S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
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May 7, 2013

Opinion No. 13-38

Conflict of Interest of Board Member of the Tennessee Board of Regents

QUESTION

Is a company co-owned by a board member of the Tennessee Board of Regents ("TBR") prohibited from bidding as a subcontractor on any contract that is with the TBR institution and must be approved by the TBR?

OPINION

Yes.

ANALYSIS

Tennessee has a longstanding common law policy that precludes public officials from placing themselves in a position where their personal interests conflict with their public duties. This Office recently explained the rationale for this policy as follows:

> 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 (1073), *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:
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> > [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. 12-104 (Nov. 9, 2012) (quoting Tenn. Att'y Gen. Op. 85-036 at 2 (Feb. 14, 1985)).

Conflicts of interest for board members of the TBR are governed by statute. Tenn. Code Ann. § 49-8-204(d) states in relevant part:

> It is unlawful for any member of the board to be financially interested in any contract *or transaction* affecting the interests of any institution governed by the board. . . . A violation of this subsection (d) shall subject the member so offending to removal by the governor or the board.

(emphasis added). Tennessee courts have recognized that conflict of interest statutes such as Tenn. Code Ann. § 49-8-203(d) are designed 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 interest." *Madison County v. Alexander*, 116 Tenn. 685, 688, 94 S.W. 604 (1906).

This Office in interpreting Tenn. Code Ann. § 49-9-207 (formerly Tenn. Code Ann. § 49-3308), which applies to board members of the University of Tennessee Board of Trustees ("UTBT") and has language identical to Tenn. Code Ann. § 49-8-203(d), has opined that allowing a company whose president is a board member of the UTBT to subcontract to do work for the University of Tennessee violates Tenn. Code Ann. § 49-9-207. 11 Tenn. Att'y Gen. Op. (Sept. 4, 1975) (copy attached).[1] As this Office succinctly explained:

> Any financial interest by a Board member is prohibited. Importantly, the restriction . . . is not limited to contracts with the University of Tennessee. It extends to any *transaction* "affecting" the University. The statute is specific and unambiguous. Thus a subcontract is within the proscription of T.C.A. § 49-3309 (currently Tenn. Code Ann. § 49-9-207).

Id. (emphasis in original). *See also* Tenn. Att'y Gen. Op. 90-22 (Feb. 26, 1990) (observing that Tenn. Code Ann. § 49-9-207 is "apparently intended to prohibit board members from deriving a financial gain from any of the University's contracts or transactions").

The reasoning of the opinion issued by this Office on September 4, 1975, is equally applicable to the language of Tenn. Code Ann. § 49-8-203(d). Thus Tenn. Code Ann. § 49-8-

[1] This opinion is unnumbered.

203(d) prohibits a company co-owned[2] by a TBR board member from bidding as a subcontractor on any contract that is with a TBR institution and must be approved by the TBR. Indeed this statute by its terms would prohibit a company co-owned by a TBR board member from bidding on any contract with a TBR institution, regardless whether the contract required TBR approval.

The conflict of interest provisions for TBR board members under Tenn. Code Ann. § 49-8-203(d) are stricter than the general conflict of interest provisions governing other members of State boards set forth at Tenn. Code Ann. § 12-3-106(b). *Compare* Tenn. Code Ann. § 49-8-203(d) (providing it "is unlawful for any member of the [TBR] board to be financially interested in any contract or transaction affecting the interests of any institution governed by the board") *with* Tenn. Code Ann. §12-3-106(b) (stating that "[i]t is a conflict of interest for any person or any company with whom such person is an officer, a director, or an equity owner having an ownership interest greater than one percent (1%) to bid on any public contract for products or services for a governmental entity if such person or a relative of such person is a member of a board or commission having responsibility for letting or approving such contract"). The specific provisions of Tenn. Code Ann. § 49-8-203(d) describing conflicts for TBR board members take precedence over the general conflict of interest standards for other State board members established by Tenn. Code Ann. § 12-3-106(b). *See, e.g., Keough v. State* 356 S.W.3d 366, 371 (Tenn. 2011) (stating general rule of statutory construction that a special statute will prevail over a general provision in another statute).

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Requested by:

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[2] This opinion construes "co-ownership" of a company to include any ownership interest in the company.

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September 4, 1975

Mr. Beauchamp E. Brogan
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Dear Mr. Brogan:

Your office has requested the opinion of the Attorney General on the following factual situation: The University of Tennessee has taken bids for a construction project. The low bid was submitted by construction company "C" which desires to subcontract part of the work to company "B." Company "B" is a wholly owned subsidiary of company "A." Company "A" is a publicly owned corporation. A member of the University of Tennessee Board of Trustees is a stockholder of company "A" and is president of company "B." Company "B" is one of very few companies with the capability of doing the work required for the project. In all likelihood, no matter who is awarded the general contract, company "B" will be the subcontractor. The question asked is whether such a subcontractual arrangement would be a violation of T.C.A. § 49-3308, the University of Tennessee's conflict of interest statute.

It is the opinion of the Attorney General that allowing a member of the Board of Trustees to subcontract to do work for the University of Tennessee is a violation of T.C.A. § 49-3308 which prohibits "any member of the Board of Trustees [from being] financially interested in any contract or transaction affecting the interest of the University." Undoubtedly, the Trustee, who is president of the subcontracting company, is financially interested in the transaction. Any financial interest by a Board member is prohibited. Importantly, the restriction imposed by T.C.A. § 49-3308 is not limited to contracts with the University of Tennessee. It extends to any transaction "affecting" the University. The statute is specific and unambiguous. Thus a

subcontract is within the proscription of T.C.A. § 49-3308.

I hope that this opinion fully answers your question. Whenever this office can be of assistance to you in the future, please feel free to call upon us.

Sincerely,

Richard Lodge
Assistant Attorney General

RL:bjm