May 27, 1959

Honorable Robert D. Schuttler
State Representative
18 North West Fourth Street
Evansville, Indiana

Dear Mr. Schuttler:

Your letter dated April 4, 1959, requesting an Official Opinion has been received. The question contained therein is stated as follows:

“A member of the Board of Public Works of our city is also an employee of a concrete pipe company which supplies concrete pipe to contractors and sub-contractors who have general contracts with the Board of Public Works for various municipal jobs. Naturally, this employee, as a member of the Board of Public Works, is a party to the approval of these various contracts. As a member of the Board, he does not deal directly with the pipe company of which he is an employee.

“Could you say whether or not there would be anything illegal in the actions of this Board member?”

There are two statutes bearing on the illegality of such an officer having any interest in contracts of which the governmental unit which that officer represents is a party. 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.”

and: 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; and any person violating any of such provisions shall be fined not more than one thousand dollars [$1,000] and imprisoned in the state prison not less than one [1] year nor more than ten [10] years. No councilman or trustee or other officer, clerk, deputy or employee of any city or incorporated town shall, either directly or indirectly, purchase any bond, order, claim or demand whatsoever against such city or incorporated town, during his continuance in
office or employment, for any sum less than the amount specified therein; and any bond, order, claim or demand so purchased by any such officer or other person in contravention of the foregoing provisions shall be forfeited to such city or incorporated town, and no action shall be maintained thereon. Gifts and the acquisition of equitable interests by any such officers in any such bonds, orders, claims or demands shall be deemed to be within the meaning and scope of the foregoing provisions.”

You will note that the above statutes contain criminal penalties against the officer for the violation thereof, and it is settled in this state under numerous decisions of the Supreme Court that contracts in violation of these statutes are void ab initio. In order to answer your question, we must first examine the meaning of the words “direct or indirect interest” as used in the above statutes and determine whether an officer of the city, employed by a materialman or sub-contractor, has such an interest in a contract between the city and the contractor, who is furnished supplies by said materialman or sub-contractor, so as to render such contract void.

There have been two cases in the Appellate Court of this state concerning a similar factual situation which will aid in answering your question. Each case concerned a member of the common council of a city who furnished materials to a contractor who contracted with such city. In both cases the officer brought an action on the contractor’s bond for moneys in payment for materials furnished to the contractor by such officer. The defendant surety claimed that the officer became interested in a contract with the city and therefore could not maintain an action thereon. In Finn et al. v. State of Indiana ex rel. McDaniel (1916), 66 Ind. App. 432, 114 N. E. 9, transfer denied, the court examined the provisions of Burns’ 48-1247, supra. At that time the statute contained language similar to the present statute. The court, in construing the provisions of such section said at page 434:

“* * * It appears to be limited to ‘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.' By the language used the legislature has eliminated city officials not parties to, connected with, or interested in the original contract made with the city by other parties, but who simply furnished materials in the regular way to such general contractor and no rule of construction would permit its being read into the statute. * * *"

In Kerr et al. v. State of Indiana ex rel. McDaniel (1917), 65 Ind. App. 102, 116 N. E. 590, the surety company raised an additional defense that the sale of materials by the officer to the contractor was against public policy and void. In answer to this defense of the surety company, the Appellate Court said at page 106:

"In determining the question under consideration, it must be kept in mind that the principle of law which forbids the enforcement of any contract on the ground that it contravenes public policy, whether found in express legislative enactment or in the body of the law, as expressed and declared by the courts and the legal text-writers, rests always upon the idea that the contract so forbidden is injurious to the public or the state. In the answer under consideration, there is no averment that relator contracted with the city, and nothing appears therein which shows that he had any interest, either direct or indirect, in such contract at the time of its execution, or that there was any agreement, collusion or secret understanding of any kind between relator and the contractor when the contract was made whereby relator became in any way connected therewith or interested therein. No fraud of any kind is shown or attempted to be shown whereby the city or the public was in any way affected to its harm or injury by reason of said contract or on account of the material used in the improvement involved therein. True, the answer shows that appellant Finn procured the acceptance by the city of said improvement, including the material furnished by the relator, and that when such acceptance was procured the relator was a member of the council that accepted it; but to our minds this averment weakens rather than strengthens appellants' posi-
tion, because it shows that the contractor has received the full benefit of the contract which he is now seeking to avoid on the ground that it contravenes public policy, and that, in so far as there was a possibility of the public being injuriously affected by the acceptance of the improvement and said material furnished by the relator in connection therewith, appellant Finn has himself procured the full benefits of such acceptance and received value from the city for the materials.

"Even in cases where the public corporation seeks to avoid the payment of an honest obligation for material received and used by it, the courts, in the absence of a positive statute requiring them to do so, hesitate to lend their aid in accomplishing such an end on the ground of a mere surmise that sales by one of the officers of such corporation of material to the contractor may have influenced the mind of such official in the acceptance of such contract originally, or in the acceptance of the work done or material furnished thereunder. Escondido Lumber, etc., Co. v. Baldwin (1906), 2 Cal. App. 606, 84 Pac. 284; O'Neill v. Auburn (1913), 76 Wash. 207, 135 Pac. 1000, 50 L. R. A. (N. S.) 1140.

