1962 O. A. G.

OFFICIAL OPINION NO. 44

July 3, 1962

Hon. Paul E. Hatfield
State Senator
706 Old National Bank Building
Evansville, Indiana

Dear Senator Hatfield:

This is in response to your request for my Official Opinion upon the following question:

"In the event an individual serving as a member of an Independent Administrative Board of a Municipality enters into a contract, as an individual in connection with his business, with an Independent Administrative Board of the City, other than that upon which he serves, what is the effect of Burns Section 48-1247 and Burns Section 10-3713 upon the validity of the contract between such individual and such Independent Administrative Board, which Board is acting on behalf of the Municipality?

"In the event the validity of the contract is affected by the fact that such individual is serving on another Municipal Administrative Board, there is a second portion of this Inquiry, to-wit, will the validity of the contract be affected notwithstanding the character of the Contracting Board or the character of the Board of which the individual is a member; that is to say, will the result be the same if the Contracting Board, or the Board of which he is a member, is a Board of Public Works, a Board of Public Safety, a Library Board, a Municipal Stadium Board, a Park Board or a City-County Plan Commission, or any other Municipal Board?"

The question of participation by public officials in contracts with the municipality in which they serve is the subject of a number of Official Opinions of this office. The Official Opinions of the Attorney General dealing most closely with the questions you have asked are as follows:

1943 O. A. G., page 340;
1959 O. A. G., page 85, No. 18;
It was pointed out in the above Official Opinions that there are two statutes which apply generally to the question of public officials or employees contracting with a unit of government. They are quoted as follows:

Acts of 1905, Ch. 169, Sec. 517, as found in Burns' (1956 Repl.), Section 10-3713:

"Any state officer, county commissioner, township or town trustee, mayor or a common councilman of any city, school trustee of any town or city, or their appointees or agents or any person holding any appointive power, or any person holding a lucrative office under the constitution or laws of this state, who shall, during the time he may occupy such office or hold such appointing power and discharge the duties thereof, be interested, directly or indirectly, in any contract for the construction of any state house, court house, school house, bridge, public building or work of any kind, erected or built for the use of the state, or any county, township, town or city in the state, in which he exercises any official jurisdiction, or who shall bargain for or receive any percentage, drawback, premium, or profit or money whatever, on any contract, or for the letting of any contract, or making any appointment wherein the state, or any county, township, town or city is concerned, on conviction, shall be fined not less than three hundred dollars [$300] nor more than five thousand dollars [$5,000], and be imprisoned in the state prison not less than two [2] years nor more than fourteen [14] years, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period."

Acts of 1905, Ch. 129, Sec. 46, as amended, as found in Burns' (1950 Repl.), Section 48-1247:

"No member of the common council or board of trustees, nor any officer, clerk, or deputy of such officer, or other employee of any city or incorporated town of this state, shall, either directly or indirectly, be a party to, or in any manner interested in, any contract or agreement, either with such city or incorporated town, or
with any officer, board, clerk, deputy or employee of such city or incorporated town, for any matter, cause or thing by which any liability or indebtedness is in any way or manner created or passed upon, authorized or approved by such council or board of trustees or by any member thereof, or by any officer, board, clerk, deputy or employee of such city or incorporated town. Any contract in contravention of the foregoing provisions shall be absolutely void * * *"

Both Burns' 10-3713, supra, and Burns' 48-1247, supra, contain criminal penalties and are subject to the rule that the acts prohibited must fall within the letter as well as with the spirit of the law.

State ex rel. Ayer v. Ewing, Judge, et al. (1952), 231 Ind. 1, 106 N. E. (2d) 441;

Colvin v. State of Indiana (1932), 203 Ind. 417, 180 N. E. 479;


In civil actions involving the expenditure of public funds our courts have referred to these statutes as expressive of public policy, and have refused to enforce contracts which contravene their provisions. It is settled law in this state by numerous decisions of the Supreme Court of Indiana, that contracts made in violation of criminal statutes are void ab initio.

While your question does not require me to determine if a "direct or indirect interest" is legally created by the contract you contemplate, I nonetheless call to your attention my 1959 O. A. G., page 85, No. 18, in which the words "direct or indirect interest" as used in the above-quoted statutes were examined at length, and conclusions reached concerning their applicability.

In the case of In the Matter of State Board of Accounts, etc. et al. v. Holovachka etc. (1957), 236 Ind. 565, 142 N. E. (2d) 593, it was contended the next to last sentence of Burns' 48-1247, supra, which prohibits city officers from purchasing claims against the city for less than the amount specified
therein, necessarily implies an officer of the city could purchase such contracts at face value. The Supreme Court in rejecting this contention stated at page 584:

"* * * However, this provision is merely a further limitation regarding financial transactions of city officials with the city. It cannot be construed as authorizing or legalizing the acts of appellee, as outlined above, in view of the specific statutory prohibitions against a public officer receiving a profit, percentage, or any money whatsoever, or being interested directly or indirectly in any public contract executed or passed upon under his jurisdiction or authority. * * *"

It is noteworthy that in the Holovachka case, supra, the Supreme Court of Indiana cited with approval the reasoning of the court in Cheney et al. v. Unroe (1906), 166 Ind. 550, 77 N. E. 1041, wherein the court stated at page 553:

