



STATE OF ARKANSAS  
**Department of Finance  
and Administration**

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January 8, 2018

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RE: Advisory Opinion No. 2018-01

Dear Mr. Fulkerson:

This letter is in response to your request, dated December 20, 2017, for an advisory opinion and/or waiver of a conflict of interest pursuant to Ark. Code Ann. §19-11-715(b) and Ark. Code Ann. §19-11-715(c), respectively, concerning a possible conflict of interest regarding the University of Arkansas System ("UASYS") and certain members of its evaluation team currently in the process of acquiring consultant services for implementation of new software.

This opinion is based upon the following facts that have been presented to me in the attached request and which I am relying upon. It should be noted that if one or more of these facts are later shown to be incorrect, it could result in a revised opinion.

1. In early spring of 2017, UASYS issued a request for proposal (the "RFP") to acquire a cloud based software as a service solution for finance, procurement, human capital management, payroll, time tracking, inventory management, grants management, planning and student information systems.
2. Following the process provided by statute, a solution has been selected, and UASYS is now in the process of acquiring consulting services for implementation of the software (the "RFP2").
3. As part of the procurement process, fourteen employees across UASYS and its constituent campuses and units were selected to serve on the evaluation committee.
4. The evaluators were asked to complete the standard confidentiality form for evaluation team members (see attached). In the course of completing the document, two potential evaluation team members informed the University of Arkansas Procurement Office of a potential conflict of interest.
5. Ms. Gina Terry, Chief Financial Officer for UASYS, disclosed that her son is a Manager for Price Waterhouse Coopers ("PwC") (Little Rock location) in the Attest (audit) division, with a specific concentration in the Financial Services sector (banks and broker/dealers). PwC is one of the bidders that responded to UASYS's RFP2.
6. Mr. Jacob Flournoy, Chief Audit Executive for the UA System, disclosed that his son is a first-year auditor for Deloitte (Houston location) with a specific concentration in

the Energy Industry sector (petroleum). Deloitte is one of the bidders that responded to UASYS's RFP2.

7. Based on an internal investigation, UASYS has determined that the potential for any ethical conflict is insubstantial or remote. UASYS took into account that both PwC and Deloitte are large multinational companies and that the adult children do not have positions of control or any ownership interest in their respective firms. UASYS also determined that the adult children did not participate in developing their respective firm's proposals, and would not be involved in delivering relative to the procurement.

Ark. Code Ann. §19-11-705 (a)(1)(A) prohibits state employees from participating directly or indirectly in any particular matter pertaining to any state agency contracts in which an employee or an employee's immediate family member has a financial interest. "Direct or indirect participation" is defined to include, but not be limited to, involvement through decision, approval, disapproval, recommendation, preparation of any part of a procurement request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity. *See* Ark. Code Ann. §19-11-705 (a)(2).

Based on the above facts, and reviewing the matter under Ark. Code Ann. §19-11-705 (a)(1)(A), as well as Office of State Procurement ("OSP") policy, having two evaluation team members that each have an adult child currently employed by a company that has sent in a proposal creates the appearance of a conflict of interest, even if merely an attenuated or remote one. UASYS stated in its letter there was no reasonably foreseeable scenario where either adult child would participate in the response to the RFP or in any way participate in the project if it were awarded to a company where one of the adult children works. However, the conflict of interest would be created by the work of the potential evaluation team members and the appearance of impropriety that would inevitably result.

Because RFP2 was a solicitation of proposals through a request for proposals, the governing statute is Ark. Code Ann. § 19-11-230. It contemplates an award being made to the responsible offeror whose proposal is determined to be the most advantageous to the State "considering price and evaluation factors set forth in the request for proposals." The statute confers substantial discretion to evaluators as it does not provide a detailed procedure for precisely how price and evaluation factors are to be considered, merely requiring that they be considered. *See id.* OSP has promulgated a rule requiring proposals be evaluated "based on the evaluation factors set forth in the Request for Proposals." OSP R4:19-11-230(a). It requires all members of evaluation committees to "participate in Evaluation Committee Training sponsored either by OSP or the college or university agency procurement official." *Id.* It also requires evaluations to be conducted "in accordance with OSP policy." *Id.*

Current OSP policy regarding evaluation of proposals can be found at:<http://www.dfa.arkansas.gov/offices/procurement/Documents/PolicyEvaluationProposals.pdf>. The current policy states in part that "The standard approach to evaluating proposals is to utilize an evaluation committee comprised of individuals who have no conflict of interest . . ." and "Evaluation committee members must not have a financial interest, employee interest, or personal

interest with any of the respondents or related parties, including identified subcontractors, who have submitted proposals in response to the solicitation. If a committee member discloses such an interest, or the chairperson of the commission and/or the procurement official learn that a member has such an interest, that member shall be removed from the committee.”

Furthermore, the Arkansas Legislature has clearly laid out its policy regarding the appearance of conflicts of interest and actual conflicts of interest in state contracting and employment:

(a) Public employment is a public trust. It is the policy of the state to promote and balance the objective of protecting government integrity and the objective of facilitating the recruitment and retention of personnel needed by the state. The policy is implemented by prescribing essential restrictions against conflict of interest without creating unnecessary obstacles to entering public service.

(b) Public employees must discharge their duties impartially so as to assure fair competitive access to governmental procurement by responsible contractors. Moreover, they should conduct themselves in such a manner as to foster public confidence in the integrity of the state procurement organization.

(c) To achieve the purpose of this subchapter, it is essential that those doing business with the state also observe the ethical standards prescribed in this subchapter.

Ark. Code Ann. §19-11-703

In the matter at hand there is, at least, an apparent conflict of interest with having Ms. Terry and Mr. Flournoy be members of an evaluation team considering proposals from PwC and Deloitte. The ability of these two potential team members to discharge their duties impartially could be brought into question, likely inviting a protest of any anticipated awardee. I do not see how the interests of the state so require granting a waiver for Ms. Terry and Mr. Flournoy to participate as evaluation team members. As Ark. Code Ann. §19-11-703 (a) articulates, while there is an intent to balance objectives, the objectives of protecting government integrity and fostering public confidence are indeed essential objectives. UASYS’s evaluation team currently has fourteen members and I am confident that highly knowledgeable substitutes can be found, or if not, the committee can continue with twelve members.

Accordingly, I advise that substitutes should be found for the two evaluators identified with familial connections to vendors, or that the evaluation proceed without them and with 12 evaluators to avoid the appearance of a conflict of interest under Ark. Code Ann. §19-11-701 et seq.. Because 14 evaluators are not needed, and because the UASYS has a deep talent pool from which to pull alternates, waiver is not appropriate.

This advisory opinion is issued in accordance with Ark. Code Ann. § 19-11-715(b) and Ark. Code Ann. § 19-11-715(c). Compliance with the above course of conduct is deemed to constitute compliance with the ethical standards of the Ark. Code Ann. §19-11-701 et seq.

Sincerely,



Larry W. Walther  
Director

cc: Edward Armstrong, Office of State Procurement