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File No. S-518

**COUNTIES:
Officers
Conflict of Interest**

Honorable Albert N. Kennedy
State's Attorney of Lee County
Dixon, Illinois 61021

Dear Mr. Kennedy:

I have your recent letter wherein you state in part:

"Is there a conflict of interest if a member of the County Board for the County of Lee becomes a sub-contractor under a general contractor who is awarded a contract with the County of Lee?"

Section 3 of An Act to prevent fraudulent and corrupt practices in the making or accepting of official appointments and contracts by public officers, prevents county board members from having a direct or indirect interest in public contracts.

Ill. Rev. Stat., 1971, ch. 102, par. 3.

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Section 3 (Ill. Rev. Stat., supra) reads as follows:

"No person holding any office, either by election or appointment under the laws or constitution of this state, may be in any manner interested, either directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. No such officer may represent, either as agent or otherwise, any person, association, trust or corporation, with respect to any application or bid for any contract or work in regard to which such officer may be called upon to vote. Nor may any such officer take or receive, or offer to take or receive, either directly or indirectly, any money or other thing of value as a gift or bribe or means of influencing his vote or action in his official character. Any contract made and procured in violation hereof is void."

Section 4 (Ill. Rev. Stat., 1971, ch. 102, par. 4) provides for criminal sanctions for violation of Section 3 (Ill. Rev. Stat., supra) in the following manner:

"Any alderman, member of a board of trustees, supervisor or county commissioner, or other person holding any office, either by election or appointment under the laws or constitution of this state, who violates any provision of the preceding sections, is guilty of a misdemeanor, and may be punished by confinement in the penitentiary for not less than one year nor more than five years, or fined not less than \$200 nor more than \$1,000, or both; and in addition thereto, any office or official position

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held by any person so convicted shall become vacant, and shall be so declared as part of the judgment of court; and the person so convicted may not hold any office or position of trust and confidence in this state until two years after the date of such conviction."

Statutes that prohibit public officers from having an interest in contracts executed in their official capacity are declaratory of the common law. (McCarthy v. City of Bloomington, ex rel. McIntosh, 127 Ill. App. 215). It is fundamental that a public office is a public trust and the holder thereof may not use it directly or indirectly for a personal profit. (67 C.J.S. Officers § 116). Thus, statutes such as Section 3 of An Act to prevent fraudulent and corrupt practices * * * (Ill. Rev. Stat., supra) prevents a public officer from placing himself in a position in which personal interest may come into conflict with the duty he owes to the public.

A pecuniary interest in a contract disqualifies a public officer from executing the contract, (Panozzo v. City of Rockford, 306 Ill. App. 443). Our Supreme Court in People v. Adduci, 412 Ill. 621, 627 gave the following definition of interest forbidden under Illinois law:

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"The interest against which the prohibition is leveled is such an interest as prevents or tends to prevent the public official from giving to the public that impartial and faithful service which he is in duty bound to render and which the public has every right to demand and receive. Not every interest is a bad or corrupt interest. The desire of every public official to serve the public faithfully necessarily requires him to take a keen interest in the affairs of his office and the prohibition is manifestly not leveled against this interest. Whether or not the interest in any given case comes within the prohibition of the statute may well become a question of construction for the court in view of all the facts and circumstances shown in the particular case. (Taylor v. Comrs. of Highways of Town of Normal, 88 Ill. 526; School Directors v. Parks, 85 Ill. 338.) In the present case it is alleged that there was a personal financial interest, and, certainly, such an interest would come within the prohibition of the law."

There can be no question but that a sub-contractor performing under a general contract has a direct financial interest in the contract. Even if the sub-contractor acquires his contract by competitive bidding, this does not serve to validate the contract. Mitchell v. Flintkote Co., 185 F. 2d 1008 (C.A. 2d, 1951).

The relationship which invalidates a contract is that which puts the interested party in a position where he may be called upon to act or vote in the making or letting of such contract (Peabody v. Sanitary District, 330 Ill. 250.) Therefore,

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it is irrelevant whether an interested person takes part in the letting of the contract or votes thereon. If the officer's duties are such that he could or might be called upon to take any action in the matter of making a contract, that fact disqualifies him from having any interest in the contract (Id. p. 258).

In commenting on a Federal penal statute under which a government contract was declared to be unenforceable by reason of a conflict of interest, the United States Supreme Court stated:

"* * * The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation. Rankin v. United States, 98 Ct. Cl. 357."

