

STATE OF TENNESSEE
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Opinion No. 12-104

Conflict of Interest – Member of County Board of Education

QUESTIONS

1. Does a county school board member, in a county that has adopted the County Financial Management System Act of 1981 (“CFMSA”), codified at Tenn. Code Ann. §§ 5-21-101 to -130, have a conflict of interest under Tennessee law if the board of education and county commission contract with a public building authority and construction manager to remodel a high school, the construction manager then hires a general contractor to perform the work, and the general contractor issues requests for public bids on subcontracts for the project and ultimately awards a subcontractor for electrical materials and services to a company that the school board member owns with his or her parents?

2. Does a county school board member, in a county that has adopted the CFMSA, have a conflict of interest under Tennessee law if a company owned by the member and the member’s parents is awarded no-bid contracts by the school system for minor electrical repairs, including labor and materials, performed at facilities owned by the county school system?

OPINIONS

1. Probably no, based on these specific facts.
2. Probably no, based on these specific facts.

ANALYSIS

This opinion request seeks guidance on whether a county school board member, under certain defined factual scenarios, would have a conflict of interest under Tennessee law. Tennessee has adopted various statutes that generally govern when a state or local government official has a conflict of interest and what action must be taken to mitigate any such conflict of interest. *See, e.g.*, Tenn. Code Ann. § 5-21-121 (prohibited conflicts of interest for certain officials of counties operating under the County Financial Management System Act of 1981); Tenn. Code Ann. § 12-4-101 (defining conflicts of interest for public officials who have a duty “to vote for, let out, overlook, or in any manner to superintend” any work or contract in which defined State and local governmental entities may be interested).

Tennessee courts have long recognized that such conflict of interest statutes are generally intended to ensure “that a public official may not contract with the body of which he is a member, because it may lead to other contracts very detrimental to the public interests.” *Madison County v. Alexander*, 116 Tenn. 685, 688, 94 S.W. 604 (1906). In *Madison County*, the Tennessee Supreme Court invalidated a contract for the sale of 196 pounds of peas to the county workhouse where the seller was the superintendent of the workhouse. *Id.* The Court found the contract was prohibited by Tennessee’s conflict of interest statute, noting that “[i]t does not matter that the service is rendered faithfully and inures to the benefit of the county, or that the material may be necessary and cheaply furnished.” *Id.*

This Office on several occasions has also recognized Tennessee’s longstanding common law policy precluding public officials from placing themselves in a position where their personal interests conflict with their public duties. As this Office recently stated:

At common law, “the essence of the offense [of having a conflict of interest] was acting or appearing to act inconsistently with the best interest of the public...” Note: *Conflicts of Interests: State Government Employees*, 47 Va. L.R. at 1048. In *Anderson v City of Parsons*, 209 Kan. 337, 496 P.2d 1333 (1972), the common law principle was described as not permitting the public officer “to place himself in a position that will subject him to conflicting duties or cause him to act other than for the best interests of the public.” *Id.* at 1337. This policy is not limited to a single category of officers, but applies to all public officials. *Low v. Madison*, 135 Conn. 1, 60 A.2d 774 (1948); *Housing Authority of the City of New Haven v. Dorsey*, 164 Conn. 247, 320 A.2d 820 (1973), *cert. denied* 414 U.S. 1043.

The common law principle has been followed in several opinions of this office. For example, this office has stated:

[t]here exists a strong public policy which opposes an official placing himself in a position in which personal interest may conflict with public duty... A public office is a trust conferred by the public. The duties of that office must be exercised with fairness and impartiality. The good faith of the officer is not a consideration, for the policy exists to prevent an officer being influenced by anything other than the public good.

Op. Att. Gen. 83-278 (August 15, 1983). See also, Op. Att. Gen. 78-088 (May 16, 1978).

Tenn. Att’y Gen. Op. 12-09, at 3 (Jan. 20, 2012) (quoting Tenn. Att’y Gen. Op. 85-036, at 2 (Feb. 14, 1985)). Thus, any review of a potential conflict of interest of a public official must be conducted in recognition of Tennessee’s strong public policy against public officials placing themselves in a position where their personal interests may conflict with their public responsibilities.