"If, in such cases, the courts hesitate to relieve the public corporation from liability, much greater reason exists for a court's refusal to give consideration or aid to the accomplishment of such an end when, as in the instant case, the invalidity of the contract is invoked by the contractor himself, to avoid paying for the very material, the acceptance of which, and the payment for which, he has procured at the hands of such public corporation. Worrell v. Jurden (1913), 36 Nev. 85, 132 Pac. 1158. Elliott, in his work on Contracts (Vol. 2, p. 10, § 650), says: 'A doubtful matter of public policy is not sufficient to invalidate a contract. An agreement is not void on this ground unless its contravention of public policy is clear and is manifestly injurious to the interest of the state.' The authorities cited, supra, we think, necessitate the conclusion that the demurrer to said answer was properly sustained."

In State v. Green et al. (1935), 207 Ind. 583, 194 N. E. 182, a member of the common council of the city of Gary was
prosecuted under the criminal provisions of Burns' 48-1247, *supra*. The affidavit charged that the defendant, as a member of the common council, appropriated funds for the painting of city fire stations and authorized the fire chief to enter into a contract for such painting and "did then and there unlawfully and feloniously * * * become interested in and was a party to said contract and agreement * * *." The Supreme Court held such affidavit to be insufficient, saying at page 588:

"* * * There are many ways in which the appellee might have become interested in the contract after it was entered into, and yet not be guilty of violating any provisions of the statute in question. For an illustration—suppose that the appellee was a painter by profession, and had been employed by Harris as a painter to help paint the city buildings, he would of course, in a sense become interested in and a party to the contract of painting, but not within the meaning of the statute. Finn v. State *ex rel.* (1918), 66 Ind. App. 432, 114 N. E. 9."

It appears that other jurisdictions are in agreement with the principles set out in the above Indiana cases. The following cases hold that if a subcontractor, who is also an officer of a municipal corporation, supplies materials, service, etc., to a contractor who has contracted with such municipal corporation, in the absence of any prior understanding at the time the contract was entered into with the municipal corporation, the officer is not interested, directly or indirectly, in such contract so as to render it void in violation of law or as against public policy.

Fredericks v. Borough of Wanaque (1920), 95 N. J. L. 165, 112 A. 309;

People v. Southern Surety Co. (1917), 199 Mich. 30, 165 N. W. 769;

O'Neil v. Auburn (1913), 76 Wash. 207, 135 Pac. 1000, 50 L. R. A. (N. S.) 1140, 44 C. J. 94.

See also: 44 C. J. Municipal Corporations, § 2178, p. 94.

If a city officer supplying materials to a contractor who contracts with the city does not have a "direct or indirect
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interest” in such contract with the city, it must follow that if such city officer were merely an employee of a subcontractor or materialman, he would also not have such “direct or indirect interest” in the contract.

This is not to say that under certain conditions an officer might be put in a position where he is not acting in the best interests of the public. An examination of many decisions by the Supreme and Appellate Courts of Indiana shows that Indiana is one of the strictest jurisdictions in the United States insofar as the law regarding contracts of public officers is concerned. In Noble et al. v. Davison (1911), 177 Ind. 19, 96 N. E. 325, the Supreme Court of Indiana held that a contract for the installation of a heating plant in a public school entered into between a school corporation and a member-elect, who had not yet qualified as a member of the school board, was void as being in violation of Burns’ 10-3713, supra, and also contrary to public policy. The court said at page 28:

"* * * This court has ever steadfastly adhered to the rule which invalidates all agreements injurious to the public, against the public good or which have a tendency to injure the public. Contracts belonging to this class are held void, even though no injury results. The test of the validity of such agreements is the tendency to public injury, regardless of the actual intent of the parties, and regardless of actual results.

"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. 9 Cyc. 485. 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."

In view of the language in the above case, I would advise the public officers involved to exercise extreme caution in acting upon a contract in the situation which your question presents.

However, an examination of the facts as presented in your request does not reveal that the officer’s employment would
place him in a position in which his action on the contract would be contrary to the best interests of the public. Therefore, it is my opinion that in the absence of additional facts, and further, in the absence of fraud, a member of the Board of Public Works of your city who is employed by a company which supplies materials to contractors who have contracts with said Board of Public Works does not have a "direct or indirect interest" in such contract so as to render it void or illegal either in violation of the statutes of this state or as contrary to public policy.

OFFICIAL OPINION NO. 19

June 1, 1959

Honorable William E. Wilson
State Superintendent of Public Instruction
227 State House
Indianapolis, Indiana

Dear Mr. Wilson:

Your letter of May 12, 1959, has been received and reads as follows:

"I am in need of an Official Opinion on the following questions:

"1. In Fountain County, the present attendance officer received five votes of the eleven members of the county board of education while another candidate received six of the eleven votes. Which person is legally the attendance officer?

"2. The county has a total school attendance of 4,037. Is the county board of education forced to name an attendance officer or can they do away with the office of county attendance officer?"

Acts of 1921, Ch. 132, Sec. 1, as amended, as found in Burns' (1948 Repl.), Section 28-501, in part, provides as follows:

"* * * The superintendent of schools of each city and/or county having fifteen hundred [1,500] or more