is "engaged in the performance of governmental function" in providing architecture services to the DOA/FPC for the Clinical Research Facility at LSU Pennington Biomedical Research Center pursuant to state law. The answer is no.

La. R.S. 39:1 creates the Division of Administration as a division of the Office of the Governor. La. R.S. 39:121 says the Division of Administration is to "exercise supervision over the expenditure of funds and the construction projects." La. R.S. 39:121(4) specifically provides, "the Division of Administration shall "[s]upervise construction, approve estimates, and select and employ engineers, architects, and other personnel necessary in connection with the administration of contracts for projects."

⁴ Opinion No. 2009-154

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Pursuant to La. R.S. 39:124, "facility planning and control section shall make periodic inspections at all stages of construction of any facility constructed pursuant to this Part and shall make detailed reports which shall be made available to the legislature and to the public. Such inspections shall include but not be limited to the close technical on-site examination of the materials, structure, and equipment and surveillance of the workmanship and methods used to insure reasonably that the project is accomplished in compliance with information given by the contract documents and good construction practices."

La. R.S. 39:125 also provides the "facility planning and control section shall be responsible for directing final payment for work done on each project. However, if upon final inspection of any project it shall be found that the plans, specifications, contract, or change orders for the project shall not have been fully complied with, the facility planning and control section shall, until such compliance shall have been effected or adjustments satisfactory to it shall have been made, refuse to direct such payment. Upon completion of the project the facility planning and control section shall release it to the agency. The facility planning and control section shall be responsible for making an inspection of the project prior to the expiration of the guarantee period to observe any defects which may appear within one year after completion of the contract. The facility planning and control section shall give prompt written notice to the contractor of defects which are due to faulty materials and workmanship."

Section 7 of the Louisiana Capital Improvements Projects Procedure Manual for Design and Construction (Procedure Manual) outlines the role of the architect.⁵ The array of services shows the

⁵ The role of the architect involves designing the project within the applicable legal requirements and cost constraints and advising the owner if this cannot be done. The designer is charged with providing the necessary geotechnical reports and surveys, and finalizing the time schedule. The designer is to submit a statement of probable costs, and a report based on the applicable codes for state owned buildings. The designer is responsible for the coordination of all documents and disciplines. The designer distributes construction documents and is required to comply with all provisions of Public Bid Law. The designer evaluates prior approval requests for substitution of materials, products and equipment required by the applicable statutes and owner procedures. The designer issues the agenda and modifies construction documents. The designer participates in a pre-bid conference in accordance with the contract documents. The designer provides a form to the owner to tabulate the bids. The designer analyzes the bids and makes a recommendation to the owner as to whether to award the bid to the low bid contractor or to reject all bids. The architect administers the construction documents and submits to the owner a cost data form for the owner's evaluation. The architect makes recommendations for the owner's approval in regard to testing. The architect advises and consults with the owner and communicates the owners instructions to the contractor. The designer can act on behalf of the owner as provided for the manual. The designer conducts a pre-construction conference. The designer and consultants must visit the site for inspections. The designer is to guard the owner against defects and deficiencies. Reports are required from the designer and consultants to the owner upon each visit. The designer agrees to qualifications, experience and training of his representatives in making decisions and interpreting construction documents. The designer is to confirm in writing all such decisions to the owner. The designer is also charged with replacing any representative the owner determines does not meet the qualifications. The designer issues certificates for payment upon determining the quality and progress of the contractor's work. The designer instructs the contractor to conduct monthly meetings in regard to project scheduling. The designer is to

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design professional functions in the role of an architect, which supports the supervisory governmental function of the DOA/FPC. The architect certainly assists the DOA/FPC, but the architect does not perform the function of the DOA/FPC. It is misleading to suggest otherwise. The DOA/FPC has its own supervisory role, its own inspections to perform, its own budgetary concerns to address, its own reports to write, its own contract administration to perform, its own duties to the legislature and the public arising from these projects, essentially, its own administration to perform separate, independent and apart from the work of the architect. While the DOA/FPC may rely on the information supplied by the architect in performing its tasks, to find that anyone whose work is relied upon by the government agency in performing its duties is engaged in the performance of a governmental function is overly broad. The Board of Ethics cannot find WHLC is a state employee without interpreting 42:1102 (18)(a)(iii) expansively.