The two questions posed ask whether a member of a county school board has any conflict of interest under the following facts. Under the first question, a county board of education and a county commission have approved the construction of a new high school and the remodeling of the existing high school to be used as a middle school. The school board and commission contracted with a public building authority and construction manager to perform these projects. The construction manager then hired a general contractor for both projects. The construction manager issued requests for public bids on subcontracts through its general contractor. A member of the county school board owns an interest in an electrical contracting company along with his parents. This electrical contracting company submitted a bid to perform work on the remodeling project, including labor and materials, and was ultimately awarded the contract. Per the second question, the same company has been awarded no-bid contracts in the past for minor electrical repairs, including labor and materials, performed at other facilities of the county school system. The county operates under the County Financial Management System Act of 1981 (“CFMSA”), codified at Tenn. Code Ann. §§ 5-21-101 to -130.

These factual scenarios could implicate three separate conflict of interest provisions under Tennessee law. These include Tenn. Code Ann. § 12-4-101 (the general conflict of interest standards for public officials), Tenn. Code Ann. § 49-6-2003 (setting forth certain conflicts of interest for local school officials and employees) and Tenn. Code. Ann. § 5-21-121 (defining conflicts of interest for certain county officials in counties that have adopted CFMSA). The application of each of these statutes to the facts presented will be examined below.

1. Turning to the first set of facts, Tenn. Code Ann. § 12-4-101 addresses conflicts of interest where a state or local officer has a duty to let out or superintend a contract. Under subsection (a) of the statute, a state or local officer may not be directly interested in any contract that he or she has an official duty to “vote for, let out, overlook, or in any manner to superintend.” The statute provides in relevant part:

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 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. This subdivision (a)(1) 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, appropriation 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.

Tenn. Code Ann. § 12-4-101(a)(1) (emphasis added).

Thus, under Tenn. Code Ann. § 12-4-101(a)(1), a school board member may not be a direct party to a contract that he or she has a duty as a school board member to vote for, let out, overlook, or superintend. In addition, any business in which the board member has the controlling interest may not be a party to a contract that the board member has a duty to vote for, let out, overlook, or superintend. Tenn. Code Ann. § 12-4-101(b) further provides that a state or local officer must publicly disclose any indirect interest in a contract that he or she has the official duty to vote for, let out, overlook, or superintend. Under this subsection, “indirectly interested” means any contract in which the officer is interested but not directly so, and includes contracts where the officer is directly interested but is the sole supplier of goods or services in a municipality or county. Tenn. Code Ann. § 12-4-101(b).

The opinion request states that the member owns “an interest” in the electrical contracting company. If this interest is a “controlling interest” as described above, then the member may not vote for, let out, overlook, or in any manner superintend any contract between the school board and the company. Whether the member has a controlling interest in the business depends on the specific facts and circumstances in each individual case. Under Tenn. Code Ann. § 12-4-101(a)(1), “controlling interest” includes “the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation.” Thus, if the board member owns the largest number of outstanding shares in the company, he or she is directly interested in a contract between the board and the company. The term “controlling interest” could also include other indicia of control, including, for example, the power to direct company operations. Even if the member has such an interest, however, the member is only indirectly interested in a contract if the company is the sole supplier of electrical services and materials in the county. Tenn. Code Ann. § 12-4-101(b). In that case, the statute does not prohibit contracts between the board and the business, but the member must publicly disclose his or her indirect interest. *Id.* Accordingly, if the member does not own a controlling interest in the company, or the company is the only supplier of electrical services and materials in the county, Tenn. Code Ann. § 12-4-101(a)(1) does not prohibit the subcontract.

If the member owns a controlling interest in the company and the company is not the only supplier of electrical services and materials in the county, then the subcontract is prohibited if the school board member has a duty to vote for, let out, overlook, or superintend it. Tenn. Code Ann. § 12-4-101. Again, whether this duty exists depends on the facts and circumstances in each individual case. Under the facts presented here, it does not appear that the school board contracted directly with the electrical company. Instead, the request indicates that the school board directly contracted with a public building authority and construction manager to carry out work on the schools. The manager hired a general contractor, who reviewed requests for public bids on subcontracts and approved the subcontract with the electrical company. But if the school board must approve subcontracts, or in any manner “overlook” or “superintend” the final project, including the work of the subcontractor, then the member has a prohibited interest in the subcontract within the meaning of Tenn. Code Ann. § 12-4-101(a)(1).

