Bid tampering, definition of public servant

Number: AGO 2012-21

Date: June 28, 2012

Subject:
Bid tampering, definition of public servant

The Honorable Jerry Hill
State Attorney, Tenth Judicial Circuit
Drawer SA, Post Office Box 9000
Bartow, Florida 33831-9000

RE: PUBLIC SERVANTS--PUBLIC CORRUPTION--BID TAMPERING--CRIMESTOPPERS--non-profit crime stoppers not "public servant" for purposes of bid tampering prosecution. ss. 838.014 and 838.22, Fla. Stat.

Dear Mr. Hill:

You ask substantially the following question:

Is the executive director of the Heartland Crime Stoppers Program a public servant for purposes of alleged bid tampering under section 838.22, Florida Statutes?

In sum:

The executive director of the Heartland Crime Stoppers Program, a private, non-profit corporation, does not fall within the definition of a "public servant" for purposes of prosecution under section 838.22, Florida Statutes.

As a result of an investigation by your office into the activities of the Heartland Crime Stoppers Program (HCS) and its executive director involving alleged bid tampering under section 838.22, Florida Statutes, you question whether the program is a public entity and its executive director a public servant subject to the provisions of the statute. You state that Polk County Crime Stoppers, Incorporated, d/b/a Heartland Crime Stoppers, is funded in large part by a grant from the Attorney General's Office,[1] but also receives donations from other law enforcement agencies and the public. Heartland Crime Stoppers is a registered non-profit corporation in Florida and qualifies as a 501(c)(3) corporation with the Internal Revenue Service. The HCS's website states that its program began in 1982 as a result of the combined efforts of the city commission and the city's police department, but now operates as an independent organization. The program provides a method for local law enforcement to receive information on crimes.[2]

Section 838.22, Florida Statutes, makes it unlawful for a public servant with corrupt intent to influence or attempt to influence the competitive bidding process undertaken by any state, county, municipal, or special district agency, or any other public entity, for the procurement of commodities or services.[3] For purposes of the statute, section 838.014(6), Florida Statutes,

defines "[p]ublic servant" as:

"(a) Any officer or employee of a state, county, municipal, or special district agency or entity;
(b) Any legislative or judicial officer or employee;
(c) Any person, except a witness, who acts as a general or special magistrate, receiver, auditor, arbitrator, umpire, referee, consultant, or hearing officer while performing a governmental function; or
(d) A candidate for election or appointment to any of the positions listed in this subsection, or an individual who has been elected to, but has yet to officially assume the responsibilities of, public office."[4]

The plain language of the statute defines "public servant" in a manner that would appear to exclude officers or employees of a private entity. Neither section 838.014 nor section 838.22, Florida Statutes, has been interpreted by a court of this state for purposes of determining what constitutes a "public servant." The definition of a "public servant," however, was analyzed in an interim report prepared in 2010 by the Nineteenth Statewide Grand Jury on public corruption in Florida.[5]

Testimony heard by the grand jury indicated that impediments to prosecuting criminal violations under Chapter 838, Florida Statutes, were in large part due to the current definition of "public servant," as the "narrow definition . . . prevents numerous prosecutions of corrupt individuals who are serving a governmental function or service but are not within reach of the law as written."[6] The report recognized that many governmental duties have been shifted to private or semi-private entities and actors who do not fall within the existing narrow definition, thereby escaping prosecution under the anti-corruption laws.[7]

The Grand Jury's first and "most critical" recommendation was to redefine "public servant" to include

"[a]ny officer, director, partner, manager, representative, or employee of a nongovernmental entity, private corporation, quasi-public corporation, quasi-public entity or anyone covered under chapter 119 that is authorized by law or contract to perform a governmental function or provide a governmental service on behalf of the state, county, municipal, or special district agency or entity to the extent that the individual's conduct relates to the performance of the governmental function or provision of the governmental service."[8]

The report further suggested defining "governmental function" or "governmental service" for purposes of the act to mean "performing a function or serving a governmental purpose which could properly be performed or served by an appropriate governmental unit or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds."[9]

The present definition of "public servant" came into existence when the "Paul Mendelson Citizens' Right to Honest Government Act" was enacted.[10] The original bill filed for enactment of the legislation proposed defining "public servant" to include:

"[a]ny officer, director, partner, manager, representative, or employee of a nongovernmental

entity that is authorized by law or contract to perform a governmental function or provide a governmental service on behalf of a state, county, municipal, or special district agency or entity to the extent that the individual's conduct relates to the performance of the governmental function or provision of the governmental service[.]"[11]

This language from the original bill was deleted and the present definition substituted, however, in a strike all amendment, which, as stated by the sponsor, "does not contain reference to non-governmental entities."[12] The sponsor further expressed concern "about bringing non-governmental folks potentially into that net; we didn't think that that was good public policy."[13] As noted in the grand jury report, the amendment to the original bill has no reference to an agent of the government or a person acting on behalf of an agent or employee of the government and it struck language which would have included non-governmental entities performing a governmental function or service. The report states that the amendment "managed to omit anyone who is not directly an 'officer or employee of a state, county, municipal, or special district agency or entity.'"[14]

Although the grand jury report was issued in 2010, it does not appear that the Legislature has modified the definition of "public servant" to accommodate the grand jury's recommendation.