This Board has said quite correctly and is worth again quoting here:

"The Board takes cognizance of the untold hundreds, if not thousands, of contracts between private entities and governmental agencies. The object of these contracts varies greatly. Some provide professional services (legal, accounting, architecture, landscape architecture, medical, engineering, etc.); some provide construction, renovation or repairs of buildings, roads, equipment, etc.; some provide social services, employment and management guidelines, insurance advice and policies, some provide products including consumables; the list is virtually endless. To hold that each of those private entities and their employees are public employees appears beyond the intent of the legislature in adopting Sec.1102(18)(a). If the legislature intended that result, it would simply have provided in Section 1102(18)(a) that "any

submit to the owner, user agency and contractor a monthly status report. The form of the report is supplied to the designer. The Designer's Statement for Professional Services and the Contractor's Certificate for payment shall be supplied to the owner. The designer is the impartial judge between the owner and contractor for the requirements of the contract documents. The designer can reject all work that is not in compliance with the contract documents. The designer reviews shop drawings, samples and submissions of the contractor only for conformance of the design concept. The designer is to respond to requests for information from the contractor. Only with the authorization of the owner shall the designer prepare change orders. The designer conducts an inspection with the owner, user agency and the contractor to determine if the contractor's work is in general accordance with the contract documents. When the owner desires to accept the work on full or substantial completion, the designer shall recommend such acceptance in writing, excepting the retained percentage, liquidated damages or the value of the punch list items. Upon receipt of the clear lien certificate, the designer makes the final inspection. The designer issues guarantees, operation and maintenance manuals, keys and other closing documents for the owner. After acceptance by the owner, the designer prepares a final report containing information requested by the owner and two sets of as built drawings. The designer reviews and approves the punch list. The designer follows up on items to be corrected during the warranty period.

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person who provides a service or product under contract to a governmental agency is deemed to be a public employee."⁶

A finding that WHLC is a state employee has far reaching ramifications. Each private architect who contracts from here on with the DOA/FPC for Capital Improvement Projects will be subject to the same strict confines of the ethics code applicable to state employees. The Procedure Manuel outlines the roles for all architects working on these projects, and the revised statutes applicable to the DOA/FPC apply in each instance as well. Accordingly, a finding that the architect is engaged in the performance of a governmental function in this instance would mean the same result for each architect engaged in services under any Capital Outlay Project.

Womack's bid is in the best interest of the tax payer

DOA/FPC claims the tax payer is at a great disservice when contractors bid on projects designed by immediate family members⁷. The DOA/FPC conveniently excluded from its analysis that through the vetting process of the public bid, Womack's bid was nearly \$400,000 less than the next highest bid. If WHLC is found to be a public employee and in turn Womack is precluded from proceeding with the project, an extra \$400,000 will be necessary to complete this project. We again caution against an expansive interpretation of WHLC being engaged in the performance of the governmental function for practical reasons such as this.

At the time WHLC became the architect, there were no ethical concerns to address regardless of whether WHLC is found to be a state employee or not. WHLC as the architect designed the plans, prepared the specifications to be bid, etc. It was not until after Womack bid the job and the DOA/FPC awarded the contract to Womack that the DOA/FPC claimed there was an ethical conflict. The DOA/FPC did not raise its ethical concerns until the job was approximately one year from completion. It would be a great disservice to the taxpayers of this state to nullify the contract of the architect and/or the contract of the contractor. Given most of the work has been completed, the parties request that neither contract be nullified, as no ethical impropriety grounded in fact has been found.

The DOA/FCP's assertions of ethical concerns arising from the work of WHLC and Womack are unfounded.

The DOA/FPC contends the primary objective of the ethics code is "to prevent not only the

⁶ *In Re: Taylor Porter* 2008-1150

⁷ April 29, 2009 correspondence from the DOA/FPC to the Board of Ethics page 6.

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actuality of conflicts of interest, but also to prevent the occurrence of those situations that tend to create a perception of a conflict of interest."⁸ In finding a conflict of interest under these circumstances and based on the assertions of the DOA/FPC, one would need to presume first of all, these actions are possible and secondly, WHLC is prepared to ignore the provisions of the Louisiana State Board of Architectural Examiners, cheat, lie and steal in order to further its interests and those of Womack. This is an extreme charge in order to find an ethical conflict, especially since any design professional would face legal and professional ramifications for the actions suggested by the DOA/FPC. The DOA/FPC's arguments for ethical conflict also ignore the fact that the architecture services were provided subject to a joint venture with Post Architects.

A. Closing Specifications

DOA/FPC contends that the designer could easily manipulate its design to favor the contractor by including a closing specification.⁹ The DOA/FPC is aware this type of manipulation did not occur. Section 7.1.4 of the Procedure Manual specifically addresses closing specifications. Generally, state law prohibits closing specifications with few exceptions. Section 7.1.4(1)(b) of the Procedure Manual provides, "Any reason for closing specifications as provided for by law shall be brought to the attention of the owner in writing for review." Accordingly, any closing specification included in the plans would not be a secret. Further, for this specific project, the construction documents were developed with a closing specification, not at the insistence of the architect, but at the request of the user agency. The closing specification requested by the user agency involved the fire alarm and mechanical system, and this closing specification was approved by FPC when Womack bid the project. The DOA/FPC knows closing specifications are generally prohibited. The DOA/FPC also knows that if a closing specification is included in the plans, the owner will be aware of the specification and the specification will be subject to approval. Suggesting an ethical conflict based on closing specifications which are known by the owner and subject to approval is misleading.

