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OPINION  
OF  
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Opinion No. 92-06

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TO: Kathleen R. Marr  
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## QUESTIONS:

1. Do the procedures employed by the State Auditor for contracting with independent public auditors comply with the Procurement Code, NMSA 1978, §§ 13-1-23 to -199 (Repl. Pamp. 1988 & Cum. Supp. 1991)?

2. Does the State Auditor have authority to contract with independent auditors to perform the annual audits of state agencies and local governments?

## CONCLUSIONS:

1. No. The procedures the State Auditor employs to contract with independent auditors violate the requirements of the Procurement Code.

2. No. The Audit Act, NMSA 1978, §§ 12-6-1 to -14 (Repl. Pamp. 1988), does not authorize the State Auditor to contract with independent auditors to perform the annual audits of state agencies and local governments.

FACTS AND BACKGROUND:

Under the Audit Act, the financial affairs of each agency must be "examined and audited each year by the State Auditor, personnel of his office designated by him or by independent auditors approved by him." NMSA 1978, § 12-6-3. Pursuant to § 12-6-14 of the Act and regulations promulgated thereunder,<sup>1</sup> independent auditors are selected by the agency to be audited. The contracts between the agency and the independent auditor it selects then must be approved by the State Auditor. Id. Pursuant to this statutory scheme, approximately 450 state and local government entities<sup>2</sup> are audited each year, including some 118 state agencies. Virtually all of these audits are performed by independent auditors contracting directly with the agency to be audited. These annual audits are vital to the functioning of government. They serve as management tools, may uncover wrongdoing, and are a condition of continued funding in programs receiving federal monies. They also influence the state's bond rating, and help assure that the finances of state and local governments are conducted in an orderly and business-like manner.

The questions this opinion addresses arose when the State Auditor informed certain agencies that his office would conduct their annual audit "assisted by" a specifically-identified independent auditor designated by him. At the same time, he

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<sup>1</sup>Current regulations governing audit contracts are contained in SA Rule 92-1, § I. This opinion does not address the legality of the Rule. However, some of its provisions may raise questions. For example, Section I(3)(D) requires an agency contracting for independent audit services to submit a listing of the amounts of each proposal or quotation to the State Auditor with the agency's three recommendations, from which the State Auditor will choose one. This procedure may be inconsistent with the Procurement Code's requirement that contract awards be made to the offeror whose proposal is most advantageous to the agency based on evaluation factors set forth in the RFP. NMSA 1978, § 13-1-117. In addition, the procedure may fly in the face of the Audit Act's provisions leaving the selection of an independent auditor to the agency's choice, unless the State Auditor's decision to reject an agency's choice for auditing services is guided by rational standards and criteria. See Oil Transport Co. v. New Mexico State Corp. Comm'n, 110 N.M. 568, 798 P.2d 169 (1990) (agency may not act arbitrarily or capriciously or abuse its discretion).

<sup>2</sup>These entities are all considered "agencies" under the Audit Act. NMSA 1978, § 12-6-2 (Repl. Pamp. 1988).

submitted three-party contracts to the Department of Finance and Administration ("DFA") for approval. The parties to these contracts were the State Auditor, the agency to be audited and the designated independent auditor. These contracts required that the agency pay the bulk of the auditing fee to the independent auditor "assisting" the State Auditor and a portion thereof (usually between one and five percent of the total) to the State Auditor.<sup>3</sup> These contracts range in amount from \$6,000 to \$89,900.

Some agencies balked at the State Auditor's effort to unilaterally dictate their selection of their independent auditor, expressing concern about the cost and qualifications of the State Auditor's selections.<sup>4</sup> Others objected to the State Auditor increasing their audit costs by adding his "supervision" charge to the contract amount.<sup>5</sup> Questions arose about what criteria the auditor had used in selecting particular independent auditors for certain agencies, and about whether valuable and important state contracts were being awarded in compliance with the Procurement Code and the Audit Act. When the State Auditor and DFA were unable to reach agreement on the propriety of the State Auditor's practices, DFA requested this opinion.

