

51

TOWNSHIP TRUSTEE—CONTRACTS, INTEREST IN—LEASE OF FARM TO GRAVEL COMPANY FROM WHOM TOWNSHIP PURCHASES GRAVEL—ROYALTY PROVISIONS IN LEASE; §2919.08—BIDDING DOES NOT CURE THE INVALIDITY.

SYLLABUS:

1. A township trustee who has leased his farm land to a gravel company on a royalty basis, whereby he receives a certain sum for each ton of gravel sold, would have an interest in a contract by the board of township trustees of which he is a member in the purchase of gravel by the township from such gravel company, within the purview of Section 2919.08, Revised Code, and such contract of purchase would be illegal.

2. Township trustees purchasing gravel for road repair are not required by law to advertise for bids.

3. When a township trustee has an interest in a contract by a township other than the one of which he is a trustee, in violation of Section 2919.09, Revised Code, such contract is illegal and void, notwithstanding such contract is made pursuant to competitive bids, where there is no provision in the law for such competitive bidding.

Columbus, Ohio, January 27, 1959

Hon. James W. Freeman, Prosecuting Attorney
Coshocton County, Coshocton, Ohio

Dear Sir:

I have before me your communication addressed to my predecessor, requesting an opinion on the questions presented therein, your letter reading as follows:

“This office respectfully requests your formal opinion on the following questions which arise out of this factual situation:

“*SITUATION:*

A, a land owner and a trustee in C Township, has leased his farm land to B, a gravel company, on a royalty basis at eight (8) cents per ton for all gravel removed from A's farm. A has no interest in the B gravel company, other than under the lease agreement.

“*Question No. 1:*

Can C township trustees purchase gravel from B gravel company, where the purchase is made without advertisement and

without competitive bidding, assuming of course, that B gravel company will sell the gravel to C township for the lowest price obtainable?

“Question No. 2:

If your answer to question No. 1 is ‘no’, would your answer be the same if the purchase was made from B gravel company under advertisement and competitive bidding?

“Question No. 3:

Would A be ‘interested in a contract for the purchase of property . . . for the use of the . . . township . . . with which he is connected’ under the provisions of Section 2919.08 of the Revised Code?

“Question No. 4:

Can townships, other than C township, purchase gravel from B gravel company for the lowest price obtainable, where the purchase is made without advertisement and competitive bidding? The primary question involved is the matter of *interest* as that word is used in Sections 2919.08 and 2919.09 of the R. C. I thought perhaps this situation that I have described might be analogous to and permissible under the authority of Opinion No. 1682 of the 1952 Attorney General’s Opinions.”

Your first question is as to the legal propriety of the purchase by the township trustees of gravel from a company which is the lessee of a member of the board, and the question is whether, under the circumstances stated, such member has such an interest in the contract as would render it illegal. Your second question is as to the procedure required by law of township trustees in the purchase of gravel.

1. Section 511.13, Revised Code, reads in part:

“No member of the board of township trustees or any officer or employee thereof shall be interested in any contract entered into by such board.”

Section 305.27, Revised Code, has a similar provision as to county commissioners, in these words:

“No county commissioner shall be concerned, directly or indirectly, in any contract for work to be done or material to be furnished for the county. For a violation of this section, a commissioner shall forfeit not less than two hundred nor more than two thousand dollars, to be recovered by a civil action, in the name of the state, for use of the county.”

Like provisions are found in the statutes as to members of municipal councils and boards of education.

Section 2919.08, Revised Code, reads as follows :

“No person, holding an office of trust or profit by election or appointment, or as agent, servant, or employee of such officer or of a board of such officers, shall be interested in a contract for the purchase of property, supplies, or fire insurance for the use of the county, township, municipal corporation, board of education, or a public institution with which he is connected.

“Whoever violates this section shall be imprisoned not less than one nor more than ten years.”

This section was Section 12910, General Code.

The question for our determination, therefore, is whether the member of the board of trustees in question is “interested in the contract” made by his board for the purchase of the gravel in question. Since he is to profit to the extent of eight cents per ton for all gravel removed from his farm, it is hard to believe that he would not have an interest in seeing to it, so far as possible, that purchases of gravel made by the township should be made from his lessee. It is true that he is not a part of the gravel company, and he is not himself selling the gravel directly to the township, but I cannot resist the conviction that he has very direct interest in the contract of purchase. It is conceivable that such purchases of gravel by the township might be trivial and occasional. On the contrary, they might amount to a very large sum and result in a substantial enrichment of the trustee in question.

