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ATTORNEY GENERAL OPINION NO. 82- 144

James L. Wisler  
Linn County Attorney  
Judicial Building  
Mound City, Kansas 66056

Re: Counties and County Officers -- Conflict of  
Interests -- Prohibited Contracts

Synopsis: K.S.A. 75-4304 prohibits a county commissioner from contracting, in his official capacity, with a business in which the commissioner has a substantial interest. The prohibition is not eliminated if the other county commissioners approve the subject contracts.

K.S.A. 75-4304 does not preclude participation by the county commissioner in county commission decisions to accept or reject bids for county work from contractors to whom the county commissioner sells automobile batteries, so long as the commissioner has no substantial interest in any contractor bidding for county work. Cited herein: K.S.A. 75-4301, K.S.A. 1981 Supp. 75-4302, K.S.A. 75-4304, K.A.R. 19-51-2(c).

\* \* \*

Dear Mr. Wisler:

You have informed this office that a Linn County commissioner is engaged in the sale of automobile batteries as his primary business, and the commissioner's disclosure of substantial interests, filed pursuant to K.S.A. 1981 Supp. 75-4302, indicates that he has a substantial interest in an automobile battery business that contracts with Linn County, as well as various contractors that bid on county contracts. However, the battery purchases by Linn County are not made subsequent to competitive bidding.

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The questions raised in your opinion request may be stated as follows:

1. Does the Commissioner have a conflict of interests vis a vis the sale of automobile batteries to Linn County?
2. May the commissioner's automobile battery business contract with Linn County if such contracts are approved by the other two Linn County commissioners?
3. Does the commissioner have a conflict of interests vis a vis his sale of automobile batteries to contractors who bid on county projects?
4. May the commissioner vote on bids made by contractors to whom he sells batteries, or should he abstain from such votes?

Prior to addressing these questions, an overview of conflict of interests law will be helpful. K.S.A. 75-4304 states:

"(a) No public officer or employee shall in his or her capacity as such officer or employee, make or participate in the making of a contract with any person or business by which he or she is employed or in whose business he or she has a substantial interest, and no such person or business shall enter into any contract where any public officer or employee, acting in such capacity, is a signatory to or a participant in the making of such contract and is employed by or has a substantial interest in such person or business. A public officer or employee does not make or participate in the making of a contract if he or she abstains from any action in regard to the contract.

"This section shall not apply to the following:

"(1) Contracts let after competitive bidding has been advertised for by published notice; and

"(2) Contracts for property or services for which the price or rate is fixed by law.

"(b) Any public officer or employee who is convicted of violating this section shall forfeit his or her office or employment."

K.S.A. 75-4304 was analyzed in Attorney General Opinion No. 74-269 and it was determined that the act is intended to prohibit self-dealing, *i.e.*, it precludes a public officer or employee, acting in that capacity, from making or participating in the making of a contract with a business in which he or she has a substantial interest. The opinion also states that

"a public officer or employee may not be a party to a contract in connection with which he enjoys a dual role, *i.e.*, acting or participating therein in both his public and private capacities."

K.S.A. 75-4304 is the codification of the common-law rule which precludes the making of contracts between counties and members of a governing board having an interest in such contract or agreement. Southern v. Beeler, 195 S.W.2d 857 (Tenn. 1946), Bosworth v. Hagerty, 99 N.W.2d 334 (S.D. 1959), Miller v. County of Lake, 404 N.E.2d 222 (Ill. 1980), State, ex rel., v. Schroeder, 199 Kan. 403 (1967), Sedgwick County v. State, 66 Kan. 634 (1903). It has been held that even an indirect interest, such as owning stock in a company benefitting from a county contract, is sufficient to disqualify the county official from acting on the contract. Clark v. Utah Constr. Co., 8 P.2d 454 (Idaho, 1932), Claxton v. Johnson County, 20 S.E.2d 606 (Ga., 1942), Githens v. Butler County, 164 S.W.2d 650 (Mo. 1942), Paisley & Co. v. Cole & Miller, 1 Tenn. App. 714 (1926), Adams v. Bd. of Trustees of Employees Retirement Sys. of Baltimore, 137 A.2d 151 (Md., 1957).