B. Price Increases and Change Orders

The DOA/FPC contends an architect could approve cost increases and approve change orders to increase the contract price as a benefit to the contractor.¹⁰ An architect cannot unilaterally approve cost increases or change orders in favor of family members and to suggest that one can is again misleading, especially when dealing with charges of ethical impropriety. Section 7.1.6.15 of the Procedure Manual further provides, "Only with the authorization of the Owner, shall the Designer

⁸ April 29, 2009 correspondence from the DOA/FPC to the Board of Ethics page 2.

⁹ April 29, 2009 correspondence from the DOA/FPC to the Board of Ethics page 6.

¹⁰ April 29, 2009 correspondence from the DOA/FPC to the Board of Ethics page 6.

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prepare Change Orders. The designer shall obtain from the Contractor his estimate of cost and time changes in accordance with the contract documents for the Change Order, review and approve same and submit it to the Owner for approval before any changes are made in the Contract." There is no basis for the claims of the DOA/FPC in regard to ethical concerns over price increases and change orders. (Emphasis added)

C. Ignoring Delays Caused by the Contractor

The DOA/FPC argues that an ethical conflict may arise if the architect ignores delays caused by the contractor resulting in delays of occupancy and loss of the owner's right to contractually stipulated damages.¹¹ This argument ignores the fact that any weekly or monthly reports¹² from the architect are submitted to the owner for review, ignores the premise that the DOA is charged with performing its own inspections pursuant to La. R.S. 39:121(4) and ignores the fact that the facility planning and control section is to make periodic inspections at all stages of construction and is to make detailed reports available to the legislature and to the public pursuant to La. R.S. 39:124. The DOA/FPC seems to argue the WHLC has free reign, but there is owner oversight as to the status of the project on a strict and routine basis. Further, WHLC is providing its services subject to a joint venture with Post Architects. It is impractical to argue that long delays caused by the contractor would be ignored by the architect.

Further, the designer is to be the "impartial judge of the performance there under by both the Owner and Contractor,"¹³ and the designer shall "endeavor to guard the owner against defects and deficiencies in the work of the contractor."¹⁴ Accordingly, both WHLC and Post Architects can be sued for breach of contract and for professional negligence if the architects participate in the scheme alleged by the DOA/FPC. One who asserts an ethical conflict is present or potentially present must presume WHLC is engaged in professional negligence and is breaching its contract to the owner. The Board should not presume professionals are engaged in schemes of professional negligence and breaches of contract. No reasonable person would engage in these actions.

¹¹ April 29, 2009 correspondence from the DOA/FPC to the Board of Ethics page 6.

¹² Section 7.1.6.6 and 7.1.6.10 of the Louisiana Capital Improvements Projects Procedure Manual for Design and Construction

¹³ Section 7.1.6.11 of the Louisiana Capital Improvements Projects Procedure Manual for Design and Construction

¹⁴ Section 7.1.6.6 of the Louisiana Capital Improvements Projects Procedure Manual for Design and Construction

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D. Information Conveyed only to the Favored Contractor

DOA/FPC contends that an architect could convey information to a preferred contractor that would not be known by any other contractor bidding the job, which would allow for an unfair, competitive advantage in securing the bid.¹⁵ There are factual constraints to this argument, and again, no reasonable professional would engage in this activity.

Section 7.1.5 of the Procedure Manual establishes, "Upon receipt of written approval from the User Agency and other State regulatory agencies, receipt of corrected and completed Construction Documents, and approval of the Latest Statement of Probable Construction Costs, the Owner may advertise the project for bids and shall be assisted by the Designer in obtaining bids." Section 7.1.5.6 also establishes that "the architect provides the Owner with a form to assist the owner in tabulating the bids." Accordingly, the process for tabulating the bids is the same as to all submissions and based on the documents previously approved. It is unclear how secretive information could give one contractor an advantage over another if all of the contractors' bids are based on the same plans and specifications approved by the owner, user agency and state regulatory agencies, and if the criteria contained in the plans and specifications is used to evaluate the bids.

Any vagueness in the plans and specifications may be called into question by any of the contractors. Accordingly, this is simply another roadblock to any attempts by an architect to unethically favor a contractor.

The argument of the DOA/FPC also suggests that the owner would be completely unaware if the criteria upon which the bids were evaluated favored a particular contractor. We suggest this would be clear if an architect was brazen enough to do this.

It should be noted Womack presented a bid that was \$400,000 lower than any of the other contractors. This speaks to the integrity and professional reputations of WHLC and Womack in that the bid was not challenged by any of the other contractors. The potential challenge of other contractors in regard to a bid submission is a deterrent to any design professional from favoring one contractor over another.

It should not be presumed that professionals are engaged in these sorts of activities. There are strong deterrents to these practices as provided by the Louisiana State Board of Architectural Examiners and the laws of this state.

¹⁵ April 29, 2009 correspondence from the DOA/FPC to the Board of Ethics page 6.