U.S. v. Mississippi Valley Co.,
364 U.S. 520, 549, 550, 81 S.Ct.
294, 309, 5 L.ed., 2d 268.

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In People ex rel. Pearsall v. Sperry, 314 Ill. 205, the Supreme Court held void a contract because nine out of eleven city council members were key employees of the company contracting with the city. The court at p. 207-208 stated:

"If we attach any significance to the words used by the statute, 'directly or indirectly interested in the contract,' we think the conclusion cannot be escaped that the officers of the city who are also employees of the contractor must be considered as indirectly interested in the contract, without regard to the fact that they derived no direct benefits from the contract itself. They would be more than human if they could make the same fair and impartial contract with the contractor as they could with another party with whom they had no relation, by way of employment or otherwise. We have no doubt that the officers who signed and participated in making the contract did so without any intentional bad faith, and that the same is true of the contractor; still, we are clearly of the opinion that the court properly held that the contract was void within the provisions of the statute. The three city officers who signed on the part of the city had such an interest in the business and welfare of the contractor in this case as would naturally tend to affect their judgment in their determination to let the contract and to pass upon the question whether or not the same was completed in full accord with the terms thereof. * * *"

The same is true of a county board member acting as a sub-contractor under a general contract awarded by the county,

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his interest in the general contract would naturally affect his judgment in the determination to let the contract.

All contracts made whereby any person is bound to the county or the inhabitants thereof, or to the county commissioners, or the board of supervisors for the performance of any matter or thing to or for the use of any county, vests in the county all the rights, interest and actions which would be vested in any individual. Suits may be commenced, sued and prosecuted in the name of the county as any person may upon like contracts made to him. (Ill. Rev. Stat. 1971, ch. 34, par. 552). A county board member so interested in a contract as a sub-contractor could not impartially exercise the judgment necessary before a suit is commenced for breach of the contract. Nor could he exercise impartial judgment in determining whether or not to accept the contractual work performed where he in all probability would be performing on the general contract or providing materials for the general contractor.

Further, a county board member/sub-contractor could participate in all negotiations giving a contract its substance and meaning, be instrumental in establishing specifications and

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schedules most advantageous to his or his firms particular mode of operation and participate in the selection of a general contractor who has previously contacted him relative to performing work on other contracts.

In regard to a sub-contractor/public officer furnishing supplies and materials to a general contractor under a public contract, the Illinois Appellate Court, Second District, stated:

"If the contract [general contract] at its inception was bona fide and legal and no understanding was had or entered into between the contractors and appellees, whereby the contractors were bound to purchase their material and cut stone from appellees, then no act of the contractors could render the contract entered into with the appellees either void or voidable and no provision of the statutes above referred to or any other statute that we have been able to find can be construed as prohibiting or in any manner limiting the rights of a contractor, who has in good faith obtained a public contract, from thereafter purchasing his material or supplies or doing business with a person, firm or corporation, any member of which may be a public officer and connected with the public body through which he originally obtained his contract and in the absence of fraud or connivance, such as in the present case, there is no legal basis upon which the acts of the appellee corporation in selling to the contractors, Swenson and Bippus, can be criticized in the slightest degree." Henschen v. Board of School Inspectors, 267 Ill. App. 296 at 310-311.

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The Henschen case (supra) must be strictly limited to its facts. There was no question raised as to the validity and legality of all the proceedings incident to the letting of and execution of the general contract. In the purchase of the materials from the public officer it was conceded that there were in fact no fraudulent practices. There was nothing in the case to dispute the fact that at the time of the letting of the general contract there was no agreement or understanding on the part of the general contractor with the public officer as to furnishing of the materials subsequently sub-contracted for. Also, the facts indicate that the furnishing of prices and estimates for the letting of the sub-contracts were all done subsequent to the letting of the general contract. Nor was any question raised as to the acceptance of work performed by the general contractor by the school inspectors.

Thus, the Henschen decision cannot be applied to a factual situation wherein the general contractor has asked the sub-contractor/public officer for price estimates prior to the letting of the general contract; where there has been prior business contacts between the general contractor and sub-contractor/

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public officer giving rise to an implication of connivance; nor to a situation where the public officer after having been contacted for an estimate has participated in preliminary negotiations that could render contractual terms and specifications more favorable to his method of operation; nor to a case wherein the public officer has to act or vote on the final acceptance of the project upon which he has furnished materials to the general contractor.

Therefore, it is my opinion a county board member cannot become a sub-contractor under a general contract awarded by the county.

Very truly yours,

A T T O R N E Y G E N E R A L