Advisory Opinion C.F.C. 2013-01 - DRAFT

Question Presented

Whether a consultant who assists a local government in the preparation of a proposal for a grant from the state government, advocates for the award of the grant, and accepts a small percentage of the grant award as compensation is in violation of the prohibition on contingent fees for lobbying under O.C.G.A. § 21-5-76(a), where there is no intergovernmental agreement or other "contract" between the local government and any state agency.

Advisory Opinion

The Georgia Government Transparency and Campaign Finance Commission (the "Commission") has received this request for advisory opinion from the law firm of Holland & Knight LLP.

The Georgia Government Transparency and Campaign Finance Act (the "Act") provides that

> No lobbyist shall be employed for compensation contingent, in whole or in part, upon the passage or defeat of any legislation, upon the adoption or decision not to adopt any state agency rule or regulation, or upon the granting or awarding of any state contract.

See O.C.G.A. § 21-5-76(a).

A person is deemed a lobbyist under the Act in a number of alternative situations. *See* O.C.G.A. § 21-5-70(5). If a person falls within any of those enumerated definitions, then that person must register with the Commission as a lobbyist. *See* O.C.G.A. § 21-5-71(a)(1). Under the Act, once a person is deemed and registered as a lobbyist, he or she is prohibited from being employed on a contingent fee basis upon the granting or awarding of any state contract. Code Section 21-5-76(a) does not provide for any exceptions to this prohibition depending upon the scope of the lobbyist's engagement. Thus, a person cannot shed the lobbyist mantel by claiming his or her work is a consulting job not within the scope of his or her lobbying activities.

The Act does not define the word "state contract." Likewise, the Act does not provide a definition of the term "grant." While no Georgia court has directly addressed the question of whether a grant is a contract, a review of federal law reveals that grant agreements are routinely deemed "contracts." *See, e.g., Knight v. U.S.*, 52 Fed. Cl. 243, 251 (2002)("A grant agreement is an enforceable contract in this court."); *Heart of Valley Metropolitan Sewage Dist. V. U.S. E.P.A.*, 532 F. Supp. 314, 317 (E.D. Wis. 1981)("[S]uch a grant agreement is a contract enforceable in the Court of Claims."); 42 U.S.C. § 5908(m)(2)("[T]he term 'contract' means any contract, grant, agreement…."); *Ozdemir v. U.S.*, 89 Fed. Cl. 631, 639 (2009)('[T]he word 'contract' encompasses a wide range of formal agreements, including [grants]…."); *County of Suffolk, N.Y. v. U.S.*, 19 Cl. Ct. 295, 300 (1990)(characterizing dispute related to two federal

grant agreements as a breach of contract action). *But see City of Manassas Park v. U.S.*, 224 Ct. Cl. 515, 521 (1980)(holding claim related to grant agreement not contractual); *Trauma Serv. Group, Ltd. v. U.S.*, 33 Fed. Cl. 426, 429 (1995)("Not every agreement is a contract."). In light of this persuasive authority, the Commission finds that a grant can be a state contract as the term is used in O.C.G.A. § 21-5-76(a). But the Commission does not find that every grant is such a contract.

Accordingly, the Commission finds that the Act does not prevent a consultant who is not a lobbyist from being employed on a contingent fee basis upon the granting or awarding of any state contract. The Commission finds, however, that a consultant who is a lobbyist and who assists a local government in the preparation of a proposal for a grant from the state government, advocates for the award of the grant, and accepts a small percentage of the grant award as compensation could be in violation of the prohibition on contingent fees for lobbying under O.C.G.A. § 21-5-76(a). Because the question of whether a grant agreement is a state contract is factual and must be determined on a case-by-case basis, the Commission finds that it cannot offer a bright line test in response to the question presented.

Prepared by Jonathan Hawkins.
March 14, 2013.

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Via First Class Mail and Email

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Re: Advisory Opinion Request

Dear Chairman Abernethy and Commissioners:

We are writing to request a written advisory opinion under O.C.G.A. § 21-5-6(b)(13). This firm represents persons that occasionally assist local governments in the preparation of proposals for grants awarded by various executive agencies of state government. For aid in the advice and counsel we provide our clients, this firm respectfully request an advisory opinion by the Georgia Government Transparency and Campaign Finance Commission that:

> A consultant who assists a local government in the preparation of a proposal for a grant from the state government, advocates for award of the grant, and accepts a

small percentage of the grant award as compensation is not in violation of the prohibition on contingent fees for lobbying under O.C.G.A. § 21-5-76(a), where there is no intergovernmental agreement or other "contract" between the local government and any state agency.