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E. Ignoring Defective or Substandard Construction

The argument by the DOA/FPC that an architect might just ignore defective or substandard construction is completely unreasonable.¹⁶ **No architect wants problems with the construction of his project.** The architect is charged with protecting the owner from defects and deficiencies.¹⁷ Ignoring defective and substandard construction, no matter who the contractor is, would likely subject the architect to professional negligence and breach of contract claims resulting in damages, repair costs, emotional distress damages, etc. When there are legal and professional ramifications of this nature, it should not be presumed that these actions would occur. Especially in the case of a joint venture, it is not only WHLC that would be exposed to legal action, but also Post Architects.

The DOA/FPC's argument suggests it has no control over the project, but the DOA/FPC has total control. In fact, it has final acceptance. Pursuant to 7.1.6.15 of the Procedure Manual, R.S. 38:2241.1 gives the owner discretion to make acceptance on either full completion or substantial completion. The designer conducts an inspection with the Owner, User Agency, and Contractor to determine if the work is in general accordance with the contract documents. Accordingly, the agency conducts its own independent evaluation as to the construction.

Pursuant to La. R.S. 39:125, "facility planning and control section shall be responsible for directing final payment for work done on each project. However, if upon final inspection of any project it shall be found that the plans, specifications, contract, or change orders for the project shall not have been fully complied with, the facility planning and control section shall, until such compliance shall have been effected or adjustments satisfactory to it shall have been made, refuse to direct such payment. Upon completion of the project the facility planning and control section shall release it to the agency." There are so many reasons an architect would not ignore substandard construction regardless of who the contractor is that this argument is unfounded.

Lack of Capacity for Decision Making

Crucial to finding no ethical conflict in *In Re: Kean Miller*¹⁸ was that Kean Miller was not the decision maker.¹⁹ The OCD was to be the decision maker as to the outcome of the appeals and the decision as to what title company to use was made by IFC and the Road Home Applicant. As

¹⁶ April 29, 2009 correspondence from the DOA/FPC to the Board of Ethics page 6

¹⁷ Section 7.1.6.6 of the Louisiana Capital Improvements Projects Procedure Manual for Design and Construction

¹⁸ *In Re: Kean Miller* 2009-169

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outlined in the Procedure Manual, the owner maintains approval over the plans and specifications, any change orders are subject the owner's approval, inspections are made by not only the architect, but by the government agencies as well, payments are made subject to the approval of the owner, and final acceptance of the project is subject to the approval of the owner. The owner, not the architect, makes the final decision on aspects crucial to the project, the same aspects the DOA/FPC seems to suggest lend to an ethical conflict.

Conclusion

WHLC should not be deemed a public employee. The DOA/FPC has set forth scenarios for ethical conflict that are neither factually, legally or ethically plausible. One would need to presume architects have complete control over the plans and acceptance of these state owned projects to assert an ethical conflict. Further, one would have to presume architects who have excellent reputations in their fields would partake in unprofessional actions which would subject them to professional ridicule and hardship as well as lawsuits in order to further an already independently successful contractor. These are not presumptions that should be made to find real ethical conflict exists.

Very truly yours,

LONG LAW FIRM, L.L.P.

**MICHAEL A. PATTERSON
SEBASTIAN R. CABALLERO**

MAP: src
cc: Mike Hill

Alesia Ardoin

From: Michael Patterson [MAP@longlaw.com]
Sent: Monday, May 11, 2009 10:46 AM
To: Alesia Ardoin
Subject: Request for info on WHLC ownership

Ms Ardoin,
Per your request, here is the information on WHLC.

Russell Washer- President 42.5% shareholder
Mike Hill VP 21.5% shareholder
Rick Lipscomb Sec/Treas. 21.5% shareholder
Rex Cabaniss 15% shareholder

Mr. Hill oversees the production of all the contract documents and construction administration of all projects for the firm.

On the Pennington project, he oversees Jason Bethany who handles the day to day construction administration of the project. Mr. Hill attends all jobsite meeting with Mr. Bethany.



LONG LAW FIRM

2.0 V. 1.0 D. 1.0 A. 1.0 J. 1.0 S.

MICHAEL A. PATTERSON
PARTNER



Phone: 225-922-5110

map@longlaw.com

General Item

Ethics Board Docket No. BD 2009-816 12/18/2009

RE:

Appearance in connection with a request that the Board reconsider its decision not to waive the \$150 late fee assessed against Tracy Smith, for failure to timely file a Legislative ER-5/09 lobbying report.

Relevant Statutory Provisions, Advisory Opinions:

24:58

Comments:

Tracy Smith filed his Legislative ER-5/09 lobbying report that was due by June 25, 2009, 3 days late on June 28, 2009. He was assessed a \$150 late fee.

Mr. Smith states that a family dog was hit and killed on the due date and as such he requested a waiver of late fees for his father on June 28, 2009. However, his father was not late filing his report. Mr. Smith was under the erroneous impression that his father was late filing his report, not himself who was actually late.

His waiver request was denied at the August 26, 2009 Board meeting.

Mr. Smith then indicated, on October 2, 2009, that he was experiencing technical difficulties with the website server and could not access the system, and therefore he was late with the filing of his report.