Based upon interviews with DFA personnel and representatives of the State Auditor's office, it appears undisputed that the independent auditors designated to "assist" the State Auditor's office and thus to receive state contracts were selected from the so-called "pool" of auditors. The current "pool" consists of 31 accounting firms or individual certified public accountants which responded to a Request for Proposals ("RFP") issued by the State Auditor in February 1991 and another 20 such firms or individuals who responded to a virtually identical RFP issued in February 1992.

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<sup>3</sup>For example, for the 80th fiscal year, the State Auditor's share amounted to \$2,000 of a \$89,000 audit contracted for the Energy & Minerals Department, \$1,000 of a \$21,000 contract for the State Land Office, \$1,274 of a \$46,907 contract for the Office of Cultural Affairs, \$1,160 of a \$23,000 contract for the Game and Fish Department, and \$2,000 of a \$99,800 contract for the Corrections Department.

<sup>4</sup>See, e.g., letter from Laura Threet, Secretary, General Services Department to Tom Udall (May 6, 1992).

<sup>5</sup>See, e.g., letter from Tony J. Jaramillo, Socorro County Manager, to Tom Udall (June 15, 1992). The State Auditor refused the county's request to do an RFP, required the county to contract with the same auditor the county had used the prior year and added his \$2500 "supervision" fee on top of the \$9500 audit cost.

The RFPs sought proposals from "Independent Public Accountants (IPAs)"<sup>6</sup> who were willing to work on a composite rate basis "to assist the State Auditor in conducting audits of selected state and local governmental entities." The RFPs state that the State Auditor's office will contract with the IPAs "to provide needed assistance in conducting audits of each agency," that the contracts will be for a four-year period (or three years in the case of the 1992 RFP), and that each fiscal year an addendum will be added to the contract "stating the name of the agency that will be audited by the State Auditor and the maximum hours of assistance required from the IPA ...."

The RFPs set forth six evaluation factors for the award of the contract: state government experience, 50%; computer-based information systems knowledge and expertise, 10%; qualifications of individuals who will conduct the audit, 10%; knowledge of pension and retirement funds and insurance reserve accounts, 10%; cost, 10%; and ability to work within time frame and due dates, 10%.

In an interview,<sup>7</sup> the State Auditor acknowledged that any properly licensed certified public accountant who responded to the 1991 or 1992 RFP and who was willing to work for a composite rate was made a part of the pool. He acknowledged that, in effect, his RFP process was not followed: no four- or three-year contracts for pool membership were executed between the State Auditor and the pool auditors, no contract addenda were executed when a pool auditor was selected for a specific agency job, and the RFP evaluation factors were not utilized in determining who would be permitted in the pool.

In terms of his selection of specific auditors to receive contracts for assisting his office on specific audits, he admitted that no "formal" evaluation of the pool auditors occurred. Rather, the State Auditor's office utilizes its "discretion" and personal knowledge of the pool auditors to determine which of the pool auditors will receive a state contract.

In his letters to agencies informing them who their contract auditor would be, the State Auditor advised them that they would be required to pay for the audit services at the rate of \$40 per

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<sup>6</sup>Generally, in this opinion we use the term "independent auditors" in place of the State Auditor's term "IPAs."

<sup>7</sup>Interview on June 22, 1992, with State Auditor Robert Vigil, Deputy State Auditor Ray Tellez and attorney Fred Martinez.

hour. In reality, the contract amount is based upon the agency's budget for its annual audit.<sup>8</sup>

The existence of an auditor "pool" predates the current State Auditor. The practice reportedly began in about 1985. In general, under prior State Auditors the pool was used primarily as a list of auditors pre-approved by the State Auditor. Agencies designated by the State Auditor for audit by an independent auditor (rather than by the State Auditor or personnel of his office) were given the option of issuing their own RFPs or selecting an auditor from the pool. Most agencies chose to issue their own RFPs. State agencies which chose to use the pool generally selected three to five independent auditors from the pool for closer review. The agency and the prospective auditors would meet and the agency, in consultation with the State Auditor, would choose the auditor it determined to be most appropriate. The agency and the independent auditor would negotiate the required time for the audit and the maximum cost to the agency. The State Auditor would contract directly with the pool auditor, make the required contract payments and bill the agency being audited for repayment. Thus, the practice of the current State Auditor in directing agencies to contract with him and the pool auditor designated by him to "assist" him,<sup>9</sup> differs substantially from the practices of his predecessors.