In light of the grand jury's analysis of the present definition of "public servant" in section 838.014(6), Florida Statutes, and the fact that non-governmental entities performing governmental acts or services are not included within the definition, I must conclude that the executive director of the Heartland Crime Stoppers Program is not a "public servant."

I would note, however, that you have indicated that alleged bid tampering activities by the Heartland Crime Stoppers Program and its executive director would be subject to prosecution if the executive director was a "public servant" under the bid tampering statute. It is regrettable that such an organization using public funds cannot be held accountable for actions that could be prosecuted if carried out by an individual meeting the technical definition of a "public servant." Consideration of this situation for possible legislative action to ensure accountability of the expenditure of public funds may be advisable.

Sincerely,

Pam Bondi
Attorney General

PB/tals

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[1] Section 16.555(5), Fla. Stat., provides:

"(a) The [D]epartment [of Legal Affairs] shall be the disbursing authority for distribution of funding to units of local government, upon their application to the department for funding assistance.
(b) Funds deposited in the trust fund pursuant to paragraph (4)(b) shall be disbursed as provided in this paragraph. Any county may apply to the department for a grant from the funds collected in the judicial circuit in which the county is located under s. 938.06. A grant may be awarded only to

counties which are served by an official member of the Florida Association of Crime Stoppers and may only be used to support Crime Stoppers and their crime fighting programs. Only one such official member shall be eligible for support within any county. In order to aid the department in determining eligibility, the secretary of the Florida Association of Crime Stoppers shall furnish the department with a schedule of authorized crime stoppers programs and shall update the schedule as necessary. The department shall award grants to eligible counties from available funds and shall distribute funds as equitably as possible, based on amounts collected within each county, when more than one county is eligible within a judicial circuit."

[2] *See* http://www.heartlandcrimestoppers.com/about.aspx.

[3] The statute specifies instances in which unlawful activity occurs and provides penalties:

"(1) It is unlawful for a public servant, with corrupt intent to influence or attempt to influence the competitive bidding process undertaken by any state, county, municipal, or special district agency, or any other public entity, for the procurement of commodities or services, to:
(a) Disclose material information concerning a bid or other aspects of the competitive bidding process when such information is not publicly disclosed.
(b) Alter or amend a submitted bid, documents or other materials supporting a submitted bid, or bid results for the purpose of intentionally providing a competitive advantage to any person who submits a bid.
(2) It is unlawful for a public servant, with corrupt intent to obtain a benefit for any person or to cause unlawful harm to another, to circumvent a competitive bidding process required by law or rule by using a sole-source contract for commodities or services.
(3) It is unlawful for any person to knowingly agree, conspire, combine, or confederate, directly or indirectly, with a public servant to violate subsection (1) or subsection (2).
(4) It is unlawful for any person to knowingly enter into a contract for commodities or services which was secured by a public servant acting in violation of subsection (1) or subsection (2).
(5) Any person who violates this section commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084."

[4] Section 838.014(6), Fla. Stat.

[5] *See* Nineteenth Statewide Grand Jury, Case No. SC 09-1910, First Interim Report, "A Study of Public Corruption in Florida and Recommended Solutions," dated December 17, 2010.

[6] *Id.* at p. 17.

[7] *Id.* at pp. 17-18.

[8] *Id.* at pp. 16-17.

[9] *Id.* at p. 17.

[10] Chapter 2003-158, Laws of Fla.

[11] *See* HB 847, 2003 Regular Legislative Session, Original Filed Version, known as the

"Citizens' Right to Honest Government Act." *See also* Florida Public Corruption Study Commission, Final Report, February 3, 2000, p. 8, proposing a comprehensive definition of "public servant" to include not only public employees but also specifically described non-governmental entities performing "privatized" governmental services and functions authorized by law or contract.

[12] Subcommittee on Ethics and Elections, Florida House of Representatives, Rep. Goodlette, HB 847, March 27, 2003, Tape 2 of 2.

[13] *Id.*

[14] Nineteenth Statewide Grand Jury, Case No. SC 09-1910, *supra* n.5 at p. 19.