Ms. Smith has no prior late filings. (MDD)

Recommendations:

Deny the request for reconsideration.

Latisha Thomas

From: tsmith1887@gmail.com
Sent: Friday, October 02, 2009 5:22 PM
To: Latisha Thomas
Subject: Re: IMPORTANT REMINDER-Lobbying Report Due Thursday, June 25, 2009
Attachments: image001.jpg

Yes....I would like to appear before the board to discuss my fine. Than you, Tracy Smith

Sent via BlackBerry by AT&T

From: Latisha Thomas
Date: Fri, 2 Oct 2009 16:36:09 -0500
To: Tracy Smith<tsmith1887@gmail.com>
Subject: RE: IMPORTANT REMINDER-Lobbying Report Due Thursday, June 25, 2009
Mr. Smith,

Your request for a reconsideration has been received. As discussed in our conversation, if you wish to appear before the Board it is necessary to indicate so that we may place this matter on the agenda as an appearance. An appearance is not required but I am just letting you know you do have that option. Feel free to call us with any questions.

Latisha

From: Tracy Smith [mailto:tsmith1887@gmail.com]
Sent: Friday, October 02, 2009 4:07 PM
To: Latisha Thomas
Subject: Re: IMPORTANT REMINDER-Lobbying Report Due Thursday, June 25, 2009

Latisha,

I would like to have my issue with regard to the May expenditure report be reconsidered. In addition to the death of our family dog I was experiencing technical difficulties with the server and could not access the system. I would always comply with the rules and conditions of the board. However, it is my strong feeling that this was an extenuating circumstance which should warrant a re-consideration.

Thank you,

Tracy Smith

On Mon, Jun 29, 2009 at 9:21 AM, Latisha Thomas <Latisha.Thomas@la.gov> wrote:

I will submit this email to the Board as your request for a waiver at our July Board meeting. You will receive correspondence from our Executive Secretary acknowledging receipt of your request. After the Board meets, you will be notified of their decision.

I have to send you a letter assessing the late fee for this report. however, it will indicate that you have opted to file a waiver request. Your Dad's May report is timely. It was filed in early June.

From: Tracy Smith [mailto:tsmith1887@gmail.com]

Sent: Sunday, June 28, 2009 3:21 PM

To: Latisha Thomas

Subject: RE: IMPORTANT REMINDER-Lobbying Report Due Thursday, June 25, 2009

Latisha,

I understand that this report was due on the 25th of June. I want to let you know that we had a tragedy in the family. Our family dog was hit and killed on Thursday. We would appreciate whatever leniency you may extend to my Dad. The last thing on our minds was filing expenditure reports. Thank you for your consideration.

Please call me if you have any questions.

Tracy Smith

Since 1968
&Smith
Associates
Political and Legislative Consultants

Tracy Donovan Smith

Smith and Associates, LLC

Governmental Relations Consulting

225 405-4004

From: Latisha Thomas [mailto:Latisha.Thomas@LA.GOV]

Sent: Friday, June 19, 2009 4:55 PM

To: Ethics Louisiana

Subject: IMPORTANT REMINDER-Lobbying Report Due Thursday, June 25, 2009

June 19, 2009



****You are receiving this email because you have not “finalized” the filing of your May 2009 expenditure report as of June 19, 2009****

!!! Attention Lobbyists !!!

REPORT DUE THURSDAY, JUNE 25, 2009

[reporting covering May 1, 2009 - May 31, 2009]

Because you were registered as a Lobbyist between May 1, 2009 and May 31, 2009, you are required to file the monthly Lobbying Expenditure Report which is due June 25, 2009.

EVEN IF YOU HAD NO EXPENDITURES, YOU MUST FILE THIS REPORT.

CONFIRMATION :

An automated email is sent after you have successfully finalized your report. To view your report, please visit our website, www.ethics.state.la.us and under the Lobbyist section, you may go to “search lobbyists records”.

AUTOMATIC LATE FEES

Pursuant to LSA-R.S. 42:1157 and LSA-R.S. 49:78, if your expenditure report for the month of May 2009 has not been electronically finalized by June 25, 2009, then an automatic late filing fee of **\$50 per day**, up to a maximum of \$1,500, will be assessed for each day after June 25, 2009 until your report is finalized.

If your report is not finalized by July 6, 2009, the staff must refer your failure to file to the Louisiana Board of Ethics for consideration of additional civil penalties.

For assistance, please call Latisha Thomas or Michael Dupree at (225) 219-5600 or toll free at (800) 842-6630.

Louisiana Board of Ethics

Lobbying Program

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Smith & Associates, LLC
Political and Legislative Consultants
Tracy D. Smith
Partner

December 2009



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STATE OF LOUISIANA
DEPARTMENT OF STATE CIVIL SERVICE
LOUISIANA BOARD OF ETHICS

P. O. BOX 4368
BATON ROUGE, LA 70821
(225) 219-5600
FAX: (225) 381-7271
1-800-842-6630
www.ethics.state.la.us

September 1, 2009

Mr. Tracy Smith
4013 Hyacinth Avenue
Baton Rouge, LA 70808

RE: Ethics Board Docket No. 2009-816

Dear Mr. Smith:

The Board of Ethics, at its August 26, 2009 meeting, considered your request for a "good cause" waiver of the \$150 late fee assessed for your failure to timely file the Legislative Lobbyist Expenditure Report which was required to be filed with the Board of Ethics by June 25, 2009 pursuant to LSA-R.S. 24:55(B)(2).