Two other factual or background matters are relevant to this opinion. First, under the Audit Act the cost of all annual audits, regardless of whether they are performed by the State Auditor's office or an independent auditor, are paid by the audited agency.

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<sup>8</sup>According to the State Auditor, the actual cost of an audit is based on the amount an agency has budgeted for that purpose. Thus, the effective hourly rate may be more or less than \$40 per hour depending on how long the audit takes relative to the maximum audit cost budgeted or agreed to between the parties. For example, if an agency has \$4,000 available for an audit and the audit takes 50 hours, the auditor's effective rate will be \$80 per hour. If the audit takes 200 hours, the auditor's effective rate will be \$20 per hour. See, e.g., letter from Ray Tellez, CPA to Laura E. Threet, Secretary, General Services Department (Mar. 16, 1992) (stating that the audit fee would be based on actual hours and billed at \$40 per hour, with a maximum amount to be determined jointly by the agency, contract auditor and the State Auditor's office).

<sup>9</sup>Until now, this office has not officially reviewed or expressed an opinion concerning the propriety of the auditor pool created by the State Auditor's office.

NMSA 1978, § 12-6-4. If the audit is performed by the State Auditor's office, the fees and costs paid by the agency audited are deposited into a non-reverting "audit fund," which is used to pay the salaries and expenses of the State Auditor's office. *Id.* § 12-6-3. The State Auditor said that he tries to provide one-third of his operating budget by billing agencies for audit fees. Second, the State Auditor's office is authorized 25 full-time and two term employees. 1992 N.M. Laws, ch. 94, § 4(C), p. 27-28. He acknowledges that this is an insufficient number of personnel to conduct the 450 annual audits or even the 118 state agency audits.<sup>10</sup> The office, through its own personnel and without the assistance of independent auditors, does perform the audits for several major agencies and institutions and generates substantial fees from such audits.<sup>11</sup>

#### ANALYSIS:

##### 1. PROCUREMENT CODE

State law and the State Auditor's own regulations require that every expenditure by state agencies and local public bodies for the procurement of services be conducted pursuant to the Procurement Code. NMSA 1978, § 13-1-30, SA Rule 92-1, § I, ¶ 3(A). Yet the procedures employed by the State Auditor in creating the audit pool and then directing agencies to contract with auditors he designates from the pool bear virtually no relationship to the requirements of the Procurement Code.

First, in reference to the creation of the audit pool itself, the Procurement Code requires that the procurement of professional services be done by competitive sealed proposals. NMSA 1978, § 13-1-111. The RFP must include all contractual terms and conditions applicable to the procurement and must state the relative weight

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<sup>10</sup>For example, in the past legislative session, the State Auditor was appropriated \$971,200 for salaries for 25 full time employees. 1992 N.M. Laws, ch. 94, § 4(C), p. 27-28. According to the State Auditor, approximately 15 of these are certified public accountants. Appropriations from previous years similarly limit the number of employees the State Auditor has available to perform agency audits.

<sup>11</sup>For example, the State Auditor has stated that this year his office is conducting audits for the University of New Mexico and the State Highway and Transportation Department, and that the cost of the latter audit will be \$100,000.

to be given to the factors used to evaluate proposals. Id. §§ 13-1-112, 13-1-114. Nothing in the Procurement Code authorizes an agency to issue an RFP, the terms and conditions of which, as in this case, bear no relationship to the contractual relationship actually contemplated and actually created.

More significantly, the Procurement Code presupposes that the result of the procurement process will be the award of a contract to a competitively selected bidder "whose proposal is most advantageous to the state agency or a local public body, taking into consideration the evaluation factors set forth in the request for proposals." Id. § 13-1-117. The only provisions of the Procurement Code which even arguably permit the creation of a "pool" are Sections 13-1-134 and 13-1-153. The first section provides that offerors may be "prequalified," but specifically provides that potential offerors are not limited to the prequalification list. Section 13-1-153 permits multiple source awards,<sup>12</sup> but the winning offers must still comply with Section 13-1-117.

