

**STATE OF TENNESSEE**  
OFFICE OF THE  
**ATTORNEY GENERAL**  
PO BOX 20207  
NASHVILLE, TENNESSEE 37202

May 5, 2010

Opinion No. 10-63

Comptroller's Service on Proposed State Procurement Commission

---

**QUESTIONS**

1. Is it constitutionally permissible for the comptroller to act as a part of the Executive Branch, the branch of government that carries out laws, by serving on a proposed State Procurement Commission.

2. The State Comptroller has been appointed to a number of boards, commissions, councils, and other entities of state government. One of the principal duties and responsibilities of the State Comptroller is to audit governmental entities to ensure they are responsibly carrying out their functions. Is there a conflict of interest for the Comptroller to serve on boards and commissions that are subject to review by the Office of the Comptroller? Is this constitutionally permissible?

**OPINIONS**

1. Yes.

2. The scenario created by the proposed legislation does not give rise to a conflict of interest that violates Tennessee law. Nor does the Tennessee Constitution prohibit the service of the Comptroller on boards and commission that are subject to review by the Office of the Comptroller.

**ANALYSIS**

Your questions concern an amendment (SA1288) to SB3598/HB3353, which would, among other things, create a procurement commission, a procurement office, and an advisory council on state procurement. These new state entities would be assigned the responsibility for the oversight of many of the procurement and contracting activities of the state, including prescribing standards, policies and procedures for state procurement and promulgation of rules

and regulations governing procurement matters.<sup>1</sup> Your inquiries focus upon the role of the Comptroller under the procurement system to be created by the proposed legislation.

---

<sup>1</sup> While this proposed legislation is too lengthy to quote here, the legislative bill summary prepared for this bill states, in part, as follows:

**Bill Summary**

**PROCUREMENT COMMISSION**

This bill creates a procurement commission. The commission will consist of seven ex officio members as follows: the governor, comptroller, commissioner of general services, commissioner of finance and administration, speakers of the senate and house, and a procurement professional member appointed by the governor upon the recommendation of the National Institute of Government Purchasing. The chief procurement officer will serve as a non-voting member.

The governor will serve as chair and the commission will elect from its membership a vice chair and secretary. The attorney general and reporter will serve as legal counsel to the commission. All members will serve as their official role provides, except the procurement professional member will serve a five-year term. The members of the commission shall serve without additional compensation, but shall be entitled to reimbursement for their necessary expenses.

This bill authorizes the commission to prescribe standards, policies and procedures, and to promulgate rules and regulations to be followed consistent with this bill, governing the procurement, contracting, management, control, and disposal of any and all goods and services by the state. The commission will not exercise authority over the award or administration of any particular contract, but will have authority to hear protests related to the procurement process for adherence to procurement standards, policies, rules, regulations, procedures and guidelines.

**PROCUREMENT OFFICE**

This bill creates a procurement office headed by the chief procurement officer. The office will be administratively attached to the department of general services, but responsible to the state procurement commission. The commission will appoint the chief procurement officer, who will be a person qualified by training and relevant and recent experience in public procurement and in the large-scale procurement of goods and services, contract administration and control, and demonstrated executive and organizational ability to perform the duties of this office.

The chief procurement officer may adopt operational procedures governing the internal functions of the procurement office. [ . . . ]

\* \* \* \* \*

**ADVISORY COUNCIL ON STATE PROCUREMENT**

This bill creates an advisory council on state procurement. There will be five voting members of the council and seven non-voting members of the council representing the bidder and vendor community and other procurement professionals. All members must have a demonstrable working knowledge of the state procurement process. The five voting members of the council will consist of two representatives of state agencies appointed by the commissioner of general services, one representative from the department of finance and administration, one representative from the office of the comptroller, and the chief procurement officer who will serve as chair.

\* \* \* \* \*

When requested by the chief procurement officer, the council may conduct studies, research, analyses, and make reports and recommendations with respect to subjects or matters within the authority and duties of the chief procurement officer. The chief procurement officer may appoint advisory groups to assist in specific areas, and with

1. With regard to whether it is constitutionally permissible for the Comptroller to act as a part of the Executive branch by serving on the proposed State Procurement Commission, this Office has previously addressed a closely analogous issue in a different context. In Op. Tenn. Att’y Gen.. 83-206 (Apr. 22, 1983) (copy attached), this Office was asked whether, in light of the doctrine of separation of powers, the Comptroller, the Treasurer and the Secretary of State may serve on the State Building Commission. This Office opined that the Comptroller’s service on the State Building Commission is permissible under the both the Tennessee Constitution and Tennessee law. After examining the duties and powers of the Comptroller we concluded that the office of the Comptroller is “substantially executive or administrative” in nature. The duties and responsibilities of the State Building Commission were also found to be “essentially executive.” Consequently, this Office was of the opinion that service by the Comptroller on the State Building Commission was not a violation of the separation of powers doctrine, as set forth in Article II, Sections 1 and 2 of the Tennessee Constitution.<sup>2</sup>

The powers and duties of the proposed Procurement Commission, like those of the State Building Commission, are to be predominantly executive and administrative in nature.<sup>3</sup>

---

respect to any other matters within the authority of the chief procurement officer.

In performing its responsibilities, the council's role will be strictly advisory, but this bill authorizes the council to perform certain functions, such as monitoring the performance of the chief procurement office in the implementation of legislative directives.

\* \* \* \* \*

OTHER PROVISIONS

This bill authorizes the comptroller of the treasury to examine and approve all procurements, contracts, grants and other documents that serve to incur financial obligations against state government. This authority to examine and approve will be developed in consultation with the chief procurement officer and set forth in procurement and contract policies, standards, rules, regulations, procedures and guidelines approved by the commission.