The penalty for violating Tenn. Code Ann. § 12-4-101 is set forth by Tenn. Code Ann. § 12-4-102, which states:

Should any person, acting as such officer, committee member, director, or other person referred to in § 12-4-101, be or become directly or unlawfully indirectly interested in any such contract, such person shall forfeit all pay and compensation therefore. Such officer shall be dismissed from such office the officer then occupies, and be ineligible for the same or a similar position for ten (10) years.

The conflict of interest provisions of Tenn. Code Ann. § 49-6-2003(a) apply to local school officials and employees, and thus could possibly relate to the facts presented. This statute states:

It is unlawful for any teacher, supervisor, commissioner, director of schools, *member of a board of education* or other school officer in the public schools to have any pecuniary interest, *directly or indirectly*, in supplying books, maps, school furniture *or apparatus* to the public schools of the state, or to act as agent for any author, publisher, bookseller or dealer in such school furniture or apparatus on promise of reward for the person's influence in recommending or procuring the use of any book, map, school apparatus or furniture of any kind, in any public school; provided, that nothing in this section shall be construed to include authors of books.

Tenn. Code Ann. § 49-6-2003(a) (emphasis added).

Subsection (b) contains a number of exceptions that would not apply under the facts presented. The provisions of Tenn. Code Ann. § 49-6-2003(a) generally prohibit local school officials and employees, including a member of the local board of education, from having a direct *or indirect* pecuniary interest in supplying, or acting as an agent or representative of a supplier of, certain tangible personal property to Tennessee public schools, including "apparatus." A school board member would have an indirect pecuniary interest in a subcontract under which a company he or she partly owns provides electrical materials to the county high schools. Thus, under the facts presented, the question is whether the electrical company partially owned by the school board member, which is providing through its subcontract both services and materials, is providing "apparatus" to the county schools. The statute does not define the term "apparatus." This Office has concluded that the term "apparatus" as used under this statute could include school equipment and possibly other tangible personal property, but does not include a contract for services. Tenn. Att'y Gen. Op. 09-48 (April 2, 2009). Given the subcontract in question appears to be primarily a contract for services, with any materials furnished being merely incidental to the service contract, then the subcontract in question would not appear to create a conflict of interest under Tenn. Code Ann. § 49-6-2003. *See Mitchell v. Fayetteville Public Utilities*, 368 S.W.3d 442, 448 (Tenn. 2012) (recognizing the general rule of statutory construction that in reviewing a statute a court should follow the General Assembly's intent without unduly broadening or restricting the scope of a statute).

Finally, consideration must be given to CFMS's provisions, given the request states the county in question has adopted CFMS. This statutory scheme contains a stricter conflict of interest provision than the previous conflict of interest statutes analyzed. This statute provides in relevant part:

The director, purchasing agent, members of the committee, members of the county legislative body, or other officials, employees, or *members of the board of education* or highway commission shall not be financially interested or have any personal beneficial interest, *either directly or indirectly*, in the purchase of any supplies, materials, equipment, or contractual services for the county.

Tenn. Code Ann. § 5-21-121(a) (emphasis added).

It appears the transactions addressed in this opinion were entered into before March 30, 2012. At that time, this statute only prohibited an interest in the purchase of any “supplies, materials, or equipment.” Effective March 30, 2012, the General Assembly amended this statute to also prohibit an interest in the purchase of “contractual services.” 2012 Tenn. Pub. Acts ch. 640, § 1. The addition of “contractual services” to the prohibited interests listed in Tenn. Code Ann. § 5-21-121(a) strongly implies that, prior to the effective date of this amendment on March 30, 2012, such “contractual services” rendered directly or indirectly by a board member did not constitute a prohibited conflict of interest. *See State v. Gomez*, 367 S.W.3d 237, 244 (Tenn. 2012) (stating the general rule of construction that an amendment to a statute raises a presumption that the General Assembly intended to change the existing law). Thus, the subcontract for services in which the board member in question had a direct or indirect interest would not, prior to March 30, 2012, create a conflict of interest under Tenn. Code Ann. § 5-21-121(a). Moreover, given it appears the primary purpose of this subcontract was to provide services with any supplies or materials furnished being incidental to the services contract, it is doubtful the incidental inclusion of such supplies or materials in a service contract would implicate the conflict of interest provisions under Tenn. Code Ann. § 5-21-121(a) that existed prior to March 30, 2012. *See Mitchell v. Fayetteville Public Utilities*, 368 S.W.3d at 448 (stating a court will not unduly broaden the scope of a statute beyond the General Assembly’s express intent).¹