In the case of *Stone v. Osborn*, 24 Ohio Appeals, 251, it was held that the sale of a municipal light plant and grant of franchise to a member of the municipal board, who continued as a member until two days before he bid for and became the purchaser of the property, was not unlawful. But it is to be observed that he had entirely terminated his position as a member of the public body before he made the purchase.

In the early case of *In re Leach*, 19 Ohio Opinions, 263, a common pleas court held :

“5. A member of a board of education has a pecuniary interest in a contract for the sale of coal to a person for delivery to the board, where the coal is furnished from mines in which he owns an interest as a partner.

“6. Any pecuniary interest moving directly or indirectly to the officers is sufficient under Section 4757, General Code; it is

not even necessary for the contract to be profitable to the officer under Sections 12910 and 12911 General Code.

“7. The pecuniary interest of a member of a board of education in a contract for the purchase of coal and in the employment of his minor son as janitor by such board, constitutes a ground for removal from office under Section 10-1, General Code.”

Section 4757, General Code, referred to in that case, was a part of the school law, and, in pertinent part, provided as follows :

“No member of the board shall have, directly, or indirectly, any pecuniary interest in any contract of the board.”

The fact that in these statutes relating to the various political subdivisions the legislature has in some cases added the words “directly or indirectly”, does not appear to me to detract in any degree from the force of the language in the statutes in which these words are not employed. The plain purpose of all of these statutes is to keep the administration of these public agencies free from corruption, and from becoming the means for self enrichment by officers who have been elected to these positions of trust.

2. This brings me to a discussion of your second question, namely, would the answer be the same if the purchase of the gravel was made pursuant to advertisement and competitive bidding.

Section 2919.09, Revised Code, (12911, General Code) has some bearing on this proposition. Said Section 2919.09 reads as follows :

“No person, holding an office of trust or profit, by election or appointment, or as agent, servant, or employee of such officer or of a board of such officers, shall be interested in a contract for the purchase of property, supplies, or fire insurance for the use of the county, township, municipal corporation, board of education, or a public institution *with which he is not connected*, if the amount of such contract exceeds the sum of fifty dollars, unless such contract is let on bids advertised as provided by law.

“Whoever violates this section shall be imprisoned not less than one nor more than ten years.” (Emphasis added)

The obvious effect of that section is to relieve such officer of his legal liability and the contract from invalidity, in case the contract is let on bids as provided by law.

It is significant that there is no such exemption provided in Section 2919.08, *supra*.

Furthermore, I am not able to find any statute which would require the township trustees to advertise for bids for the purchase of gravel or other supplies. Section 5575.01, Revised Code, which is a part of the chapter relating to maintenance and repair of township roads, contains this provision :

“In the maintenance and repair of the roads the board of township trustees may proceed either by contract or force account. *When it proceeds by contract the contract shall, if the amount involved exceeds one thousand dollars, be let by the board to the lowest responsible bidder after advertisement* for bids once, not later than two weeks prior to the date fixed for the letting of such contract, in a newspaper published in the county and of general circulation within the township, but if there is no such paper published in the county, then in one having general circulation in the township. If the amount involved is one thousand dollars or less the contract may be let without competitive bidding. Such contract shall be performed under the supervision of a member of the board or the township road superintendent.” (Emphasis added)

This section was in effect in substantially the same words as a part of Section 3373, General Code, in 1946, when Informal Opinion No. 45, Informal Opinions of the Attorney General for 1946, page 103, herein-after set out, was rendered. The only change in the statute since that time was in the amount required to call for advertising. That opinion reads as follows :

“Referring to your letter relating to the authority of township trustees to purchase gravel for the repair of roads, and the procedure to be followed in that regard under Section 3373, General Code, you are advised that if the trustees contemplate making a single purchase of gravel for either one or more roads and the amount involved in the purchase is \$500.00 or less the competitive system need not be followed in making the purchase ; but if the amount involved in a purchase for either one or more roads exceeds \$500.00 the competitive system should be adopted by advertising for bids.

“In this connection attention is also called to the further provision of Section 3373 that the trustees in the maintenance and repair of roads may proceed either by contract or force account.”

I cannot agree with the conclusion reached in that opinion for the reason that the obligation to advertise for bids was limited to a procedure by *contract*, as against the alternative procedure of doing the work by

force account in which case there appears to be no requirement whatever for advertisement or receipt of bids.

In the case you present, no advertisement for bids would be required, since the requirement of competitive bidding found in Section 5575.01, *supra*, relates to construction contracts rather than the purchase of supplies.

