924

1. CORPORATION—PRINCIPAL STOCKHOLDER MEMBER OF GENERAL ASSEMBLY—MAY NOT ENTER INTO CONTRACT TO PERFORM ANY WORK, STATE PRINTING—SECTION 754 G. C.

2. CORPORATION—PRINCIPAL STOCKHOLDER AGENT OF AUDITOR OF STATE—MAY NOT ENTER INTO CONTRACT TO PERFORM ANY WORK, STATE PRINTING.

SYLLABUS:

1. A corporation, in which a principal stockholder is a member of the General Assembly, may not enter into a contract to perform any of the state printing designated by Section 754, General Code.

2. A corporation, in which a principal stockholder is an agent of the Auditor of State, may not enter into a contract to perform any of the state printing designated by Section 754, General Code.

Columbus, Ohio, November 13, 1951

Hon. Herbert D. Defenbacher, Director of Finance
State of Ohio, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Contracts for the Ohio State printing cover five separate classes of printing. One contract covers classes 1 and 2 and the other contract covers classes 3-4-5. Each contract is let for a two year period. When an award is determined and the successful

bidder notified the total amount of all State printing covered by that particular contract, or the classes thereof must go to the successful bidder.

"Proposals for the contract or contracts of classes 3-4-5 must be awarded by November ... For classes 3 and 5 we have bids from the H. Printing Company, D. Press, Inc. and X Press, Inc. One of the principal stockholders of the X Press, Inc. is X an employe of the State Auditor's office. One of the principal stockholders of the D. Press, Inc. is Mr. D., a member of the General Assembly. The question has been raised as to whether or not either X Press, Inc. or D. Press, Inc. is legally eligible to bid in view of the State affiliation of a principal stockholder in each firm.

"Will you kindly advise us of your thinking on the legal status as bidders of each of the two firms referred to. There is no question of the legal status of the proposal of the third bidder, the H. Printing Company."

The classes of printing to which you refer are established by Section 754, General Code. That section defines classes three, four and five of the state printing as follows:

"* * * Third Class. Reports, communications and other documents ordered by the general assembly, or either house thereof, or by the executive department or elective state officers to be printed in pamphlet form.

"General and local laws and joint resolutions.

"Fourth Class. Blanks, circulars and other work for the use of the executive departments, and elective state officers, not including those to be printed in pamphlet form.

"Fifth Class. The bulletins of the agricultural commission. * * *"

I am informed by your office that H, D and X have all bid on the printing of the third class; that only the F. Printing Company has bid on the fourth class and that no question is raised as to it; and that D and H have bid on the printing of the fifth class.

Any discussion of the question raised by your inquiry involves a consideration of Section 12910, General Code. Although, for reasons which appear more fully below, I do not believe that section to be controlling here, it does play a part in the final solution of the problem. That section provides as follows:

> "Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

It will be noticed that the statute does not, by its language, refer to contracts on behalf of the state itself. The contract in question comes within the statute, therefore, only if the corporations, and through them the individuals, in question would become "interested in a contract for the purchase of * * * supplies * * * for the use of * * * a public institution with which" they are connected.

Numerous opinions of my predecessors have held that the state and state officers are not within the purview of Section 12910, General Code, and that the state is not a "public institution." See: Opinion No. 245, Opinions of the Attorney General for 1912, page 1238; Opinion No. 529, Opinions of the Attorney General for 1913, page 363; Opinion No. 1182, Opinions of the Attorney General for 1916, page 66; Opinion No. 598, Opinions of the Attorney General for 1917, page 1683; Opinion No. 357, Opinions of the Attorney General for 1939, page 438; Opinion No. 1745, Opinions of the Attorney General for 1940, page 83.

Opinion No. 988, Opinions of the Attorney General for 1929, page 1518, held that in a case where a member of a Board of Deputy State Supervisors of Elections was contracting with the Board of which he was a member, the Board was a "public institution" within the meaning of the statute. That opinion did not, however, hold that the state itself was a public institution or create precedent for a holding that the General Assembly or the office of the Auditor of State is a public institution within the meaning of the statute. In view of these precedents, I am inclined to the view that the contracts in question, if entered into with D and X would not subject them to the penalties imposed by Section 12910, General Code.

But that is not the question before me. You have asked as to the "legal status as bidders" of D and X and I assume from that that you mean their legal rights to enter into contracts with the state. That question necessarily takes us into the field of contracts and away from the question of possible violation of a criminal statute.

