STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

May 18, 2016

Opinion No. 16-19

Conflict of Interest - Contracts: "Sole Supplier" Exception and Penalty for Unlawful Interest

Question 1

Does the "sole supplier" exception in Tennessee Code Annotated § 12-4-101(b) apply only when a county official is the sole supplier located in the county or may the exception apply when a county official is the sole supplier doing business in the county?

Opinion 1

The "sole supplier" exception in Tennessee Code Annotated § 12-4-101(b) applies only when a county official is the sole supplier located in the county.

Question 2

If the answer to question 1 is that a supplier doing business in the county prohibits a business located in the county from being a sole supplier, can there ever be a sole supplier in a county?

Opinion 2

This question is pretermitted by the response to question 1.

Question 3

If a county official contracts with the county in violation of Tennessee Code Annotated § 12-4-101, does the county official have to refund all of the funds paid to him by the county for the goods or services rendered by the official or does the doctrine of quantum meruit apply?

Opinion 3

Under the general rule established by Tennessee courts, the doctrine of quantum meruit does not apply if an official contracts with the county in violation of Tennessee Code Annotated § 12-4-101.

ANALYSIS

Tennessee Code Annotated § 12-4-101 generally governs conflicts of interest with respect to county officials. A conflict arises for a county official under this statute when the official has a

pecuniary interest in a county contract,[1] and the official is "directly interested" or "indirectly interested" in the contract. *See* Tenn. Code Ann. § 12-4-101.

Subsection (a)(1) forbids an official from being "directly interested" in a contract that the official has a duty to award or supervise:

> 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.

Tenn. Code Ann. § 12-4-101(a)(1).

Subsection (b), though, permits the official to be "indirectly interested" in the 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."

1. You ask whether this "sole supplier" exception applies only when a county official is the sole supplier located in the county or whether the exception may apply when a county official is the sole supplier doing business in the county. For the reasons that follow, we are of the opinion that this statutory exception applies only when the county official is the sole supplier located in the county.

The primary rule of statutory construction is that the intention of the General Assembly must prevail. *See Gragg v. Gragg*, 12 S.W.3d 412, 415 (Tenn. 2000); *Moser v. Department of Transp.*, 982 S.W.2d 864, 867 (Tenn. Ct. App. 1998). When the language of a statute is unambiguous, legislative intent is to be ascertained from the plain and ordinary meaning of the statutory language. *Carson Creek Vacation Resorts, Inc. v. State*, 865 S.W.2d 1, 2 (Tenn. 1993).

[1] *See State ex rel. Kirkpatrick v. Tipton*, 670 S.W.2d 224 (1984); *Savage v. Mynatt*, 156 Tenn. 119, 299 S.W. 1043 (1927); *Crass v. Walls*, 36 Tenn. App. 546, 259 S.W.2d 670 (1953); *State ex rel. Abernathy v. Robertson*, 5 Tenn. Civ. App. 438 (1914).

The Tennessee Supreme Court has succinctly stated the role of courts in interpretation of legislation as follows:

> When ... a statute is without contradiction or ambiguity, there is no need to force its interpretation or construction, and courts are not at liberty to depart from the words of the statute. *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 16 (Tenn. 1997). Moreover, if "the language contained within the four corners of a statute is plain, clear, and unambiguous, the duty of the courts is simple and obvious, 'to say sic lex scripta, and obey it.'" *Id*. (quoting *Miller v. Childress*, 21 Tenn. (2 Hum.) 320, 321–22 (1841)). Therefore, "[i]f the words of a statute plainly mean one thing they cannot be given another meaning by judicial construction." *Henry v. White*, 194 Tenn. 192, 198, 250 S.W.2d 70, 72 (1952).
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> Finally, it is not for the courts to alter or amend a statute. *See Town of Mount Carmel v. City of Kingsport*, 217 Tenn. 298, 306, 397 S.W.2d 379, 382 (1965); *see also Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 453 (Tenn. 1995); *Manahan v. State*, 188 Tenn. 394, 397, 219 S.W.2d 900, 901 (1949). Moreover, a court must not question the "reasonableness of [a] statute or substitut[e] [its] own policy judgments for those of the legislature." *BellSouth Telecomms., Inc. v. Greer*, 972 S.W.2d 663, 673 (Tenn. Ct. App. 1997). Instead, courts must "presume that the legislature says in a statute what it means and means in a statute what it says there." *Id*. Accordingly, courts must construe a statute as it is written. *See Jackson v. Jackson*, 186 Tenn. 337, 342, 210 S.W.2d 332, 334 (1948).

Gleaves v. Checker Cab Transit Corp., Inc., 15 S.W.3d 799, 803 (Tenn. 2000).

The statutory exception applies "if the officer is the sole supplier of goods or services *in* a municipality or county." Tenn. Code Ann. § 12-4-101(b) (emphasis added). The General Assembly used the word "in," not the phrase "doing business in." As stated above, it is not the function of courts to alter or amend that language or to make it mean something other than what it says. Courts assume that the General Assembly selected its words deliberately. *Lee v. Franklin Special Sch. Dist. Bd. Of Educ*., 237 S.W.3d 322, 332 (Tenn. Ct. App. 2007) (citation omitted). Had the General Assembly intended the "sole supplier" exception to include sole suppliers merely doing business in a city or county, it could have done so by explicit language.