It appears to be well settled that where a contract made by a public officer or board is tainted by violation of the statutes to which reference has been made, particularly those imposing criminal liability, it will have the effect of invalidating a contract so made. In 33 Ohio Jurisprudence, page 747, under the heading of "Public Works" we find the following:

"The statutes contain numerous provisions prohibiting particular public officers from being interested in contracts of the public bodies they respectively represent. Some of these statutes provide for forfeitures for violations of their provisions. Criminal punishment is generally provided.

"The effect of a statute making it a crime for an officer to be personally interested in a contract entered into by the authority he represents is to render any contract as to which such interest is present, void, or at least voidable,—particularly, if the action of the officer was essential to the making of the contract. The fact that the public would suffer no financial loss from performance is not material to the question of validity."

Citing, *inter alia*, *Bellaire Goblet Co. v. Findlay*, 5 C.C., 418; *Dalzell Co. v. Findlay*, 5 C.C., 435 (Affirmed 27 Bull. 128); *Findlay v. Parker*, 17 C.C., 294 (Affirmed 63 Ohio St. 565).

In Opinion No. 947, Opinions of the Attorney General for 1929, page 1460, it appears that a contract was made by a board of county commissioners for the purchase of coal from a company of which the clerk of the board was a stockholder. It was held that this contract was invalid, and numerous citations of authority were made in support of that holding. In the case of *Bellaire Goblet Co. v. Findlay*, *supra*, where it appeared that a purchase had been made by the trustees of the Gas Works of the City of Findlay from a company in which a member of the board had an interest, it was held:"

"Contracts entered into between a Board of Gas Trustees of a municipality and an incorporated company, when a member of the Board of Gas Trustees is at the same time an officer and personally interested in the incorporated company, are against public policy, and void."

In the case of *The Dalzell Co. v. Findlay, supra*, it was held:

“If one or more of the Gas Trustees of a city owning and operating a natural gas plant, are beneficially interested in a contract to supply natural gas for fuel to a manufactory at a nominal consideration, such contract will not be enforced in equity.”

This case, as I have already noted, was affirmed by the Supreme Court.

3. Your third question appears to be covered by the fore-going discussion relative to questions Nos. 1 and 2.

4. Your fourth question is whether another township than the one of which he is a trustee, could lawfully purchase gravel from B's lessee, if the purchase was made on competitive bids.

A very similar situation was presented as the basis for Opinion No. 366, Opinions of the Attorney General for 1949, page 101, the syllabus of which reads as follows:

“A county commissioner would be subject to prosecution under provisions of Section 12911, General Code, if interested in a contract for the sale of supplies to a local board of education when the amount exceeds \$50.00 and let on competitive bids after advertisement, when the advertising for bids is not required by law.”

The question arose under Section 12911, General Code, (2919.09, Revised Code, *supra*) In the course of this opinion it was said:

“The fact that requests for bids had been advertised, there being no provision in the law for this procedure, does not affect the question, for on the facts stated by you, Section 12911, *supra*, prohibits an officer from having an interest in such contracts. Under the saving clause of Section 12911, General Code, if provision be made for advertisement by law, the officer may be interested, legally, in such contracts, but if advertisement is not provided for or required by law, the officer is prohibited from having any interest in such contracts.”

A like holding is found in Opinion No. 2341, Opinions of the Attorney General for 1934, page 263, where it was stated:

“* * * if there is no provision in the law requiring advertisement and competitive bidding for the particular ‘supplies,’ then it would be illegal for a senator or representative to be interested in a contract for the purchase of supplies’ over \$50.00 for the use of the county from which he was elected, even if advertisement and competitive bidding was had before the contract was let.”

I agree with the opinions last cited and accordingly conclude that where the contract, though made with a township other than the one with which the offending trustee is connected, and though made pursuant to competitive bidding *for which the law does not provide*, is tainted by the same illegality and is void.

In specific answer to the questions submitted, it is my opinion and you are advised:

1. A township trustee who has leased his farm land to a gravel company on a royalty basis, whereby he receives a certain sum for each ton of gravel sold, would have an interest in a contract by the board of township trustees of which he is a member, in the purchase of gravel by the township from such gravel company, within the purview of Section 2919.08, Revised Code, and such contract of purchase would be illegal.

2. Township trustees purchasing gravel for road repair are not required by law to advertise for bids.

3. When a township trustee has an interest in a contract by a township other than the one of which he is a trustee, in violation of Section 2919.09, Revised Code, such contract is illegal and void, notwithstanding such contract is made pursuant to competitive bids, where there is no provision in the law for such competitive bidding.

Respectfully,

MARK McELROY

Attorney General