This issue has been the subject of several previous attorney general opinions. In a letter opinion to the Hugoton city attorney dated November 2, 1971 (VII Op. Att'y Gen. 912), it was determined that the conflict of interests statute precluded certain city councilmen from contracting with the city of Hugoton to provide data processing equipment. General authorities support this conclusion. In C. Antieau, County Law (1982), for example, the author states that a county official

"occupies a fiduciary relationship to the county. Such officers and employees are obligated to discharge their responsibilities with integrity and fidelity. They may not prostitute their official position for their private benefit. County officers and employees are accountable to the county for every violation of good faith in dealings with and for the county." Id. at §34.08, p. 96.

The members comprising the governing body of a county have also been characterized as trustees with a fiduciary responsibility to their constituents. Butler County v. Campbell, 182 S.W.2d 589, 591-592 (Mo., 1944).

Considering the foregoing legal authorities we shall address each question posed by your opinion request.

1. Does the commissioner have a conflict of interests vis a vis the sale of automobile batteries to Linn County?

The commissioner's disclosure of substantial interests indicates that he is the owner of a battery company which sells automobile batteries to Linn County. Thus, we are of the opinion that the commissioner would be acting contrary to the provisions of K.S.A. 75-4304 if he voted for or participated in the making of a contract between the county and his battery company. Since there is no indication that any competitive bidding takes place prior to the purchase of the automobile batteries, or that the prices of the batteries are fixed by law, the statutory exceptions at paragraphs (1) and (2) of K.S.A. 75-4304(a) are not applicable.

2. May the commissioner's automobile battery business contract with Linn County if such contracts are approved by the other two Linn County commissioners?

The prohibitions of K.S.A. 74-4304 extend to businesses affected with a proscribed interest that attempt to contract with the county when the interested government officer (here, the county commissioner) participates in the making of the contract. However, the prohibitions of K.S.A. 75-4304 are not triggered unless the interested government officer "participates" in the making of such contracts. In Attorney General Opinion No. 73-164 a contract between Riley County and a company owned by one of the county commissioners was questioned vis a vis K.S.A. 75-4301 et seq. The opinion discussed the prohibition against participation by a public officer in making a contract as follows:

"This is a broad prohibition and it seems to us that merely abstaining from signing a contract is not sufficient; a public officer or employee must not participate in any way in the making of such a contract. Thus it would be improper for the public official or employee to participate in any deliberations of the governing body regarding the terms of [sic] conditions of such. It would be prudent for him to exclude himself from any meeting or that part thereof wherein such contracts are being considered." (Emphasis original.)

We note that the 1974 amendment to K.S.A. 75-4304 added the following language:

"A public officer or employee does not make or participate in the making of a contract if he or she abstains from any action in regard to the contract."

This amendment was subsequent to the issuance of Attorney General Opinion No. 73-164, supra, and it is our considered opinion that the amendment codified the restrictive language of the above-cited attorney general opinion. Further, this is consistent with the interpretation of K.S.A. 75-4304 by the Governmental Ethics Commission (now Public Disclosure Commission) in their Opinion No. 75-75.

Accordingly, if the commissioner "participates" in the making of contracts with a business affected with a proscribed interest, the concurring votes of the other two commissioners would be ineffective to remove the statutory prohibition. To avoid the proscription of K.S.A. 75-4304, the commissioner in question must abstain from "any action" regarding the contract.

3. Does the commissioner have a conflict of interest vis a vis his sale of automobile batteries to contractors who bid on county projects.