In contrast with these statutory requirements, the State Auditor's pool is equivalent to a yellow-page listing of certified public accountants who would like to be awarded state audit contracts. Thus, when the State Auditor tells an agency that his office will conduct the agency's audit with his designated pool auditor at a specified hourly rate, he has effectively circumvented the entire Procurement Code process. The State Auditor's practice is completely antithetical to the purposes of the Procurement Code "to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of equality and integrity."<sup>13</sup> Id. § 13-1-29(C).

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<sup>12</sup>A "multiple source award" is "an award of an indefinite quantity contract for one or more similar services ... to more than one bidder or offeror." NMSA 1978, § 13-1-69. Such awards are permitted only when "necessary for adequate delivery or service." Id. § 13-1-153. In addition to the violations mentioned in the text, the State Auditor's procedure for obtaining pool auditors also violates Section 13-1-153 because, among other things, there is no showing that the number of auditors in the pool are necessary to adequately deliver auditing services to the State Auditor's office.

<sup>13</sup>In fact, a number of the "pool" auditors have complained that they have been solicited by the State Auditor for political contributions.

Moreover, except in limited circumstances not present here,<sup>14</sup> the Procurement Code does not permit one agency to procure services for another. The Procurement Code requires the agency procuring and paying for professional services to issue an RFP and award a contract to the responsible offeror whose proposal is most advantageous to the agency, taking into consideration the evaluation factors set forth in the RFP. Id. § 13-1-117. See also SA Rule 92-1. Pursuant to Section 12-6-14 of the Audit Act, the "procuring" agency is the agency to be audited. That provision provides that an agency designated for audit by an independent auditor "shall enter into a contract with an independent auditor of its choice in accordance with procedures prescribed by regulations of the state auditor." The State Auditor's role in this procedure is to approve the contract between the agency and the independent auditor. NMSA 1978, § 12-6-14. It is a violation of the Procurement Code for the State Auditor to direct an agency to enter into a contract with an independent auditor selected by him and paid for by the agency.

## 2. Audit Act.

The second issue -- whether or not the State Auditor has the authority to contract with independent auditors to assist him in doing agency audits -- presents a more complex legal question. The State Auditor's authority to conduct state agency and local government audits is governed by the Audit Act.

The Audit Act defines three categories of persons who can conduct annual audits: (1) the state auditor, (2) personnel of his office designated by him, or (3) independent auditors approved by him. NMSA 1978, § 12-6-3(A). Regarding audits performed by independent auditors, the statute further provides, in pertinent part:

The state auditor shall notify each agency designated for audit by an independent auditor, and the agency shall

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<sup>14</sup>The Procurement Code authorizes cooperative procurement by state agencies and local public bodies which have entered into joint powers agreements. NMSA 1978, §§ 13-1-135 to -136. State agencies also may use services belonging to another agency in accordance with an agreement approved by the State Board of Finance. Id. § 13-1-137. To our knowledge, the State Auditor has not entered into any joint powers agreements for cooperative procurement or an agreement for audit services approved by the State Board of Finance.

enter into a contract with an independent auditor of its choice in accordance with procedures prescribed by regulations of the state auditor. Each contract for auditing entered into between an agency and an independent auditor shall be approved in writing by the state auditor. No payment of public funds may be made to an independent auditor unless a contract is entered into and approved as provided in this section.

... The state auditor or personnel of his office designated by him shall examine all reports of audits of agencies made pursuant to contract.

Id. § 12-6-14.

Reading these provisions together, as required by the rules of statutory construction,<sup>15</sup> they do not authorize the State Auditor to contract with or choose independent public accountants to conduct agency audits.<sup>16</sup> The State Auditor may designate an agency for audit by an independent auditor, but the designated agency is then authorized to contract with an independent auditor "of its choice." The State Auditor may promulgate regulations governing the contract process and must give his final approval to a contract, but the affected agency, not the State Auditor, is charged with the initial selection of an independent auditor. A contrary interpretation permitting the State Auditor to impose his choice of independent auditors on agencies would make § 12-6-14 meaningless. It would make it possible for the State Auditor to do all 450 annual audits with the "assistance" of contract auditors

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<sup>15</sup>In general, a statute is read in its entirety, and each part is construed in connection with every other part to produce a harmonious whole. Lopez v. Employment Security Div., 111 N.M. 104, 105, 802 P.2d 9 (1990); General Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 76, 703 P.2d 169 (1985).