The Board concluded, and instructed me to inform you, that it has declined to waive the late fee imposed. If a check or money order for \$150 made payable to the Treasurer of the State of Louisiana is not received on or before October 2, 2009, then this matter will be placed before the Board for further action.

If you have any questions, please feel free to contact me.

Sincerely,

LOUISIANA BOARD OF ETHICS

A handwritten signature in black ink, appearing to read "Michael Dupree".

Michael Dupree
For the Board

EB:MDD

General Item

Ethics Board Docket No. BD 2009-935

12/18/2009

RE: Appearance in connection with consideration of a request for an advisory opinion as to the propriety of the Office of Coastal Protection and Restoration (OCPR) hiring a person whose spouse works for an engineering firm that has contracts with the OCPR.

Relevant Statutory Provisions, Advisory Opinions: 1111C(2)(d), 1113A

Comments: The Office of Coastal Protection and Restoration (OCPR) is a newly-formed entity that was created by combining parts of the LA Dept. of Natural Resources (DNR) and the LA Dept. of Transportation and Development (DOTD). Brown and Caldwell currently performs coastal planning and project management consulting work for OCPR under an existing DNR contract. While the contract is with DNR, it is managed by OCPR; the work is also performed for OCPR. Laura Belden is a regular-salaried, mid-level employee of Brown and Caldwell. Laura Belden works full time as a project manager on the Coastal Impact Assistance Program. Chris Williams, the head of project management at OCPR, directs the implementation of this work. OCPR would like to hire Laura Belden's husband, Cory Belden, as a project manager. Chris Williams would be Cory Belden's direct supervisor. If Cory Belden were hired by OCPR, he would not participate in any selection process for any projects in which Brown and Caldwell would be involved, nor would he manage, supervise or approve any of Brown and Caldwell's work.

Section 1111C(2)(d) of the Code prohibits a public servant from accepting anything of economic value from a person who has or is seeking to have a business or financial relationship with the public servant's agency. Ethics Board Docket No. 82-02D creates an exception to Section 1111C(2)(d) of the Code when the following factors are met: (1) the employee must be a salaried or wage-earning employee; (2) the employee's salary must remain substantially unaffected by the contractual relationship; (3) the public servant must own less than a "controlling interest" in the company; and (4) the public servant must be neither an officer, director, trustee, nor partner in the company. In BD 2007-420 the Board concluded that Pam Hazlett was able to continue her employment with Providence Engineering, a company with contracts with LDEQ, while her husband, Jim Hazlett was employed with LDEQ. The Board concluded that Ms. Hazlett may continue to work for Providence since she meets the requirements set forth in BD No. 82-02D; (2) since Ms. Hazlett does not have a substantial economic interest in Providence or the project between Providence and DEQ, Mr. Hazlett is not prohibited from participating in transactions involving the project; and (3) since the individual work performed by Ms. Hazlett on behalf of Providence on the project will not be subject to review or approval or disapproval by Mr. Hazlett or his department, Ms. Hazlett is not prohibited from working on this project for Providence. It appears that Cory Belden would meet the requirements of 82-02D.

However, there appears to be a violation of Section 1113A of the Code. Section 1113A prohibits public servants and members of their immediate family from bidding on or entering into a contract, subcontract or other transaction under the supervision or jurisdiction of the public servant's agency. In BD 2007-420 Ms. Hazlett's work for Providence was not subject to review, approval or disapproval by Mr. Hazlett or his department. Here, Laura Belden's work, performing program management duties for the Coastal Impact Assistance Program is under the supervision of Chris Williams, an employee of OCPR and Cory Belden's supervisor. (AMA)

Recommendations: Adopt the proposed advisory opinion.

DATE

Shelton Dennis Blunt
Phelps Dunbar, LLP
P.O. Box 4412
Baton Rouge, LA 70812

Re: Ethics Board Docket No. 2009-935

Dear Mr. Blunt:

The Louisiana Board of Ethics, at its December 18, 2009 meeting, considered your request for an advisory opinion as to whether the Office of Coastal Protection and Restoration (OCPR) may hire Cory Belden, when his wife Laura Belden is employed by Brown and Caldwell, a company with a contractual relationship with OCPR. You stated Brown and Caldwell currently performs coastal planning and project management consulting work and that while the contract is with the Department of Natural Resources, the work is managed by OCPR and the work is performed for OCPR.

