STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

April 23, 2018

Opinion No. 18-20

State Board Member's Ability to Contract with State Agencies

Question 1

Is a member of the Underground Storage Tanks and Solid Waste Disposal Control Board a state employee?

Opinion 1

A member of the Underground Storage Tanks and Solid Waste Disposal Control Board is a state official. While state officials are treated as "state employees" for some purposes, state officials are not treated as "state employees" for the purpose of procuring a public contract.

Question 2

If a contractor has an employee or subcontractor who serves as a member of the Underground Storage Tanks and Solid Waste Disposal Control Board, may the contractor respond to a request for proposal or a request for qualifications to provide services under a contract with a state agency whose services are not overseen by the Board?

Opinion 2

In the absence of a specific statutory or local governmental charter provision that dictates otherwise, such a contractor may respond to a request for proposal or a request for qualifications to provide services under a contract with a state agency when the Board member does not have a duty "to vote for, let out, overlook, or in any manner superintend any work or any contract" in which the state agency is interested.

Question 3

To what extent is a contractor described in question #2 disqualified from contracting with the State to provide state services as the result of a conflict of interest?

Opinion 3

The contractor described in question #2 may not contract with a state agency *if* the Board member has a duty "to vote for, let out, overlook, or in any manner superintend any work or any contract" in which the state agency is interested *and* the Board member is "directly interested" in the contract, as defined in Tennessee Code Annotated § 12-4-101(a). The only exception is the

"sole supplier" provision in Tennessee Code Annotated § 12-4-101(b). If the Board member is "directly interested" in the contract but is the sole supplier of the services in a municipality or county, the Board member is treated as being only "indirectly interested" in the contract. In that instance, for the contract to be valid, the Board member must publically acknowledge his or her interest.

ANALYSIS

The Underground Storage Tanks and Solid Waste Disposal Control Board (the "Board") is created by state statute. Tenn. Code Ann. § 68-211-111. The Board has two primary roles. The Board is empowered to promulgate rules and regulations to implement the Tennessee Petroleum Underground Storage Tank Act, *see* Tenn. Code Ann. § 68-215-107(f), and to ensure the proper management and disposal of solid waste and hazardous materials, as set forth in Chapters 211 and 212 of Title 68 of the Tennessee Code. The Board also hears appeals from orders, assessments, and other actions of the commissioner of environment and conservation. *See* Tenn. Code Ann. §§ 68-211-111(f); 68-212-107(e), -117, -215, -312; 68-215-119, -123.

The Board has fourteen members who are appointed by the governor. Tenn. Code Ann. § 68-211-111(a)(1)(A). The Board's membership includes one representative of county governments; one representative of municipal governments; ten individuals engaged in various fields, including but not limited to petroleum, manufacturing, and the management of solid wastes or hazardous materials; and two *ex officio* voting members, the commissioner of economic and community development (or designee) and the commissioner of environment and conservation (or designee). *Id*.

Members of the Board are appointed for four-year terms. Tenn. Code Ann. § 68-211-111(b). Each member of the Board, other than the *ex officio* members, is entitled to be paid fifty dollars for each day that the member discharges his or her official duties. Tenn. Code Ann. § 68-211-111(h). Each member is also entitled to be reimbursed for traveling expenses and other necessary expenses that the member incurs while engaged in the performance of his or her official duties. *Id*.

1. Under this statutory scheme, a member of the Board is not an "employee" of the State. An "employee" is generally defined as "[s]omeone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." *Black's Law Dictionary* 639 (10th ed. 2009). *See* Tenn. Code Ann. § 50-6-102(12)(A) ("employee" under Workers' Compensation Act is defined as "every person . . . in the service of an employer . . . under any contract of hire or apprenticeship, written or implied"). A member of the Board does not provide services to the State under a "contract of hire"; rather, the member is appointed to perform functions and duties authorized by state law.

Our courts have found that "an individual who has been appointed or elected in a manner prescribed by law, who has a designation or title given him by law, and who exercises the functions concerning the public assigned to him by law" is a "public officer" or "public official," not an employee. *Sitton v. Fulton*, 566 S.W.2d 887, 889 (Tenn. Ct. App. 1978) (quoting 67 C.J.S. Officers

§ 2); *Gamblin v. Town of Bruceton*, 803 S.W.2d 690, 692-693 (Tenn. Ct. App. 1990). Accordingly, on several occasions, this Office has opined that persons who serve on state boards and commissions, like the Board here, are state officials. *See, e.g.*, Tenn. Att'y Gen. Op. 88-153 (Aug. 24, 1988) (Commission on Continuing Legal Education); Tenn. Att'y Gen. Op. 87-50 (Mar. 25, 1987) (Board of Directors of Tennessee Economic Development Corporation); Tenn. Att'y Gen. Op. 80-449 (Sept. 16, 1980) (Tennessee Prison Agri-Industries Board).