<sup>16</sup>The State Auditor's practice of contracting with independent auditors apparently was condoned in an opinion issued during a previous administration of the Attorney General's office. See AG Op. No. 87-54 (1987). According to that opinion, if the State Auditor revoked his designation of an agency to choose an independent auditor, he could perform the audit himself, through personnel of his office, or with the assistance of independent auditors under contract with his office. The reasons for this conclusion are not given in the opinion, and to the extent the opinion supports a result different from that reached here, we hereby overrule the previous opinion.

selected by him from his pool, but paid for by the agencies. This is contrary to the statutory intent.

The State Auditor also cannot contract with independent auditors on the basis that they constitute "personnel of his office designated by him." Unless the legislature clearly intends otherwise, the words in a statute are given their ordinary meaning. State ex rel. Kline v. Blackhurst, 106 N.M. 732, 735, 749 P.2d 1111 (1988). The New Mexico Supreme Court applied this rule to a statute using the phrase "personnel matters," and defined the word "personnel" as referring to "a body of employees, and not to 'an employee.'" State v. Hernandez, 89 N.M. 698, 699, 556 P.2d 1174 (1976). See also Webster's Third New International Dictionary 1687 (1986) (defining "personnel" as "a body of persons employed in some service (as the army or navy, a factory, office, airplane)"). This is consistent with the legislature's general practice of using the term "personnel" in its enactments synonymously with the term "employees." See, e.g., NMSA 1978, § 10-9-3 (Repl. Pamp. 1990) (Personnel Act provisions defining an "employee" as a person in a position in the "state personnel service"); NMSA 1978, § 33-1A-1 (Repl. Pamp. 1990) (governing leases of state real property to officers of the corrections department, and "such other [corrections] department personnel or other state employees"); NMSA 1978, § 59A-11-6 (Repl. Pamp. 1988) (giving the superintendent of insurance the option of conducting insurance license examinations through department "personnel" or by contract with "an established independent agency"). When used to refer to employees, the word "personnel" does not include "an independent contractor such as an accountant, lawyer, or architect." Hinds County Bd. of Supervisors v. Common Cause of Mississippi, 551 So.2d 107 (Miss. 1989). In general, case law distinguishes between employees and independent contractors. See, e.g., Triple B Corp. v. Brown & Root, Inc., 106 N.M. 99, 102, 739 P.2d 968 (1987); Roybal v. Bates Lumber Co., 76 N.M. 127, 129, 412 P.2d 555 (1966).

In the context of the Audit Act, we believe that the phrase "personnel of his office" is used in its ordinary sense to refer to employees of the State Auditor. Nothing in the Audit Act suggests that the legislature intended to use the term "personnel" in other than its accepted meaning. Indeed, the statute itself clearly distinguishes between "personnel" and "independent auditors" performing audits under contract with agencies. See NMSA 1978, §§ 12-6-3(A), 12-6-14(D). When construing a statute, it is presumed that the legislature used no surplus words and attributed to each word "some meaning not within the plain signification of other language found in the act." Cromer v. J.W. Jones Construction Co., 79 N.M. 179, 184, 441 P.2d 219 (Ct. App. 1968). It would be impossible to interpret the word "personnel" in the Audit Act to mean the same thing as "independent auditor" without

impermissibly rendering one of the two redundant. Cf. State ex rel. Bird v. Apodaca, 91 N.M. 279, 284, 573 P.2d 213 (1977) (a statute should be construed to give effect to all of its provisions). Moreover, such an interpretation would reduce to an absurdity Section 12-6-14(B) of the Audit Act which requires "the State Auditor or personnel of his office designated by him ... [to] examine audit reports made pursuant to contract." State v. Herrera, 86 N.M. 224, 226, 522 P.2d 76 (1974) (statute will not be construed to achieve an absurd result).