The prohibitions of K.S.A. 75-4304 are applicable when a county commissioner has a substantial interest in a business that seeks to contract with the county. Substantial interest is defined at K.S.A. 75-4301 as follows:

"The ownership by an individual or his or her spouse, either individually or collectively of a legal or equitable interest exceeding five thousand dollars (\$5,000) or five percent (5%) of any business, whichever is less, and also including the receipt by an individual or his or her spouse directly or indirectly of any salary, gratuity, other compensation or remuneration or a contract for or promise or expectation of any such salary, gratuity, other compensation or remuneration having a dollar value of one thousand dollars (\$1,000) or more in the current or immediately preceding or succeeding calendar year from any business or combination of businesses, and also including the holding of the position of officer or director of any business, irrespective of the amount of compensation or remuneration received by the person holding any such position. If a person's

salary, compensation or other remuneration is a portion or percentage of a fee paid to a business or combination of businesses, a person shall have a substantial interest in any client who pays a fee to such business or combination of business from which fee such person receives one thousand dollars (\$1,000) or more in the current or immediately preceding calendar year."

A similar issue was addressed in a letter opinion issued May 5, 1972, to the St. Francis city attorney. VII Op. Att'y Gen. 1019. There, the city had been awarded a federally financed housing project. The city was responsible for conducting preliminary studies and was to advertise for bids from developers for the construction project. Upon completion of construction and approval by the city council, title to the housing project property was to be conveyed to the city. One city councilman owned a tract of real property under consideration as a site for the housing project. The issue was whether a conflict of interests existed should the councilman sell the land to the developer and subsequently participate in the deliberations to accept or reject the project for the city. The opinion found no conflict of interests because

"the property owned by the councilman in question would be sold not to the city but to the developer, as we understand. If the project is accepted by the city, the property, as part of the completed project, is transferred only at that time from the developer to the city. The councilman's participation in the decision to accept or reject the project raises no question, in our opinion, under the general conflict of interest law, nor does his sale of the land to the developer itself." Id.

The prohibitions of K.S.A. 75-4304 were not applicable in the St. Francis case because the city councilman was not attempting to arrange a contract between the city and a business in which he had a substantial interest. Further, the St. Francis city councilman's subsequent participation in the city's decision to accept or reject the housing project would have no financial effect on his prior sale of the land in question, i.e., the councilman did not stand to gain anything by his subsequent official participation in decisions regarding the subject real property.

This is in contrast to the situation where the county commissioner participates in contract deliberations regarding businesses to which his company has sold batteries in the

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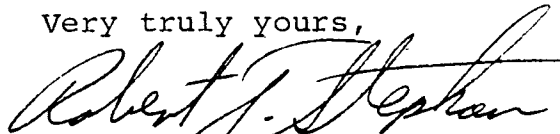
past and with which there is an expectation of a continued commercial relationship. Commercial relationships that generate at least one thousand dollars worth of compensation in a calendar year may create a substantial interest pursuant to K.S.A. 75-4301. We also note that a substantial interest in a business may result from the indirect receipt or anticipated receipt of compensation or remuneration.

From the information you have provided us, we are unable to discern whether the commissioner has a substantial interest in any business other than those listed on his disclosure of substantial interests. However, if the commissioner has any question whether the relationship between his battery company and any other business creates a substantial interest in such other business, we suggest that he advise the Public Disclosure Commission of the particular details involved and request an advisory opinion from the Commission as to his appropriate course of action.

4. May a commissioner vote on bids made by contractors to whom he sells batteries, or should he abstain from such votes?

The response to this question is suggested by the answer immediately preceding. K.S.A. 75-4304 prohibits participation in contract deliberations and votes only when a commissioner has a substantial interest in the business attempting to secure a county contract. Therefore, a commissioner may vote on bids made by contractors to whom his company sells batteries, so long as he has no substantial interest in any of the businesses attempting to secure county contracts.

Very truly yours,



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ATTORNEY GENERAL OF KANSAS



Robert Vinson Eye  
Assistant Attorney General

RTS:RVE:hle