

# MAINE STATE LEGISLATURE

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April 24, 1953

To Herbert G. Espy, Commissioner of Education  
Re: Contracts of Cities Building Under Regulations of the Maine  
School Building Authority

We have your question of April 22d, which is as follows:

"Can a member of the city government do business for compensation with a contractor employed by the building committee of a town which is acting under a lease agreement with the Maine School Building Authority?"

The statute in question is Section 78 of Chapter 80 of the Revised Statutes of 1944:

'No member of a city government shall be interested, directly or indirectly, in any contract entered into by such government while he is a member thereof; and contracts made in violation hereof are void.'

The decisions of our Law Court relative to the statute in question are not decisive of the issue here presented; for in each instance where decisions have been rendered the member of the city or state government involved, has been directly interested with the contract. In other words there was no sub-contract involved. Opinion of Justices, 108 Me. 545 (party was treasurer and stockholder in contracting corporation); O'Neil v. Flannigan, 98 Me. 426 (party was surety on performance bond of the contractor); Goodrich v. Waterville, 88 Me. 319 (contracting physician was member of board which issued contract); Bangor v. Ridley, 117 Me. 297 (contracting trucker was member of city council that let contract).

Therefore we must turn to decisions in other States to see what they have said on this particular issue. The rule is clearly stated in People v. Deysher, 25 P. 2d, 499 (Cal.) and 40 P. 259:

"Purchase, after award of contract, and without previous agreement to do so, by the contractor of material used in the performance of the contract, from a member of a board awarding the contract, or from a corporation of which such member is a stockholder or employee, does not create in such member an interest in the contract which will invalidate it. Escondido Lumber Co. v. Baldwin, 84 P. 284 (Cal.); Warrell v. Jurden, 132 P. 1158 (Nev.); Kerr v. State, 116 N.E. 590 (Ind.); O'Neill v. Auburn, 135 P. 1000 (Wash.); People v. Southern Security Co., 165 N.W. 769 (Mich.); Fredricks v. Borough of Wanaque, 112 A. 309 (N.J.)"; (For further citations to the same effect see note in 50 L.R.A. (N.S.) 1140; and Commonwealth v. Withers, 98 S.W. 2d 24 (Ky.); Fenn v. State, 114 N.E. 9 (Ind.); Wayman v. Cherokee, 215 N.W. (Iowa).)

The important restriction on the above stated rule is that the purchase shall be on a free market and not in accordance with a previous agreement between the member of the board and the contractor. Northport v. Northport Townsite Co., 68 P. 204 (Wash.); People v. Deysner, supra (both cases).

Thus it evolves into a question of fact: Did such an agreement exist at the time? One must also remember that in determining whether a contract is illegal and void as against public policy, the court will not be bound by technical relationships, and will look behind the veil and discern the vital facts. Tuscan v. Smith, 130 Me. 36.

The question whether a previous agreement exists is one of fact and is beyond the scope of this opinion. This opinion is based upon the presumption that everyone concerned has acted in good faith as to the letting of the subcontract.

It should be stated that this opinion is limited in scope and applies only to cities and is also necessarily limited as above stated to questions of fact which will appear from time to time to vary conditions. Further, this opinion is rendered as if the city itself had in fact issued the contract to the general contractor without any attempt to clarify the unusual relationship that exists between the Maine School Building Authority and the towns and cities with which it contracts. The reason the relationship has not been considered is that it would only tend to confuse the issue and it can be decided on the above basis without confusion.

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