Laura Belden is a regularly salaried employee and is neither an officer or director of Brown and Caldwell. The contract with Brown and Caldwell includes program management of the Coastal Impact Assistance Program (CIAP). Laura Belden performs program management duties and serves as the project manager on CIAP projects. OCPR employee, Chris Williams, directs the implementation of the work on the CIAP project. Cory Belden would work as a project manager for OCPR and Chris Williams, the head of project management, would be his direct supervisor. Cory Belden would not participate in any selection process for any projects in which Brown and Caldwell would be involved, nor would he manage, supervise, or approve any of Brown and Caldwell's work.

Generally, Section 1111C(2)(d) of the Code prohibits a public servant or his spouse from providing compensated services to a person who has a contractual, business or financial relationship with his agency. However, there is an exception to Section 1111C(2)(d) contained in BD 82-02D that is applicable if the following criteria are met: 1) the employee is a salaried/wage-earning employee, 2) his salary will not be affected by the relationship between the employer and his agency, 3) he does not own a controlling interest in the company, and 4) he is not an officer, director, trustee or partner of the company. Laura Belden is a salaried employee whose wages would not be affected by the contractual relationship between Brown and Caldwell and OCPR; she does not own a controlling ownership interest in Brown and Caldwell and that she does not serve as an officer, director, trustee or partner of the company. Because the four elements of BD 82-02D are satisfied, Laura Belden would be permitted under Section 1111C(2)(d) of the Code to be compensated for services she performs for Brown and Caldwell while Cory Belden is employed with OCPR.

However, the Board concluded and instructed me to inform you that Laura Belden is prohibited from performing services for OCPR on behalf of Brown and Caldwell. Section 1113A of the Code prohibits a public servant or member of his immediate family from bidding on or entering into any contract, subcontract or other transaction which is under the supervision or jurisdiction of his agency. Since the individual work performed by Laura Belden on behalf of Brown and Caldwell on the CIAP

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DATE

project will be subject to review or approval or disapproval by Corey Belden's department, Laura Belden is prohibited from working on this project for Brown and Caldwell if Cory Belden is hired by OCPD.

This advisory opinion is based solely on the facts as set forth herein. Changes to the facts as presented may result in a different application of the provisions of the Code of Ethics. The Board issues no opinion as to past conduct or laws other than the Code of Governmental Ethics. If you have any questions, please contact me at (225) 219-5600 or (800) 842-6630.

Sincerely,

LOUISIANA BOARD OF ETHICS

Alesia M. Ardoin
For the Board

December 2009

General Appearances Page 81 of 84

2009-935

PHELPS DUNBAR LLP
COUNSELORS AT LAW

New Orleans, LA
Baton Rouge, LA
Houston, TX
London, England

II City Plaza • 400 Convention Street • Suite 1100
Baton Rouge, Louisiana 70802-5618
P. O. Box 4412
Baton Rouge, Louisiana 70821-4412
(225) 346-0285
Fax (225) 381-9197

Jackson, MS
Tupelo, MS
Gulfport, MS
Tampa, FL

SHELTON DENNIS BLUNT
Partner
Baton Rouge Office
225, 376-0241
bluntd@phelps.com

www.phelpsdunbar.com
September 15, 2009

25932-0001

VIA HAND DELIVERY

Mr. Frank Simoneaux
Chairman
Louisiana Board of Ethics
617 North Third Street
LaSalle Building, Suite 10-36
Baton Rouge, LA 70802

2009 SEP 15 PM 2:11
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REGISTRATION

Re: Request for Ethics Advisory Opinion

Dear Mr. Simoneaux:

I serve as counsel for Brown and Caldwell. Lucila Cobb, vice-president of Brown and Caldwell, has asked me to request an advisory opinion from the Louisiana Board of Ethics concerning Brown and Caldwell's continued contractual relationship with the Office of Coastal Protection and Restoration ("OCPR"). The facts pertinent to this inquiry are more fully described below.

Brown and Caldwell is an employee-owned private company with approximately 1,500 employees and over 40 offices. Laura Belden is a regular salaried, mid-level employee of Brown and Caldwell. She has no contract signature authority and is neither an officer nor controlling member of the company.

OCPR is a newly formed entity that was created by combining parts of the Louisiana Department of Natural Resources ("DNR") and the Louisiana Department of Transportation and Development ("DOTD"). OCPR has approximately 150 employees and manages over 200 coastal restoration and protection projects. Currently, all employees of OCPR are either DOTD or DNR employees, but soon they may all become OCPR employees. Laura's husband, Cory Belden, is a registered Professional Engineer with the State of Louisiana. Cory would like to accept a position of employment with OCPR as a project manager. He would likely be hired as a DOTD employee, but he may eventually become an OCPR employee. Chris Williams, the head of Project Management at OCPR, would be Cory's direct supervisor. Others within OCPR's organization, such as someone from Engineering, could also become Cory's supervisor.

HAND DELIVERED

Brown and Caldwell currently performs coastal planning and project management consulting work for OCPR under an existing DNR contract ("the Contract") as a sub-consultant to CSRS. While the Contract is with the DNR, it is managed by OCPR; the work is also performed for OCPR. Chris Williams oversees the Contract. Laura currently works full time under the Contract as a project manager, though she has worked for a variety of clients in the past and may work for other clients in the future.

