

OFFICIAL OPINION NO. 69-10, Road contractor holding contract to construct county roads may purchase gravel from member of South Dakota Legislature

STATE OF SOUTH DAKOTA  
OFFICE OF  
THE ATTORNEY GENERAL

February 6, 1969

Richard Hopewell  
Deputy State's Attorney  
Minnehaha County Courthouse  
Sioux Falls, South Dakota 57102

OFFICIAL OPINION NO. 69-10

**Road contractor holding contract to construct county roads may purchase gravel from member of South Dakota Legislature**

Dear Mr. Hopewell:

You have requested my official opinion in answer to the following question:

"Minnehaha County has awarded a contract to construct a county highway to the XYZ Construction Company. To fulfill its obligation under the contract, the construction company must furnish gravel, which it must purchase from a third party. The most accessible gravel pit to the project is owned by a qualified member of the South Dakota Legislature."

In this situation you have submitted this question:

"Is it lawful for the XYZ Construction Company to purchase gravel from such legislative member to be used in the construction of a county highway for Minnehaha County?"

You have advised that it is the opinion of the Minnehaha State's Attorney staff that the answer to this question should be YES and ask if I concur with such conclusion.

It is my opinion that your conclusion is correct, and it is my opinion that such question as submitted must be answered YES.

In viewing the statutes of this state, there are three separate statutes which must be considered.

SDC 10.0708, as last amended by Ch. 30 of the Session Laws of 1963, can not apply to this situation inasmuch as pointed out in 1957-58 AGR 161 this statute applies only to county, municipal, township and school district officers. The weight of judicial precedent has settled the question as to the position of a member of the State Legislature to be a "state office," and not a "county office." See **Brown v. Court**, 81 Ariz. 236, 303 P 2d 990; **Rich v. Industrial Accident Commission**, 36 Calif. App. 2d 628, 98 P 2d 249; and, **In Re Anderson**, 164 Wis. 1, 159 NW 559.

SDC 13.1308 may be said to apply. However, in 1931-32 AGR 128, and 1933-34 AGR 647 it was pointed out that this statute does not prohibit officers, generally, from becoming interested in public contracts, but rather applies only to such contracts which the officer is authorized to make in his official capacity. The distinction between contracts prohibited by such statute and those not affected by the statute was pointed out in the 1933-34 opinion when it was found that the writing of a bond and collecting a premium on the fidelity bond of the chief clerk of the Banking Department by John M. Cogley, Inc., one of whose members was a member of the South Dakota Board of Charities and Corrections, was not violative of such statute.

I agree with these limitations on SDC 13.1308. The sale of the gravel to the holder of a public contract by a South Dakota Legislator is not a result of his official capacity, nor a contract authorized because of his public official capacity. This statute does not apply.

SDC 55.2818 may be said to apply. However, this statute applies to state contracts and certainly no state contract is involved. Your attention is called to the opinion reported in 1941-42 AGR 374 where it was held lawful for the State Highway Commission to purchase right-of-way necessary for a public highway from a state officer or employee.

Finally, if it were to be argued that while there is no specific statute involved, the question raised as to the propriety of a state officer entering into a public contract makes such contract contrary to public policy and void.

For argument only, and without admitting the correctness of such argument, such is not applicable to the factual situation presented, for the reason that the public contract involved is between the XYZ Corporation and the County. The contract between such State Legislator

and the private corporation is strictly a private contract to furnish necessary materials for the private corporation to perform a public contract. To extend the effect of public contracts by virtue of public policy to such collateral contracts, would, in my mind, be carrying the purposes of statutes and public policy denying a public officer a right to contract with a public body to a limit that neither logic nor the purposes of such prohibition can support.

As there is no showing of a violation of specific statute, nor is the principle of public policy of such statute violated, I again reiterate, the specific question submitted must be answered YES.

Respectfully submitted,

Gordon Mydland  
Attorney General