Because Section 12910, supra, and similar statutes have been in force for a long time, it is natural that most of the emphasis, both in decided cases and in opinions rendered by this office, has been upon interpretation of those statutes in particular cases. It has sometimes been overlooked that the statutes are simply the crystallization of a policy firmly established in the common law that a public officer can not serve two masters, and that he should never be placed in a position where he might be tempted to think of his own interests when transacting the public's business. It is my opinion that the enactment of criminal statutes covering certain officers and their contracts did not abrogate or supersede this common law principle as applied to the right of officers to enter into public contracts.

In contrast to this concentration on the interpretation of statutes in the public contract field, the decisions in another similar field have relied almost exclusively upon case law and precedents established by the opinions of this office. That other field is the familiar one of incompatibility of certain offices. While there are some constitutional and statutory provisions that certain officers shall hold no other office, the great majority of incompatibility decisions are based upon so-called "judge-made law" as typified by the case of State, ex rel. Attorney General v. Gebert, 12 O.C.C.(N.S.) 274, where the court, at page 275, made the following often quoted statement:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; * * *."

It is not considered novel for a court or for the Attorney General to invoke the common law in a question of the compatibility of certain offices in the absence of a statute, and I consider it equally appropriate here. The principle was recognized by one of my predecessors in Opinion No. 3026, Opinions of the Attorney General for 1934, page 1179, where the following statement appears at page 1182:

> "However, even if the transactions were held not to be a violation of the two statutes, Sections 3808 and 12912, General Code, such transactions would be void as constituting 'contracts against public policy.' * * *"

To carry the above comparison one step further, I think that the incompatibility field might well provide the principles upon which the

instant case should be decided. While they have not assumed another office, the individuals in question are seeking to put themselves in a position which might be incompatible with the duties of the offices which they now hold, as tested by the standard quoted above.

A statement of these general principles, and a reference to the decided cases confirming them, sufficient for this opinion, is set out in 43 American Jurisprudence, page 103, Public Officers, Section 294, as follows:

> "A contract made by a public officer is against public policy and unenforceable, if it interferes with the unbiased discharge of his duty to the public in the exercise of his office, or if it places him in a position inconsistent with his duty as trustee for the public, or even if it has a tendency to induce him to violate such duty. Such contracts are invalid, although there may be no statute or charter provision prohibiting them, and although there may have been no actual loss or detriment to the public or fraudulent intent in entering into the contracts, since the rule invalidating the contracts is based on public policy."

There remains now the problem of applying these principles to the question which you have presented. Let us consider first the position of D, who is a member of the General Assembly. It is fundamental that the General Assembly must appropriate the money for the performance of all state contracts, including printing. Reference to any general appropriation bill shows that it also designates what amounts shall be spent by each department under the budget classification of F-8, Paper, Printing and Binding. The interest of any potential bidder on the state's printing in keeping those amounts high is at once apparent; and that interest presents a possible conflict with his duty to the state as a legislator within the principles set out above. It is, therefore, my opinion that the D Press, Inc., in which a principal stockholder is D, a member of the General Assembly, may not enter into a contract to perform any of the state printing designated by Section 754, General Code.

The second person covered by your request is X, who you say is "an employe of the State Auditor's office." You do not set out the nature of his duties in that office, and for the purposes of this opinion, I will assume that he performs some of the duties involving the discretion with which the Auditor is invested as a public officer. In other words, I must assume that X stands in the place of his principal in the performance of his official duties.

It is my opinion that an examination of Section 243, General Code, reveals a conflict of interest which prohibits X from holding a contract with the state. That section provides as follows:

> "The auditor of state shall examine each voucher presented to him, or claim for salary of an officer or employe of the state, or per diem and transportation of the commands of the national guard, or sundry claims allowed and appropriated for by the general assembly, and if he finds it to be a valid claim against the state and legally due, and that there is money in the state treasury duly appropriated to pay it and that all requirements of law have been complied with, he shall issue thereon a warrant on the treasurer of state for the amount found due, and file and preserve the invoice in his office. He shall draw no warrant on the treasurer of state for any claim unless he finds it legal, and that there is money in the treasury which has been duly appropriated to pay it."

One of the duties of the Auditor under this section is to satisfy himself that work performed and supplies furnished for the state are according to specification and in the quantities actually charged for. That duty could not be performed in the best interest of the public if it were performed by an agent of the Auditor who had himself furnished the labor and supplies. I note that class three of the printing described in Section 754, General Code, upon which class the X Press, Inc. has bid, includes documents ordered by the elective state officers, which include the Auditor of State. So, in the case of such printing ordered by the Auditor, there is the additional possibility that the department actually using the printed material would not require that it conform to specification.

It is, therefore, my opinion that the X Press, Inc., in which a principal stockholder is X, an agent of the Auditor of State, may not enter into a contract to perform any of the state printing designated by Section 754, General Code.

Respectfully,
C. WILLIAM O'NEILL
Attorney General.