Currently, there are two components to the Contract:

- i. Coastal Impact Assistance Program (CIAP) Program Management: Laura works full time on this component, performing program management duties for the CIAP program and serving as a project manager on CIAP projects. Chris Williams directs the implementation of this work.
- ii. Annual Plan Development: Laura does not currently work on this component. Kirk Rhinehart, the head of Planning, directs the implementation of this work.

Chris Williams is fully aware of the relationship between Cory and Laura. If Cory were hired by OCPR, his work would be wholly unrelated to Brown and Caldwell's work for OCPR. Cory would not participate in any selection process for any projects in which Brown and Caldwell would be involved, nor would he manage, supervise, or approve any of Brown and Caldwell's work.

Brown and Caldwell may pursue and be selected for additional work with OCPR and/or DNR and/or DOTD in the future, either as a prime consultant or a sub-consultant. Moreover, Brown and Caldwell may receive additional task orders under existing contracts as a sub-consultant to CSRS, Chester Engineering or BEM.¹

Prior to Cory accepting employment with OCPR, Brown and Caldwell requests the Board's opinion as to whether Cory's employment with OCPR, while Laura works for Brown and Caldwell, poses any violations of the Louisiana Code of Governmental Ethics (the "Ethics Code"). Specifically, BC requests the Board's opinion as to the following questions:

- i. Does the Ethics Code prohibit Cory from working for OCPR while Laura is employed by Brown and Caldwell and performing work for OCPR pursuant to a contract between OCPR and Brown and Caldwell (as a sub-consultant to CSRS)? If certain criteria must be met in order for Cory's employment to be deemed acceptable, what are those criteria?

¹ Brown and Caldwell has two additional Engineering contracts as 1) sub-consultant to CSRS and 2) separately as sub-consultant to Chester Engineering to perform Coastal Engineering work for OCPR. Each prime consultant holds their respective contract with DNR. Chris Knotts is the head of Engineering at OCPR and oversees these contracts. Brown and Caldwell currently does not perform any work under these contracts. Brown and Caldwell also has an additional contract as subconsultant to BEM to perform Environmental Services for Coastal Restoration projects for OCPR. BEM holds this contract with DNR. Jamie Favorite in Planning at OCPR oversees this contract. Brown and Caldwell currently does not perform any work under this contract.

- ii. Does the Ethics Code prohibit Brown and Caldwell from submitting proposals and/or obtaining new work through OCPR, DNR, or DOTD, either directly or as a subcontractor if Cory accepts a job with OCPR?
- iii. Assuming that, under the present facts, an ethics violation would not occur if Cory accepted a job with OCPR, would an ethics violation occur in the event that Cory were promoted to a managerial position within OCPR and/or Laura were promoted within Brown and Caldwell? If certain criteria must be met in order for these promotions to be deemed acceptable, what are those criteria?

If I can provide you with any additional information, please do not hesitate to contact me.

With kindest regards, I remain

Very truly yours,

PHELPS DUNBAR LLP

A handwritten signature in black ink, appearing to read 'Shelton Dennis Blunt', with a long horizontal line extending to the right.

Shelton Dennis Blunt

SDB:lmw:jlg

cc: Ms. Lucila S. Cobb
Mr. Robert D. Goodson

PHELPS DUNBAR LLP
COUNSELORS AT LAW

New Orleans, LA
Baton Rouge, LA
Houston, TX
London, England

II City Plaza • 400 Convention Street • Suite 1100
Baton Rouge, Louisiana 70802-5618
P. O. Box 4412
Baton Rouge, Louisiana 70821-4412
(225) 346-0285
Fax (225) 381-9197

Jackson, MS
Tupelo, MS
Gulfport, MS
Tampa, FL

SHELTON DENNIS BLUNT
Partner
Baton Rouge Office
(225) 176-0211
bluntcd@phelps.com

www.phelpsdunbar.com
November 19, 2009

25932-0001

VIA FACSIMILE

Ms. Alesia Ardoin
Attorney, Louisiana Board of Ethics
617 North Third Street
LaSalle Building, Suit 10-36
Baton Rouge, LA 70802

Re: Louisiana Board of Ethics Docket No. BD 2009-935
Brown and Caldwell

Dear Ms. Ardoin:

The Louisiana Board of Ethics is scheduled to discuss the above-referenced matter on Friday, November 20, 2009 during its monthly meeting. My client and I are currently collecting additional information which we will be forwarding to you under separate cover. We would like the Board to have an opportunity to review this information prior to formally considering this matter. Therefore, we respectfully request that this matter be deferred until the Board's December 18, 2009 meeting.

Please let me know if you have any questions or concerns. With kindest regards, I remain

Very truly yours,

PHELPS DUNBAR LLP


Shelton Dennis Blunt

lmw:

2009 NOV 19 PM 4:37
ELECTION REGISTRATION
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