ALAN WILSON
ATTORNEY GENERAL

May 30, 2012

Kenneth E. Gaines, Esquire
City Attorney, City of Columbia
P.O. Box 667
Columbia, South Carolina 29202

Dear Mr. Gaines,

We received your letter requesting an opinion of this Office concerning the employment of the Mayor by a law firm that serves as general obligation bond counsel for the City of Columbia (the "City") as well as underwriter's counsel on the issuance of City water and sewer bonds. By way of background, you provide us with the following information:

> The Mayor of the City of Columbia has joined the law firm of Parker, Poe, Adams & Bernstein. Parker, Poe, Adams & Bernstein has previously been selected to serve as general obligation bond counsel by the City of Columbia and has served as underwriter's counsel on City of Columbia water and sewer bond issuances. Parker, Poe, Adams & Bernstein rotates as general obligation bond counsel along with two other firms. This rotating list was developed by utilizing a request for qualifications process. Professional services, such as these provided by Parker, Poe, Adams & Bernstein, are exempt from the City of Columbia's competitive procurement process. (See City ordinance Sec. 2-204 enclosed).
>
> The Mayor participates in the issuance of bonds issued by the City of Columbia. He votes on the bond ordinance along with other members of City Council. The Mayor also signs the bond ordinance and the closing documents.
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> Past opinions of your office indicate that recusal and full disclosure by the Mayor under § 5-7-130 and the State Ethics Act is required if there is a bond closing involving the professional services of Parker, Poe, Adams & Bernstein. Since professional services, such as those provided by Parker, Poe, Adams & Bernstein, are exempt from the City's competitive procurement process, it appears that compliance with § 5-21-30 cannot be accomplished.
>
> A prior opinion of your office suggests that § 5-21-30 no longer applies because it was superseded by § 5-7-130 which was a later enactment in conflict with § 5-21-30. See Op. S.C. Att'y Gen., May 12, 1981 (copy enclosed).

In light of the above information, you ask whether this Office is of the opinion that § 5-21-30 no longer applies because it was superseded by a later conflicting enactment. If not, you ask for guidance on how the matter should be handled in order to comply with § 5-21-30.

Law/Analysis

Section 5-21-30 provides:

> (A) It is unlawful for a municipal officer to take a contract to perform work or furnish material for the municipal corporation of which he is an officer or receive compensation on any contract except that:
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> > (1) in cities of over thirty thousand inhabitants such contracts may be allowed by the unanimous vote of the city council upon each specific contract, the vote to be taken by yeas and nays and entered upon the council's journal; and
> >
> > (2) a municipal officer may enter into a contract whenever the contract is awarded to him as low bidder after a public call for bids and the contract is allowed by the unanimous vote of the city or town council upon each particular contract, the vote to be taken by yeas and nays and entered upon the council's minutes.
>
> (B) A person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined in the discretion of the court or imprisoned not more than three years.

§ 5-21-30 (1976). The original version of this statute was enacted in 1900. See Act No. 259 of 1900.

Section 5-7-130 provides:

> Any municipal officer or employee who has a substantial financial interest in any business which contracts with the municipality for sale or lease of land, materials, supplies, equipment or services or who personally engages in such matters shall make known that interest and refrain from voting upon or otherwise participating in his capacity as a city officer or employee in matters related thereto.
>
> Any city officer or employee who wilfully conceals such a substantial financial interest or wilfully violates the requirements of this section shall constitute malfeasance in office and upon conviction shall forfeit his office or position. Violation of this section with the knowledge express or implied of the person or corporation contracting with or making a sale to the city shall render the contract or sale voidable by the municipal governing body.

§ 5-7-130 (1976). The original version of this statute was enacted in 1975. See Act No. 283 of 1975.

Furthermore, section 8-13-700 of the State Ethics Reform Act provides, in part:

> (A) No public official ... may knowingly use his official office ... to obtain an economic interest for himself ... or a business with which he is associated....
>
> (B) No public official ... may make, participate in making, or in any way attempt to use his office ... to influence a governmental decision in which he ... or a business with which he is associated has an economic interest. A public official ... who, in the discharge of his official responsibilities, is required to take an action or make a decision which affects an economic interest of himself ... or a business with which he is associated shall:
>
> > (1) prepare a written statement describing the matter requiring action or decisions and the nature of his potential conflict of interest with respect to the action or decision;
> >
> > ....
> >
> > (4) if he is a public official, other than a member of the General Assembly, he shall furnish a copy of the statement to the presiding officer of the governing body ... of [the] ... municipality, who shall cause the statement to be printed in the minutes and require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause the disqualification and the reasons for it to be noted in the minutes;
> >
> > ....