\* \* \* \* \*

This bill imposes restrictions on public officers and employees who are involved in making or administering a contract on behalf of a public agency deriving a direct benefit from the contract. This bill prohibits a public officer or employee from soliciting or receiving any gift, reward, or promise of reward in exchange for recommending, influencing, or attempting to influence the award of a contract by the public agency he or she serves. This bill details other conflict of interest provisions regarding state contracts and provisions governing kickbacks and other prohibited activities in regard to state contracts. Anyone violating specified prohibitions would be guilty of a Class 1 misdemeanor and a contract entered into in violation of this bill would be void. A contract that is void under these provisions may continue in effect until an alternative can be arranged in certain circumstances.

<sup>2</sup> The doctrine of separation of powers in the Tennessee Constitution appears in Article II, Sections 1 and 2, and states: [Section 1] “The powers of the Government shall be divided into three distinct departments: the Legislature, Executive and Judicial” and [Section 2] “No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.” Tenn. Const. Art. II, §§ 1 and 2.

<sup>3</sup> The duties of the State Building Commission include the approval and supervision of all projects involving improvements to real property, demolition of any structure on state real property, and prescribing

Accordingly, service by the Comptroller on the proposed Procurement Commission appears to be another example of service by an executive or administrative official on a state commission whose duties and functions are chiefly executive and administrative.

2. Turning to the issue of whether the Comptroller's service on the proposed State Procurement Commission creates an impermissible conflict of interest under either Tennessee law or the Tennessee Constitution, we answer both questions in the negative.

The Office of Comptroller is provided for in Article VII, Section 3 of the Tennessee Constitution, which states: "There shall be a Treasurer or Treasurers and a Comptroller of the Treasury appointed for the State, by the joint vote of both houses of the General Assembly, who shall hold their offices for two years." Tenn. Code Ann. § 4-3-301 creates the Department of Audit, and Tenn. Code Ann. § 4-3-302 makes the Comptroller of the Treasury the administrative head of the Department of Audit. The Comptroller and the Department of Audit are empowered by Tenn. Code Ann. § 4-3-304(1) to perform audits of "all accounts and other financial records of state government, and of any department, institution, office or agency thereof."

Tennessee's general conflict of interest law appears at Tenn. Code Ann. § 12-4-101. This statute, however, addresses conflicts of interest created when state officials have a "direct interest" (i.e., the official is the sole proprietor, is a partner, or is the person having the controlling interest) in any business that has a contract with a governmental entity. A conflict exists where an official has a direct interest in a contract he or she has a duty to vote for, let out, overlook, or to superintend.<sup>4</sup>

In the current scenario, however, Tenn. Code Ann. § 12-4-101 is inapplicable. Your question suggests that a conflict of interest exists due to the Comptroller's simultaneous service as the head of the State Audit Department and as a member of the proposed State Procurement Board, which will be audited by the Department of Audit. The duties of the Comptroller are primarily determined by legislative enactments. The General Assembly has determined that the Comptroller should act as head of the State Audit Department, as well as serving on boards such as the State Building Commission and, if SB3598/HB3353 is enacted in its current form, the State Procurement Commission.

Service by public officials on boards and commissions with overlapping interests and responsibilities is not unusual and is often unavoidable. For example, as discussed above, the Comptroller is head of the Department of Audit, which is responsible for auditing all "accounts

---

standards and promulgating rules and regulations for the construction of state buildings. *See* Tenn. Code Ann. §§ 4-15-102(a) and 4-15-104(a). The duties of the proposed State Procurement Commission will include reviewing and commenting upon proposed rules, regulations, policies, standards and procedures, and making recommendations for changes thereto, governing procurement of goods and services, construction, agency contract and grant management and control, training and professional development, and disposal of any and all goods and services by the state. *See* SB3598/HB3353, Section 1, creating Tenn. Code Ann. § 4-56-103.

<sup>4</sup> *See* Tenn. Code Ann. § 12-4-101(b) and (c) for conflicts of interest involving "indirect interests." *See also* Op. Tenn. Att'y Gen 10-02 (Jan. 14, 2010), Op. Tenn. Att'y Gen. 09-44 (Mar. 27, 2009) and Op. Tenn. Att'y Gen. 03-034 (Apr. 1, 2003) for further discussion of Tennessee conflict of interest law.

and financial records of state government, and of any department, institution, office or agency thereof.” The Department of Audit is therefore empowered to audit itself. Similarly, we have previously issued opinions discussing the legality of legislators and members of local legislative bodies voting upon their own salaries or serving on boards whose responsibilities might be interpreted as conflicting.<sup>5</sup> These matters represent fundamental policy choices that are determined by the General Assembly and are always subject to revision, amendment, or repeal. As we observed in Op. Tenn. Att’y Gen. 88-122:

Thus, the fundamental state law requires members of the General Assembly to set their own compensation. The “check” on the conflict of interest in this situation is found in the electorate. If the voters do not like the way the members of the General Assembly alter their compensation, they may voice their displeasure through the election process.

Accordingly, we are of the opinion that the Comptroller’s service on boards and commissions that are subject to review by the Office of the Comptroller presents no impermissible conflict of interest under Tennessee law or the Tennessee Constitution.

ROBERT E. COOPER, JR.  
Attorney General and Reporter

BARRY TURNER  
Deputy Attorney General

KEVIN STEILING  
Deputy Attorney General

Requested by:

The Honorable Karen Camper  
State Representative  
20 Legislative Plaza  
Nashville, TN 37243-0192

---

<sup>5</sup> See e.g. Op. Tenn. Att’y Gen. 09-172 (Oct. 29, 2009); Op. Tenn. Att’y Gen. 01-049 (Mar. 28, 2001); Op. Tenn. Att’y Gen. 88-122 (July 13, 1988).