



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

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May 16, 2019

Kermit B. Channell II Executive Director
PO Box 8500
Little Rock, AR 72215

RE: Advisory Opinion No. 2019-06

Dear Mr. Channell,

This letter responds to your request for an advisory opinion and/or waiver pursuant to the Ark. Code Ann § 19-11-701 et seq. regarding whether it would violate Arkansas statutory ethical standards for Pin Point Testing, LLC ("PinPoint") to contract with the Arkansas State Crime Lab ("ASCL"), based on the marital relationship between one of PinPoint's members and an ASCL employee. The proposed contract is for services for validation of current and new equipment for laboratory purposes and for standards used for validation and testing at the ASCL, and was competitively solicited by the Office of State Procurement.

This opinion is based upon the following facts presented to me through your initial 2016 request, follow up emails, the 2016 Advisory Opinion, your October 19, 2017 extension request, the 2017 Advisory Opinion, and your May 9, 2019 request. 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. The Arkansas State Police (ASP) is a mandatory reporter to the Federal Fatal Analysis Reporting System (FARS);
2. The ASP sends motor vehicle accident samples to ASCL for comprehensive toxicology testing;
3. Samples are received from federal, state, and local law enforcement agencies;
4. In 2015, the ASCL received 4,908 cases consisting of law enforcement, coroner, and medical examiner cases;
5. Due to the large number of cases received in 2015, the ASCL only performed drug screen testing on motor vehicle accident cases if the blood alcohol results were less than the legal limit of .080%;
6. ASP notified ASCL that the FARS reporting program requires drug confirmation for all motor vehicle accident cases, regardless of blood alcohol level;

7. With the ASCL infrastructure existing at the time, it would have been difficult to perform and maintain acceptable turn-around times, and would have potentially jeopardized current laboratory accreditations, and would have delayed the release of Death Certificates of victims of criminal acts to family members;
8. ASP and ASCL met to create a plan of action to address the issues created by FARS reporting;
9. To assist in meeting the FARS mandates, ASP and ASCL concluded there was a need for validation of the Liquid Chromatography Mass Spectrometers (LC/MS/MS and LC/TOF) to provide ASCL with the capability and infrastructure to perform comprehensive drug testing on all motor vehicle accidents, to purchase and validate new LC/MS/MS equipment, and the continuous purchase of drug standard plates needed to perform validation of the equipment and controls in case work;
10. ASCL requested competitive bids for validation of the current LC/MS/MS along with validation of new equipment after purchase;
11. Bids were sent via email to three vendors and only one response was received;
12. PinPoint, a company that was assisted in its development by UAMS Bio Ventures, was selected to provide services;
13. At the time PinPoint had four (4) interest holders that were current or former state employees -Jeffery Moran, Nancy Rush, Kathryn Seely, and Charles Kokes;
14. Jeffery Moran was employed as an adjunct faculty at UAMS; Cindy Moran was the Scientific Operations Director at ASCL and married to Jeffery Moran;
15. Cindy Moran developed the specifications for the bid and suggested vendors to solicit bids from;
16. The initial contract to validate current equipment was for \$37,000 and the contract to validate the new equipment ASP purchased was for \$15,000;
17. On September 1, 2016, I issued an advisory opinion and written waiver, stating therein: (a) there was no conflict of interest related to Jeffery Moran, Nancy Rush, Charles Kokes and Kathryn Seeley; (b) the conflict of interest related to Cindy Moran was waived ; and (c) the waiver was issued on the condition that the contract only be granted for a period of one (1) year, during which time ASCL should prepare to engage in an appropriate competitive procurement without any involvement from Cindy Moran or any other employee with a potential financial interest in the procurement;
18. Accordingly, ASCL executed the contract with PinPoint;