Analysis and Argument:

The Ethics in Government Act (hereinafter "the Act") provides that "[n]o person, firm, corporation, or association shall retain or employ a lobbyist for compensation contingent, in whole or in part, upon the passage or defeat of any legislative measure, upon the adoption or decision not to adopt any state agency rule or regulation, or upon the granting or awarding of any state contract. No lobbyist shall be employed for compensation contingent, in whole or in part, upon the passage or defeat of any legislation, upon the adoption or decision not to adopt any state agency rule or regulation, or upon the granting or awarding of any state contract." O.C.G.A. § 21-5-76(a) Although O.C.G.A. § 21-5-76(a) prohibits lobbying for a contingent fee, this provision should not include consultants that prepare grant proposals for local governments. First, a consultant who assists local governments in the preparation of proposals for grants from the state government is not a "lobbyist" under the Act. Second, grants are not "state contracts." Accordingly, a consultant who requests a percentage of such grants as compensation would not violate the prohibition against contingent fees for lobbying.

I. A consultant who prepares proposals for grants for local governments is not a "lobbyist."

Under the Act, "lobbyist" means, among other things, one who is "compensated specifically for undertaking to promote or oppose the passage of any legislation" or "hired specifically to undertake influencing a public officer or state agency in the selection of a vendor to supply any goods or services to any state agency." O.C.G.A. § 21-5-70(5)(A),(G). Consultants who assist local governments in the preparation of proposals for grants and advocate for those grants do not engage in any efforts to promote or oppose legislation or influence a state agency to select a certain vendor to supply goods or services to the state. Therefore, under the plain language of the statute, consultants who are hired for the specific purpose of writing and advocating for grant proposals for local governments are not "lobbyists."

The Commission should opine that consultants engaged solely in the preparation of grant proposals for local governments are not "lobbyists" under the Act. In determining who may be considered a lobbyist under the Act, this Commission has opined that the word "specifically" is of great consequence. "In reading the Act's definition of "lobbyist," the word 'specifically' has

important significance. According to Black's Law Dictionary, specifically is the adverb form of the word specific, which means "[o]f, relating to, or designating a particular or defined thing; explicit <specific duties>." Ga. State Ethics Comm'n Op. No. 2008-06 (December 4, 2008). In deciding whether a commission salesperson was a "lobbyist" within the meaning of the Act, the Commission went on to opine if that person's "job requires said salesperson to, *among his or her explicit duties*, influence a public officer or state agency in the selection of a vendor, then such salesperson would be classified as a lobbyist according to the Act. Conversely, if a commission salesperson was hired to, for example, sell newspapers and such individual contacted a public officer or state agency on his or her own initiative, then such individual would not be classified as a lobbyist because his or her *explicit duties* do not require influencing a public officer or agency." *Id.* (emphasis added). Unless influencing a state agency or promoting or opposing legislation is an *explicit* part of a person's duties, then, that person is not a "lobbyist."

Moreover, the Commission has stated that it is also concerned with "the function that is performed" by a person in determining whether that person is a lobbyist within the meaning of the Act. Ga. State Ethics Comm'n Op. No. 2009-01 (February 24, 2009). In that opinion, the Commission indicated that the key to determining whether a person is a lobbyist is *whether that person undertakes to influence the award of a state contract or the passage of a state agency rule or regulation. Id.* Under this reasoning, consultants who do *not* perform such functions and assist in the preparation of proposals for state grants would not be considered lobbyists.

II. Grants awarded by executive agencies state government are not "state contracts."

The grants that local governments secure with the assistance of these consultants are not "state contracts." Consultants who assist local governments in this manner are not seeking contracts for the local governments they assist to provide goods or services for the state, but are instead seeking grants that the state has specifically designated for municipalities that apply and meet the requisite qualifications. The objective of O.C.G.A. § 21-5-76 is to impose accountability for vendor lobbyists seeking to secure state contracts on behalf of their private sector clients. *See* J. Randolph Evans and Douglas Chalmers Jr., *New Ethics Law Brings More Accountability Transparency*, ATLANTA JOURNAL-CONST., June 15, 2010, at A13. Consultants that assist local governments in writing grant proposals are not vendor lobbyists because they are not hired to "influence a public officer or state agency in the selection of a vendor to supply goods or services to a state agency." O.C.G.A. § 21-5-76(a). Therefore, the grants they assist local governments in securing are not "state contracts." The statute imposes restraints on vendor lobbyists seeking state contracts for members of the private sector, not local governments and their consultants seeking to secure grants from state government.

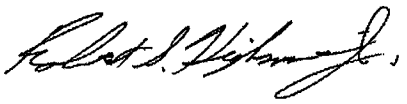
Conclusion

We respectfully request the Commission to opine that a consultant who assists local governments in the preparation of grants and requests a percentage of the grant as compensation is not in violation of the prohibition of contingent fees for lobbyists under O.C.G.A. § 21-5-76(a).

We appreciate the Commission's time and consideration in this matter.

Sincerely yours,

HOLLAND & KNIGHT LLP



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