State officials are treated as "state employees" only when the General Assembly declares so. For instance, Title 8, Chapter 42 of the Tennessee Code addresses the "Defense of State Employees." The crux of this chapter is found in Tennessee Code Annotated § 8-42-103, which provides in part:

> When a civil action for damages is commenced in any court by any person against *any state employee as defined in this chapter* for any acts or omissions of the state employee within the scope of the employee's employment, except for willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain, the attorney general and reporter has the discretion to provide representation to the employee. . . .

Tenn. Code Ann. § 8-42-103(a) (emphasis added). Because a "state official" is included in the definition of "state employee" in Tennessee Code Annotated § 8-42-101(3)(A), a state official is treated as a state employee for the limited purpose of requesting representation from this Office when sued for acts or omissions that stem from the official's duties.

In sum, a Board member is a state official except in those instances when the General Assembly statutorily treats state officials as state employees.

2. and 3. In the public-contract context, the General Assembly has retained the distinction between employees and officials. *See* Tenn. Code Ann. §§ 12-4-101 to -117 *passim*. Thus, a Board member's procurement of a public contract is governed by the provisions addressing the procurement of public contracts by officials.

Tennessee Code Annotated § 12-4-101 generally governs conflicts of interest with respect to officials and public contracts.[1] Subsection (a)(1) forbids an official from being "directly interested" in a contract that the official has the duty "to vote for, let out, overlook, or in any manner to superintend." "'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." Tenn. Code Ann. § 12-4-101(a). A "'[c]ontrolling interest' includes the

[1] This statutory provision governs contracts for the sale of services, as well as the sale of goods, by state officials. Tenn. Att'y Gen. Op. 84-298 (Nov. 7, 1984). *See, e.g.*, Tenn. Att'y Gen. Op. 08-192 (Dec. 29, 2008); Tenn. Att'y Gen. Op. 06-159 (Oct. 9, 2006). While Tennessee Code Annotated § 12-4-103 specifically address the sale of goods by state employees and state officials, this Office has previously opined that Tennessee Code Annotated § 12-4-101 takes precedence over Tennessee Code Annotated § 12-4-103 with respect to the sale of goods *by state officials*. Tenn. Att'y Gen. Op. 84-298 (Nov. 7, 1984). *See* Tenn. Att'y Gen. Op. 09-111 (June 8, 2009).

individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation." *Id*.

Subsection (b), though, does permit an official to be "indirectly interested" in a public contract if the official publically acknowledges that interest. "Indirectly interested" is defined as "any contract in which the officer is interested but not directly so, but 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).

When subsections (a) and (b) are read together, the definition of "indirectly interested" provides an exception to the prohibition that an officer may not be directly interested in a contract that the officer has a duty to award or supervise. Even if an officer is otherwise "directly interested" in a contract, the officer is treated as being only "indirectly interested" if the officer is "the sole supplier of goods or services in a municipality or county."

Given these provisions, a contractor that has an employee or subcontractor who serves as a Board member will generally be able to respond to a request for proposal or a request for qualifications to provide services under a contract with a state agency when the Board member does not have a duty "to vote for, let out, overlook, or in any manner superintend any work or any contract" in which the state agency is interested.[2] Conversely, if a Board member does have duty "to vote for, let out, overlook, or in any manner superintend any work or any contract" in which the state agency is interested and the Board member is "directly interested" in the contract, the contractor may not contract with the state agency. The only exception is the "sole supplier" provision in Tennessee Code Annotated § 12-4-101(b). If the Board member is "directly interested" in the contract but is the sole supplier of the services in a municipality or county, the Board member is treated as being only "indirectly interested" in the contract. In that instance, for the contract to be valid, the Board member must publically acknowledge his or her interest. *See* Tenn. Code Ann. § 12-4-101(b).

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[2] Other statutory provisions or local governmental charter provisions could apply, though, depending on the specific facts and circumstances surrounding the contract at issue and the identity of the Board member.

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