19. During the year, ASCL was able to validate two LC/MS/MS for the Toxicology Section, and the vendor performed validations, enabling the ASCL analysts to continue casework and keep cases turnaround s to thirty (30) days;
20. However, various delays in the installation of the instruments and supporting equipment occurred due to receiving damaged equipment that necessitated on-site technical support;
21. ASCL next requested an extension of the written waiver until June 30, 2018 in order to complete the instrument installation and corresponding validations;
22. An extension was granted due to the state's interest for the contract work to be finalized without any prejudice to the ASCL;
23. However, the extension was granted conditionally with steps to taken immediately to replace the contract with a competitively solicited contract that is procured without any involvement from Cindy Moran or any other ASCL employee with a potential financial interest in the procurement;
24. The waiver was extended until June 30, 2018, to allow the ASCL sufficient time to undertake a competitive solicitation prior to the contract's expiration;
25. OSP issued an Invitation for Bid for bid number SP-19-0102 on April 26, 2019, with a bid opening date of May 7, 2019;
26. In addition to the website posting, OSP notified approximately one hundred and fifty AASIS vendors by email;
27. OSP received one bid from PinPoint Testing;
28. PinPoint's Contract and Grant Disclosure and Certification Form disclosed that Cindy Moran is an Assistant Director at ASCL as well as being 12% owner of Pinpoint;
29. On May 9, 2019, you, Kermit Channel, sent a letter request for an advisory opinion and/or waiver of a conflict of interest. The letter noted that ASCL submitted specifications to OSP for competitive bid for validation services of instrumentation associated with toxicology testing. Your letter also stated that Cindy Moran had no influence in or was involved in any of the bid process and/or selection of vendors. All proceedings regarding this contract were implemented and facilitated by ASCL's Toxicology Supervisor, Kristen Maudlin.

Ark. Code Ann. § 19-11-705, prohibits state agencies, including state-supported institutions of higher education, from contracting with a business in which an employee or an employee's immediate family member has a financial interest if the employee participates, either directly or indirectly, in the procurement of such contracts. "Employee" is defined broadly to include volunteer members of state boards and commissions, Ark. Code Ann § 19-11-701(8). "Direct or indirect participation" is defined under Ark. Code Ann. § 19-11-705(a)(2), and includes without limitation, "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." The position of employment and an employee's participation in the procurement process, both directly and indirectly, are examined on a case-by-case basis.

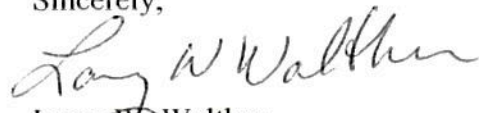
By way of qualification, I note that I am relying upon the accuracy of the facts that have been presented to me by ASCL. As slated above, Ark. Code Ann. § 19-11-715(b) gives me authority, as the Director of DFA, to issue an advisory opinion, upon written request and in consultation with the Attorney General, as to whether the proposed transactions would comply with the ethical standards of Ark. Code Ann. § 19-11-701, et seq. It does not, however, confer upon me the authority to subpoena documents, compel sworn statements, or utilize other information collection mechanisms entrusted to judicial officers and law enforcement. Accordingly, the contractor and the contracting agency are in superior positions to ascertain the relevant facts, and beyond doing basic due diligence in researching publicly available information, I am left to rely largely upon the facts given to me in analyzing and formulating an advisory opinion.

As stated previously, it was clearly an apparent conflict of interest for your agency to contract with PinPoint in 2016 given Cindy Moran's connection to an interest holder (Jeffery Moran) and the fact that Cindy Moran participated in developing the specifications for the bid. According to Ark. Code Ann. § 19-11-715(c), the Director may grant a waiver or permission to proceed with the transaction that may otherwise involve an ethical conflict when interests of the state so require or, alternatively, when the ethical conflict is insubstantial or remote. The waiver may contain terms and conditions upon which such waiver is based. Accordingly, although I found the interests of the state required a waiver, I imposed a condition on the waiver by limiting it to one (1) year. I stated ASCL should utilize that time to prepare to engage in an appropriate competitive procurement without any involvement from Cindy Moran or any other employee with a potential financial interest in the procurement. Due to delays, the waiver was then extended to June 30, 2018, but still contained the conditions.

In this matter, based on the above facts and relevant law, ASCL's contract with PinPoint no longer appears to violate the statute's wording regarding participating directly or indirectly in the procurement process. ASCL is representing that it has met the conditions imposed upon it by the previous waiver and extension. ASCL has engaged in an appropriate competitive solicitation and ASCL is representing that Cindy Moran had no influence in or was involved in any of the bid process and/or selection of vendors, thereby lifting the conflict of interest off of the newly solicited contract.

This advisory opinion is issued in accordance with Ark. Code Ann. § 19-11-715. Compliance with the above course of conduct is deemed to constitute compliance with the ethical standards established by law and Executive Order 98-04.

Sincerely,



Larry W. Walther
Director