"* * * 'It is a well-established and salutary doctrine,' says a distinguished author, 'that he who is entrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself. This rule does not depend on reasoning technical in its character, and is not local in its application. It is based on principles of reason, of morality, and of public policy. It has its foundation in the very constitution of our nature, for it has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well-regulated system of jurisprudence prevails.' 1 Dillon, Mun. Corp. (4th ed.), §444. The principle is stated in 1 Clark & Skyles, Agency, §39 (e), as follows: 'Any contract of agency by a public officer by which he binds himself to violate his duty to the public, or which places him in a position which is inconsistent with his duty to the public and has a tendency to induce him to violate such duty, is clearly illegal and void.' Greenhood, Public Policy, p. 337, states the doctrine thus: 'Any contract by one acting in a public capacity, which restricts the free exercise of a discretion vested in him for the public good, is void * * *"
Unquestionably the purposes of Burns' 10-3713, supra, and Burns' 48-1247, supra, are the protection of public funds, not only from fraud and collusion, but those less readily identifiable acts tending to induce the officer or agent of public to become remiss in his duty to the public. Influence and pecuniary or personal interests may be subtle agents. They are often potential when their presence is unsuspected. How far our courts might go in defining an indirect interest sufficient to void a contract, probably cannot be generalized, but must necessarily remain dependent upon the facts of the particular case.

The interest requisite for a criminal conviction, under either Burns' 10-3713, supra, or Burns' 48-1247, supra, would undoubtedly be greater than that which would be required to void a contract for interested dealing upon the basis of public policy. It may also be true that in a criminal prosecution, the courts would require the person who is interested to have some jurisdiction or authority through which he would pass upon, or approve, the contract. Without commenting further on the criminal aspects, as this Opinion would be of no force in criminal action, it can be said that in a civil action upon an interested dealing contract, it is not a requisite that the interested party pass upon, or approve, the contract.

In the case of Mogul v. Garvey (1913), 54 Ind. App. 547, 103 N. E. 118, the appellant insisted by way of defense, that the statute, Burns' 48-1247, supra, simply means that no officer of a town shall be interested in any contract with the town where any liability or indebtedness is created, passed upon, authorized or approved by such officer. The Supreme Court, after rejecting the appellant's argument, stated at page 550:

"It appears, therefore, that this contract falls both within the spirit and letter of the statute quoted and hence is of that character which the statute was clearly intended to inhibit * * *"

To this extent I must disagree with the reasoning in 1943 O. A. G., page 340. In 1943 O. A. G., page 340, supra, the question presented was whether or not a member of the park board could sell supplies and materials to other departments
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of city government. The Opinion makes a comparison of the Acts of 1905, Ch. 129, Sec. 46, as amended, as found in Burns' (1950 Repl.), Section 48-1247, supra, and its predecessor, the Acts of 1867, Ch. 15, Sec. 52, and concluded that the 1905 Act and the 1907 amendment thereto, was an effort on the part of the Legislature to relax the theretofore strictness of the statute. Upon re-examination of the two enactments, it appears that perhaps the contrary is actually true because the latter statute broadened its prohibitive coverage by addition of the words "clerk or deputy of such officer, or other employee," while the former 1867 Act applied only to "member of the common council or other officer." Had the Legislature intended to prohibit only those contracts where the officer with the direct or indirect interest was also in a position to pass upon the acceptance thereof, there would have been no need to include employees of the city or town for the reason that employees do not generally pass upon the acceptance of public contracts. The broader coverage evidenced by the 1905 Act and 1907 amendment, seems to invoke a more realistic approach to the problem involved by attempting to declare invalid those contracts which may have been fostered and accepted through inter-departmental friendship, influence and collusion. However much we would like to believe that these factors do not and could not exist in public contracts, the fact remains that the situation does often become a real and existing evil resulting in actual or probable injury to the general public. This is the principle of which the court was speaking in Noble et al. v. Davison (1911), 177 Ind. 19, 96 N. E. 325, where at pages 28 and 29, the court said:

"Integrity in the discharge of official duty is zealously guarded by the law. It lends no aid to that which tends to corrupt or contaminate official action, whether such action be judicial, legislative or administrative * * * And the tendency of contracts between municipal corporations and officers thereof, for municipal improvements or supplies, is to mislead the judgments of the officers of the municipality, if not to sully their purity."

Therefore, in answer to your first question, it is my opinion that a contract between an individual serving as a member
of an "Independent Administrative Board of a Municipality," who is directly or indirectly interested in such contract, with some other department of the same municipality, including some other "Independent Administrative Board" of which the individual is not a member, is void as against public policy and as being contrary to the provisions of Burns' 48-1247, supra, and Burns' 10-3713, supra. This conclusion is substantially the same as that reached in 1961 O. A. G., page 287, No. 45, in which I stated that it was my opinion that a contract between a member of a city or town board of zoning appeals or plan commission and the unit of government in which he exercises his official jurisdiction is absolutely void.

Your second question asks whether the validity of the contract discussed in your first question would be affected by the character of the contracting board or of the board of which the contracting individual is a member. I believe that my discussion in answer to your first question clearly indicates that the character of the board on which the contracting officer serves and the character of the board with which he contracts is immaterial, providing that the contract creates a liability or indebtedness against the municipality in which he serves. However, this answer should not be extended to include contracts between the officials or employees enumerated in Burns' 48-1247, supra, and Burns' 10-3713, supra, and some other unit of government which is outside the official's normal sphere of authority and in which he exercises no official jurisdiction. In 1961 O. A. G., page 287, No. 45, and 1955 O. A. G., page 76, No. 22, I discussed such contracts and concluded that they would not violate Burns' 48-1247, supra, and probably would not violate Burns' 10-3713, supra. However, I added the comment that such contracts should be avoided by any public official in order to insure that such official might be fully protected legally and otherwise.