

OPINION
49-26

April 7, 1949 (OPINION)

CONTRACTS AND CONTRACTORS

RE: Water Conservation Commission

Your letter of April 5 to the Attorney General has been received and contents noted.

You state that the Water Conservation Commission is contemplating the purchase of certain motor vehicles as follows:

- 1 Sedan Delivery
- 1 Carrycastle Sedan
- 1 Four-door Sedan
- 1 3/4 Ton Pick-up
- 1 3 to 4 Ton Truck

These vehicles are necessary in the conduct of the work of making surveys, repairing dams, etc. You have advertised for bids and a copy of the notice of bids is attached to your letter.

A member of the State Water Conservation Commission is manager and director of a corporation handling Ford cars, which corporation will probably be a bidder for the furnishing of these vehicles and the question you present is whether or not, under the provisions of section 12-1006 of the North Dakota Revised Code of 1943, this corporation may legally be a bidder and awarded a contract for furnishing one or more of these vehicles.

Section 12-1006 provides as follows:

Every public officer authorized to sell or lease any property, or make any contract in his official capacity, who voluntarily becomes interested individually in such sale, lease, or contract, directly or indirectly, is guilty of a misdemeanor."

I desire to call your attention to the following language in the statute quoted: "who voluntarily becomes interested individually in such sale, lease, or contract, directly or indirectly, is guilty of a misdemeanor."

The general rule in such cases is that a public office is a public trust and the holder thereof cannot use it directly or indirectly for personal profit, and officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public; but public officers are denied the right to make contracts in their official capacity with themselves, or to become interested in contracts thus made, or to take contracts which it is their official business to see faithfully

performed. Neither is a board, bureau, or commission authorized under the statute quoted to make a contract with one of its members in respect of the trust reposed in it. (46 C.J. pp. 1037-38, Sec. 308.)

In a California case it was held that members of city councils occupy a position of trust and are bound to the same measure of good faith toward their constituents that a trustee is to his cestui que trust, and the fact that a member of such a body acts as such in connection with any other matter in which he is interested vitiates the transaction. Thus, a sale of merchandise by a councilman to the town is contrary to public policy and therefore void, although the councilman did not vote for the purchase. (McQuillin Municipal Corporations (2d), Volume 2, pp. 286-7).

In a Minnesota case under a similar statute, it was held that a common council has no power to authorize one of its members to enter into a contract with the municipality for his own benefit where the statute prohibits public officers from being interested in such contracts. (State v. Bevans, 88 Minn. 127; 92 N.W. 510.)

It would appear, therefore, and from the decision to which we have referred that the State Water Conservation Commission would be prohibited by the statute quoted from entering into a contract with the corporation whose manager and director is also a member of the State Water Conservation Commission.

WALLACE E. WARNER

Attorney General