



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 486

December 2, 2009

Whether House Bill 3445 adopted during the regular session of the 81st Legislature applies retroactively to prohibit certain lobby contracts that were effective before September 1, 2009. (AOR-550)

The Texas Ethics Commission has been asked to consider whether the provisions in House Bill 3445 (HB 3445),¹ adopted by the 81st Legislature during its regular session, prohibit a sales commission that is paid under a lobby contingency fee contract related to agency purchasing decisions that exceed 10 million dollars if the contract was legally valid, binding, in force, and signed before the bill's effective date.

Section 305.022 of the Government Code prohibits a payment of contingent fees for certain communications made directly with members of the executive branch or legislative branch to influence legislation or administrative action. *See* Gov't Code § 305.022. HB 3445 amended section 305.022 and included a transition provision that stated, "This Act takes effect September 1, 2009."²

Prior to the adoption of HB 3445, section 305.022 stated:

- (a) A person may not retain or employ another person to influence legislation or administrative action for compensation that is totally or partially contingent on the passage or defeat of any legislation, the governor's approval or veto of any legislation, or the outcome of any administrative action.
- (b) A person may not accept any employment or render any service to influence legislation or administrative action for compensation contingent on the passage or defeat of any legislation, the governor's approval or veto of any legislation, or the outcome of any administrative action.
- (c) For purposes of this section, a sales commission payable to an employee of a vendor of a product is not considered compensation contingent on the outcome of administrative action.
- (d) This section does not prohibit the payment or acceptance of contingent fees:
 - (1) expressly authorized by other law; or
 - (2) for legal representation before state administrative agencies in contested hearings or similar adversarial proceedings prescribed by law or administrative rules.

Gov't Code § 305.022.

In addition, commission rules provided that contingency fees for efforts to influence state agency purchasing decisions were not prohibited by section 305.022 and that compensation received for communicating with a member of the executive branch concerning those purchasing decisions, or negotiations regarding such decisions, was not included for purposes of calculating the registration threshold under Government Code

section 305.003(a)(2). 1 T.A.C. §§ 34.5(11) and 34.21. Those rules have been superseded and certain advisory opinions previously adopted by the commission have been modified by HB 3445.³

Section 305.022(c) as amended by HB 3445, now prohibits sales commissions in circumstances in which a state agency purchasing decision exceeds 10 million dollars. *Id.* § 305.022(c).⁴ The transition provision in HB 3445 does not specify the activity to which it applies, but only that it takes effect on September 1, 2009. As a general rule, it is presumed that an act is intended to operate prospectively and not retroactively, and if there is any doubt, the intention will be resolved against retroactive operation of a statute. *Ex parte Abell*, 613 S.W.2d 255 (Tex. 1981). An act will not be applied retrospectively unless it appears by fair implication from the language used that it was the intent of the legislature to make it applicable to both past and future transactions. *Id.* In addition, a statute is presumed to be prospective in its operation unless expressly made retrospective. Gov't Code § 311.022. There is no indication in the language in HB 3445 that the legislature intended the act to prohibit payments made before September 1, 2009, and in our opinion the act must therefore apply prospectively to payments made only on or after September 1, 2009.

However, the requestor is concerned with a situation in which a sales commission that was permissible prior to September 1, 2009, is paid to a person after September 1, 2009, pursuant to a legally binding contract in which the person agreed to communicate directly with a state agency to influence a purchasing decision that exceeds 10 million dollars. In that instance, the requestor asks whether the prohibition of the payment would unlawfully impair the obligation of a contract. The Texas Constitution provides that no retroactive law or any law impairing the obligation of contracts shall be made. Tex. Const. art. 1 § 16. The obligation of a contract is what the party to a contract is required by duty and by law to perform, and any law that releases a part of this obligation must impair it. Tex. Att'y Gen. Op. No. DM-299 (1994). *See also Cardenas v. State*, 683 S.W.2d 128 (Tex. App.—San Antonio 1984).⁵

If a person is contractually and legally bound to render a service to influence administrative action, or to compensate another person to influence administrative action, then a subsequent law that prohibits such a rendering of services or compensation would impair an obligation of a contract. In enacting a statute, it is presumed that compliance with the constitutions of this state and the United States is intended and that the entire statute is intended to be effective. Gov't Code §§ 311.021(1), (2). Considering that the transition provision in HB 3445 does not explicitly state that the act applies to obligations made pursuant to legally binding contracts that predate the act, and the apparent violation of the Texas Constitution that would occur if such obligations were impaired, we conclude that section 305.022, as amended by HB 3445, does not prohibit a person from retaining, employing, or compensating another or rendering services if the person is obligated to perform such activity pursuant to a contract that was legally binding prior to September 1, 2009.

Chapter 305 of the Government Code, including section 305.022 as amended by HB 3445, and rules adopted by the Ethics Commission also provide circumstances in which a person must register and disclose certain activity related to communications made to influence a member of the legislative or executive branch regarding legislation or administrative action. We are not aware of the manner in which the reporting requirements of HB 3445 would impair the obligation of a contract or otherwise violate article I, section 16 of the Texas Constitution.⁶ However, it is apparent that the legislature intended that all reporting requirements under HB 3445 be enforced in connection with activity that occurs on or after September 1, 2009. Thus, we conclude that the reporting requirements under chapter 305 of the Government Code, including section 305.022 as amended, apply accordingly.

SUMMARY

Section 305.022, as amended by HB 3445, does not prohibit a person from retaining, employing, or compensating another or rendering services if the person is obligated to perform such activity pursuant to a contract that was legally binding prior to September 1, 2009. All reporting requirements under chapter 305 of the Government Code, including section 305.022 as amended by HB 3445, would also apply in such circumstances.

¹ Act of June 3, 2009, 81st Leg., R.S., ch. 1174, 2009 Tex. Gen. Laws 3722.

² *Id.* § 8.

³ The following are the advisory opinions that were superseded or modified by HB 3445: Ethics Advisory Opinion Nos. 341 (1996), 185 (1994), 160 (1993), 159 (1993), 158 (1993).

⁴ Act of June 3, 2009, 81st Leg., R.S., ch. 1174, § 4, 2009 Tex. Gen. Laws 3722.

⁵ Whether a contractual obligation is legally enforceable depends upon the terms of the contract and the application of then-existing law. *See Langever v. Miller*, 124 Tex 80, 94 (1934) (stating that the obligation of a contract is the means the law afforded for its enforcement at the time of its creation).

⁶ *See* Ethics Advisory Opinion No. 1 (1992) (stating that reporting requirements for personal financial statements effective January 1, 1992, constitutionally applied to statements due in 1992 despite requiring information about activity that occurred in 1991). *See also* Tex. Att’y Gen. Op. No. H-190 (1973).