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Opinion No. 08-192

State Contracts

QUESTIONS

1. May a company that employs a state legislator seek to enter into contracts with the state of Tennessee?

2. May a state legislator directly participate in efforts to obtain contracts with municipalities and counties?

3. If a company which employs a state legislator obtains a contract with the state and such contract contains a provision which prohibits payment of contract funds to state employees, can the company still enter into the contract if it pays the salary of the state legislator from alternate sources of revenue.

OPINIONS

1. Yes.

2. Yes.

3. Whether such an arrangement would be permissible would depend upon the particular facts and circumstances, including the structure of the company's compensation system.

ANALYSIS

You have indicated that a member of the general assembly is employed by a company that does seal coating and striping. The company is considering employing a new product that would allow it to seek state contracts. The legislator is a salaried employee with no ownership or equity in the company, and it will not be a part of the legislator's job to obtain, directly or indirectly, any

contracts with the state of Tennessee. In light of these circumstances, you have asked whether there is any law that would prohibit such a company from seeking state contracts.

There are two different statutes that are potentially applicable to this situation. The first is the general conflict of interest statute, which appears at Tenn. Code Ann. § 12-4-101. Subdivision (a)(1) prohibits an official whose duty it is to vote for, let out, or supervise a contract from being directly interested in the contract. The statute provides:

> (a)(1) It is unlawful for any officer, committee member, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation, county, state, development district, utility district, human resource agency, or other political subdivision created by statute shall or may be interested, to be directly interested in any such contract. "Directly interested" means any contract with the official personally or with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest. "Controlling interest" includes the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation. The provisions of this subdivision shall not be construed to prohibit any officer, committee person, director, or any person, other than a member of a local governing body of a county or municipality, from voting on the budget, appropriate resolution, or tax rate resolution, or amendments thereto, unless the vote is on a specific amendment to the budget or a specific appropriation or resolution in which such person is directly interested.

Under this statute, a contract between the state and a company in which a legislator owns the controlling interest would be prohibited if the legislator has a duty to vote for, let out, overlook, or in any manner to superintend the contract. Here, you have indicated that the legislator is a salaried employee with no ownership or equity interest in the company. Furthermore, most legislators would not ordinarily have a duty to vote for, let out, overlook, or in any manner superintend state contracts. Accordingly, Tenn. Code Ann. § 12-4-101(a)(1) would not prohibit a contract between the state and such company.[1]

The second statute is Tenn. Code Ann. § 2-10-123 which prohibits a legislator from receiving any compensation for consulting services other than compensation paid by the state, a county or municipality. Subsection (b) of that statute provides:

> (b) It is an offense for any person or other entity, other than the state, a county, or a municipality, to pay a fee, commission or any other form of compensation for consulting services to a person such person or entity knows to be a member of the general

[1] Under the last sentence of Tenn. Code Ann. § 12-4-101(a)(1), such a contract would not be prohibited if the legislator merely votes on an appropriations act that funds the contract.

> assembly, member-elect of the general assembly, governor, member of the governor's staff, secretary of state, treasurer, or comptroller of the treasury.

With respect to an official in the legislative branch, "consulting services" is defined as including "services to advise or assist a person or entity in maintaining, applying for, soliciting or entering into a contract with the state of Tennessee." Tenn. Code Ann. § 2-10-122(1).

Under this statute, a company would be prohibited from paying any form of compensation to a legislator for advising or assisting the company in applying for, soliciting or entering into a contract with the state of Tennessee. You have indicated, however, that it would not be part of the legislator's job with the company to obtain, directly or indirectly, any contracts with the state of Tennessee. Thus, Tenn. Code Ann. § 2-10-123(b) would not prohibit a contract between the state and the company. We are also not aware of any other provision of law that would prohibit such company from seeking state contracts without the legislator's assistance.

You have also asked whether a legislator may directly participate in efforts to obtain contracts between his or her employer and municipalities and counties. Subsection (a) of Tenn. Code Ann. § 2-10-123 states:

> It is an offense for any member of the general assembly, member-elect of the general assembly, governor, member of the governor's staff, secretary of state, treasurer, or comptroller of the treasury to knowingly receive a fee, commission or any other form of compensation for consulting services from any person or entity, other than compensation paid by the state, a county or municipality.

As previously discussed, "consulting services" is defined with respect to a legislator as including "services to advise or assist a person or entity in maintaining, applying for, soliciting or entering into a *contract with the state of Tennessee*." Tenn. Code Ann. § 2-10-122(1). Thus, under Tenn. Code Ann. § 2-10-123(a), a legislator is prohibited from receiving compensation from anyone other than the state, a county or municipality for consulting services with respect to contracts with the state, but not contracts with counties and municipalities. Accordingly, Tenn. Code Ann. § 2-10-123(a) would not prohibit a legislator from directly participating in efforts to assist his or her employer in obtaining contracts with municipalities and counties and receiving compensation from the employer for those efforts.

Finally, you have asked whether, if a company that employs a member of the general assembly obtains a contract with the state and such contract contains a provision prohibiting payment of contract funds to state employees, that company may still enter into the contract if it pays the legislator's salary from alternate sources of revenue. Whether such an arrangement would be permissible would depend upon the particular facts and circumstances, including the structure of the company's compensation system.

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