2. The request also asks whether any conflict of interest provision under Tennessee law would be violated if the same school board member’s company had previously been awarded no-bid contracts for minor electrical repairs, including labor and materials, performed at other county school system facilities. This question implicates the same three conflict of interest statutes previously analyzed.

As discussed above, if the member does not own a controlling interest in the company, or the company is the only supplier of electrical services and materials in the county, Tenn. Code Ann. § 12-4-101(a)(1) does not prohibit the contracts in question. The member must nonetheless disclose the interest. Tenn. Code Ann. § 12-4-101(b). If the school board member owns a

¹ A violation of Tenn. Code Ann. § 5-21-121(a) is a misdemeanor and subjects a county official or employee to removal from office. Tenn. Code Ann. § 5-21-125. As this Office noted in an earlier opinion, however, a court would probably find unconstitutional the criminal penalties imposed by Tenn. Code Ann. § 5-21-125 for violation of the provisions of Tenn. Code Ann. § 5-21-121(a), given that the CFMS is a local option act that may or may not be adopted by a county and no rational basis exists for imposing this criminal penalty only in counties that adopt the CFMS. Tenn. Att’y Gen. Op. 05-017, at 3 (Feb. 3, 2005) (discussing *State v. Whitehead*, 43 S.W.3d 921 (Tenn. Crim. App. 2000)). At the same time, the statute remains enforceable to the extent that it provides for the removal from office of an official who violates Tenn. Code Ann. § 5-21-121. *See id.*

“controlling interest” in the company and it is not the only supplier in the county, then the member is directly interested in the contracts. Tenn. Code Ann. § 12-4-101(a). The arrangement violates Tenn. Code Ann. § 12-4-101(a)(1) if the school board member has a duty to vote for, let out, overlook, or superintend these contracts with the company. This would be the case if, for example, the contracts are directly approved or supervised by the school board.

Tenn. Code Ann. § 49-6-2003(a) prohibits a school board member from having any direct or indirect pecuniary interest in supplying “books, maps, school furniture or apparatus” to state public schools. Under these facts presented, the board member apparently has an indirect pecuniary interest in a contract for electrical repairs entered into by a company in which the member has an ownership interest. However, as previously discussed, since the contracts at issue appear to be primarily contracts for repair services, with any materials furnished being merely incidental to these service contracts, then these contracts would probably not create a conflict of interest under Tenn. Code Ann. § 49-6-2003(a).

Finally, because the school board member owns an interest in a company that is primarily furnishing repair services for county school facilities prior to March 30, 2012, under our aforementioned analysis in response to question 1 these contracts would not appear to violate Tenn. Code Ann. § 5-21-121(a).²

A suit to enforce any of the aforementioned conflict of interest penalties would be a *quo warranto* action that ordinarily is initiated by the district attorney general. *See* Tenn. Att’y Gen. Op. 04-016, at 2 (Feb. 5, 2004). *See also State ex rel. Odom v. Ridley*, 730 S.W.2d 318, 322 (Tenn. 1987); *State ex rel. Abernathy v. Anthony*, 206 Tenn. 597, 598, 335 S.W.2d 832, 833 (1960).

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² As previously observed, effective March 30, 2012, Tenn. Code Ann. § 5-21-121(a) was amended to prohibit an interest in the purchase of “contractual services.” 2012 Tenn. Pub. Acts. Ch. 640 § 1. The contracts that are the subject of this request were apparently entered into prior to this effective date.

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