We acknowledge that "a general grant of power or statutory direction to perform official duties, unaccompanied by definite directions as to how the power is to be exercised, implies the right and duty on the part of individual officials to employ the means and methods necessary to comply with statutory requirements." Smith v. Greene, 545 P.2d 550, 556 (Wash. 1976). See also Wimberly v. New Mexico State Police Bd., 83 N.M. 757, 758, 497 P.2d 968 (1972) (agency's authority includes all powers that may fairly be implied from its express powers). If, therefore, the legislature gave the State Auditor merely the general authority to conduct audits, we might agree that he could contract with independent auditors as a means of carrying out his statutory functions. Here, however, the legislature has prescribed the means for selecting eligible persons to conduct audits, effectively foreclosing any other method. See Maxwell Land Grant Co. v. Jones, 28 N.M. 427, 431, 213 P. 1043 (1923) (agency action confined to methods and procedures prescribed by legislature).<sup>17</sup>

Finally, it is noteworthy that the State Auditor himself has not interpreted the Audit Act to permit the State Auditor to contract with independent auditors to conduct agency audits. The State Auditor's rules governing "the audits of agencies of the State of New Mexico" specify that audits will be conducted either by the State Auditor's "own staff" or by independent auditors selected by and contracting with the agencies to be audited. SA

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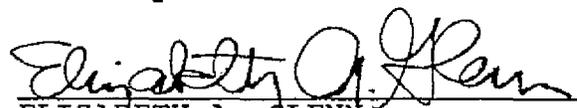
<sup>17</sup>The State Auditor's status as a constitutional officer does not give him license to ignore the procedures prescribed under the Audit Act. Although the legislature may not effectively eliminate the office under the guise of regulation, Torres v. Grant, 63 N.M. 106, 109, 314 P.2d 712 (1957), or interfere with the basic purpose for the existence of the office, Thompson v. Legislative Audit Comm., 79 N.M. 693, 448 P.2d 799 (1968), the legislature is authorized to enact laws prescribing the duties of the State Auditor and he is bound by them. Torres v. Grant, 63 N.M. at 109-110. See also State v. Davidson, 33 N.M. 664, 669, 275 P. 373 (1929) (powers and duties of the Attorney General are defined and limited by statute).

Rule 92-1 (March 1992). Under the State Auditor's rule, agencies are required to follow the Procurement Code in selecting three final candidates, and the State Auditor finally approves one of the three. Id. § I, ¶ 3. Except under limited circumstances, the rule does not authorize the State Auditor to designate directly independent auditors to conduct agency audits. Id. § I, ¶ 3(F). Thus, the State Auditor's practice of selecting independent auditors to conduct agency audits is precluded not only by statute, but also by his own rules. See Miller v. City of Albuquerque, 89 N.M. 503, 507, 554 P.2d 665 (1976) (a municipal legislative body is bound to follow the regulations it has adopted); Jaramillo v. Fisher Controls Co., Inc., 102 N.M. 614, 619, 698 P.2d 887 (Ct. App.), cert. denied, 102 N.M. 613, 698 P.2d 886 (1985) (legislatively authorized rules and regulations have the force of law); Saenz v. New Mexico Dep't of Human Serv., 98 N.M. 805, 808, 653 P.2d 181 (Ct. App. 1982) (citing "long-standing principle that administrative agencies are bound by their own regulations").

The State Auditor's claim that these independent auditors are merely assisting his office is belied by the very limited role being played in these audits by the State Auditor's office. The fee split proposed in the contracts clearly indicates that substantially all the work is to be performed by the independent auditor.<sup>18</sup>

Accordingly, the State Auditor's current practice of assigning contract auditors "to assist" him in conducting agency audits illegally circumvents the legislature's decision to place the selection of such contract auditors and the contract negotiations with the agencies themselves. We do not believe that this conclusion will detract in any way from the independence of the state's audits. As the legislature recognized, the independence and integrity of the independent auditors is preserved by the State Auditor's approval process, by the ethical and license requirements for certified public accountants and by the contract requirements.

  
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<sup>18</sup>See supra note 3 and accompanying text.