Consequently, we are of the opinion that the "sole supplier" exception in Tennessee Code Annotated § 12-4-101(b) requires a county official to be the sole supplier located in the county. The word "in" connotes a spatial concept: "'In' means 'inside of,' 'within the bounds or limits of.'" *Anderson v. Spencer*, 162 Colo. 328, 334, 426 P.2d 970, 973 (1967) (citations omitted). Accordingly, when the word "in" is employed in a statute with respect to a local governmental entity, such as a county, inclusive space is intended. *Counts v. Medley*, 163 Mo. App. 546, 146 S.W. 465, 466 (1912). *Cf. Fayette Cnty. Bd. of Educ. v. Tompkins*, 212 Ky. 751, 280 S.W. 114, 116 (1926) (court found the word "at" as used in a statute with reference to county seat town did not have the same significance as the words "in" or "within" so as to require establishment of school within the corporate limits of the county seat town).

2. In light of our response to the first question, the second question is pretermitted.

3. Lastly you ask whether a county official who contracts with the county in violation of Tennessee Code Annotated § 12-4-101 must refund all of the funds paid to him by the county for the goods or services rendered by the official or whether the doctrine of quantum meruit applies.

Under Tennessee Code Annotated § 12-4-102, a county official who enters into a contract in violation of Tennessee Code Annotated § 12-4-101 "shall forfeit all pay and compensation" associated with the contract, be dismissed from office, and be barred from holding a similar position for ten years. With respect to the provision that the official "shall forfeit all pay and compensation," the Tennessee Supreme Court has stated:

> It was the evident intent of the lawmakers to meet a serious menace to public funds by drastic and far-reaching provisions. The language "shall forfeit all pay and compensation therefor," would appear to embrace, not only a refusal of payment but the right to compel repayment when made in the teeth of the statute. The word "forfeit" is inclusive of both remedies.

Savage, 156 Tenn. at 123, 299 S.W. at 1044.

Accordingly, an official who has violated Tennessee Code Annotated § 12-4-101 may not recover payment under the contract and is liable to pay back any compensation the official received under the contract. *See Savage*, 156 Tenn. at 123-26, 299 S.W. at 1044-45 (city commissioner ordered to repay funds received from city for services he performed for city under contract); *Madison Cnty. v. Alexander*, 116 Tenn. 685, 687-89, 94 S.W. 604, 604-05 (1906) (official was refused recovery for merchandise sold to county in violation of the statute); *Hope v. Hamilton County*, 101 Tenn. 325, 327-29, 47 S.W. 487, 487-88 (1898) (court held member of the County Court could not recover for services performed for the county pursuant to contract); *Crass*, 36 Tenn. App. at 551-53, 259 S.W.2d at 673-74 (town recovered one-half of money paid to partnership under contract for street repair services and garbage pickup because mayor was one of the two partners); *Hammon v. Miller*, 13 Tenn. App. 458, 460-62 (1931) (town recovered all compensation paid to mayor under a contract to rent mayor's company's concrete mixer and truck, plus the wages paid to mayor to supervise project).

Moreover, an official's good faith is no defense to application of the penalty provisions of Tennessee Code Annotated § 12-4-102. *See State v. Perkinson*, 159 Tenn. 442, 445, 19 S.W.2d 254, 255 (1929); *Madison Cnty.*, 116 Tenn. at 688, 94 S.W. at 604-05; *Crass*, 36 Tenn. App. at 551, 259 S.W.2d at 673. Similarly, the fact that valuable services may have been rendered to the governmental unit in question is irrelevant. *Madison Cnty.*, 116 Tenn. at 688, 94 S.W. at 604-05; *Hope*, 101 Tenn. at 327-28, 47 S.W. at 488-89. In so finding, the Tennessee Supreme Court has reasoned:

> The underlying principle is that no man shall be allowed to make a contract with the county, whose duty it is to pay for such a contract. In other words, he cannot make a contract to pay himself out of the public treasury for any purpose. That such a rule may operate harshly is no argument against it. It is based on a wise purpose and principle, that is, to prevent public officials from using their public

> functions and duties to subserve their private interests. It 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.

Madison Cnty., 116 Tenn. at 688, 94 S.W. at 604. Therefore, an official who violates Tennessee Code Annotated § 12-4-101 may not be paid for goods or services on a quantum meruit basis. *See Hope*, 101 Tenn. at 332, 47 S.W. at 488; *Crass*, 36 Tenn. App. at 551, 259 S.W.2d at 673.[2]

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[2] In *Crass*, the court stated that there could be an emergency situation justifying an exception to the general rule that the doctrine of quantum meruit does not apply:

> We concede that at least in the absence of statute an emergency may exist justifying an exception to the general rule, as where there is an immediate necessity for the contract and it is shown that there was no one other than the city officer with whom it could have been made. This exception, however, does not extend to ordinary emergencies. It is not applied where the contracting officer fails to sustain the burden of proving the absolute necessity for making the contract; that it could not have been made with anyone else and that the necessity was not brought about by his own fault or neglect.

Crass, 36 Tenn. App. at 554, 259 S.W.2d at 674 (citations omitted). Application of this exception, of course, would depend on the particular facts and circumstances of the contractual transaction.