§ 8-13-700 (Supp. 2011). This statute is applicable to the Mayor as he meets the statutory definition of a "public official." See § 8-13-100(27) (definition of "public official" includes "an elected ... official of ... a municipality").

In the 1981 opinion you reference, we concluded a city council member was authorized to transact business with the municipality he was an officer of by either selling insurance or providing mosquito spraying service to the municipality provided the requirements of section 5-7-130 and former section 8-13-460 were complied with, i.e., "he must disclose his financial interest in the business transaction and refrain from voting thereon and he must file a statement with the State Ethics Commission disclosing his financial interest and again refrain from voting thereon." Op. S.C. Att'y Gen., 1981 WL 157771 (May 12, 1981). In that opinion we also considered such city council member was required to comply with the low bidder requirement of section 5-21-30(A)(2) before contracting with the municipality:

> Ordinarily no competitive bidding is required unless the municipality requires competitive bidding by ordinance. As you point out, however,

> [Section 5-21-30], as amended, prohibits municipal officials from contracting with their municipality unless they are the low bidder after a public call for bids is made. As I read Section 5-21-30 of the Code, it appears to prohibit entirely any such contract involving a municipality of under thirty thousand inhabitants regardless of whether or not the municipal official is the low bidder. This interpretation of Section 5-21-30 would of course prevent the Town of Jackson from entering into the aforementioned contracts; Section 5-7-130 of the Code, however, allows municipal officials of any South Carolina city to enter into contracts with the municipalities if the requirements of that Section are met and, inasmuch as Section 5-7-130 is the later enactment, it supersedes the earlier conflicting statute to the extent of the conflict. Accordingly, my opinion is that the contracts may be entered into so long as the requirements of Section 5-7-130 are met and, while I believe that the provisions of Section 5-21-30(2) no longer must be complied with, I would recommend compliance from an abundance of precaution. If the Town of Jackson requires competitive bidding by ordinance, then the contracts would have to comply with that ordinance.

Id. (citations omitted).

In a 1984 opinion, we noted it is possible that section 5-21-30 has also been repealed by the provisions of the State Ethics Act:

> While repeal of a statute by implication is not favored, Strickland v. State, 276 S.C. 17, 274 S.E.2d 430 (1981), it is possible that the Ethics Act, Section 8-13-10 et seq., has impliedly repealed [Section 5-21-30]. Furthermore, the Ethics Act, as the later expression of the legislature's will, may be deemed as controlling, rather than this Section. Feldman v. South Carolina Tax Commission, 203 S.C. 49, 26 S.E.2d 22 (1943). As will be noted in the body of this letter, the State Ethics Commission would be the appropriate body to make the determination of which statute should be applied.

Op. S.C. Att'y Gen., 1984 WL 249892, at *2, n.1 (May 21, 1984).

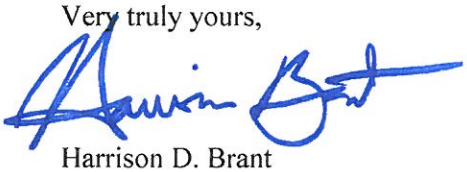
Consistent with the above opinions, we still believe section 5-21-30 has likely been superseded by either section 5-7-130 or section 8-13-700 of the State Ethics Reform Act, although we cannot reach such a conclusion with absolute certainty. Therefore, we do not believe the City is required to comply with the low bidder requirement of section 5-21-30(A)(2) in order to continue using the services of Parker, Poe, Adams & Bernstein.

Regardless of whether section 5-21-30 has been superseded, compliance with sections 5-7-130 and 8-13-700 is still necessary. Pursuant to section 5-7-130, the Mayor must disclose his financial interest in Parker, Poe, Adams & Bernstein and refrain from participating in any matter in his capacity as Mayor which involves services the law firm provides for the City. The determination of whether disclosure and recusal is necessary with regards to any particular matter or in a specific situation is

question of fact that cannot be resolved by this Office. See Op. S.C. Att'y Gen., 2010 WL 3896162, at *3 (Sept. 29, 2010) ("This Office is not a fact-finding entity; investigations and determinations of facts are beyond the scope of an opinion of this Office and are better resolved by a court"). However, in the situation you mention in which the services of the law firm of Parker, Poe, Adams & Bernstein are used in connection with the issuance of City bonds, we believe section 5-7-130 would require the Mayor to disclose his interest in the law firm and recuse himself from voting on, or otherwise participating in, the issuance of such bonds.

As for compliance with section 8-13-700, we note that the Legislature has specifically afforded the South Carolina Ethics Commission the authority to interpret and issue opinions concerning the provisions of the State Ethics Reform Act. See § 8-13-320(11). Thus, we advise you to contact the State Ethics Commission with any questions concerning a potential conflict of interest under section 8-13-700 or any other provision of the State Ethics Reform Act.

Very truly yours,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General